No. 20-30438

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DANIEL DAVIS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to defendant's request for oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION AND STATUTES: **PAGE**

GUIDELINES:

RULES:

RULES (continued): **PAGE**

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JURISDICTIONAL STATEMENT

This appeal is from the district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant-appellant Daniel Davis on July 2, 2020. ROA.1298-1304.[1] Davis timely appealed on July 13, 2020. ROA.1307. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

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[1] "ROA.___" refers to page numbers of the Record on Appeal. "Br. ___" refers to page numbers in Davis's opening brief.

STATEMENT OF THE ISSUES

1. Whether the district court properly denied Davis's motion to sever trial of the two counts charging Davis in connection with assaults of an inmate from the four counts charging Davis with covering up the assaults.

2. Whether the district court properly admitted evidence that two non-defendant correctional officers, who either participated in or witnessed the assaults, took and failed polygraph examinations, in order to explain why they had decided to change their accounts to investigators.

3. Whether the introduction at trial of non-testimonial statements made by a witness to the assault, who did not testify at trial, violated Davis's rights under the Sixth Amendment's Confrontation Clause or constituted inadmissible hearsay.

4. Whether the district court properly excluded evidence that the victim had thrown feces out of his cell at correctional officers on other occasions.

5. Whether the district court at sentencing properly applied a two-level restraint enhancement because the victim was handcuffed and shackled during the assault.

STATEMENT OF THE CASE

While Joseph Savoie was an inmate at the Louisiana State Penitentiary in Angola, Louisiana (LSP-Angola), he was twice assaulted by correctional officers. Daniel Davis, a supervisory correctional officer at the prison, failed to intervene

when a subordinate correctional officer repeatedly punched Savoie while he was handcuffed and shackled. After escorting Savoie to an outdoor walkway, Davis initiated the second assault by yanking Savoie's leg shackles from behind, causing him to fall face first onto the concrete ground, and then stomping on Savoie's back as other officers punched, kneed, and kicked him. This appeal arises out of Davis's conviction and sentencing for the second of these assaults, as well as for four other counts related to his subsequent cover-up of the assaults.

1. Factual Background

a. The Assaults

i. The First Assault Outside Savoie's Cell

Davis was the highest-ranking officer over his area of LSP-Angola on the day of the assaults. ROA.1676, 3676. Davis's supervisor ordered Davis to separate Savoie from correctional officer Willie Thomas because Savoie and Thomas had had an altercation two weeks earlier. ROA.1681, 1829-1830, 3679-3680. But Davis flouted this directive, and purposely assigned Thomas to work in Savoie's housing unit. ROA.1682, 3682-3863. Lenora Ellis, a correctional officer who had heard the supervisor's directive, commented to Davis that Thomas's assignment was "not what [the supervisor] wanted done." ROA.1682-1683. Davis replied, "I'm not going to be bored this weekend." ROA.1683, 3863.

The next day, Savoie threw soap at Thomas. ROA.3747, 3754. Thomas called for help. ROA.1912-1913. Davis and three other supervisors then on duty—Captain Scotty Kennedy, Captain James Savoy, and Captain John Sanders—were in Davis's office when they received Thomas's call. ROA.2125-2127, 4052-4053.

Because, under LSP-Angola policy, after an altercation between an inmate and an officer both parties must have a medical evaluation (ROA.1763), Davis and Kennedy went to Savoie's cell to take him to the treatment center (ROA.1760, 3754-3755). Savoie refused to be handcuffed so he could be led out of his cell. ROA.1760. Consequently, Kennedy pepper sprayed Savoie and then restrained him. ROA.1760-1763, 3755-3757.

While Kennedy and Savoie were at the treatment center, Davis instructed Sergeant Enrico George to make a mess of Savoie's cell, under the guise of searching Savoie's cell for contraband, to retaliate for the soap-throwing incident. ROA.1917-1918, 3856-3857. When Savoie returned to his cell and saw its condition, he asked George who had messed it up. ROA.3861-3862. George responded that he had done so, and Savoie spat in his face. ROA.3862-3863.

After learning that Savoie spat in George's face, Davis ran to Savoie's cell. ROA.2130. Davis ordered Kennedy to take Savoie, still in full restraints, out of his cell. ROA.1774, 3766. Kennedy did so and placed Savoie against the wall.

ROA.1775, 3767. Sanders then arrived, and George told Sanders that "he had been spit on." ROA.2131. Sanders became angry, walked over to where Kennedy was holding Savoie, put on leather gloves to protect his hands, and began punching Savoie in the head. ROA.2131, 2179, 4061. Davis watched, but did nothing to stop Sanders. ROA.1780, 3770-3771, 4061-4062. Sanders admitted at trial that he assaulted Savoie because he "was angry about him spitting on a fellow officer." ROA.4061.

ii. The Second Assault On The Breezeway While Taking Savoie To The Treatment Center

As a result of the first assault, Savoie was "bleeding from the face." ROA.2130. Davis placed a jumpsuit over Savoie's head and then Davis, Kennedy, and Sanders began walking Savoie away from his cell. ROA.1780-1781, 2133-2134. When they reached the lobby, Davis instructed Kennedy to go to the treatment center and report that Savoie had spit on him. ROA.1781-1782, 3773. Savoie, of course, had not spat on Kennedy. ROA.3773. Rather, Kennedy presumed, Davis instructed him to lie and say Savoie had spat on him to justify the assault that had just taken place outside Savoie's cell. ROA.3773. Kennedy then went into the bathroom and threw water on his shoulder "to make it look like [he] had washed [the spit] off." ROA.3773-3774.

When Kennedy left the bathroom, he saw Davis and Sanders escort Savoie onto an exterior walkway, called a "breezeway." ROA.3774. Kennedy saw Davis

reach down from behind, grab Savoie's leg restraints, and yank them up, causing Savoie to fall face first onto the concrete floor. ROA.1784-1785, 3774-3775. Savoie, still in full restraints and with a jumpsuit over his head, could not brace himself for the fall. ROA.1786, 1924, 3776. While Savoie was lying face-down on the concrete, Davis, Sanders, and Savoy (who had joined them on the breezeway) started punching, kicking, kneeing, and stomping on Savoie. ROA.1786-1787, 1925-1926. During the assault, Davis yelled at Savoie, "Don't fuck with my people. This is what you get." ROA.2136. Kennedy, feeling "the situation was totally out of control," and not wanting any part in it, left to go to the treatment center. ROA.3778.

Eventually, Davis picked up Savoie by his jumpsuit and saw Thomas nearby. ROA.2139, 4074. Davis told Thomas, "You need to make sure you get some of that." ROA.2139. Thomas then walked over and punched Savoie in the ribs. ROA.2139, 4074. Davis explained to Sanders and Savoy, "You have to make sure that [any witnesses] hit them too so they don't rat on you." ROA.2139.

Davis, Savoy, and Sanders then walked Savoie to a patrol van to go to the treatment center. ROA.2140-2141, 4078. When Davis shoved Savoie into the patrol van, the bloody jumpsuit fell off Savoie's head. ROA.2141-2142. Davis told Savoy to call him if the jumpsuit fell off again so Davis could "come pull over on the side of the road and whip his ass." ROA.2142.

Savoie arrived at the treatment center with the blood-soaked jumpsuit still over his head. ROA.1928. Savoie had several contusions, a cut under one eye, multiple abrasions and bruising on his back, chest, legs, and arms, a potentially dislocated shoulder, several fractured ribs, and a partially collapsed lung. ROA.2057-2061, 2284-2286. Savoie was taken to a hospital in New Orleans for treatment. ROA.2267, 2274-2275. According to the doctor who treated Savoie, his injuries, some of which were potentially life threatening, demonstrated a "pretty severe beating." ROA.2283, 2286.

Patricia Seymore, a correctional officer who worked in a nearby guard tower, witnessed part of the assault on the breezeway. ROA.1679-1680, 5422. At the time, Seymore was on the telephone with correctional officer Katherine Minor. ROA.3945, 5422. While on the telephone, Seymore suddenly began screaming "Oh, my God. Oh, my God." ROA.3945. Seymore then shouted, "Davis, he's hitting him." ROA.3945. Crying, Seymore told Minor that Davis had a jumpsuit around the inmate's head and that "he's going to hurt him bad." ROA.3945-3946. A few days later, Minor wrote a written report, memorializing what Seymore had told her in this conversation. ROA.3944, 5422.

Finally, immediately after the assault, Seymore called Ellis, a correctional officer who was responsible for searching vehicles entering or exiting the facility. ROA.3668-3669, 3699. Seymore, sounding upset, asked Ellis, "What was that on

that inmate's head?" ROA.3699, 3725. Ellis responded it may have been a substitute for a spit mask. ROA.3699. Seymore then asked Ellis, "Well, did you see what happened? Did you see them beating that inmate?" ROA.3700.

b. The Cover-Up: Davis And Other Correctional Officers Conspired To Cover Up The Assaults

Under LSP-Angola's use-of-force policy, officers must write an Unusual Occurrence Report (UOR) when force is used on an inmate. ROA.1792. Officers also must write a disciplinary report to document any inmate rule infractions. ROA.1793. After Kennedy returned from the treatment center, he, Davis, and Sanders met to discuss what to write in these reports. ROA.1791-1793, 2143.

Davis decided it would be better for Kennedy to take responsibility for the use of force because the other officers had past problems with excessive force and Kennedy had a clean record. ROA.1794, 2143-2144. Therefore, they devised a cover story and Kennedy wrote that he alone responded to the spitting incident, had an altercation with Savoie, "gave him a few knee strikes," and "took him to the ground." ROA.1794, 2144. According to the cover story, after Savoie was on the ground, Davis arrived and helped Kennedy escort Savoie to the patrol van. ROA.2144.

Kennedy wrote and signed a UOR containing this cover story. ROA.1797-1800. Kennedy also wrote a false disciplinary report and false UORs for Davis and George, which they signed. ROA.1807-1809, 1944-1945.

Meanwhile, Davis told Sanders and Savoy to claim they were somewhere else during the incident. ROA.2145. To support that story, Sanders and Savoy falsified time cards to make it appear that they were in a different building during the assaults. ROA.2145, 2148-2150. When Sanders and Savoy told Davis what they had done, Davis responded, "Good, that's where y'all were. Stick to that." ROA.2150. Davis also gave Sanders a UOR to review so that Sanders would be familiar with the cover story if he was questioned. ROA.2150-2151.

Because the cover story did not match Savoie's serious injuries, prison investigators opened an internal investigation. ROA.1810-1811, 3984-3987. Davis encouraged the other officers to stick with the cover story during the investigation because "we had to have each other's backs." ROA.1950. Davis also encouraged the officers by telling them to "stick to the story[,] and everything will be ok." ROA.2156.

Eventually, Davis and his three co-conspirators, along with other witnesses, were administered polygraph examinations by internal investigators. ROA.168, 1813-1814, 1950-1951. Kennedy and George both initially repeated the cover story. ROA.1811-1814, 1949-1951. But after being told that he had failed his polygraph test, Kennedy came clean. ROA.1814. Similarly, after the polygraph examiner told George about an incident where an officer had gotten in trouble for lying, George also decided to come clean. ROA.1951-1953.

2. Procedural History

a. A grand jury charged Davis, Sanders, and Savoy with various civil rights, conspiracy, and obstruction-of-justice violations in an eight-count indictment. ROA.46-58. Davis was charged in six of the counts. In Count 1, he was charged (along with Sanders) with deprivation of Savoie's civil rights, in violation of 18 U.S.C. 242, for aiding and abetting and failing to intervene to stop the first assault outside Savoie's cell. ROA.47. In Count 2, Davis was charged (along with Sanders and Savoy) with deprivation of Savoie's civil rights, in violation of 18 U.S.C. 242, for the second assault on the breezeway. ROA.47-48.

The remaining counts concerned the cover-up. In Count 3, Davis (along with Sanders and Savoy) was charged with conspiracy to obstruct justice, in violation of 18 U.S.C. 371. ROA.48-52. In Count 4, Davis was charged with obstruction of justice for falsifying a report to cover up the assaults, in violation of 18 U.S.C. 1519. ROA.52. In Count 7, Davis was charged with witness tampering for persuading others to provide false and misleading information, in violation of 18 U.S.C. 1512(b)(3). ROA.54. And in Count 8, Davis was charged with perjury for lying under oath during a related civil action, in violation of 18 U.S.C. 1623. ROA.54-55. Finally, Sanders and Savoy were charged in Counts 5 and 6,

respectively, for falsifying reports to cover up the assaults in violation of 18 U.S.C. 1519. ROA.53.[2]

b. Davis pleaded not guilty to all charges. See ROA.1298. Before trial, he moved to sever trial of Counts 1 and 2, which charged Davis for assaulting Savoie, from trial of Counts 3, 4, 7, and 8, which charged Davis with covering up the assaults. ROA.136-137. Davis argued that he could not "reasonably defend himself against cover up allegations without it appearing as though he is admitting to" the excessive force counts. ROA.144. Davis also moved to exclude any reference to the polygraph examinations. ROA.168. The United States opposed both motions. ROA.333, 340. Following an evidentiary hearing, the court denied the motions. ROA.1343-1345, 1367-1370.

The United States moved to exclude Savoie's disciplinary records, arguing that they were not relevant to the excessive force inquiry, would be offered to establish that Savoie has a propensity for violence in violation of Federal Rule of Evidence 404(a)(1), and would invite jury nullification. ROA.695-697. Davis responded by requesting permission to introduce, among other matters, evidence

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[2] Before the indictment, Kennedy had pleaded guilty to an information charging him with one count of deprivation of Savoie's civil rights, in violation of 18 U.S.C. 242, for failing to intervene to stop the assaults, and to one count of conspiracy to cover up the assaults, in violation of 18 U.S.C. 371. ROA.3804, 4869-4879. Before trial, Sanders and Savoy pleaded guilty to Count 2 (regarding the second assault) and to Count 3 (for the conspiracy to cover up the assaults). ROA.4104-4105, 4115, 4883.

that Savoie had previously thrown feces at guards and other prisoners. ROA.720-721. Davis argued the evidence would "demonstrate habitual defiance" by Savoie of prison regulations under Federal Rule of Evidence 406. ROA.721. Alternatively, Davis sought to introduce evidence of Savoie's throwing feces under Federal Rule of Evidence 404(a)(2), which permits the admission of evidence of an alleged victim's pertinent trait, generally known to the defendant, if offered for a non-propensity purpose. ROA.722. The district court granted the United States' motion to exclude inquiry about prior occasions on which Savoie threw feces out of his cell. ROA.843-844.

Finally, shortly before trial, the United States filed a "Brief Addressing Evidentiary Issues," arguing, among other things, that the government should be allowed to introduce the eyewitness account of Seymore, who observed part of the second assault from her position in the guard tower. ROA.820. Because Seymore was unavailable for trial (see ROA.3410-3412), the United States proposed to introduce Seymore's statements through the testimony of Minor, who had been on the telephone with Seymore when Seymore witnessed the assault (ROA.820, 5422). The United States argued that Seymore's nontestimonial, contemporaneous statements to Minor, describing her eyewitness account of the second assault, were admissible as both present sense impressions under Federal Rule of Evidence 803(1) and excited utterances under Federal Rule of Evidence 803(2). ROA.820.

Additionally, if Minor was unable to recall the substance of the conversation, the United States proposed to read into evidence Minor's handwritten statement as a recorded recollection under Federal Rule of Evidence 803(5). ROA.820-821.

In response, Davis filed a motion in limine arguing that Seymore's statements were both inadmissible hearsay and violated his rights under the Confrontation Clause because they were testimonial statements. ROA.826, 830-831. Davis also disputed that Minor's written statement was a "recorded recollection," arguing that it was more akin to a police report and, therefore, inadmissible. ROA.831. The district court denied Davis's motion to exclude Minor from testifying about Seymore's statements and to exclude Minor's written statement. ROA.1389-1393.

c. Davis had three trials. Following the first trial, the jury acquitted Davis of Count 1 (for aiding and abetting and failing to intervene to stop the first assault outside Savoie's cell) and was unable to reach a unanimous verdict on Count 2 (for the second assault on the breezeway). ROA.863. The jury found Davis guilty of Counts 3, 4, 7, and 8 (for covering up the assaults). ROA.863-865. The United States elected to retry Davis on Count 2. ROA.890-892.

Before the second trial, the United States filed a motion to preclude reference to the existence and outcome of the initial trial. ROA.914. Subsequently, the United States and Davis reached an agreement that the

government could introduce evidence that Davis conspired to cover up the assault but could not reference the fact that Davis was convicted of doing so. ROA.935-936. Despite this agreement, and through no fault of the parties, the jury in the second trial learned that Davis had been previously tried and convicted of related charges. ROA.1072. Shortly after the jury's guilty verdict, the trial judge received that information, vacated Davis's conviction on Count 2, and granted Davis's motion for a new trial on Count 2. ROA.1072, 1087.

At the beginning of the third trial, the government alerted the court that sometime after the second trial, Ellis (the correctional officer responsible for searching vehicles) reported to the government, for the first time, that immediately after the assault Seymore had called her and asked two questions: "Did you see what happened?" and "Did you see them beating that inmate?" ROA.3411, 3668-3369. The United States disclosed this information to the defense and sought permission to introduce these two statements, along with the statements Seymore made to Minor (noted above). ROA.3411. The United States argued that like her statements to Minor, Seymore's questions to Ellis fell within the present-sense-impression and excited-utterance exceptions to the general rule against hearsay. ROA.3413. Davis objected (ROA.3420), but the court overruled his objection (ROA.3603).

Following the third trial, a jury found Davis guilty of Count 2 (for the second assault on the breezeway). ROA.1276-1277, 1298. Thus, in total, Davis was convicted of five felony offenses charged in the indictment: four obstruction offenses (Counts 3, 4, 7, and 8 for conspiracy, falsifying a report, witness tampering, and perjury, respectively) at the first trial, and one assault offense (Count 2 for deprivation of rights under color of law) at the third trial.

d. The United States Probation Office's second revised presentence investigation report (PSR) calculated Davis's recommended range under the United States Sentencing Guidelines to be 121-151 months' imprisonment.[3] ROA.6020. Under Section 3A1.3 of the Guidelines, the PSR increased the base offense level for Count 2 (the second assault) by two levels because the victim was restrained during the assault. ROA.6008. Davis objected to the two-level

[3] Using the 2018 Guidelines Manual, the Probation Office calculated the total offense level to be 32 for Count 2 (the second assault). ROA.6007-6009. This calculation was based on a base offense level of 14, a five-level increase because the victim sustained serious bodily injury, a six-level increase because the offense was committed under color of law, a two-level increase because the victim was physically restrained, a three-level increase because the defendant was a manager in a criminal activity that involved five or more participants, and a two-level increase for obstruction of justice. ROA.6007-6009. Under Sentencing Guidelines § 3D1.2(c), the Probation Office grouped Counts 3, 4, 7, and 8 (for obstruction of justice) together with Count 2 because the obstruction counts embody "conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to Count [2]." ROA.6014. With a criminal history category of I and a total offense level of 32, the Guidelines range was 121 to 151 months. ROA.6023.

enhancement. ROA.4367. While Davis admitted that Fifth Circuit precedent "probably * * * precludes my argument," he argued that given "all the specific offender characteristics and the cross references," restraint of the victim had already effectively been taken into account. ROA.4367-4368. Davis also argued the fact that Savoie was restrained as a matter of policy, not to facilitate the offense, supported his objection. ROA.4368; see also ROA.5993-5994. The court overruled the objection. ROA.4369.

Given the "history and characteristics of the defendant" the district court sentenced Davis to a below-guidelines sentence of 110 months' imprisonment on Counts 2, 4, and 7, and 60 months on Counts 3 and 8, to run concurrently. ROA.4382, 6026. Davis filed a timely notice of appeal of his convictions from the first and third trials and his sentence. ROA.1307.

SUMMARY OF ARGUMENT

This Court should affirm Davis's convictions and sentence for assaulting Savoie and covering up the assaults.

1. The district court properly denied Davis's motion to sever the assault charges (Counts 1 and 2) from the cover-up charges (Counts 3, 4, 7, 8). Before his first trial, Davis moved to sever trial of these counts, arguing that he could not defend himself against the cover-up allegations without appearing as though he was admitting the assault charges. But because Davis was not convicted on the

assault charges in the first trial, this argument has no bearing on his subsequent conviction on Count 2 in the third trial. Moreover, to the extent Davis's real argument is that evidence that he covered up the assaults should not have been admitted in his third trial, he has waived that argument. In the subsequent trials on Count 2 (resulting in a conviction in the third trial), Davis agreed that the government could introduce evidence that Davis conspired to cover up the assault.

To the extent this argument is directed at Davis's convictions on Counts 3, 4, 7, and 8, this argument lacks merit.[4] The court correctly rejected Davis's motion to sever, explaining that severance of counts against a defendant is inappropriate where the same evidence would be admissible in separate trials (as it was here) or if, as Davis argues, the potential prejudice arises from mere exposure to additional evidence (a feature of nearly every trial of a multi-count indictment). See *United States* v. *Owens*, 683 F.3d 93, 98 (5th Cir. 2012); *United States* v. *Ballis*, 28 F.3d

[4] As noted above, Davis was convicted on one count of violating 18 U.S.C. 242 for his assault of an inmate (Count 2) and four counts for covering up the assault (Counts 3, 4, 7, 8). In this appeal, Davis raises five issues, but does not explain how any of the issues relate to a specific count of conviction. See generally *United States* v. *Scroggins*, 599 F.3d 433, 446-447 (5th Cir. 2010) (concluding that the appellant had not properly challenged an issue on appeal where he merely mentioned it in conclusory sentences and did not discuss the issue in any depth); *Knatt* v. *Hospital Serv. Dist. No. 1*, 327 F. App'x 472, 483 (5th Cir. 2009) (summarizing the Fifth Circuit's standards for when inadequate briefing results in waiver of an issue).

1399, 1408–1409 (5th Cir. 1994). Moreover, the court correctly found that Davis had not shown that he suffered clear, specific, and compelling prejudice.

2. The district court properly admitted testimony concerning polygraph examinations taken by two correctional officers' during the internal investigation of the assaults. At trial, the court permitted the government to introduce evidence that Kennedy and George were told that they had failed their polygraph examinations to explain why these witnesses abandoned their cover story and came clean about the assaults. The court correctly concluded that the polygraph evidence was highly probative of the witnesses' credibility and that therefore exclusion of the polygraph evidence under Federal Rule of Evidence 403 was unwarranted. Additionally, any resulting prejudice was limited and could not have substantially outweighed the probative value of the polygraph evidence because (1) the polygraph evidence was introduced not for the truth of the results but, rather, to put Kennedy and George's changed stories in context, and (2) the court excluded evidence that Davis himself had taken and failed a polygraph.

3. The district court properly admitted Seymore's out-of-court statements to Minor and Ellis during telephone conversations when Seymore was either witnessing the assault (Minor) or immediately thereafter (Ellis) regarding Seymore's contemporaneous observation of the assault. Davis's arguments to the contrary are not correct.

First, Davis argues that admission of Seymore's statements through the testimony of Minor (by reading Minor's recorded recollection) and Ellis violated his Sixth Amendment Confrontation Clause rights. But that argument fails because Seymore's statements were not testimonial in nature, *i.e.*, they were not made with the primary purpose to establish or prove past events potentially relevant to a later criminal prosecution. Rather, Seymore's statements were made during informal, spontaneous conversations in response to witnessing an assault. Moreover, to the extent that Davis argues that Minor's reading of her written recollection violated his right to confrontation, that argument also fails because the Confrontation Clause does not apply to prior testimonial statements when the declarant of the testimonial statement (here, Minor) testifies at trial.

Second, Davis argues that the statements to Minor and Ellis were inadmissible hearsay. But Seymore's statements to Minor and Ellis were properly admitted as exceptions to the hearsay rule because they qualified as both present sense impressions (Rule 803(1)) and excited utterances (Rule 803(2)). Seymore made the statements about the assault in a state of excitement and contemporaneously with witnessing the assault.

Third, apart from whether Seymore's statements to Minor and Ellis were inadmissible hearsay, Davis argues that Minor's written recollection, which she read to the jury, was itself inadmissible hearsay. But this argument is incorrect

because, as with Seymore's statements to Minor and Ellis, Minor's written recollection falls within an exception to the rule against hearsay. Specifically, Rule 803(5) allows the introduction of a recorded recollection, in lieu of live testimony, concerning "a matter the witness once knew about but now cannot recall well enough to testify fully and accurately." Fed. R. Evid. 803(5).

Finally, Davis argues that the court erred in admitting the recorded recollection as an exhibit. Davis waived this argument because he stipulated to the exhibit's admission on the first day of trial and did not object when the pre-admitted exhibit was published to the jury. Nevertheless, we agree that, under Rule 803(5), although the recorded recollection was properly read into evidence, the admission of the recorded recollection as an exhibit was improper. But Davis was not prejudiced by its admission and, given the overwhelming evidence of Davis's role in assaulting Savoie, any error in admitting the statement as an exhibit was harmless.

4. The district court properly denied Davis's request to introduce evidence that Savoie had previously thrown feces out of his cell. It was undisputed that Savoie had not thrown feces on the day of the charged assault. Moreover, contrary to Davis's assertion, evidence of specific instances of Savoie throwing feces on other occasions was not relevant to whether Davis's use of force during the assaults was commensurate and necessary to contain Savoie or whether Davis

willfully deprived Savoie of his right to be free from excessive force. In other words, that Savoie may have previously thrown feces out of his cell was not relevant to Davis's on-the-spot evaluation of the danger a handcuffed-and-shackled Savoie posed during the assault on the breezeway. Nor was it relevant to the appropriate level of force, if any, that may have been necessary to respond to that danger.

This evidence was not admissible under Federal Rules of Evidence 404 and 405 or Rule 406. Rule 404 allows a defendant to offer evidence of a victim's pertinent character trait, but Rule 405 restricts character evidence to testimony about the victim's reputation or testimony in the form of an opinion. Only if the character trait is an essential element of the charged crime, which is not the case here, can the character trait be proved by "relevant specific instances of the victim's conduct." Fed. R. Evid. 405. The evidence also does not rise to the level of habit under Rule 406 because nothing in the record suggests that Savoie consistently threw feces every time he had a dispute with correctional officers.

5. The district court correctly applied a two-level enhancement under Sentencing Guidelines § 3A1.3, which applies when "a victim was physically restrained in the course of the offense." Sentencing Guidelines § 3A1.3. Davis does not dispute that Savoie was handcuffed and shackled during the assault. Rather, he argues that the physical restraint of the victim was already incorporated

into his sentence by other guidelines and enhancements. But this Court has regularly upheld the district court's imposition of the restraint enhancement where, as here, the color-of-law and bodily-injury enhancements also were applied. Moreover, as Davis acknowledges, this Court has previously rejected Davis's argument that the enhancement should not apply where the victim was lawfully restrained. *United States* v. *Clayton*, 172 F.3d 347, 353 (5th Cir. 1999). Where the defendant "took advantage of the restraint and the particular vulnerability of the victim," as Davis did here, "both the letter and spirit of the guideline applies to impose an additional sentence on [the defendant], beyond the one mandated for his use of unreasonable force." *Ibid.*

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DAVIS'S MOTION TO SEVER

A. Standard Of Review

"The denial of a motion to sever is reviewed under an exceedingly deferential abuse of discretion standard." *United States* v. *Hager*, 879 F.3d 550, 557 (5th Cir. 2018) (internal quotation marks and citations omitted). This Court will not reverse the district court's decision to sever properly joined charges "unless there is clear, specific and compelling prejudice that resulted in an unfair trial." *United States* v. *Singh*, 261 F.3d 530, 533 (5th Cir. 2001) (internal quotation

marks and citation omitted). This places a "heavy burden" on the defendant. *United States* v. *Salomon*, 609 F.2d 1172, 1175 (5th Cir. 1980). Further, if a challenge to an error has been waived, that error is unreviewable. *United States* v. *Musquiz*, 45 F.3d 927, 931 (5th Cir. 1995).

B. The District Court Did Not Abuse Its Discretion In Denying Davis's Motion To Sever Because Davis Could Not Show Clear, Specific, And Compelling Prejudice

Davis argues that the district court abused its discretion in denying Davis's motion to sever Counts 1 and 2, which charged Davis for assaulting Savoie, from Counts 3, 4, 7, 8, which charged Davis with covering up the assault, because, according to Davis, any evidence introduced in trial on the joined charges would "contribute to the implication [that Davis] must have participated in some conduct that merited him having to cover it up." Br. 18. In denying the motion for severance, the district court concluded that Davis had made "no specific compelling showing of prejudice arising from being tried on all counts of the indictment in a single trial, particularly when measured against the delay in efficiency and possibility for inconsistency introduced by ordering separate trials." ROA.1343-1345. The district court's decision was not an abuse of discretion. Moreover, this issue has no bearing on Davis's conviction on Count 2 because Davis was not convicted on the assault charges in the first trial and he waived this argument during his subsequent trials on Count 2.

1. To the extent Davis's severance argument is directed at his conviction on Count 2 in this third trial, this argument has no bearing on this appeal. Davis was not convicted on either of the assault counts in the first trial (Count 1 (acquittal) and Count 2 (hung jury)) (ROA.863-865), and therefore the failure to sever those counts in the first trial did not prejudice him. Moreover, to the extent Davis's real argument is that evidence that he covered up the assaults should not have been admitted in his third trial, he has waived that argument. In the subsequent trials on Count 2 (resulting in a conviction in the third trial), Davis agreed that the government could introduce evidence that Davis conspired to cover up the assault but could not reference that Davis was convicted of doing so. ROA.935-936; see also ROA.3418-3419 (stating that the defense "fully accept[s]" that evidence of the cover up would be introduced during the third trial). Davis does not dispute that at the third trial this is precisely what happened – the government introduced evidence of the cover-up, but the jury did not learn that Davis had been previously convicted. A defendant may not agree at trial to permit the introduction of certain evidence and then complain on appeal that the admission of such evidence prejudiced him.

2. To the extent this argument is directed at Davis's convictions for the cover-up (Counts 3, 4, 7, 8), see note 4, *supra*, the district court acted within its discretion in denying the motion to sever. It is well established that joinder of

counts in a single indictment is proper where the offenses charged "are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a); *Singh*, 261 F.3d at 533. The joinder of counts, where authorized by Rule 8(a), promotes efficiency, reduces the likelihood of inconsistent verdicts, and minimizes the inconvenience and trauma of victim testimony. See *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987).

Considering those important interests, "[t]here is a strong presumption against severing properly joined counts." *United States* v. *Robinson*, 781 F.3d 453, 461 (8th Cir. 2015) (citation omitted). Severance of properly joined counts is appropriate only in rare cases where a single trial on all counts would result in "clear, specific and compelling prejudice" likely to result in an unfair trial. *United States* v. *Mays*, 466 F.3d 335, 340 (5th Cir. 2006). Recognized bases for severance of counts include situations where inflammatory evidence supporting one count would be inadmissible at the trial of the other count. See *e.g.*, *United States* v. *Holloway*, 1 F.3d 307, 310-311 (5th Cir. 1993).

Here, Davis has failed to show that denial of his motion to sever properly-joined counts created specific and compelling evidence resulting in an unfair trial. As this Court has explained, severing counts is inappropriate where, as here, the same evidence would be admissible at separate trials. *United States* v. *Ballis*, 28 F.3d 1399, 1408-1409 (5th Cir. 1994) ("No prejudice inures to the defendant where

a severance of counts would not result in a segregation of evidence.") (citations omitted). Even if Davis had been tried separately on the assault and cover-up counts, evidence of the assault charges "would have been probative of [Davis's] motive to obstruct the government's investigation and to make false statements" while under oath. See *id.* at 1409. Similarly, "evidence of the obstruction of justice offenses would have been probative evidence of consciousness of guilt" with respect to the assault count "and admissible against [Davis] whether he testified or not." *Ibid.* Because the same evidence would have been admissible at separate trials, the court did not abuse its discretion in denying severance. See *United States* v. *Williamson*, 482 F.2d 508, 511 (5th Cir. 1973) (holding the failure to sever resulted in no prejudice where separate trials would not have resulted in the segregation of the evidence as to each offense).[5]

[5] Indeed, in similar excessive-force cases, the government often charges the defendant-officer with the substantive offense and offenses relating to a cover-up, and tries both sets of charges together in a single trial. See, *e.g.*, *United States* v. *Davis*, 971 F.3d 524, 528 (5th Cir. 2020); *United States* v. *Dodge*, 814 F. App'x 820, 822 (5th Cir. 2020); *United States* v. *Dukes*, 779 F. App'x 332, 334 (6th Cir. 2019); *United States* v. *Melgoza*, 469 F. App'x 357, 358 (5th Cir. 2012); *United States* v. *Aguilar*, 242 F. App'x 239, 241 (5th Cir. 2007); Indictment (Jan. 02, 2019) and J. (Feb. 26, 2020), *United States* v. *Davis*, No. 3:19-cr-8008 (D. Ariz.); Indictment (June 20, 2018) and J. (Nov. 11, 2020), *United States* v. *Bryant*, No. 3:18-cr-144 (M.D. Tenn.); Superseding Indictment (Oct. 24, 2017) and J. (May 10, 2018), *United States* v. *King*, No. 1:16-cr-415 (N.D. Ga.); Superseding Indictment (Oct. 20, 2015) and J. (Feb. 9, 2018), *United States* v. *Hamilton*, No. 1:15-cr-240 (N.D. Ga.); *United States* v. *Boone*, 110 F. Supp. 3d 909, 910 (S.D. Iowa 2015). In

(continued...)

Moreover, in prior cases, this Court has specifically rejected the argument Davis makes (Br. 19) that he would be prejudiced by the jury, "in considering the weight of the evidence for the cover-up counts, * * * also considering the evidence against [Davis] in the two [assault] counts." Severing counts is inappropriate where the potential prejudice arises from mere exposure to additional evidence, a feature of nearly every trial of a multi-count indictment. See, *e.g.*, *United States* v. *Owens*, 683 F.3d 93, 98 (5th Cir. 2012) ("[A] spillover effect, by itself, is an insufficient predicate for a motion to sever.") (citation omitted). Rule 8 anticipates that some prejudice will result from the "mere act of * * * having multiple counts in an indictment." *United States* v. *Scott*, 659 F.2d 585, 589 (5th Cir. 1981). Thus, Davis's argument (Br. 17-18) that any evidence introduced at a trial on both the assault and the cover-up counts would improperly "contribute to the implication" that Davis "must have participated in some conduct that merited him having to cover it up" is without merit. This limited degree of disadvantage is insufficient to find an abuse of discretion where the evidence relating to both the assault and the cover-up counts would have been admissible in separate trials.

3. The cases Davis cites (Br. 18-19) do not support severing the assault counts from the obstruction counts. For example, in *United States* v. *McRae*, 702

(...continued)
none of these cases did the defendants seek to sever the assault and cover-up counts.

F.3d 806 (5th Cir. 2012), a police officer appealed from his convictions for excessive force and unlawful discharge of a firearm because the district court had denied his motion to sever his trial from that of two other police officers who were charged with obstruction violations, including burning a dead body and providing false statements to the FBI. *Id.* at 810-811, 820-821. There was no evidence that the appellant "was in any way associated with the acts of his co-defendant officers in obstructing justice and covering-up evidence" nor was he charged with "the alleged obstruction and cover-up crimes." *Id.* at 823. Thus, this Court held that the case presented one of the rare situations warranting severance because the highly inflammatory evidence related to the charges against his co-defendants was inadmissible against the appellant. *Id.* at 828. In contrast, not only was Davis "associated with the acts of his co-defendant officers in obstructing justice and covering-up evidence," Davis himself was charged with both the assaults and "the alleged obstruction and cover-up crimes." See *id.* at 823. Accordingly, unlike in *McRae*, the evidence as to each type of charge would have been admissible at separate trials.

Davis's reliance on *United States* v. *Huntsberry*, 956 F.3d 270 (5th Cir. 2020), to support his argument that the fact that he was acquitted of Count 1 supports his severance argument is also misplaced. Br. 18-20. In that case, the defendant sought to sever the trial of different counts—there, a felon-in-possession

of a firearm charge from drug charges. 956 F.3d at 287. This Court found that the defendant's argument had "some force," especially given that his mother was acquitted on the drug charges while the defendant was ultimately convicted. *Id.* at 288. This Court explained that felon-in-possession charges present special prejudice concerns "because, absent severance, the jury will hear evidence of a defendant's prior felonies that would otherwise be inadmissible." *Id.* at 287 (citation omitted). But despite these concerns, this Court ultimately held that the district court did not abuse its discretion in denying the defendant's motion to sever because the defendant had not established he would face clear prejudice from the joinder of the charges. *Id.* at 289.

The case for severance here is even weaker. In contrast to *Huntsberry*, joinder here presented no special prejudice concerns because evidence of the assault charges would have been admissible in a trial on the obstruction charges and vice versa.

In sum, because the same evidence concerning the assaults would have been admissible at a separate trial on the cover-up charges, Davis has not shown that he suffered clear, specific, and compelling prejudice from the introduction of such evidence during the first trial. The district court's denial of the motion to sever was not an abuse of discretion.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING POLYGRAPH EVIDENCE REGARDING TWO NON-DEFENDANT WITNESSES TO THE ASSAULT

A. Standard Of Review

"This court reviews a district court's evidentiary rulings for an abuse of discretion, subject to the harmless error doctrine." *United States* v. *Salazar*, 440 F. App'x 400, 406 (5th Cir. 2011) (citation omitted).

B. The District Court Did Not Abuse Its Discretion In Denying Davis's Motion To Exclude Polygraph Evidence

The district court did not abuse its discretion in denying Davis's motion to exclude any reference to polygraph examinations made during the internal investigation of this case. The court agreed that evidence that Davis took and failed a polygraph would be inadmissible, and the prosecution never sought to introduce any such evidence. ROA.1368. However, the court found that evidence that two non-defendant witnesses (correctional officers Kennedy and George) took polygraphs and were told that they had failed those polygraphs was admissible to explain why they changed their accounts of the assaults and, thus, was relevant to their credibility and to provide factual context for the cover-up charges. ROA.1369-1370. The court concluded that introducing the evidence for this limited purpose would not pose an undue risk of prejudice under Rule 403. ROA.1369.

This Court should reject Davis's argument (Br. 24-28) that the district court abused its discretion in admitting the polygraph evidence. Specifically, Davis asserts that the jury may have given too much weight to the polygraph evidence and could have improperly inferred from the testimony that Davis had also taken, and failed, a polygraph test. Br. 25-28. But the United States did not introduce the polygraph evidence to prove the truth of the tests' results nor did it imply that Davis had also taken a polygraph test; it questioned two witnesses about their polygraph tests to explain why they had decided to change their accounts of the assaults. Because this background information was more probative than prejudicial, the court did not abuse its discretion in admitting this testimony.

1. This Court has held that polygraph evidence is not per se inadmissible. *United States* v. *Posado*, 57 F.3d 428, 429 (5th Cir. 1995). Rather, courts are to apply Rule 403 as a gatekeeper. *Id.* at 435. Under Rule 403, a district court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of * * * unfair prejudice." Fed. R. Evid. 403. Applying Rule 403, this Court has found that testimony about a polygraph test is admissible where it is not offered to prove the truth of the polygraph result, but rather is offered for a limited purpose such as rebutting a defendant's assertion that his confession was coerced or proving that the defendant knew a witness was cooperating with the government.

See *United States* v. *Allard*, 464 F.3d 529, 534 (5th Cir. 2006); *United States* v. *Thevis*, 665 F.2d 616, 637 (5th Cir. 1982), superseded by Fed. R. Evid. 804(b)(6).

Under *Allard* and *Thevis*, admission of the polygraph evidence here was within the district court's discretion. As in those cases, the polygraph evidence was not admitted to prove the truth of the polygraph results but, instead, for the limited purpose of explaining why Kennedy and George had decided to change their accounts of the assaults. *Allard*, 464 F.3d at 534; *Thevis*, 665 F.2d at 637. While each of these witnesses went along with the cover story during his initial interview with internal investigators, their testimony showed that they admitted their involvement in the assaults and/or the cover-up after being confronted by their polygrapher that they failed their respective polygraphs. See ROA.1814, 1951-1953. Testimony about those pivotal conversations was necessary to allow the jury to understand why those witnesses decided to change their accounts. Had it not been introduced, the jury would have had no explanation for why Kennedy and George suddenly changed their stories, and might very well have inferred that they did so for improper reasons (*e.g.*, threats or bribes). Because this testimony was highly probative of the credibility of Kennedy and George, and because it did not unfairly prejudice Davis, the court did not abuse its discretion in admitting this evidence.

2. Davis argues on appeal that the evidence should not have been admitted because the "logical inference" from Kennedy's testimony was that Davis also "must have also been administered and failed" a polygraph. Br. 25. Specifically, Davis argues that because Kennedy testified that they "gave us" a polygraph test, it implied that Davis had also taken a polygraph. Br. 27-28. Not so.

During Kennedy's direct examination, he testified that he was interviewed three times by internal investigators. ROA.3793. During the first two interviews, Kennedy told investigators the cover story he had devised with Davis. ROA.3794-3796. However, Kennedy was aware that the investigators "were not buying the story," and they asked him to come back in for a polygraph test. ROA.3798. The government asked Kennedy what happened when he returned for the polygraph examination. ROA.3798. Kennedy responded:

> I came back, took the polygraph test. You're just hoping that you're going to pass this polygraph test. Of course you can't – you can't fake it and get through it. They came gave us the polygraph test. Mine came back showing deception and they asked me questions about the incident and what went on that day.

ROA.3798. Nothing in this testimony indicates that Davis had also taken a polygraph examination. Indeed, not once during the government's questioning of Kennedy regarding the internal investigation did Kennedy mention which other officers, if any, were also interviewed, let alone subjected to a polygraph

examination. ROA.3793-3803. Nor did the government ever suggest or imply during questioning or argument that Davis must have taken and failed a polygraph.

Davis also argues (Br. 26-28) that this case is distinguishable from *Allard* because here the district court ruled before trial that the government could introduce the polygraph evidence during its case in chief, rather than waiting to see if the defense opened the door to the evidence on cross-examination. But this argument is also without merit. In *Allard*, the probative value of the polygraph evidence was not apparent until after the defendant testified during the defense's case-in-chief that her confession had been coerced. 464 F.3d at 531. That was not the case here. The court determined before trial that limited references to Kennedy and George's polygraph examinations would help the jury evaluate Kennedy and George's credibility by understanding why they had changed their stories. ROA.1369-1370.

Moreover, this Court in *Allard* admitted polygraph evidence that had a greater potential prejudicial effect because, in that case, the evidence related to the defendant's own failure to pass the polygraph examination. 464 F.3d at 532. In contrast, here, the polygraph evidence related to two non-defendant witnesses; there was no reference to the fact that Davis took and failed a polygraph examination. See ROA.3798-3800, 3905-3911. Thus, consistent with *Allard*, the

court did not abuse its discretion under Rule 403 in admitting the polygraph evidence.

III

THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF SEYMORE'S EYEWITNESS ACCOUNT OF THE SECOND ASSAULT THROUGH THE TESTIMONY OF TWO OTHER CORRECTIONAL OFFICERS

A. Standard Of Review

Davis challenges (Br. 28), on Confrontation Clause and hearsay grounds, Minor's and Ellis's testimony concerning statements Seymore made to them while, or shortly after, Seymore witnessed the second assault. This Court reviews Davis's Confrontation Clause claim de novo and alleged errors in the admission of hearsay evidence for abuse of discretion, both subject to harmless error. *United States* v. *Kizzee*, 877 F.3d 650, 661 (5th Cir. 2017); *United States* v. *Narviz-Guerra*, 148 F.3d 530, 536 (5th Cir. 1998). Davis also argues (Br. 36-37) that Minor's recorded recollection of her telephone call, which Minor read into evidence, was improperly admitted as an exhibit under Federal Rule of Evidence 803(5).[6] We agree that the written statement should not have been admitted as an exhibit, but that error was harmless.

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[6] Rule 803(5) provides that, if admitted, a recorded recollection "may be read into evidence but may be received as an exhibit only if offered by an adverse party." Fed. R. Evid. 803(5).

B. Background

As recounted above (see p. 8, *supra*), when Seymore witnessed Davis assaulting Savoie, she was on the telephone with Minor. ROA.3945. During the call, Seymore suddenly began screaming "Oh, my God. Oh, my God." ROA.3945. Seymore then shouted, "Davis, he's hitting him." ROA.3945. Seymore told Minor that Davis had a jumpsuit around the inmate's head, and that "he's going to hurt him bad." ROA.3945-3946. A few days later, Minor wrote a written report, memorializing this conversation. ROA.3944, 5422.

Also, immediately after witnessing the assault, Seymore called Ellis. ROA.3699. Seymore, sounding upset, asked Ellis, "What was that on that inmate's head?" ROA.3699, 3725. Ellis explained that she thought it may have been a substitute for a spit mask. ROA.3699. Seymore then asked Ellis, "Well, did you see what happened? Did you see them beating that inmate?" ROA.3700.

Because Seymore was unable to testify at trial,[7] the government introduced Seymore's statements through Minor and Ellis. See ROA.3410-3412. Ellis testified as to what Seymore told her over the phone. ROA.3699-3700. But Minor was unable to recall the details of her telephone conversation with Seymore, so

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[7] Seymore was not called to testify because she had health issues. ROA.3410-3412. Davis did not object to Seymore's unavailability to testify at trial. ROA.3413.

Minor, consistent with Rule 803(5), read her recorded recollection of what Seymore said to her into evidence. ROA.3945-3946. Based on the parties' stipulation, the court also admitted Minor's recorded statement as an exhibit. ROA.3601.

Davis argues (Br. 33-39) that the introduction of Seymore's statements through the testimony of Minor (reading her recorded recollection) and Ellis (directly testifying as to what Seymore told her on the telephone) violated his rights under the Confrontation Clause and resulted in the admission of hearsay (Seymore's statements).[8] Davis also argues (Br. 35) that Minor's written report was itself hearsay (and thus contained "double hearsay") and, as such, was improperly admitted. Finally, Davis argues (Br. 36-37) that the court erred by allowing the government to have Minor's written statement admitted as an exhibit. Apart from the last argument, these arguments are incorrect. And even though Minor's recorded recollection should not have been admitted as an exhibit under Rule 803(5), Davis waived this argument. And were this Court to address the merits of this argument, any error was harmless.

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[8] "Although the protections of the Confrontation Clause and the hearsay rule overlap, they are not coextensive." *Gochicoa* v. *Johnson*, 118 F.3d 440, 446 (5th Cir. 1997). The Confrontation Clause excludes only *testimonial* statements, so non-testimonial out-of-court statements may be admitted if they meet one of the exceptions to the general rule against hearsay. See *Giles* v. *California*, 554 U.S. 353, 376 (2008).

C. The District Court Properly Admitted Evidence Of Seymore's Eyewitness Account Of The Second Assault Through The Testimony Of Two Other Correctional Officers

1. The Admission Of Seymore's Out-Of-Court Statements Through Minor And Ellis Did Not Violate The Confrontation Clause

a. The Sixth Amendment protects a criminal defendant's right to be "confronted with the witnesses against him." U.S. Const. Amend. VI. The "basic objective of the Confrontation Clause * * * is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." *Michigan* v. *Bryant*, 562 U.S. 344, 358 (2011). To ensure this right, the Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford* v. *Washington*, 541 U.S. 36, 53-54 (2004).

A "testimonial statement" is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (internal quotation marks, citation, and brackets omitted). Context matters. "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Ibid.* Thus, testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial," as well as statements made during certain "police interrogations." *Id.* at 68. But statements made to individuals who are not

law enforcement officers, working in their official capacity, are "much less likely to be testimonial." *Ohio* v. *Clark*, 576 U.S. 237, 246 (2015). In determining whether a statement is testimonial, "factors such as 'whether an ongoing emergency exists' and 'the informality of the situation and the interrogation' are especially helpful guideposts." *United States* v. *Barker*, 820 F.3d 167, 170 (5th Cir. 2016) (quoting *Clark*, 576 U.S. at 245).

Applying these principals, courts of appeals have routinely held, for example, that statements made to friends or acquaintances in an informal setting are not testimonial. In *United States* v. *Clifford*, the Eighth Circuit found no Confrontation Clause violation from a witness's testimony that his girlfriend's son told him that the defendant had "hurt mama" in response to the witness asking "[w]hat happened?" 791 F.3d 884, 888 (2015). The Court held that the statement was not testimonial because it was an informal, spontaneous conversation, with the primary purpose of determining how to respond to an emergency rather than to solicit prosecutorial information. *Ibid.*; see also *Reitz* v. *Harrison*, 406 F. App'x 212, 214 (9th Cir. 2010) (Casual remarks made by declarant to friends and family were not testimonial within the meaning of *Crawford*.); *United States* v. *Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004) (Declarant's comments "were made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."); *United States* v. *Saget*, 377 F.3d

223, 229 (2d Cir.) (Declarant's statements did not constitute testimony where the declarant "believed that he was having a casual conversation with a friend and potential co-conspirator."), supplemented, 108 F. App'x 667 (2d Cir. 2004).

Consistent with these cases, Seymore's statements to Minor and Ellis were not testimonial because they were made during informal and spontaneous conversations with her colleagues during and immediately after witnessing Savoie's second assault. Minor testified that, on the day of assaults, she was talking on the telephone with Seymore, as they regularly did, when Seymore began screaming, crying, and became very upset. ROA.3945. Because Minor was unable to remember the details of this conversation, she then read her recorded recollection into evidence. ROA.3945-3946. According to Minor's recorded recollection, Seymore suddenly started shouting and when Minor asked what was wrong, Seymore responded, "Davis, he's hitting him." ROA.3945. Minor further read into evidence that Seymore then began crying on the telephone and continued to describe what she was witnessing happen to Savoie. ROA.3945-3946. Ellis testified that immediately after the assault, Seymore called her from the tower and seemed upset. ROA.3699, 3725. Seymore asked Ellis whether she had seen "what happened" and if she saw "them beating that inmate." ROA.3700.

None of Seymore's statements, as related to the jury by Minor and Ellis, reflect "a primary purpose of creating an out-of-court substitute for trial testimony"

against Davis. *Bryant*, 562 U.S. at 358, 369. Rather, Seymore's statements were made to friends and co-workers by happenstance. In other words, as in *Clifford*, Seymore's statements were not testimonial because they were made during informal, spontaneous conversations in response to witnessing an assault—not to elicit prosecutorial information. 791 F.3d at 888. Therefore, the introduction of Seymore's statements did not violate Davis's confrontation rights.

b. Davis does not address the fundamental question whether *Seymore's* statements were testimonial. Rather, he argues (Br. 34) that *Minor's* written recollection was a testimonial statement because it was "clearly created as a police report" and, therefore, it violated his rights under the Confrontation Clause.[9] But even if Minor's recorded recollection was a testimonial statement, allowing Minor to read her prior statement to the jury did not violate Davis's confrontation rights. In *Crawford*, the Court held that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. * * * The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." 541 U.S. at 59 n.9 (citations omitted). Because Minor testified at trial and Davis

[9] Without citation, Davis also incorrectly contends that *Seymore* "wrote in an official police report" that Davis assaulted an inmate, which "became testimonial evidence." See Br. 38. No such report was mentioned at trial, let alone introduced as evidence. The Court should disregard this argument.

had an opportunity to cross-examine her, Minor's testimony reading her written recollection did not violate the Confrontation Clause. Accordingly, Davis's Confrontation Clause argument fails.

2. Seymore's Out-Of-Court Statements Were Not Inadmissible Hearsay

The district court correctly concluded that Seymore's statements to Minor and Ellis concerning the assaults were admissible under two categories of exceptions to the hearsay rule: present sense impressions and excited utterances. Although Davis states that this ruling was "error" (Br. 31), he does not develop any argument about why the statements would be *inadmissible* hearsay.

First, the district court correctly concluded that Seymore's statements were admissible as a present sense impression under Federal Rule of Evidence 803(1), which permits the introduction of "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." For example, in *United States* v. *Polidore*, this Court upheld the admission of statements a caller made to 911 while observing the defendant's drug trafficking. 690 F.3d 705, 720 (5th Cir. 2012). The Court explained the statements were admissible as present sense impressions because (1) the statements "described and explained events that the [declarant] personally witnessed" and (2) the declarant "made the statements contemporaneously with his observation of the events—*i.e.*, while he was observing the events or very soon thereafter." *Ibid.* Here too,

Seymore made statements to Minor while she watched the second assault unfold (ROA.3945-3946), and Seymore made statements to Ellis "immediately after" the assault ended (ROA.3699). Because Seymore's statements described events that she personally witnessed and because Seymore made the statements while she was observing the events or very soon thereafter, as in *Polidore*, they were properly admitted as present sense impressions.

Second, the district court correctly concluded that the statements were admissible as excited utterances under Federal Rule of Evidence 803(2), which permits the introduction of "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." For a statement to qualify as an excited utterance, courts generally require the proponent to show three conditions: (1) a startling event occurred; (2) the declarant made the statement while under the stress or excitement caused by the event; and (3) the statement relates to the startling event. *United States* v. *Moore*, 791 F.2d 566, 570 (7th Cir. 1986).

All three conditions were met here. The assault was undeniably a starling event and Seymore's statements to Minor and Ellis clearly relate to the assault. See ROA.3699-3700, 3945-3946. Moreover, the record demonstrates that Seymore made the statements while still under the stress of the event: her statements to Minor occurred while she was watching the assault and her

statements to Ellis occurred only minutes later. ROA.3699-3700, 3945-3946. Moreover, courts generally find that this condition has been met where a declarant is crying or noticeably upset. See, *e.g.*, *United States* v. *Wilcox*, 487 F.3d 1163, 1171 (8th Cir. 2007) (Declarant was crying and upset.); *United States* v. *Phelps*, 168 F.3d 1048, 1055 (8th Cir. 1999) (Declarant sounded "very upset."). Minor and Ellis's testimony establishes that Seymore was screaming, crying, and upset. ROA.3725, 3943-3946. As Seymore herself explained to Minor during the assault, "I got boys that's in jail and I am thinking about them." ROA.3946. Thus, the court did not abuse its discretion in holding that Seymore's statements were admissible under one or both exceptions to the rule against hearsay.

3. Minor's Recorded Recollection Did Not Constitute Inadmissible Hearsay

Apart from whether Seymore's statements to Minor and Ellis were inadmissible hearsay, Davis argues (Br. 28) that Minor's written recollection, which she read to the jury, was itself inadmissible hearsay.[10] But this argument is incorrect because, as with Seymore's statements to Minor and Ellis, Minor's written recollections falls within an exception to the rule against hearsay.

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[10] While Davis frames the issue on appeal as whether the "law enforcement report" contained "double hearsay" (Br. 5, 28), it is unclear from Davis's brief whether he is really arguing on appeal that the written statement itself was inadmissible hearsay. See Br. 28-39. Regardless, for the reasons explained *infra*, Minor's recorded recollection was not inadmissible hearsay.

Specifically, Rule 803(5) allows the introduction of recorded recollections, in lieu of live testimony, concerning "a matter the witness once knew about but now cannot recall well enough to testify fully and accurately." Fed. R. Evid. 803(5). To lay a proper predicate for admissibility, the proponent must show that "the witness had insufficient recollection to enable him to testify fully and accurately at trial" and that "the recording reflected the witness' knowledge correctly when the matter was fresh in his memory." *United States* v. *Judon*, 567 F.2d 1289, 1294 (5th Cir. 1978).

These factors were met here. At trial, Minor testified that she was unable to remember the details of her conversation with Seymore, which occurred more than six years before her trial appearance. ROA.3943-3944. But she testified that a few days after the assault, she wrote a report of what Seymore had told her. ROA.3944. She further testified that when she wrote the report, her conversation with Seymore was fresh in her mind and that her written report was truthful and accurate. ROA.3944. Based on this testimony, the government laid a proper foundation for the introduction of the statement under Federal Rule of Evidence 803(5), and the court did not err in permitting Minor to read directly from her written record. And, in any event, given the overwhelming evidence that Davis assaulted Savoie, including the testimony of two of his co-conspirators (Kennedy and Sanders), any error was harmless.

4. Minor's Written Recollection Of Her Telephone Call With Seymore Should Not Have Been Admitted Into Evidence, But That Error Is Harmless

Davis argues (Br. 36-37) that he was prejudiced because Minor's written statement was not only read into evidence but was also impermissibly admitted as an exhibit. Although Davis waived this argument,[11] we agree that the written statement should not have been admitted as an exhibit. Under Rule 803(5), a prior recorded recollection should only be read into evidence; it should not be received as an exhibit unless offered by an adverse party. Fed. R. Evid. 803(5). This rule exists so that past-recollection-recorded evidence "is treated on par with the oral testimony presented at trial." *United States* v. *Dazey*, 403 F.3d 1147, 1168 (10th

[11] Davis's opening brief incorrectly states that Minor's written statement had not been pre-admitted as an exhibit. Br. 36-37. On the first day of the third trial, the district court invited counsel to introduce evidence that the parties had agreed could come into evidence. ROA.3600. Counsel for the United States represented that the parties had agreed to admit Minor's written recollection (Exhibit 15-A). ROA.3601. Counsel for Davis did not object. ROA.3601.

Minor testified on the third day of trial. ROA.3939. After laying the proper predicate for admissibility under Rule 803(5), counsel for the United States asked that "Exhibit 15-A[,] which [had] been preadmitted[,] be put up on the screen." ROA.3944. Davis's attorney interjected, "Your Honor, I cannot remember if we preadmitted that one or not." ROA.3944. The court was also "unclear," and counsel for the United States confirmed that the exhibit had been preadmitted. ROA.3944-3945. The exhibit was then published to the jury, without objection from Davis. ROA.3945.

In these circumstances, because Davis stipulated to the admission of Minor's recorded recollection (ROA.3601) and did not object when the exhibit was published to the jury (ROA.3944-3945), Davis has waived this argument.

Cir. 2005). "Otherwise, the jury might, in its deliberations, tend to privilege the notes that it gets to take into the jury room over the oral testimony that might already be half-forgotten." *Ibid.*

But here, even if this Court were to address the merits of this argument, any error was harmless because the admission of the written statement as an exhibit did not prejudice Davis. Nothing in the record reflects that displaying the statement to the jury resulted in it being overemphasized. Davis himself admits that "reading the statement rather than offering it into evidence was a distinction without meaning in a criminal trial." Br. 30. Moreover, this case is like *Dazey*, in which the Tenth Circuit found no error where witnesses' handwritten notes were introduced as evidence because the court found it unlikely that the jury would improperly focus on the notes rather than hundreds of other pieces of admitted evidence. 403 F.3d at 1168. Here, given the abundance of evidence concerning the assault—including nearly 1500 pages of exhibits (ROA.4486-5953)—the likelihood that the jury overemphasized Minor's one-page handwritten statement is "vanishingly small." See *ibid.* Thus, any error was harmless.

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DAVIS'S MOTION TO ADMIT EVIDENCE THAT SAVOIE PREVIOUSLY THREW FECES FROM HIS CELL

A. Standard Of Review

This court reviews "the district court's ruling regarding the exclusion of character evidence against an abuse of discretion standard." *United States* v. *McGee*, 29 F.3d 625 (5th Cir. 1994) (quoting *United States* v. *Marrero*, 904 F.2d 251, 260 (5th Cir. 1990)).

B. The District Court Did Not Abuse Its Discretion In Excluding Evidence of Savoie's Disciplinary History That Included Throwing Feces From His Cell

At trial, Davis sought to introduce evidence that Savoie had previously thrown feces at guards and other prisoners from his cell. ROA.720-721. Davis argued that this evidence was relevant to whether the correctional officers' use of force against Savoie was reasonable and whether he acted willfully. ROA.721. More specifically, Davis argued that the evidence was admissible under Federal Rule of Evidence 406 (evidence of a person's habit) to demonstrate Savoie's "habitual defiance" of prison regulations. ROA.721. Alternatively, Davis asserted that the evidence was admissible under Rule 404(a)(2) as character evidence relating to Savoie's "pertinent trait." ROA.722. The district court granted the United States' motion to exclude inquiry about prior occasions on which Savoie threw feces out of his cell, but did allow Davis to introduce evidence of two

"necessary predicate" incidents—that Savoie had an altercation with Thomas two weeks before the assaults and that Savoie had thrown soap at Thomas on the morning of the assaults. ROA.843-844.

Davis now argues (Br. 43-44) that the district court erred in not admitting evidence that Savoie had thrown feces under Rules 404(a) and 406 because "[t]he complete truth of [Savoie's] danger to correctional officers was hidden from the jury." But evidence that Savoie previously threw feces at other correctional officers on some unspecified number of occasions is not relevant to whether Davis used unreasonable force against a handcuffed Savoie when he assaulted him on the breezeway in violation of 18 U.S.C. 242 or whether he did so willfully. Moreover, neither Rule 404(a) nor 406 compelled the admission of this evidence. Thus, the court properly excluded this evidence.

1. The Federal Rules of Evidence impose substantial constraints upon the type of character evidence that may be admitted at trial. Rule 404 "embodies the well-settled principle that evidence of a person's character is usually not admissible for the purpose of proving that the person acted in conformity with his character on a particular occasion." *Reyes* v. *Missouri Pac. R. Co.*, 589 F.2d 791, 793 (5th Cir. 1979) (citing Fed. R. Evid. 404). Rule 404(a), however, provides that a defendant may offer evidence of a "pertinent" character trait of a victim. Fed. R. Evid.

404(a). "As used in this context, 'pertinent' is synonymous with 'relevant'." *United States* v. *Roberts*, 887 F.2d 534, 536 (5th Cir. 1989) (citation omitted).

Here, that Savoie may have previously thrown feces was not relevant to the questions before the jury—whether Davis used unreasonable force against Savoie in violation of 18 U.S.C. 242 and did so willfully. ROA.4340-4341. That Savoie on previous occasions threw feces while in his cell does not demonstrate a "need to use force" (see ROA.4341) when Savoie, in full restraints and with a jumpsuit over his head, was assaulted in the breezeway by Davis and others. ROA.1784-1786, 1924-1926, 3774-3776. Nor does it somehow demonstrate that Davis did not act willfully, *i.e.*, that Davis did not act "in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite." *United States* v. *Brugman*, 364 F.3d 613, 616 (5th Cir. 2004) (quoting *Screws* v. *United States*, 325 U.S. 91, 105 (1945)).

Moreover, even where evidence is admissible under Rule 404, Rule 405 proscribes limits on the permissible methods of proving character. Fed. R. Evid. 405. Rule 405(b) dictates that prior acts are only admissible to prove character in cases where "a person's character or character trait is an essential element of a charge, claim, or defense." Fed. R. Evid. 405(b). Proving character through "specific prior acts" is limited specifically because it "possess[es] the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time." *United*

States v. *Gulley*, 526 F.3d 809, 818 (5th Cir. 2008) (citation omitted). Here, evidence of specific prior instances in which Savoie allegedly threw feces at correctional officers is not an essential element of Davis's defense.

2. Rule 406 also does not help Davis. Under Rule 406, evidence of a person's habit "may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice." Fed. R. Evid. 406. Habit is a "regular practice of meeting a particular kind of situation with a specific type of conduct." *Reyes*, 589 F.2d at 794-795 (citation omitted). To rise to the level of habit, a behavior must be so consistent it is semi-automatic. *Ibid.*; *United States* v. *Heard*, 709 F.3d 413, 434 (5th Cir. 2013).

This Court should not allow Davis to refashion inadmissible character evidence as admissible habit evidence. In *United States* v. *Serrata*, three former correctional officers, who had been convicted of assaulting an inmate, similarly argued that evidence that the victim had previously resisted arrest and refused to be handcuffed should have been admitted as "habit evidence" under Rule 406. 425 F.3d 886, 901 (10th Cir. 2005). But the Tenth Circuit correctly determined that the defendant's argument was "an untenable attempt to circumvent restrictions on character evidence by repackaging it as habit evidence." *Id.* at 906 (quoting U.S. Br.). So too here. Nothing in the record suggests that Savoie had some semi-automatic response of throwing feces at guards every time he had a dispute with

correctional officers. See *Jones* v. *Southern Pac. R.R.*, 962 F.2d 447, 449 (5th Cir. 1992) ("Evidence of habit is not lightly established."). Thus, this Court should find the evidence to be inadmissible under Rule 406 as well.

3. Davis argues (Br. 42-43) that *Perrin* v. *Anderson*, 784 F.2d 1040 (10th Cir. 1986), compels a different result. It does not. In that case, a civil action under 42 U.S.C. 1983, the defendant police officers sought to introduce evidence that the victim had previous violent encounters with police officers to prove that the victim was the first aggressor in a fight—a key element in defendants' self-defense claim. *Perrin*, 784 F.2d at 1043-1044. The Tenth Circuit held that the testimony was admissible as evidence of habit under Rule 406. *Id.* at 1045-1046. While the Court noted that it "seem[ed] rather extraordinary" that the victim had a "habit" of reacting violently to uniformed police officers, the Court held that the defendants' offer of proof—including testimony from eight police officers concerning numerous similar incidents with the victim—was sufficient where the plaintiff offered no evidence of any peaceful encounter between the victim and police. *Id.* at 1046.

In this case, Davis provided no evidence of how often Savoie threw feces from his cell in response to a dispute with a correctional officer. And, in contrast to *Perrin* where the plaintiff offered no evidence of any peaceful encounter between the victim and police, Davis himself introduced evidence of Savoie's two

most recent disputes with correctional officers preceding the assaults—one where he threw soap and a second where he allegedly slapped a guard; neither incident involved throwing feces. See ROA.3811-3812. Moreover, the charged incident itself is a prime example of a time in which Savoie had a conflict with correctional officers and did not throw feces. These incidents contradict Davis's argument that Savoie had a semi-automatic response of throwing feces in response to disputes with correctional officers.

V

THE DISTRICT COURT PROPERLY APPLIED A TWO-LEVEL ENHANCEMENT TO DAVIS'S BASE OFFENSE LEVEL UNDER GUIDELINE 3A1.3 FOR RESTRAINT OF VICTIM

A. Standard Of Review

This Court reviews the sentencing court's "application of the [Sentencing] Guidelines de novo and [its] factual findings—along with the reasonable inferences drawn from those facts—for clear error." *United States* v. *Velasco*, 855 F.3d 691, 693 (5th Cir. 2017) (citation and emphasis omitted).

B. The District Court Did Not Err In Applying A Two-Level Enhancement To Davis's Base Offense Level For Count 2 For Restraint Of Victim

In calculating Davis's sentencing guidelines range, the United States Probation Office increased Davis's base offense level by two levels under Sentencing Guidelines § 3A1.3 because Savoie was restrained when Davis and

others assaulted him in the breezeway.[12] As a result, the applicable recommended sentencing range was 121-151 months' imprisonment. ROA.6020. Davis objected to the two-level enhancement in the PSR and at sentencing. ROA.4367. The court overruled the objection. ROA.4369. But in any event, it then sentenced Davis to a below-guidelines sentence of 110 months of imprisonment on Counts 2, 4, and 7, and 60 months on Counts 3 and 8, to run concurrently. ROA.4369, 4382.

Davis now renews his argument that this sentence is procedurally unreasonable because the two-level enhancement for restraint of victim should not have applied. Davis does not argue that the handcuffed-and-shackled victim was not physically restrained during the offense. Rather, he claims that the factor of restraint was already incorporated into his Guideline range by: (1) a five-level enhancement because the victim sustained serious bodily injury; (2) a six-level enhancement because the offense was committed under color of law; and (3) "the fact that the inmate was both lawfully restrained and restrained as a matter of policy at the time of the assault." Br. 45-46. This argument is incorrect and, as

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[12] Sentencing Guidelines § 3A1.3 provides for a two-level enhancement "[i]f a victim was physically restrained in the course of the offense." The commentary to Section 3A1.3 explains that the enhancement does not apply "where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself." Sentencing Guidelines § 3A1.3, comment. (n.2).

Davis again admits (Br. 44-45), this Court's decision in *United States* v. *Clayton*, 172 F.3d 347 (5th Cir. 1999) "precludes relief."

First, this Court has regularly upheld the district court's imposition of the restraint enhancement where, as here, the under-color-of-law and bodily-injury enhancements also were applied. For example, in *United States* v. *Broussard*, where the defendant pleaded guilty to a violation of Section 242 for failing to intervene while other officers beat an inmate, this Court upheld the application of the restraint enhancement although the under-color-of-law and bodily-injury enhancements also were applied. 882 F.3d 104, 109-111 (5th Cir. 2018). Similarly, in *United States* v. *Hatley*, in the same context, this Court held that the district court did not err in finding that the bodily-injury enhancement, the physical-restraint enhancement, and the color-of-law enhancements each applied. 717 F. App'x 457, 463 (5th Cir. 2018). Likewise, the district court here did not err in rejecting Davis's challenge to the physical-restraint enhancement despite the application of these other enhancements.

Second, the application of the physical-restraint enhancement does not turn on the lawfulness of the defendant's restraint of the victim, an argument this Court squarely rejected in *Clayton*. In that case, a former sheriff was convicted of kicking an arrested woman in the head while she lay facedown and handcuffed. 172 F.3d at 349. The district court concluded that the physical-restraint

enhancement was not applicable because the victim had been lawfully restrained, and the government appealed. *Id.* at 352. This Court reversed, explaining that Section 3A1.3 considers the physical restraint of a victim during an assault to be "an aggravating factor that intensifies the willfulness, the inexcusableness and reprehensibleness of the crime and hence increases the culpability of the defendant." *Id.* at 353. Thus, as this Court further explained, regardless of "the lawfulness of the defendant's restraint of the victim," so long as the defendant "took advantage of th[e] restraint and the particular vulnerability of the victim" to commit the unlawful assault, "both the letter and spirit of the guideline applies to impose an additional sentence on [the defendant], beyond the one mandated for his use of unreasonable force." *Ibid.*

That was the case here. Even if Savoie was lawfully handcuffed and shackled, the evidence established that Davis used the restraints to facilitate the second assault and the restraints contributed to the seriousness of Savoie's injuries. See ROA.1784-1785, 3774-3775; see also ROA.2135. Therefore, the court properly applied the restraint enhancement to Davis's base offense level and the sentence is not procedurally unreasonable.

CONCLUSION

For the foregoing reasons, this Court should affirm Davis's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 29, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth 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.

s/ Yael Bortnick
YAEL BORTNICK
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,991 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) 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 it has been prepared in a proportionally spaced typeface using Word 2003, in 14-point Times New Roman font.

s/ Yael Bortnick
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Date: March 29, 2021