Nos. 17-7016, 17-7017

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

CHRISTOPHER A. BROWN,

and

RAYMOND A. BARNES,

Defendants-Appellees

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

REPLY BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLANT

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As the United States argued in its opening brief (U.S. Br. 21-44), this Court should vacate defendants' sentences as substantively unreasonable.[1] The district court erred in imposing significant and unjustified downward variances from

[1] The United States' opening brief is cited as "U.S. Br. __." Barnes's and Brown's response briefs are cited as "Barnes Br. __" and "Brown Br. __," respectively. "Aplt. App. __" refers to pages in the appellant's appendix.

Barnes's and Brown's advisory Sentencing Guidelines range of 70-87 months. Barnes's sentence (24 months) is less than 35%, and Brown's sentence (12 months) is less than 20%, of a minimum Guidelines sentence. Moreover, the district court's analysis of the factors set out in 18 U.S.C. 3553(a) is substantially flawed, and its reasons for the huge downward variance are not persuasive. As a result, the court imposed "sentence amount[s] grossly at odds with the sentencing guidelines." *United States* v. *Morgan*, 635 F. App'x 423, 452 (10th Cir. 2015) (unpublished).

These extraordinarily lenient sentences are not substantively reasonable for two head jailers who repeatedly abused and assaulted restrained inmates, conspired to force other jailers to participate in the abuse, required subordinates to falsify reports, and retaliated against proper reporting. U.S. Br. 4-11, 39. Defendants used their authority to institutionalize violence. Indeed, inmate abuse was so routine that the jail had a name for the orchestrated assaults – "Meet and Greets." U.S. Br. 4. Under these circumstances, defendants deserve greater punishment, not radically less punishment, than a Section 242 offender who strikes out in a fit of anger. Cf. *United States* v. *Hayes*, 762 F.3d 1300, 1309 (11th Cir. 2014) (vacating sentence in part because defendant engaged in a pattern of bribery, and not a one-time bribe, before being caught). Moreover, the premeditated pattern of offenses

also makes this "the unusual case" calling for reversal. *United States* v. *Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (en banc) (citation omitted).

To be clear, the United States is not arguing that the district court failed to adequately explain its reasons – *i.e.*, that it made procedural errors − as Barnes assumes. Barnes Br. 7, 24, 38-40. Nor is this a case where the court mistakenly included an improper factor or neglected an essential one. Barnes Br. 7. Instead, the district court's improper analysis of the Section 3553(a) factors resulted in sentences that are substantively unreasonable, *i.e.*, the length of the sentences is not reasonable "given all [of] the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *United States* v. *Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009) (citation omitted).

Barnes's argument, therefore, reflects a misunderstanding of the nature of a substantive challenge. He repeatedly attempts to hinder scrutiny of his sentence by claiming – incorrectly − that any close look at the district court's reasons is a procedural, rather than a substantive, challenge to the defendants' sentences that falls outside the scope of this appeal. Barnes Br. 7, 41, 43. Barnes argues that because the United States did not lodge *specific* objections to the court's reasons for its sentences as procedurally improper, it is barred from pursuing much of its challenge to the reasonableness of defendants' sentences. Barnes Br. 7, 9-10, 24,

28, 35, 39-41, 43.[2] But a substantive challenge does not depend on specific objections below. *United States* v. *Torres-Duenas*, 461 F.3d 1178, 1182-1183 (10th Cir. 2006), cert. denied, 551 U.S. 1166 (2002); see *United States* v. *Walker*, 844 F.3d 1253, 1256 (10th Cir. 2017) (rejecting defendant's waiver claims). Instead, review of the substantive reasonableness of a sentence requires a detailed analysis of the facts in light of the Section 3553(a) factors, an analysis that does not preclude examination of the court's consideration of these factors and reasons for weighing them as it did.

In short, Barnes hopes to divert attention from the fact that the district court "only paid lip service to the § 3553(a) factors" by rebranding as "procedural" several aspects of the government's challenge to the *substantive* reasonableness of defendants' sentences. Barnes Br. 38-39. But this failure goes to the heart of the sentences' substantive reasonableness. See *Walker*, 844 F.3d at 1258 (vacating sentence as substantively unreasonable where court "gave inadequate attention" to deterrence and "never mentioned" incapacitation). This Court in *Morgan*, for example, concluded that, in assessing substantive reasonableness, "[t]he court paid only lip service to the seriousness of the offense and its harm to * * * public faith in legitimate state government." *Morgan*, 635 F. App'x at 448-449.

[2] We note, however, that the United States did object to both sentences on substantive and procedural reasonableness grounds at the end of the sentencing hearings. Aplt. App. 613, 654.

ARGUMENT

DEFENDANTS' SENTENCES ARE SUBSTANTIVELY UNREASONABLE

This Court must consider the reasonableness of a sentence in light of the factors set forth in 18 U.S.C. 3553(a), the totality of the circumstances, and the magnitude of any variance. *Gall* v. *United States*, 552 U.S. 38, 46-50 (2007). A sentencing court's "major departure should be supported by a more significant justification than a minor one." *Id*. at 50. This Court's review is deferential, but "deference does not imply abdication." *United States* v. *Angel-Guzman*, 506 F.3d 1007, 1015 (10th Cir. 2007). Where a sentencing decision is not "reasonable given all [of] the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)," this Court will reverse. *United States* v. *Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009) (citation omitted). In this case, neither the Section 3553(a) factors nor the other factors the district court cited – either singularly or together – supports the court's enormous downward variances.[3]

[3] Barnes takes issue with the government's use of term "reduced" sentences in its opening brief to describe the district court's downward variances. Barnes Br. 18. Barnes asserts that this is a "skewed characterization" of the court's sentencing analysis because "[b]efore the district court announced the sentence, there was no other sentence. Thus the sentence was not reduced." Barnes Br. 18-19; see generally Barnes Br. 7, 17-19. It is difficult to see how the government's occasional use of this adjective undermines its argument that the sentences were substantively unreasonable. In any event, this Court analogously views a substantial downward variance as "a diminished sentence." *United States* v. *Morgan*, 635 F. App'x 423, 445 (10th Cir. 2015) (quoting *United States* v.

(continued…)

A. The Conspirators' Objective, To Intimidate Inmates Through Violence, Does Not Support Leniency

Barnes asserts that the district court appropriately fashioned his sentence to reflect his motive for the crimes, *i.e.*, that "a show of strength and control may have served a purpose in the control of disorderly inmates and the overall safety of the jail staff." Barnes Br. 4, 6 (quoting Aplt. App. 609); see also Barnes Br. 7. The motive for defendants' crimes is an important consideration here, but it does not – and should not – have helped Barnes. Barnes exercised such "control" (Barnes Br. 4), for example, when he instructed jailers that in pulling inmate Jace Rice out of the van, they should ensure that "the first thing that touched the ground [was] his head," *United States* v. *Brown*, 654 F. App'x 896, 900 (10th Cir.) (unpublished) (alteration in original), cert. denied, 137 S. Ct. 237 (2016).

No reasonable sentencing court should conclude that Barnes's and Brown's motives here justify a diminished sentence. Defendants' aim, as Barnes now explains, was "to manage inmates" by intimidating them. Barnes Br. 17. Barnes made this clear when he threatened Rice that "what just happened to [him] will

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(…continued)
Musgrave, 761 F.3d 602, 608 (6th Cir. 2014)). And other cases have described downward variances as "reduce[d]" sentences. *United States* v. *Smith*, 860 F.3d 508, 517 (7th Cir. 2017) *United States* v. *Huitron-Guizar*, 678 F.3d 1164, 1171 (10th Cir.), cert. denied, 568 U.S. 893 (2012). Evaluating a variance as a "reduced" sentence does not "inaccurately portray[] the federal sentencing system." Barnes Br. 18.

happen to [him] again or even worse." *Brown*, 654 F. App'x at 900 (alteration in original) (citation omitted); see also *ibid*. (similarly threatening inmate Gary Torix, who had received similar violent treatment). But as this Court observed, noting that the inmates involved in the "Meet and Greets" were "calm" and in restraints, thus posing no threat, "[t]he only proffered justification for the force used against these inmates was to discourage *future* repetition of their alleged *past* bad behavior. Such punitive treatment does not serve a legitimate penological purpose." *Id.* at 911 (emphasis omitted). In short, defendants' intentions were not laudable or mitigating; they were entirely improper. Moreover, Barnes's alleged goal of managing difficult inmates cannot account for his gratuitous and vicious assault on inmate Jeremy Armstead, who was simply standing in the medical hallway and did nothing to provoke the use of force. See U.S. Br. 8.

Moreover, assaults by law enforcement acting under color of law should be punished with particular severity. Courts "have treated violations of § 241 by police or corrections officers as serious crimes meriting far higher sentences." *United States* v. *McQueen*, 727 F.3d 1144, 1160 (11th Cir. 2013) (citing cases); *United States* v. *LaVallee*, 439 F.3d 670, 708 (10th Cir. 2006) (noting that "committing a crime while acting under color of law will result in a higher sentence − as it did in this case − rather than a lower sentence") (cited at Aplt. App. 74, 92, 247, 515, 767 and U.S. Br. 28, 36 n.8). And as we noted in our opening

brief, courts have also held that "a defendant's status as a law enforcement officer is often times more akin to an aggravating as opposed to a mitigating sentencing factor." *United States* v. *Thames*, 214 F.3d 608, 614 (5th Cir. 2000); see also *Koon* v. *United States*, 518 U.S. 81, 110 (1996); U.S. Br. 27.[4]

Barnes further suggests that defendants' purpose here was less blameworthy than the other motives − "anger" or "violence * * * entirely for the sake of violence" − that he ascribes to other law-enforcement defendants he considers more culpable than himself. Barnes Br. 16-17. It is true that some violations of Sections 241 or 242 involve outbursts of anger or a sudden rage. See, *e.g.*, *United States* v. *Smith*, 811 F.3d 907, 908-909 (7th Cir. 2016) (cited in Barnes Br. 16-18). In general, however, the law punishes crimes motived by anger or heat-of-passion *less* severely, not *more* severely, than those calculated to threaten or manipulate. Cf. *United States* v. *Sandoval*, 696 F.3d 1011, 1013 (10th Cir. 2012) (noting an assault was "mitigated by heat of passion"), cert. denied, 133 S. Ct. 1294 (2013). And here, this Court explained, the defendants' purpose reflected "malicious, sadistic intent." *Brown*, 654 F. App'x at 911. Indeed, defendants' offenses in this case did not involve a single, impulsive assault, but rather a deliberate and

[4] Barnes suggests that *Thames* and *Koon* are inapposite because sentencing procedures have changed since they were decided. Barnes Br. 19. But the fact that the sentencing Guidelines are now advisory does not suggest that a defendant's status as a law enforcement officer in an excessive force case is now somehow a mitigating sentencing factor.

systemic pattern of conduct in which Barnes and Brown orchestrated the abuse of inmates and covered their tracks afterward. Therefore, cases involving crimes motived by anger or heat-of-passion do not help defendants.

Finally, crimes by law enforcement officers not only deserve greater punishment, they require greater deterrence. U.S. Br. 33-34. The need for deterrence is "a crucial factor" in cases involving "breach of trust," *Morgan*, 635 F. App'x at 450, and it does not depend on officers' motives. Barnes is wrong to assume that his two-year sentence would adequately deter other corrections officers simply because it is more severe than punishment under state law for "a misdemeanor crime of battery." Barnes Br. 37.

B. The Circumstances Of Defendants' Crimes Do Not Justify Diminished Sentences

In considering the nature and circumstances of the crime, the district court unreasonably found certain factors to be ameliorating that, by any reasonable assessment, do not warrant special leniency and do not justify major downward variances.

1. The Pepper-Spray Incident Does Not Justify A Downward Variance

Barnes argues that the district court recognized that the incident involving Alton Murphy, in which defendants started a fight and were inadvertently pepper-sprayed, supports the downward variance. Barnes Br. 23-26; see Aplt. App. 647; see also Aplt. App. 610. But this incident does not "bring[] down * * * the

severity of the offense" in any way that could begin to justify a drastic departure from the Guidelines. Aplt. App. 647. It was unreasonable for the district court to conclude that the fact that defendants were pepper-sprayed by another jailer in the aftermath of their own unlawful assault on an inmate somehow reduced the seriousness of their crimes and (at least in part) justified a downward variance.

Rather than accept the fact that the Murphy incident does not put defendants' pattern of unprovoked assaults on inmates in a favorable light, Barnes seeks to reframe the government's objection as a "procedural error" that was "forfeited" and thus not preserved. Barnes Br. 7, 24-25. This misses the point. The United States does not claim that this event is not factually established or is "off-limits as a matter of law." Barnes Br. 7, 26. Instead, the incident is not reasonably *ameliorative* and provides no *persuasive* ground for a variance. See U.S. Br. 39-40 (arguing it was "unreasonable for the court to weigh" the incident as mitigating).

Certainly there will be some overlap in the analysis of substantive challenges and procedural ones; a substantive challenge requires analysis of the crime and of the district court's reasons to ascertain if a "justification" is "compelling." *United States* v. *Castro-Juarez*, 425 F.3d 430, 433 (7th Cir. 2005); see also *United States* v. *Walker*, 844 F.3d 1253, 1256 (10th Cir. 2017). The question here is whether the court "placed undue emphasi[s]" on a fact that bears little on defendant's

culpability. *Morgan*, 635 F. App'x at 449-450 (discussing substantive error in basing sentence on numerous letters of support which, considering the context of the crime and defendant's political allies, were "not surprising"). In this instance, the district court did just that.

Barnes's effort to evade the substantive error by parsing it as procedural challenge is similar to the arguments this Court rejected in *Walker*, 844 F.3d at 1256. There, as the Court put it, the "the government d[id] not object to the *consideration*" of Walker's pretrial stay in a drug treatment program. *Ibid.* (emphasis added). "Instead, the government argues that [Walker's] progress could not justify a time-served sentence. For this argument, the government had no reason to object" and it "did not waive its argument on substantive reasonableness." *Ibid.*

2. Lack Of Prior Criminal Activity Does Not Justify These Sentences

Defendants argue that their lack of prior criminal history justifies their light sentences. Barnes Br. 28-30; Brown Br. 26. Like most Section 241 and 242 defendants, Barnes and Brown had no criminal record before the crimes at issue were uncovered. But this unsurprising circumstance, cited by the district court (Aplt. App. 642, 652, 918, 923), does nothing to distinguish these defendants from "defendants with similar records and Guideline calculations." *United States* v.

Martinez, 610 F.3d 1216, 1228 (10th Cir.) (citation omitted), cert. denied, 562 U.S. 1019 (2010).

In discussing his criminal history, Barnes claims that the Guidelines are not nuanced enough, as they lump him into Category I with other defendants who theoretically may have had some "uncounted convictions" or an arrest. Barnes Br. 8; see also Barnes Br. 29. In essence, he claims his situation justifies the equivalent of a criminal history category of zero. Such hairsplitting distinctions cannot justify Barnes's *46-month downward variance* from the bottom of the Guidelines range. To put the size of this variance in perspective, if Barnes had a prior conviction putting him in Category II (rather than Category I), the bottom of the Guidelines range would have been a mere *8 months* longer than that applied to Category I. United States Sentencing Commission, *Sentencing Table*, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/Sentencing_Table.pdf; Aplt. App. 754.

In any event, the United States is not claiming that the district court "is * * * bound to ignore" the more intricate nuances of Barnes's criminal history (Barnes Br. 29-30), or that the court was prohibited from granting any variance on this ground. Instead, the speculative distinction between Barnes and other Category I defendants is simply not persuasive here. Defendants' conspiracy, assaults, and concealments continued over an extended period of time. The

criminal behavior was not aberrant; it was the routine way defendants "manage[d]" inmates. Barnes Br. 17. Given this pattern of misconduct, an extensive downward variance based on defendants' criminal history is not reasonable.

3. The Impact Of Defendants' Convictions And Incarceration On Family Responsibilities And Careers Does Not Justify Such A Drastic Variance

Under a discretionary sentencing regime, a court may consider non-statutory factors such as family responsibilities. However, a court must still hand down a sentence with a "compelling * * * justification based on factors in section 3553(a)." *Castro-Juarez*, 425 F.3d at 433. And while defendants' family ties and responsibilities are among those "factors [that] could reasonably support leniency," *Walker*, 844 F.3d at 1257, courts generally consider them "only when extraordinary." *United States* v. *Loya-Castillo*, 498 F. App'x 799, 802 (10th Cir. 2012) (unpublished), cert. denied, 133 S. Ct. 1296 (2013). Indeed, even under an advisory sentencing regime, "the law generally discourages district courts from taking [family responsibilities] into account." *United States* v. *Thompson*, 518 F.3d 832, 868 (10th Cir.), cert. denied, 555 U.S. 993 (2008).

In the context of this case, family matters do not justify these sentences. Defendants' family concerns are not extraordinary. As the district court said when sentencing Brown, such concerns come up "in every case." Aplt. App. 607. That is not to say family responsibilities cannot justify a variance in other

circumstances. For example, in *United States* v. *Muñoz-Nava*, 524 F.3d 1137, 1143 (10th Cir. 2008) (cited by Barnes Br. 33), defendant, a drug mule who pled guilty to one count of smuggling heroin, was the "primary caretaker and sole supporter" of his young son and elderly parents. The district court in *Muñoz-Nava* gave a "lengthy" and persuasive explanation for the variance, emphasizing "the seriousness of the non-custodial elements" of the unusual sentence (including a year of home confinement and five years of supervised release with extensive special conditions) that would allow defendant to attend to his family while facing just punishment. *Id.* at 1142-1143. Defendants here are not similarly situated to Muñoz-Nava. Defendants are not their dependents' sole caretakers. Therefore, although family responsibilities can support a variance, they cannot support the magnitude of the variance here.

Nor was it reasonable for the court to hand down light sentences based on Barnes's and Brown's loss of their law enforcement careers.[5] The district court

[5] Barnes urges this Court to draw a distinction between defendants' more immediate "job loss" and loss of their future employment in a "chosen career." Barnes Br. 34. It is not clear how this distinction is meaningful. Defendants lost both their jobs and their future law-enforcement careers. Indeed, the way the court phrased the consequence at both defendants' resentencing hearings makes this clear, each "*will* no longer be allowed to work in law enforcement" and "his life, as well as that of his family, *has been*" impacted. Aplt. App. 611, 652-653, 918, 923 (emphasis added). Neither loss justifies light punishment. See *Koon*, 518 U.S. at 110 (noting, without distinction, current and future loss of employment); *United States* v. *Smith*, 860 F.3d 508, 514 n.3 (7th Cir. 2017) (reversing law enforcement

(continued…)

emphasized this collateral consequence, stating in its short statement of reasons for Barnes's sentence that "[a]s a result of this conviction, the defendant will no longer be allowed to work in law enforcement and his life, as well as that of his family, has been significantly impacted." Aplt. App. 611; Barnes Br. 34. The court reiterated the same finding in Brown's sentencing. Aplt. App. 653, 923. Barnes's insistence that the court did not stress this factor (Barnes Br. 34) is refuted by the record. Indeed, loss of career was the *only* individual circumstance the court gave in describing how the sentences imposed met the need for "just punishment." Aplt. App. 611, 652-653, 918, 923. Defendants do not dispute, however, that loss of a job or career is a collateral consequence. As such, it does not bear on whether their sentences are just. See *Morgan*, 635 F. App'x at 444; U.S. Br. 30-32 (addressing this issue).

And again, Barnes incorrectly casts this as a procedural concern. Barnes Br. 34-35. But as *Walker* shows, improper reliance on collateral consequences can cause substantive, and not solely procedural, error. *Walker*, 844 F.3d at 1257. *Morgan* recognized this, too, explaining in its substantive reasonableness analysis that the district court had not properly justified the sentence's deterrence value where it "did so by improperly relying on the collateral consequences." *Morgan*,

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(…continued)
officer's sentence and stating that "[l]osing one's job and reputation are the normal consequences of committing a felony at work").

635 F. App'x at 450; see also *United States* v. *Bistline*, 665 F.3d 758, 760, 765 (6th Cir. 2012), cert. denied, 568 U.S. 958 (2012). Accordingly, Barnes cannot evade this point by casting it, once again, as a procedural error.

4. Assertions Of Innocence Cannot Justify Brown's Downward Variance

Brown points to weakness of the evidence against him as the "most predominant factor" justifying his sentence, and a prominent factor in the court's reasons. Brown Br. 23-24, 35-36. He argues that the "dearth of evidence certainly was not lost on the District Court" here, and that "[t]he weight of the evidence must also be considered" in evaluating the statutory sentencing factors. Brown Br. 23, 35. This argument offers little support for the sentence.

A sentencing court may not "substitute 'its view of the evidence ... for the jury's verdict.'" *Morgan*, 635 F. App'x at 443 (quoting *United States* v. *Bertling*, 611 F.3d 477, 481 (8th Cir. 2010)). Likewise, "judge-found facts may not contradict the jury's verdict." *Chontos* v. *Berghuis*, 585 F.3d 1000, 1002 (6th Cir. 2009), cert. denied, 560 U.S. 965 (2010). Judges should not "rely on a defendant's innocence when the defendant has already been found guilty beyond a reasonable doubt." *Bertling*, 611 F.3d at 482 (citation omitted); *Morgan*, 635 F. App'x at 449 (declaring it "improper, as well as illogical, to think acquittals on some counts somehow ameliorate guilt on convicted counts"). Here, no court could reasonably

rely on a purported lack of evidence as the "the most predominant factor" justifying Brown's light sentence. Brown Br. 23.

Brown's offenses were serious, and the evidence shows it. As this Court has already held, evidence at trial established that Brown assaulted the inmates he was charged with protecting, conspired to violate constitutional rights, and lied to the FBI. *Brown*, 654 F. App'x at 908-909. This Court has already rejected Brown's assertion that "the evidence presented was insufficient to prove that * * * he physically assaulted anyone." *Id.* at 907. As this Court recounted, fellow-jailer Ashley Mullen testified that Brown pulled the handcuffed Herbert Potts from a vehicle and dragged him "onto the concrete pretty much face first." *Id.* at 901, 908. Although the district court instructed the jury to disregard Mullen's testimony about a separate assault when she could not identify the victim, "he did not instruct the jury to disregard her testimony regarding Potts," and there is, as this Court has already explained, "no basis" for discounting it. *Id.* at 908 (citation omitted). Further, reviewing Brown's prior claim that testimony about the assault on Alton Murphy was "not credible," this Court noted contradictory descriptions but stated that "both indicate that Brown physically assaulted Murphy." *Id.* at 909. In any event, "[e]ven if the distinction were material," this Court explained, credibility is the jury's province. *Ibid.*

Brown's renewed arguments that various witnesses were "not credible or worthy of belief," or that there were not enough witnesses against him (Brown Br. 1), is baseless. See *United States* v. *Budd*, 496 F.3d 517 (6th Cir. 2007) (rejecting as "totally meritless" defendant's complaint that not all witnesses to a jailhouse assault identified him), cert. denied, 555 U.S. 814 (2008). Brown insists that there was "no credible evidence" that he physically harmed an inmate or instructed others to do so (Brown Br. 23), but this Court has already rejected Brown's claims as "simply not true." *Brown*, 654 F. App'x at 908. And, in any event, "[p]hysical assault is not a necessary element of either count" under Sections 241 and 242. *Id.* at 909. It follows that granting a downward variance based on a so-called lack of credible evidence that Brown harmed any inmates or instructed others to do so would not be reasonable.

Brown also relies on *United States* v. *Cole*, 765 F.3d 884 (8th Cir. 2014), where the Eighth Circuit upheld a substantial downward variance. See Brown Br. 41-42. In that case, the court sentenced Cole to three years' probation for her fraud conviction, despite a Guideline range of 135-168 months. The district court, "in a lengthy and comprehensive analysis[,] conclude[ed] with the observation that" this case was "an 'unusual, extraordinary case in which a sentence of three years probation was appropriate.'" *Cole*, 765 F.3d at 886 (quoting district court). The district court found that Cole "was not the typical white collar defendant the court

had observed in similar criminal schemes" and it relied on the defendant's "minor," and "mostly * * * passive," role. *Ibid.* (citation omitted). In contrast, Brown's role, while less than Barnes's, was not minimal. He was second in command of the jail. Unlike Cole, Brown was not passive − he carried out assaults, intimidation, and retaliation. Indeed, the court gave Brown a three-level enhancement for his supervisory role and, in his first sentencing, denied his request for a downward adjustment for being a minor participant, explaining Brown "helped organize the meet and greets." Aplt. App. 221-222; see also Aplt. App. 206, 724, 731-732, 737. Furthermore, in *Cole* the defendant's probationary sentence would allow her to earn money for restitution – not something Brown needs to do here.

C. Defendants' Unusually Light Sentences Create Unwarranted Sentence Disparities

Sentences so "grossly at odds with the sentencing guidelines," *Morgan*, 635 F. App'x at 452, undermine the Guidelines' goal of "eliminat[ing] disparities among sentences nationwide," *United States* v. *Franklin*, 785 F.3d 1365, 1371 (10th Cir.) (citation omitted), cert. denied, 136 S. Ct. 523 (2015). That is the case here.

1. Courts have repeatedly recognized that a law enforcement officer's *single* assault on a prisoner or arrestee warrants substantial punishment. For example, in *United States* v. *Carson*, 560 F.3d 566, 585 (6th Cir. 2009), cert. denied, 558 U.S.

1116 (2010), a defendant convicted of deprivation of rights, conspiracy, and obstruction for beating an arrestee received a Guidelines sentence of 33 months, the low end of his Guidelines range. A corrections officer in *United States* v. *Bailey*, 405 F.3d 102, 112 (1st Cir. 2005), was sentenced to 41 months, the low end of his Guidelines range, for an assault on a prisoner and obstruction.[6] Even an officer who pleaded guilty to a single assault in *United States* v. *Strange*, 370 F. Supp. 2d 644 (N.D. Ohio 2005), received 21 months. None of these officers was a jail administrator and none orchestrated systematic violence, intimidation, and cover-ups.

While defendants highlight factual differences in a few cases, the critical takeaway remains unaltered: in numerous cases involving civil rights offenses by law enforcement and corrections officers − even those involving Guidelines ranges at or below the recommended ranges here − federal courts have imposed prison terms far greater than what Barnes and Brown received. See, *e.g.*, *United States* v. *Conatser*, 514 F.3d 508, 512, 520-522 (6th Cir.) (affirming 70-month sentence within Guidelines range of 70-87 months), cert. denied, 555 U.S. 963 (2008); *United States* v. *Owens*, 437 F. App'x 436, 438 (6th Cir. 2011) (unpublished) (affirming 63 month sentence, with 24-month departure for substantial assistance

[6] The sentence was affirmed on appeal after *United States* v. *Booker*, 543 U.S. 220, 246-258 (2005) (striking down mandatory guidelines regime). See *Bailey*, 405 F.3d at 113-115.

to authorities and Guidelines range of 87-108 months); *LaVallee*, 439 F.3d at 679, 702-703 (affirming 30-month and 41-month sentences within Guidelines ranges of 27-33 months and 41-51 months, respectively).[7] Defendants' attempts to distinguish these cases underscore how unreasonable their sentences are.

Brown compares himself to the misdemeanant in *United States* v. *Kulla*, 434 F. App'x 268 (4th Cir. 2011) (unpublished). Brown Br. 34. In that case, defendant, a public official, was convicted of a misdemeanor violation of Section 242 for blackmail and sentenced to 12 months under the Guidelines applicable to blackmail. *Kulla*, 434 F. App'x at 269.[8] But Brown was convicted of three felony counts. And although Brown asserts that he "did not do anything to harm an inmate" (Brown Br. 23), that, as noted above, simply is not true. Brown also asserts (Brown Br. 32) that he is materially different from the defendant in *United States* v. *McCoy*, 480 F. App'x 366 (6th Cir. 2012) (unpublished), who, as a correctional officer, repeatedly slammed an arrestee's head into a metal counter and was sentenced to 120 months. Brown asserts that, unlike McCoy, he "did not

[7] The sentence in *LaValle* was affirmed on appeal post-*Booker*. See *LaVallee*, 439 F.3d at 703-707.

[8] Kulla's conviction for blackmail illustrates one of several ways a Section 242 conviction can be based on non-violent behavior. See also *Koon*, 518 U.S. at 101 ("A violation of § 242 can arise in a myriad of forms."). It was for these types of convictions, not the violent assaults orchestrated by defendants, that Congress established a range of lower sentences. See Barnes Br. 38.

slam any prisoners into walls." Brown Br. 32. Brown, instead, slammed inmates into the ground. *Brown*, 654 F. App'x at 900-901, 908; see also Aplt. App. 42-43.

Barnes acknowledges that Section 3553(a)(6) requires a judge to consider "disparities ... among defendants with similar records and Guideline calculations." Barnes Br. 41 (quoting *United States* v. *Lewis*, 594 F.3d 1270, 1276 (10th Cir. 2010) (emphasis omitted)). But, tellingly, neither he nor Brown manages to "identif[y] a single case" in which a court has imposed (or upheld) a term of incarceration for supervisory corrections officers found guilty of such serious civil rights offenses (including the physical abuse of inmates in their care and custody) as short as the prison terms imposed here. *Walker*, 844 F.3d at 1258.

2. In a further attempt to preclude this Court from considering the unwarranted disparities his sentence creates, Barnes again casts the United States' claim regarding disparities as a procedural one, *i.e.*, that the court simply "did not discuss" the issue adequately. Barnes Br. 39-40 (emphasis omitted). It is true that the district court's discussion on this point is not extensive. But the defendants' sentences are unreasonable because they create unwarranted disparities, not because the court's discussion of this factor was inadequate. A "challenge to the sufficiency of the § 3553(a) justifications relied on by the district court implicates the substantive reasonableness of the resulting sentence." *United States* v. *Smart*, 518 F.3d 800, 804 (10th Cir. 2008); see also *Walker*, 844 F.3d at 1258 (finding

sentence substantively unreasonable where district court "gave inadequate attention" to deterrence). This Court routinely considers the possibility of disparities when reviewing a sentence for substantive reasonableness. *Franklin*, 785 F.3d at 1370; *Walker*, 844 F.3d at 1258. The issue is of special importance where a district court does not hand down a Guidelines sentence. *Walker*, 844 F.3d at 1258; *United States* v. *Bartlett*, 567 F.3d 901, 908 (7th Cir. 2009), cert. denied, 558 U.S. 1147 (2010).

Barnes next argues that this Court, in looking to similar cases to assess whether there is an unwarranted sentencing disparity, can consider only the two cases Barnes believes the United States cited before the district court. Barnes Br. 42. Barnes relies (Br. 42) on this Court's decision in *Franklin*, 785 F.3d at 1371-1372. This argument is both legally and factually incorrect and misrepresents *Franklin*'s holding. In *Franklin*, the defendant challenged his sentence on appeal as substantively unreasonable in part by pointing to sixteen other cases in which the defendant received a lesser sentence. But he had not provided any cases to the district court, and therefore the district court had "*no* actual cases" as comparators to suggest disparities based on the similarities of other cases. *Id.* at 1372 (emphasis added). Further, the defendant in *Franklin* received a within-Guidelines sentence, and such a sentence "necessarily complies" with Section 3553(a)(6). *Ibid.* (citation and internal quotation marks omitted). In these circumstances, this

Court concluded that the sentence likely could not create a disparity with similarly-situated offenders. The Court in *Franklin*, therefore, unsurprisingly set a high bar for attacking a *Guidelines* sentence through comparisons to other sentences. *Ibid.* But where a sentence falls *outside* the Guidelines, this Court will consider disparities in assessing substantive reasonableness. *Walker*, 844 F.3d at 1259 (comparing defendant's sentence with another case of bank robbery). Finally, because the *Franklin* court reviewed the proffered cases, the case does not hold, as Barnes suggests, that an appeals court must ignore a citation not presented below. *Franklin*, 785 F.3d at 1371-1372.

In any event, it is not correct that the United States cited only two examples to the district court. Barnes Br. 42. In its supplemental sentencing memorandum, following remand for resentencing, the United States argued this point at length and with numerous examples. Aplt. App. 513-518; see also U.S. Br. 15, 37-38 (citing the supplemental sentencing memorandum). The United States cited many of the cases cited below in its opening brief on appeal. U.S. Br. 35-36 nn.8-9. Indeed, there are only three cases cited in the United States' footnotes 8 and 9 (U.S. Br. 35-36; see Barnes Br. 42) that were *not also* cited below. An added case citation does not amount to an "*issue*[] not raised before" the district court. Barnes Br. 42 (citation and internal quotation marks omitted; emphasis added).

D. A "Holistic" Review Does Not Support These Sentences

Finally, Barnes suggests that review of the *individual* sentencing factors the district court used in sentencing is inappropriate, because "all" of the factors must be "considered cumulatively." Barnes Br. 13, 28. Barnes asserts that the United States must present a "holistic" "analysis," rather than a discussion of discrete problems in the district court's analysis. Barnes Br. 13. In our view, none of the grounds on which the district court relied – whether considered individually or together – justifies sentencing Barnes and Brown to terms that are a fraction of the Guidelines range.

Although the reasonableness of defendants' sentences depends on the totality of the circumstances, *Gall*, 552 U.S. at 51, a sentence can be assessed only through the factors set forth in Section 3553(a), *Friedman*, 554 F.3d at 1307, and the individual factors on which the court relied. At bottom, the Court "must determine whether the court's articulated reasons * * * are sufficiently compelling on this record to satisfy [it] that the term imposed is reasonable." *Castro-Juarez*, 425 F.3d at 433. But it is Barnes who urges this Court to overlook the district court's stinting analysis of the nature of his crimes, his physical abuse of inmates, his intimidation of staff to prevent detection of Barnes's and Brown's misconduct, and Barnes's disparate sentence.

In a substantive sentencing challenge, this Court considers specific objections raised by the challenging party. See *Friedman*, 554 F.3d at 1308 (noting the government's focus on four substantive errors); *Morgan*, 635 F. App'x at 448 (reviewing the government's challenges to factors relied on by the district court and concluding "these factors, even cumulatively, do not support the gross variance"). There is no other practical way to carry out meaningful review. Nor is it true, as Barnes asserts, that "[i]f all factors stated by the court received great weight, then there is plenty of weight supporting the variance even if one or two factors are disapproved by this Court." Barnes Br. 34. "[U]ndue emphasi[s]" on a factor can render a sentence unreasonable. *Morgan*, 635 F. App'x at 449; see also *Walker*, 844 F.3d at 1259.

Finally, Barnes argues that the Court should keep in mind "the nature and circumstances of the offense (both good and bad)." Barnes Br. 16. But defendants neglect most of these. Barnes's "Statement of the Case" recounts *only* his family life and health complaints, not his actions in the jail he administered. Barnes Br. 1-3. He does not mention that he ran a conspiracy that carried out at least six assaults, or that most of the victims were handcuffed and shackled, or that he intimidated his subordinates, required them to falsify reports, retaliated against them, and told them that "everyone who talked to the FBI" about his crimes "should be fired." U.S. Br. 4-11, 39. Barnes does not discuss how much he

"enjoyed the physical contact of the meet and greet" at his old job in the "hands-on" Muskogee County Jail. Aplt. App. 275, 321-322, 341. For his part, Brown's assessment of his sentence is so far removed from the facts that he maintains he did nothing wrong. The jury, of course, found otherwise.

In sum, nothing in their circumstances separates Barnes and Brown from "run-of-the-mill" offenders who violate Sections 241 and 242. *Friedman*, 554 F.3d at 1309. What stands out in this case is defendants' wide-ranging, violent, and longstanding pattern of criminal behavior, victimizing both their inmates and their own subordinates. The district court's lenient sentences are unreasonable and indefensible in the light of such conduct.[9]

[9] Barnes also suggests there must be some "principled basis for drawing a line" between reasonable and unreasonable sentences. Barnes Br. 37-38. Barnes misunderstands this Court's review, as there is no formulaic approach. Indeed, the Supreme Court has rejected a "rigid mathematical formulation" to weigh relevant factors in sentencing. *Gall*, 552 U.S. at 49.

CONCLUSION

This Court should vacate defendants' sentences and remand this case for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains no more than 6400 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Times New Roman font.

s/ April J. Anderson
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Date: August 18, 2017

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing REPLY BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLANT, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, has been scanned with the most recent version of Symantec Endpoint Protection (version 14), and is virus-free.

s/ April J. Anderson
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Date: August 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2017, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I certify that on August 18, 2017, I will cause seven paper copies of the same to be sent by Federal Express overnight to this Court.

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