

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

CHRISTOPHER A. BROWN,

and

RAYMOND A. BARNES,

Defendants-Appellants/Cross-Appellees

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

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

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STATEMENT OF RELATED CASES

This Court has procedurally consolidated the appeals and cross-appeals involving Raymond Barnes and Christopher Brown. There are no prior appeals.

GLOSSARY

CLEET	Council on Law Enforcement Education and Training
FBI	Federal Bureau of Investigation
MCJ	Muskogee County Jail
PSR	Presentence Report

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STATEMENT OF JURISDICTION

This Court has consolidated the appeals and cross-appeals in this case. The district court had jurisdiction under 18 U.S.C. 3231. A jury returned a guilty verdict against Raymond Barnes on all three counts for which he was charged, and a guilty verdict against Christopher Brown on three of the four counts for which he

was charged. Vol. 1 at 493-494.¹ On March 18, 2015, the district court entered final judgment against each defendant. Vol. 1 at 717-721 (Barnes), 723-727 (Brown). On March 19 and 23, 2015, Brown and Barnes, respectively, filed timely notices of appeal. Vol. 1 at 728-730. On March 25, 2015, the court entered an amended judgment against Brown, correcting a clerical error. Vol. 1 at 731-735. On April 16, 2015, the United States filed timely notices of appeal, challenging each defendant's sentence. Vol. 1 at 736-739. This Court has jurisdiction pursuant to 28 U.S.C. 1291 and 3742(b).

STATEMENT OF THE ISSUES

1. Whether Brown's conviction for making a false statement in violation of 18 U.S.C. 1001 is based on sufficient evidence.
2. Whether Brown's convictions for conspiracy against rights under 18 U.S.C. 241 and for deprivation of rights under color of law under 18 U.S.C. 242 (with respect to Jace Rice), are based on sufficient evidence.
3. Whether the district court abused its discretion in denying Brown's motion for new trial as a result of the jury's having heard and been told to

¹ Documents will be cited by volume number of the record on appeal and page. Volume 2 of the record contains both partial and complete trial transcripts; this brief will cite the complete trial transcripts. For Volume 4 and the supplemental record on appeal (Supp. R.), both of which were filed under seal, the brief will use the pagination indicated in the green header at the top of the page.

disregard Ashley Mullen's testimony regarding the defendants' assault on an unidentified inmate.

4. a. Whether the district court erred in admitting lay testimony from jailers that the amount of force used in connection with particular inmate-victims was inconsistent with the training the officers received from the Council on Law Enforcement Education and Training (CLEET).

b. Whether the district court erred in allowing George Roberson, a captain with the Muskogee County Sheriff's Department, to testify as a lay witness regarding principles he taught jailers on the use of force and to describe a disagreement he had with Barnes over when it is appropriate for a jailer to strike an inmate.

5. Whether Barnes's convictions are based on sufficient evidence, where the United States did not prove to the jury that the inmate-victims were convicted prisoners (as opposed to pretrial detainees) and thus subject to Eighth Amendment protection.

6. Whether the district court properly instructed the jury regarding when a use of force against an inmate involves the unnecessary and wanton infliction of pain.

7. Whether the sentences the district court imposed on defendants—12 months' imprisonment for Barnes and 6 months' imprisonment for Brown—are procedurally and substantively unreasonable.

STATEMENT OF THE CASE

1. Procedural History

On February 13, 2013, a federal grand jury returned a four-count indictment against Raymond Barnes and Christopher Brown for crimes they committed as Superintendent and Assistant Superintendent (first and second in command), respectively, of the Muskogee County Jail (MCJ) in Oklahoma. Vol. 1 at 31-37.² Count 1 charged Barnes and Brown with conspiracy to violate the constitutional rights of MCJ inmates, in violation of 18 U.S.C. 241. Vol. 1 at 286-289. The indictment identified seven overt acts committed in furtherance of the conspiracy. Vol. 1 at 287-288. Counts 2 and 3 charged two of these overt acts as substantive offenses, involving the deprivation of rights of inmates Jace Rice and Gary Torix, respectively, in violation of 18 U.S.C. 242. Vol. 1 at 289-290. Count 4 charged Brown with violating 18 U.S.C. 1001 for making a false statement to the Federal Bureau of Investigation (FBI). Vol. 1 at 290.

² An amended indictment was filed on February 6, 2014, substituting the names of the inmate-victims for their initials. Vol. 1 at 285-291. This brief will cite the amended indictment.

A jury trial was conducted between February 18 and 25, 2014. Vol. 2 at 1284-2431. On February 25, 2014, the jury returned a guilty verdict against Barnes on all three counts against him and a guilty verdict against Brown on Counts 1, 2, and 4. The jury acquitted Brown of Count 3, the substantive offense involving Gary Torix. Vol. 1 at 493-494; Vol. 2 at 2408-2412.

The presentence report (PSR) for each defendant calculated an advisory Sentencing Guidelines imprisonment range of 70-87 months. Vol. 4 at 14, 45. On March 11, 2015, the district court granted defendants' motions for a downward variance. Vol. 2 at 1089-1090, 1160-1162. The court sentenced Barnes to 12 months and a day in prison on each count, to be served concurrently, and Brown to 6 months' imprisonment on each count, to be served concurrently. Vol. 1 at 718, 724, 732; Vol. 2 at 1092-1093, 1163-1165. The court granted each defendant's request to remain at liberty pending appeal. Vol. 2 at 1096-1097, 1167-1168.

Each defendant appealed. The United States appealed both sentences.

2. *Statement Of The Facts*

The United States called 19 witnesses to testify at trial. Defendants called no witnesses. Viewed in the light more favorable to the government, see *United States v. Jones*, 768 F.3d 1096, 1101 (10th Cir. 2014), the evidence at trial establishes the following:

a. The “Meet And Greets”

A “meet-and-greet” was the mechanism by which Barnes and Brown, as the jail administrators, used to “welcome” inmates who were being transferred from out-of-county facilities to MCJ because the sending county found them hard to control. Vol. 2 at 1353, 1570. According to detention officers, Barnes boasted that MCJ received these problem inmates because it was a “hands-on” facility. Vol. 2 at 1353, 1566, 1900.

Either Barnes, as head of MCJ, or Brown, as head of jail security and supervisor of the deputies (Vol. 2 at 1351-1352, 1807-1808), would arrange for the arrival of the transferring inmates and meet with jailers on duty. Vol. 2 at 1570, 1584, 1623. During these meetings, Barnes, with Brown at his side, would describe the new inmate’s violent or problematic behavior at the previous facility—as former deputy Dustin Applegate put it, getting the jailers “amped up” (Vol. 2 at 1356)—and would give them directions for what to do when the transport vehicle pulled in. Vol. 2 at 1355-1356, 1442, 1623-1625, 1870-1872.

Once the transport vehicle was set to arrive at MCJ, all available employees (usually 7 to 15) were summoned to the sally port outside the jail to greet the inmate with a show of force. Vol. 2 at 1355, 1534, 1578, 1606, 1625, 1849, 1874-1875. With one possible exception, Barnes and Brown were both present for all meet-and-greets described at trial, watching and condoning the assaults that

occurred.³ Deputies would swarm the vehicle as it pulled in the driveway. The inmate was not given an opportunity to exit the vehicle. Instead, detention officers, as directed by Barnes and Brown, would force the inmate out of the vehicle and violently throw or slam him to the ground, which was made of concrete and gravel (Vol. 2 at 1358, 1877, 2079). The record reflects that the inmates were fully-restrained, calm, subdued, non-resisting, and compliant, with their hands cuffed in front and legs shackled, and that the inmates were unable to brace or protect themselves.⁴

After the inmate was slammed to the ground, five to ten deputies and jailers would “pile on top” of him to change out his handcuffs and shackles for those belonging to MCJ.⁵ The inmate was then carried into the jail face down and parallel to the ground, and then handcuffed and shackled to a wall and bench inside

³ Vol. 2 at 1355, 1535, 1571-1572, 1577, 1607, 1617-1618, 1624, 1633-1635, 1747-1748, 1873, 1922-1923. There was conflicting evidence, however, regarding whether Brown was present for Gary Torix’s meet-and-greet. Compare, *e.g.*, Vol. 2 at 1370, 1624, with Vol. 2 at 1535, 1583, 1840.

⁴ Vol. 2 at 1360-1363, 1366, 1369, 1373-1374, 1443-1444, 1482-1483, 1536, 1571, 1575, 1607, 1626, 1630, 1633-1634, 1745-1747, 1750, 1795-1801, 1859-1860, 1873, 1877, 1921-1922, 2079.

⁵ Vol. 2 at 1363-1366, 1375, 1446, 1537, 1626, 1631, 1633, 1748-1749, 1801, 1923.

a “detox” cell.⁶ Barnes would then enter the cell and make a speech introducing himself as head of the jail and making statements along the lines of: “If you give us any problems, what just happened to you will happen to you again or even worse.” Vol. 2 at 1369, 1376, 1450, 1803.

Before Jace Rice’s meet-and-greet, Barnes instructed Michael Gray, the deputy who would pull Rice from the transport vehicle, that “the first thing that touched the ground should be his head.” Vol. 2 at 1442, 1458. Barnes also directed jailers “not to let his feet touch the ground.” Vol. 2 at 1748. Consistent with these directions, Rice’s head struck the concrete first; Applegate and jailer John Bradley Leopard said it sounded like a “watermelon” hitting the ground. Vol. 2 at 1361-1362, 1747-1748; see also Vol. 2 at 1444-1445, 1505-1506. Rice suffered a knot on his head as a result. Vol. 2 at 1451, 1750; see also Vol. 2 at 1369. Before Gary Torix’s meet-and-greet, Kymberlie Shamblin, the medical supervisor, specifically cautioned Barnes and other jailers at the pre-arrival meeting to be careful because Torix had a previous head injury. Vol. 2 at 1876, 2078-2079. Despite that warning, and egged on by Barnes’s encouraging “Let’s do it” (Vol. 2 at 1873), numerous jailers described how Torix was yanked from the vehicle and slammed to the ground, with his chest, head, and face hitting the

⁶ Vol. 2 at 1367-1368, 1376, 1448-1449, 1537-1539, 1575-1576, 1631-1632, 1634, 1749-1750, 1802.

ground first. Vol. 2 at 1536, 1800, 1877, 2079; see also Vol. 2 at 1576, 1608, 1626, 1833, 1873. Torix suffered lacerations across his forehead and dripped blood as he was carried into the jail cell. Vol. 2 at 1376, 1539, 1562, 1609, 1631, 1663, 1802, 2080-2081. The meet-and-greets for Rice and Torix became the subjects of Counts 2 and 3 of the indictment, respectively. Vol. 1 at 289-290.

There was also evidence that Brown personally participated in grabbing inmate Herbert Potts out of the transport vehicle and throwing him to the concrete, face-first. Vol. 2 at 1922, 1963-1964. Potts, too, suffered a gash to the head. Vol. 2 at 1798. Riley Starr's meet-and-greet followed the same pattern: Starr arrived in the vehicle fully restrained and non-threatening, yet jailers grabbed him from the vehicle by the arm, threw him to the ground, and then piled on top of him to change out his handcuffs and shackles. As the guards carried him quickly into the jail, Starr's head hit the door. Vol. 2 at 1634.

Testimony established that the meet-and-greets employed gratuitous violence and infliction of physical harm to scare and intimidate these transferred inmates into behaving properly at MCJ. Vol. 2 at 1388, 1559, 1575, 1645, 1794. As Deputy Ashley Mullen testified in describing Barnes's comments about Potts in advance of his meet-and-greet, Potts "was getting brought over to our jail because we were hands on, and we were going to show him, you know, how it was in his jail." Vol. 2 at 1900; see also Vol. 2 at 1870, 1872 (recounting Barnes's remarks

before Torix's arrival that "we were going to show him how things were run in Muskogee County"). During the training that all employees received at MCJ referred to as "jail school" (Vol. 2 at 1451, 1520), Barnes bragged about the meet-and-greets—as Deputy Ashley Wooten put it, "like he enjoyed the physical contact of the meet and greet" and "[t]hat the inmate was injured." Vol. 2 at 1523-1524.

A number of jailers testified that the force used on the incoming inmates violated the training they had received either at MCJ's jail school or at the Council on Law Enforcement Education and Training, known as "CLEET" (Vol. 2 at 1349). See, *e.g.*, Vol. 2 at 1377-1378, 1380-1381, 1541, 1610, 1619, 1757, 1796-1797, 1860-1861, 1924-1925. George Roberson, a captain with the Muskogee County Sheriff's Department who taught a class on the appropriate use of force in jail school (Vol. 2 at 2151, 2153), testified that Barnes told jailers during one of those classes that it was acceptable to "strike" an inmate who was in the jailer's "personal space" (Vol. 2 at 2155). Roberson testified that he responded to Barnes that it was wrong to "escalate" the situation and strike an inmate who is "not a threat to you," and told Barnes that if he continued to teach that way, the FBI would "come knocking on your door." Vol. 2 at 2155-2156.

Muskogee County Sheriff Charles Pearson, to whom Barnes reported, testified that under the procedures he established for receiving problem inmates, the incoming inmate was to be taken out of the transport vehicle and carried

directly into MCJ and placed in a cell, where his restraints would be replaced. Vol. 2 at 2022-2023. Pearson said he never approved throwing inmates to the ground or switching their restraints in the sally port, and that doing so would present safety and escape risks. Vol. 2 at 2024-2027, 2057.

b. Assaults On Two Other Inmates

In July 2010, 12 to 15 inmates were lined up against the wall in the hallway outside the medical office. Some inmates were talking; medical staff testified that the inmates were doing nothing out of the ordinary or threatening. Vol. 2 at 1654-1655, 2065-2066. One inmate was talking more than the others. Vol. 2 at 1655, 1712-1713. The jailer in the hall, John Guinn, who wanted the inmates to be quieter, asked Kymberlie Shamblin, the medical supervisor, to call Barnes. Vol. 2 at 1655, 2067. Shamblin initially resisted because she did not believe anything was happening in the hall that warranted a call to the administration. Vol. 2 at 2067. After repeated demands from Guinn, she called Barnes and told him Guinn asked that he come upstairs. Vol. 2 at 2068.

When Barnes arrived, accompanied by Brown, he was clearly angry. Vol. 2 at 1656, 1713-1714, 1718, 2068-2069. As both Shamblin and Marla Carr, another medical staff member, put it, Barnes was “bowed up” with his fists clenched. Vol. 2 at 1656, 2069. Barnes approached Jeremy Armstead, an inmate standing at the wall awaiting his medication, who was not the inmate who had been talking. Vol.

2 at 1656-1657, 2069-2070. After verbally threatening Armstead (Vol. 2 at 1714-1715, 2069), Barnes grabbed him by the neck or collar, pushed him up against the wall, and threw him back and forth between the walls, pushing him toward the elevator. Armstead said nothing and did not resist. Vol. 2 at 1657-1658, 1716-1717, 2069-2071. While Brown aimed a taser at Armstead, Barnes and Brown handcuffed him, and Brown brought him down to a cell. Vol. 2 at 1658, 1717-1718, 2071. Armstead suffered injury to and pain in his collar bone and shoulder. Vol. 2 at 1659, 1719-1721, 2072-2073.

In June 2010, inmate Alton Murphy was, according to Deputies Michael Gray and Brandi Hoover, being “mouthy” or “running his mouth,” and did not listen when Barnes told him to return to his cell. Vol. 2 at 1452-1453, 1493, 1787, 1806. Murphy was not being combative or threatening. Vol. 2 at 1456-1457, 1807. Barnes grabbed Murphy from behind in a full nelson to pull him down to the ground, escalating the situation. Vol. 2 at 1454, 1456-1457. According to Hoover, Barnes hit Murphy on the top part of his body, and Brown hit Murphy under his legs, and Murphy went down to the ground. Vol. 2 at 1806, 1844. Gray’s account had Barnes and Murphy falling backwards onto the floor after Barnes grabbed Murphy from behind, with Brown jumping on top of them. At that point, another guard pepper-sprayed the whole group. Vol. 2 at 1454, 1456.

c. Intimidation Of And Reprisals Against MCJ Staff To Prevent Reporting Of Misconduct

Evidence further established that, as part of the conspiracy, Barnes and Brown created a culture of fear among MCJ staff by threatening or retaliating against employees if any attempted to report abusive behavior to the Sheriff or other outside authorities.

Barnes stated at meetings that if jailers had a “problem,” they needed to go to him, not the Sheriff. Vol. 2 at 1518-1519. He threatened employees with termination if they ever went over his head to report an incident. Vol. 2 at 1611, 1621-1622. Barnes required and encouraged jailers to write incident reports that falsely justified the use of force or contained misleading or inaccurate accounts. Vol. 2 at 1525, 1527, 1539-1540, 1610, 2160-2161. Such directions were contrary to the jailers’ training. Vol. 2 at 1525, 2157-2158. At least seven jailers and medical staff testified that they did not voice concerns or report incidents (or that they stopped reporting), or wrote inaccurate reports, for fear of reprisals from Barnes and Brown, such as termination or the withholding of the CLEET training necessary for promotion (Vol. 2 at 1372, 1378-1379, 1381-1382, 1465-1466, 1519, 1539-1540, 1632, 1635, 1803-1804, 2075), while others expressed a general reluctance to report what they saw. See, *e.g.*, Vol. 2 at 1755-1756, 1879-1880.

Barnes directly interfered with the accurate documentation of assaults on inmates and of the resulting injuries inmates received. For example, he directed

medical supervisor Shamblin not to take pictures of Gary Torix's head following Torix's meet-and-greet. Vol. 2 at 1377, 1664-1665, 2082. Following the Armstead incident, Barnes asked two jailers who had *not* witnessed the incident in the medical hallway to write up reports of the incident, evidencing that Barnes did not want the incident accurately documented. Vol. 2 at 1752, 1755, 1856-1857.

Specific examples of defendants' intimidation of and reprisals against detention officers who reported misconduct were described at trial. One jailer, Tonia Hardy, testified that Barnes and Brown retaliated against her twice after she submitted reports about jail staff mistreatment of an inmate. On one occasion, Barnes switched her shift from nights to days, which he knew would be a hardship for her because of childcare issues. Vol. 2 at 2183-2186. On the second occasion, Brown changed her shift. Vol. 2 at 2186-2187.

After Barnes's assault on Armstead, then-Deputy Brandi Hoover visited Armstead in his cell. Vol. 2 at 1790, 2072. Hoover told Armstead he had rights and gave him a grievance form. Vol. 2 at 1790. Armstead filled out the grievance form, addressed it to Sheriff Pearson, and gave it to medical staff member Marla Carr. Vol. 2 at 1660, 1722, 2073-2074. Barnes had access to outgoing mail to the Sheriff (Vol. 2 at 1605), and Pearson testified that he never received the grievance (Vol. 2 at 2031-2032). Shortly thereafter, Barnes, accompanied by Brown, berated Hoover for giving Armstead the grievance form and threatened to demote her.

Vol. 2 at 1791-1793. At the next staff meeting, Barnes threatened jailers by saying that if he found out who had delivered the grievance form to the mail room, that person would be fired. Vol. 2 at 1661, 2074-2075. In connection with the FBI's investigation of the MCJ, Barnes told Shamblin that when "all of this was over * * * everyone who talked to the FBI should be fired." Vol. 2 at 2082-2083.

d. Brown's False Statement To The FBI

In September 2011 Brown, while still employed at MCJ, voluntarily spoke with FBI agents, with prosecutors present, regarding the meet-and-greets. As Special Agent Jennifer Chapman testified, Brown stated in the interview that, upon the arrival of the vehicle in the MCJ sally port, the inmate would be asked to step out of the vehicle, and once the inmate stepped out, he would be asked to get on the ground. Vol. 2 at 1997. If an inmate did not comply with the request to get on the ground, Brown stated that the jailers "would gently place the inmate onto the ground." Vol. 2 at 1997. The agent asked Brown about his use of the phrase "gently placed" on the ground. Brown confirmed that he meant to use that phrase. Vol. 2 at 1998. Brown's statement that, upon an inmate's arrival for a meet-and-greet, the inmate is ordered out of the transport vehicle and then is "gently placed" placed on the ground, formed the basis for Count 4's charge that Brown made a false statement to the FBI in violation of 18 U.S.C. 1001. Vol. 1 at 290.

e. Testimony About Defendants' Assault On An Unidentified Inmate

Count 1, Overt Act (a), of the indictment charged that, in furtherance of the conspiracy, "During or around August 2009, the defendants Raymond A. Barnes and Christopher A. Brown struck and beat an unidentified inmate who was restrained in a cell in the detox area and not posing a physical threat to anyone." Vol. 1 at 288 (emphasis omitted). Before trial, Barnes moved for an order dismissing that overt act from the indictment (Vol. 1 at 38-43), on the ground that the alleged overt act was "too indefinite" to be defended against (Vol. 1 at 39). The district court denied the motion. Vol. 1 at 97-99.

At trial, Ashley Mullen testified about this incident, which occurred in August 2009 when she had just started working as a jailer at MCJ. Vol. 2 at 1897-1898, 1904-1905. Mullen heard an unidentified inmate screaming and "cussing" from a cell in the detox area of the jail, and someone called Barnes to help control or quiet the inmate. Vol. 2 at 1905. Mullen could observe the inmate from the booking area via camera. Vol. 2 at 1905-1906. Barnes and Brown went to the detox area. Vol. 2 at 1907. Mullen then described how Barnes and Brown assaulted the inmate, who was shackled to a concrete seat in the cell. Vol. 2 at 1905-1906, 1908-1912. Mullen went to the cell and personally confronted Barnes and Brown. Vol. 2 at 1912. She was unable to name the inmate or the other jailers who also had observed the event. Vol. 2 at 1913-1914, 1926-1927, 1940-1941.

Barnes's counsel renewed his objection to Mullen's testimony about this incident, but the court initially overruled it. Vol. 2 at 1903-1904.

After the close of the government's case, however, the court changed its mind and decided that Mullen's testimony regarding the confrontation with the unidentified inmate was "so amorphous that its—its probative value is substantially outweighed by the unfair prejudice that it could have on the jury." Vol. 2 at 2258. Accordingly, when the court instructed the jury regarding the conspiracy count, the court included an instruction addressed to this incident:

You heard evidence regarding alleged conduct involving an unidentified inmate in the detox area. This allegation appears as Overt Act (a) in Count One of the Indictment.

You are instructed to disregard this evidence and Overt Act (a) and not consider them in your deliberations in this case.

Vol. 1 at 468; see also Vol. 2 at 2329-2330. The defense did not object to the curative instruction as insufficient or ask for a mistrial. Both defendants argued in post-trial motions that Mullen's testimony about this incident afforded grounds for a judgment of acquittal or new trial because the jury was unable to disregard it. Vol. 1 at 496-497, 531-532, 545-546; see also Vol. 1 at 548, 550.

3. *The Jury Verdict And Sentencing*

After deliberating for less than three hours, the jury reached its verdict. Vol. 2 at 2408-2409; see p. 5, *supra*. The court granted defendants' requests to remain at liberty pending sentencing. Vol. 2 at 2427-2429.

Both defendants filed motions for a downward variance from the advisory Sentencing Guidelines range sufficient to permit a term of probation. Vol. 1 at 628-644, 684-699. The government opposed both motions. Vol. 1 at 671-679, 700-705.

a. *Barnes*

i. The PSR calculated Barnes's total offense level as 27 and placed him in a criminal history category of I. Vol. 4 at 11-12. The advisory Sentencing Guidelines imprisonment range is 70 to 87 months. Vol. 4 at 14. Barnes objected to the PSR in various respects. Vol. 4 at 18-20. The United States agreed with the PSR's calculations. Vol. 4 at 28.

Both sentencing hearings were held on March 11, 2015. At Barnes's hearing, which came first, the district court rejected each of Barnes's objections to the PSR (Vol. 2 at 1026-1050), and ruled that the PSR would form the factual basis for the court's sentence (Vol. 2 at 1050).

In support of a downward variance, Barnes's counsel cited information Barnes allegedly had received regarding how dangerous the inmates were that he

received at MCJ. Vol. 2 at 1051-1053. Barnes's counsel argued that, although the law says a jailer cannot use punitive measures prophylactically to prevent violent behavior in the future, a court can consider that in fashioning an appropriate sentence. Vol. 2 at 1055. Barnes's other counsel claimed that Barnes had been trained to deal with dangerous incoming inmates the way he did. Vol. 2 at 1060-1061.

Barnes's counsel also argued that Barnes had been punished enough and posed no further risk to anyone. Vol. 2 at 1066. As to deterrence, Barnes's counsel maintained that the government had been "successful in destroying a life" and that anyone involved in law enforcement in Muskogee could see that. Vol. 2 at 1066. He further claimed that Barnes, as a former corrections officer, would require "special protection" if incarcerated. Vol. 2 at 1067, 1071. Pointing to the court's finding in granting release pending sentencing that "exceptional circumstances exist," and arguing that the jury's verdict was "aberrant," Barnes's counsel urged the court to sentence Barnes to probation. Vol. 2 at 1068, 1071.

The court asked government counsel factual questions about the case for purposes of evaluating the "seriousness of the offense" (Vol. 2 at 1072), as well as about the extent of the victims' injuries (Vol. 2 at 1081-1083). The court asked about the probability of recidivism by Barnes, which government counsel responded was low. Vol. 2 at 1073. The court inquired whether "a culture of fear

and intimidation is probably necessary to keep control in a jail.” Vol. 2 at 1077. Government counsel responded that the government had no objection to a “show of force” where officers show up and create a presence, but “that is different than people being thrown out on their heads.” Vol. 2 at 1077. Government counsel emphasized that, in suggesting that Barnes had little to do with the violence at the jail, his counsel had failed to discuss Barnes’s encouragement of the violence, the reprisals, and the threats to employees about going outside the chain-of-command. Vol. 2 at 1083-1084.

Government counsel addressed the argument that law enforcement officers cannot safely be sent to jail, stating that “[w]e can’t immunize jailers by saying it is too dangerous for you to go to jail for mistreating your prisoners” (Vol. 2 at 1086-1087), and that refusing to send them to jail “doesn’t provide deterrence” (Vol. 2 at 1087). She advised the court that the federal Bureau of Prisons has protections in place and that the Sentencing Commission has considered the issue of punishment for law enforcement officers by adding a six-level enhancement for offenses committed under color of law. Vol. 2 at 1087-1088. She emphasized that Barnes, a supervisor, was in charge not only of a number of jailers but also many young jailers just starting out on their law enforcement careers, who were placed in the difficult position of deciding whether to accede to violence or refuse and “face the consequences.” Vol. 2 at 1088. Government counsel urged the court to give

Barnes a Guidelines sentence “to show the seriousness of this offense and to deter others.” Vol. 2 at 1089.

The court asked how imprisonment would “provide correctional treatment for Mr. Barnes in the most effective manner.” Government counsel responded that it would “[o]nly in the same way that it will for anyone else.” Vol. 2 at 1089.

ii. The district court granted Barnes a downward variance. The court stated:

In establishing an appropriate sentence for this defendant, the Court has considered the totality of the circumstances regarding the offenses of conviction, including the defendant’s role in the offenses. Additionally, the Court has considered the defendant’s personal and family responsibilities, employment history, lack of prior criminal history, low risk of recidivism, and the need to avoid unwarranted sentencing disparities.

Vol. 2 at 1089-1090.⁷ “Taking into consideration the defendant’s history and characteristics, his unlikelihood of recidivism, as well as the offense conduct, need for just punishment, deterrence, and protection of the public,” the court found a variance based on the sentencing factors cited in 18 U.S.C. 3553(a) “appropriate in this case.” Vol. 2 at 1090. The court sentenced Barnes to 12 months and a day in prison and 2 years’ supervised release on each count, to run concurrently. Vol. 2 at 1092.

⁷ The district court stated here and at Brown’s sentencing that it had examined its prior history of sentencing in deprivation of rights cases. Vol. 2 at 1090, 1161. The court did not mention which cases it had considered.

Noting that it had considered the Guidelines calculations and found them to be “advisory in nature,” and citing the sentencing factors set forth in 18 U.S.C.

3553(a), the court continued:

The sentence prescribed by this Court reflects the seriousness of the offense, promotes respect for the law, and provides just punishment for the offense. This sentence affords adequate deterrence to criminal conduct, protects the public from further crimes of this defendant, and provides correctional treatment for the defendant in the most effective manner. The Court has further determined that this sentence is reasonable and sufficient, but not greater than necessary to meet the objectives set forth in [18 U.S.C. 3553(a)]. The Court notes for the record that this is the same sentence it would impose if given the broadest possible discretion, and the same sentence it would impose notwithstanding any judicial fact finding occurring by adoption of the presentence report or at this hearing.

Vol. 2 at 1094.

Government counsel objected to the variance and requested that the court enumerate and apply the Section 3553(a) factors to this case so there would be a record for appeal. Vol. 2 at 1095-1096, 1098. The court denied the government’s request. Vol. 2 at 1095-1096.

The court entered judgment on March 18, 2015 (Vol. 1 at 717-721), and filed a written Statement of Reasons for the sentence imposed (Supp. R. 5-8). The narrative in Parts VI.D and VIII of the Statement of Reasons contains an explanation of the sentence nearly identical to the recitation the court provided at sentencing. Supp. R. 7-8.

b. Brown

i. The PSR calculated Brown's total offense level as 27 and placed him in a criminal history category of I. Vol. 4 at 42-43. The advisory Guidelines imprisonment range is 70 to 87 months. Vol. 4 at 45. Brown objected to the PSR in various respects. Vol. 4 at 48-53. The United States agreed with the PSR's calculations. Vol. 4 at 58.

Most of Brown's objections to the PSR overlapped with Barnes's, and at Brown's sentencing, the district court rejected them. Vol. 2 at 1104-1121. The court ruled that the PSR would form the factual basis for the court's sentence. Vol. 2 at 1121.

In support of his motion for a downward variance, Brown's counsel argued that the evidence against Brown was weak. Vol. 2 at 1122. He emphasized Brown's lack of a criminal record and argued that, as a former law enforcement officer, Brown would be at risk if incarcerated. Vol. 2 at 1128. He contended that Brown has already been punished and is not dangerous or likely to re-offend. Vol. 2 at 1128-1129. Brown's counsel maintained that a sentence of imprisonment was not "necessary" to protect the public and would not "provide any deterrence." He also contended that the Bureau of Prisons could not provide educational or vocational training for Brown. Vol. 2 at 1129.

Government counsel argued, with respect to the nature and circumstances of the offense, that Brown was second in command at the jail and had “real power, real authority,” as Brown demonstrated when he changed Tonia Hardy’s shift to retaliate against her reporting violence at the jail. Vol. 2 at 1131-1132.

Government counsel emphasized that Brown stood by as violence repeatedly occurred at the jail and took no action to stop it (Vol. 2 at 1132), and that Brown personally threw Herbert Potts to the ground during his meet-and-greet (Vol. 2 at 1133). The court expressed skepticism regarding the seriousness of Brown’s offense of making a false statement to the FBI when everyone “knew” Brown was lying. Vol. 2 at 1135. The court added that he understood the law but did not “see any harm coming from the [false statement] offense.” Vol. 2 at 1136.

Responding again to the argument that law enforcement officers should not be sent to prison, government counsel emphasized the need to promote respect for the law, provide just punishment, and make sure that other officers understand there are “real consequences” for violating the law. Vol. 2 at 1137. When the court asked government counsel if she agreed that the level of animosity toward law enforcement officers in prison is greater than toward other prisoners, she replied that the federal prison system “is built to handle that.” Vol. 2 at 1138.

As she did with Barnes, government counsel asked the court to make a record of its Section 3553(a) findings for Brown. The court responded: “I think I’ve been affirmed on that before, that I’m not required to do it.” Vol. 2 at 1138.

The court then proceeded to ask questions relating to the Section 3553(a) factors. The court asked factual questions about some incidents and the extent of the victims’ injuries (Vol. 2 at 1139-1141, 1152-1155), and repeated the question it asked at Barnes’s sentencing whether “in a prison situation, a culture of intimidation and fear is probably necessary” (Vol. 2 at 1142). The court also asked whether Brown was at risk for recidivism, which government counsel agreed was unlikely. Vol. 2 at 1143.

Government counsel argued that deterrence is a factor that applies not only to Brown but to “society as a whole.” She underscored that it was important for Brown’s fellow corrections officers to understand that “this is a crime that will be punished and that is not acceptable.” She emphasized that “deterrence is not simply for him.” Vol. 2 at 1143. The court asked government counsel what correctional treatment Brown would receive in prison. Vol. 2 at 1143.

Government counsel responded that in addition to “discipline and self-reflection,” many correctional facilities offer collegiate courses. Vol. 2 at 1144.

ii. The district court granted Brown a downward variance. Vol. 2 at 1160-1162. The court’s explanation for that decision is virtually the same as for Barnes:

In establishing an appropriate sentence for this defendant, the Court has considered the totality of the circumstances regarding the offenses of conviction, including the defendant's role in the offenses. Additionally, the Court has considered the defendant's personal and family history, * * * lack of prior criminal history, low risk of recidivism, and the need to avoid unwarranted sentencing disparities.

As I said in the previous hearing, the Court has reviewed its sentencings in prior deprivation of rights cases, and is satisfied that the sentence I will give in this case will be consistent, and will avoid unwarranted sentencing disparities.

Also taken into consideration the best method for correctional treatment of the defendant, and find that imprisonment will not promote that to any great degree.

Vol. 2 at 1160-1161. The court imposed a term of 6 months' imprisonment and 3 years' supervised release on each count, to run concurrently. Vol. 2 at 1163-1164.

Government counsel objected to the variance. Vol. 2 at 1162, 1169. Again noting the "advisory" nature of the Guidelines and citing the Section 3553(a) sentencing factors, the court concluded with the identical justification for the sentence it had provided when sentencing Barnes. Vol. 2 at 1165-1166; see p. 22, *supra*.

The court entered judgment against Brown on March 18, 2015, and filed a written Statement of Reasons for the sentence imposed. Supp. R. 1-4. The narrative in Parts IV.D and VIII, purporting to justify the sentence, contains a

statement nearly identical to the recitation the court provided at sentencing. Supp. R. 3-4.

SUMMARY OF ARGUMENT

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

1. Defendants Raymond Barnes and Christopher Brown challenge the sufficiency of the evidence to support their convictions, along with various trial decisions involving the admission of evidence or jury instructions. For the reasons set forth in Parts I to VI of the Argument, and under established precedent, none of these has merit.

2. The United States has filed cross-appeals challenging the sentences imposed on each defendant.

The district court abused its discretion in granting significant, unexplained, and unjustified downward variances from Barnes's and Brown's advisory Sentencing Guidelines range of 70-87 months. Barnes's sentence of 12 months' imprisonment and Brown's sentence of 6 months' imprisonment are less than 20% and 10%, respectively, of the bottom of the Guidelines range. These are extraordinarily light sentences for jail administrators who engaged in repeated flagrant misconduct, including the physical abuse of inmates, in willful disregard of inmates' constitutional rights.

These sentences are both procedurally and substantively improper under this Court's precedents.

a. The district court violated 18 U.S.C. 3553(c)(2) and committed clear procedural error when it failed to state both in court and in a written statement the *specific* reasons for imposing sentences that varied so dramatically below the Guidelines range, despite requests from the government to do so. “[W]hen imposing a sentence *outside* the Guidelines range, the * * * statute requires a district court to state ‘the *specific* reason for the imposition of a sentence . . . , which reasons must also be stated with specificity in the written order of judgment and commitment.’” *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1200 (10th Cir. 2007) (emphasis omitted) (quoting 18 U.S.C. 3553(c)(2)). To satisfy this requirement, the district court must describe “the salient facts of the individual case, including particular features of the defendant or of his crime, and must explain for the record how these facts relate to the § 3553(a) factors.” *United States v. Mendoza*, 543 F.3d 1186, 1192 (10th Cir. 2008). The district court’s less than cursory explanation of its reasons for varying so far below the Guidelines range was wholly inadequate.

b. Both sentences were also substantively unreasonable. In the interests of judicial economy and to provide guidance for the district court on remand, the United States urges this Court to address the issue.

Appellate review of sentences for substantive reasonableness focuses on “whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a).” *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009) (citation omitted). A reviewing court may take into account both the degree of variance from the Guidelines range, *Gall v. United States*, 552 U.S. 38, 47 (2007), and whether the record distinguishes defendants from “run-of-the-mill” offenders, *Friedman*, 554 F.3d at 1309.

Barnes and Brown, both high-level supervisors at the facility, were found guilty of conspiring to violate—and of violating—the rights of inmates in their care and custody. There is nothing in the defendants’ personal characteristics or in the nature and circumstances of these serious offenses, which involve physical abuse of inmates, that justify these very light sentences. Like many law enforcement officers convicted of violating 18 U.S.C. 241 and 242, Barnes and Brown have no prior criminal histories and contend that termination of employment is punishment enough. Yet the Guidelines calculations for these defendants already take into account their lack of criminal histories by placing them into a criminal history category of I. As this Court has recognized, “in many instances, committing a crime while acting under color of law will result in a higher sentence * * * rather than a lower sentence.” *United States v. LaVallee*, 439 F.3d 670, 708 (10th Cir. 2006).

The district court’s failure to address how key Section 3553(a) factors supported its decision to vary so significantly downward from the advisory Guidelines range—rather than just list the factors—underscores the substantive unreasonableness of these sentences. For example, the United States urged the court to impose substantial sentences to deter other law enforcement officers from engaging in this sort of unconstitutional and abusive conduct. Yet the court did not discuss whether or how its sentences would “afford adequate deterrence to criminal conduct,” 18 U.S.C. 3553(a)(2)(B), as opposed to deterrence of Barnes and Brown specifically. And although the court expressed interest in avoiding unwarranted disparities among civil-rights violators, it ended up contributing to such disparities. Federal courts have rightly treated violations of 18 U.S.C. 241 and 242 as serious crimes meriting far higher sentences than those issued here.

Thus, this Court should vacate defendants’ sentences and remand for resentencing.

ARGUMENT

I

SUFFICIENT EVIDENCE SUPPORTED THE JURY’S FINDING THAT BROWN MADE A FALSE STATEMENT TO THE FBI

The district court correctly denied Brown’s motion for judgment of acquittal on his false-statement conviction (Count 4) because the jury’s guilty verdict was supported by ample evidence. See Vol. 2 at 618-619. This Court reviews the

sufficiency of the evidence to support a conviction de novo. *United States v. Wells*, 739 F.3d 511, 525 (10th Cir.), cert. denied, 135 S. Ct. 73 (2014). In so doing, the Court must “take the evidence—both direct and circumstantial, and reasonable inferences drawn from that evidence—in the light most favorable to the government and ask only whether a reasonable jury could find the defendant guilty beyond a reasonable doubt.” *Ibid.* (citation omitted).

Count 4 of the indictment charged Brown with making a false statement to a Special Agent of the FBI in violation of 18 U.S.C. 1001.⁸ Vol. 1 at 290. Specifically, the indictment charges that Brown falsely stated to the Special Agent that during meet-and-greets, when an inmate from an out-of-county jail arrives at MCJ, the inmate is ordered out of the transport vehicle and “then is ‘gently placed’ on the ground.” Vol. 1 at 290; see also Vol. 1 at 481 (jury instruction).

FBI Special Agent Chapman testified at trial regarding this statement by Brown. Vol. 2 at 1997-1998. Brown’s statement was material to a matter being investigated by the FBI and was false in that Brown knew that during the meet-and-greets, MCJ jailers routinely threw and slammed inmates from the transport vehicle to the ground even though the inmates were restrained and not posing a

⁸ The statute makes it a felony “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States [to] knowingly and willfully * * * make[] any materially false, fictitious, or fraudulent statement or representation.” 18 U.S.C. 1001(a)(2).

physical threat. Vol. 1 at 290; see pp. 6-11, *supra* (describing meet-and-greets). Indeed, the evidence shows that Brown personally participated in this gratuitous violence.

Brown argues, however, that when he told the FBI that inmates were “gently placed” on the ground, he was not asked about the four meet-and-greets charged in the indictment. Instead, he claims he was referring to meet-and-greets more generally, including meet-and-greets not alleged in the indictment, which according to Brown did not involve violence. Brown Br. 26.

This argument is meritless. As the district court held in denying Brown’s motion for judgment of acquittal (Vol. 1 at 618), there was no evidence at trial to suggest that meet-and-greets were done in any way other than the manner described at trial, which involved jailers forcing inmates out of the vehicle and then slamming the inmates head-first or face-first to the concrete, piling on top of them to change their restraints, and then carrying them facedown to a cell. Indeed, as one staff member put it, the meet-and-greets followed “basically the same routine,” in which “[t]he inmate is taken out of the vehicle and slammed onto the ground.” Vol. 2 at 1575.

In an effort to create ambiguity, Brown argues that government counsel admitted at sentencing that not all meet-and-greets involved violence. Brown Br. 26, 29, 34; see Vol. 2 at 1111. But apart from the fact that statements by

government counsel at sentencing are not evidence, Brown wrenches the statement out of context. In assessing the scope and seriousness of the offense conduct for Brown's sentencing, the district court asked government counsel:

[Court]: * * * I want, for the record, that the government isn't complaining that every meet and greet was a violent event, are you?

[Government counsel]: No, Your Honor. We are talking about the four—

[Court]: Okay.

[Government counsel]: —meet and greets for which—

[Court]: I just wanted to make sure. I wanted to make sure that that's not your position.

[Government counsel]: No.

Vol. 2 at 1111. Government counsel's response says nothing more than that the United States' case involves only the four meet-and-greets addressed in the indictment and described at trial.

None of the cases cited by Brown (Br. 26-33) has any bearing on the sufficiency of the evidence on this count. In *United States v. Moses*, 94 F.3d 182 (5th Cir. 1996), the court held that the defendant "did not make a false statement" when he responded in his naturalization application that he had not separated from his wife after the filing of his original petition for naturalization. *Id.* at 188. Accordingly, the Fifth Circuit was unable to uphold a conviction where the alleged false statement was "true on its face." *Ibid.* The same was the case in *United*

States v. Gahagan, 881 F.2d 1380, 1382-1384 (6th Cir. 1989), where the defendant's implied representation in a financial report that he did not own a Jaguar was true. Here, by contrast, evidence at trial overwhelmingly established that Brown's statement that inmates were ordered out of the vehicle and "gently placed" on the ground was false.

The Eighth Circuit's decision in *United States v. Vesaas*, 586 F.2d 101 (1978), is equally inapposite. In *Vesaas*, defendant's representation that he "did not know of any stocks, bonds or other property owned by his deceased mother and himself in joint tenancy" could not constitute a false statement because "it is legally impossible to be a joint tenant with a decedent." *Id.* at 103. As the court explained, "[a]n indictment premised on a statement which on its face is not false cannot survive." *Id.* at 104. No similar defect in the indictment exists here. Evidence at trial amply proved that Brown's statement to the FBI was false.

II

SUFFICIENT EVIDENCE SUPPORTED BROWN'S CONVICTIONS ON THE CONSPIRACY AND DEPRIVATION OF RIGHTS COUNTS

Brown attacks the sufficiency of the evidence to support the jury's guilty verdicts against him for conspiracy (Count 1) and deprivation of rights with respect to Jace Rice (Count 2). Brown Br. 34-45. The standard of review is cited at pp. 30-31, *supra*. The district court correctly denied Brown's motion for judgment of acquittal on these counts. Vol. 1 at 613-617 & n.2.

Count 1 of the indictment charged that Barnes and Brown, along with others, “willfully combined, conspired, and agreed with each other, to injure, oppress, threaten, and intimidate inmates” housed at the MCJ in the free exercise and enjoyment of their constitutional rights, in violation of 18 U.S.C. 241. Vol. 1 at 286. The jury was instructed that the government was required to prove beyond a reasonable doubt that:

First: the defendant knowingly agreed with one or more persons to injure, oppress, threaten or intimidate inmates housed at the Muskogee County Jail; and

Second: in doing so, the defendant intended to hinder, prevent or interfere with the victim’s exercise or enjoyment of his right to be free from cruel and unusual punishment, which is a right secured by the Constitution or laws of the United States.

Vol. 1 at 464; see Tenth Circuit, Criminal Pattern Jury Instructions No. 2.16 (2011 ed.); see also Vol. 1 at 465-467 (providing further instructions on these elements).

Count 2 of the indictment charged that Barnes and Brown, while aiding and abetting each other and others known and unknown to the grand jury, and while acting under color of law, “willfully deprived Jace Rice of the right * * * not to be subject to cruel and unusual punishment when MCJ jailers threw and slammed Jace Rice head-first onto the ground while Jace Rice was handcuffed and not posing a physical threat to anyone,” conduct “result[ing] in bodily injury,” in

violation of 18 U.S.C. 242 and 2. Vol. 1 at 289.⁹ The jury was instructed that the government was required to prove beyond a reasonable doubt that:

First: the defendant was acting under color of law when he committed the acts charged in Count Two of the indictment.

Second: the defendant deprived Jace Rice of his right to not to [sic] be subjected to cruel and unusual punishment, which is a right secured by the Constitution or laws of the United States.

Third: the defendant acted willfully, that is, the defendant acted with a bad purpose, intending to deprive Jace Rice of that right.

Fourth: that Jace Rice suffered bodily injury as a result of the defendant's conduct.

Vol. 1 at 470; see Tenth Circuit, Criminal Pattern Jury Instructions No. 2.17 (2011 ed.); see also Vol. 1 at 472-476 (providing further instructions on these elements).

Brown challenges these two convictions on several grounds. On the conspiracy count, Brown argues there was no evidence of a conspiratorial agreement. Brown Br. 35-36. He claims, with respect to both counts, that there was no evidence that he personally physically assaulted or injured any inmate (including Jace Rice) or that he instructed anyone else to do so. Brown Br. 35-36. Brown contends the government failed to prove the necessary mental element for

⁹ 18 U.S.C. 2 provides that a person who “aids, abets, counsels, commands, induces or procures” the commission of an offense against the United States is “punishable as a principal.” See also Vol. 1 at 478 (aid and abet instruction).

both counts (Br. 38-41), and that the government failed to overcome the deference owed to jail administrators (Br. 41-43).¹⁰ None of these arguments has merit.¹¹

A. *The Evidence Was Sufficient To Prove The Existence Of An Agreement And That Brown Entered Into That Agreement*

Brown argues that there was no evidence of any “conspiratorial agreement” between him and Barnes. Brown Br. 35-36. On the contrary, the evidence of an agreement among Barnes, Brown, and other unindicted co-conspirators was strong and compelling.

Here, the agreement was to injure, oppress, threaten, or intimidate MCJ inmates in the exercise of their constitutional right to be free from cruel and unusual punishment at the hands of detention officers. The government was not required to present evidence of a *formal* agreement among Brown, Barnes, and other jailers. Instead, “the agreement may be informal and may be inferred entirely from circumstantial evidence.” *United States v. Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000); see also Vol. 1 at 465-466 (jury instruction on agreement

¹⁰ Brown does not challenge the sufficiency of the evidence on the first and fourth elements of the offense charged in Count 2, which were uncontested at trial.

¹¹ Brown further contends that because no rational juror could have convicted him of Counts 1 and 2 beyond a reasonable doubt, Ashley Mullen’s testimony regarding the unidentified inmate “definitely had a prejudicial impact.” Brown Br. 36. Whether, notwithstanding the court’s instruction for the jury to disregard the testimony, Brown was denied a fair trial because the jury heard it, is addressed in Part III, *infra*.

requirement). “[A]n agreement may be inferred from a variety of circumstances, such as, ‘sharing a common motive, presence in a situation where one could assume participants would not allow bystanders, repeated acts, mutual knowledge with joint action, and the giving out of misinformation to cover up [the illegal activity].’” *Whitney*, 229 F.3d at 1301 (alteration in original; citation omitted); see also *United States v. Wardell*, 591 F.3d 1279, 1287-1288 (10th Cir. 2009). All these circumstances were present here.

Evidence at trial established that both Barnes and Brown supervised, orchestrated, permitted, and encouraged their deputies to slam inmates head-first and face-first onto the concrete during the meet-and-greets. Many jailers attested to the implicit—and sometimes explicit—directions that they were to throw calm, shackled, and non-resisting inmates to the ground. Barnes and Brown promoted and repeatedly allowed such attacks to occur in their presence. See pp. 6-11, *supra*. The evidence also showed that Barnes and Brown would then take steps to cover up their own and other jailers’ actions after the assaults. See pp. 13-15, *supra*.

Jailer after jailer testified about his or her understanding that Barnes and Brown wanted inmates to be injured. Barnes directed Michael Gray, during Jace Rice’s meet-and-greet, to make sure that “the first thing that touched the ground should be his head.” Vol. 2 at 1442, 1458. Rick Wheeler testified that despite the

medical supervisor's specific warning about Gary Torix's head injury, Barnes told jailers that "we were going to show [Torix] how things were run in Muskogee County" (Vol. 2 at 1870, 1872), and then, when the transport vehicle pulled up, told jailers "Let's do it." Vol. 2 at 1873. Ashley Mullen testified that during Herbert Potts's meet-and-greet, Brown reached into the vehicle himself, grabbed Potts, and "jerked" him "onto the concrete pretty much face first." Vol. 2 at 1922; see also Vol. 2 at 1963-1964. As this Court has stated, the jury may infer a conspiratorial agreement from such acts "indicating concert of action for the accomplishment of a common purpose." *United States v. Bell*, 154 F.3d 1205, 1208 (10th Cir. 1998) (citation and internal quotation marks omitted).

Brown protests, however, that "[o]f the credible witnesses" at trial, "not one testified that Brown physically assaulted or injured an inmate, and not one testified that Brown directed any employee at the jail to physically assault or injure an inmate." Brown Br. 4, 35. His Statement of Facts purporting to summarize each witness's testimony paints a picture in which Brown was virtually uninvolved in the events detailed at trial. Brown Br. 4-24.

Brown's argument is flawed in several respects.

First, "[r]ather than examining the evidence in bits and pieces," as Brown does, this Court "evaluate[s] the sufficiency of the evidence by consider[ing] the collective inferences to be drawn from the evidence as a whole," *United States v.*

Scull, 321 F.3d 1270, 1282 (10th Cir. 2003) (citation omitted), and views those inferences “in the light most favorable to the government,” *United States v. Jones*, 768 F.3d 1096, 1101 (10th Cir. 2014). Those “collective inferences,” as discussed below, amply demonstrate that Brown was deeply involved in the abuse of prisoners. Second, in evaluating the sufficiency of the evidence, this Court “will not re-weigh the evidence or assess the credibility of witnesses.” *United States v. Serrata*, 425 F.3d 886, 895 (10th Cir. 2005); accord *Wardell*, 591 F.3d at 1287.

Third, Brown’s argument that he personally did not participate in the assaults against inmates is irrelevant. The government need not prove that a detention officer *personally* assaulted an inmate-victim or instructed others to do so to obtain a conviction under Sections 241 or 242. A conspiracy conviction does not “require proof that [the defendant] assaulted a particular inmate without justification, only that he joined in the conspiracy that had such assaults as one of its objects.” *United States v. Conatser*, 514 F.3d 508, 519 (6th Cir. 2008); see, e.g., *United States v. McQueen*, 727 F.3d 1144, 1153-1154 (11th Cir. 2013) (citing as evidence of conspiracy that despite defendant’s “obligation to intervene he did nothing” but “stood by” while other corrections officers beat inmates). This Court has recognized on many occasions that a prison guard may be held criminally or civilly liable for failing to intervene to stop fellow officers’ excessive use of force. See, e.g., *Mascorro v. Billings*, 656 F.3d 1198, 1204 n.5 (10th Cir. 2011); *Serrata*,

425 F.3d at 896; *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996); see also *Wilson v. Town of Mendon*, 294 F.3d 1, 6 (1st Cir. 2002); *United States v. Reese*, 2 F.3d 870, 890 (9th Cir. 1993); Part II.B., *infra*.

The evidence overwhelmingly proves Brown's participation in the conspiracy to mistreat inmates. Jailers testified that Brown personally participated in the violence against inmates. Mullen testified that Brown slammed Herbert Potts to the concrete during Potts's meet-and-greet. Vol. 2 at 1922, 1963-1964. Brown claims the district court instructed the jury to disregard "the bulk" of Mullen's testimony (Br. 35), but the court instructed the jury to disregard only Mullen's testimony regarding the unidentified inmate Barnes and Brown assaulted in the detox area. See Vol. 1 at 468; Vol. 2 at 2329-2330; see also Vol. 2 at 2313 (explaining to counsel scope of court's exclusion of Mullen's testimony).¹²

In addition, Brandi Hoover testified that when Barnes hit Alton Murphy, an inmate who was not being combative or threatening (Vol. 2 at 1456-1457, 1807), Brown hit Murphy in the legs, bringing him down to the ground. Vol. 2 at 1806, 1844. Although an alternative account had Brown jumping on top of Murphy and Barnes when they were lying on the ground (Vol. 2 at 1454, 1456), either way the

¹² Contrary to Brown's assertions (Br. 14), Mullen's testimony that it was Brown who slammed Potts to the concrete was uncontroverted and consistent with the testimony of Kenneth Tucker and Brandi Hoover, neither of whom identified the detention officer who grabbed Potts. See Vol. 2 at 1795-1796, 1859-1860.

evidence supports the jury's verdict that Brown was a participant in the conspiracy. Likewise, during the incident involving Jeremy Armstead, an inmate standing quietly against the wall awaiting his medication, the evidence established that Brown played his part in the conspiracy by accompanying Barnes and training a taser on Armstead while Barnes attacked Armstead and pushed him toward the elevator, and then Brown took Armstead downstairs. Vol. 2 at 1656-1658, 1713-1714, 1717-1718, 2068-2071.

There was other evidence of the conspiracy besides the widespread agreement to use violence on restrained and non-threatening inmates. The existence of a conspiracy may be inferred from the "giving out of misinformation to cover up" illegal activity. *Whitney*, 229 F.3d at 1301 (citation omitted); see also *McQueen*, 727 F.3d at 1154. And false information was the name of defendants' game. Barnes required and encouraged jailers to write incident reports that falsely justified or inaccurately described the use of force (Vol. 2 at 1525, 1527, 1539-1540, 1610, 2160-2161), and directly interfered with the accurate documentation of inmate injuries following assaults by jailers (Vol. 2 at 1377, 1664-1665, 2082). Barnes and Brown retaliated against and threatened MCJ employees to prevent accurate reporting of the mistreatment of inmates. Vol. 2 at 1518-1519, 1611, 1621-1622, 1661, 1791-1793, 2074-2075, 2083, 2183-2187. The evidence at trial showed that, in this respect as well, Brown acted consistent with the conspirators'

“common motive.” *Whitney*, 229 F.3d at 1301. The testimony established that not only Barnes, but Brown as well, punished a detention officer who reported mistreatment of an inmate. Vol. 2 at 2183-2187. Brown also lied to the FBI when he claimed that jailers “gently placed” transferring inmates on the ground. Vol. 2 at 1997-1998. Each such incident—both on its own and together—amply proves the existence of an agreement among Brown, Barnes, and other jailers to abuse inmates and conceal their conduct.

B. The Government Did Not Need To Prove That Brown Personally Assaulted Or Directed The Assault Of Jace Rice For Purposes Of Count 2

Brown argues, with respect to Count 2, that there was no evidence that he “ever laid a hand on Jace Rice” or instructed any other jail employee specifically to assault Rice. Brown Br. 36. No such evidence was necessary.

As the district court found in rejecting Brown’s motion for judgment of acquittal on Count 2 (Vol. 1 at 613 n.2), Brown was properly found guilty of depriving Jace Rice of his constitutional rights based on either co-conspirator liability or directly. Members of a conspiracy are responsible for the foreseeable consequences of that conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 645-647 (1946). Although there is no evidence that Brown himself assaulted Rice, the jury’s verdict was consistent with *Pinkerton* and in line with the district court’s instruction on co-conspirator liability:

If you find either defendant guilty of the conspiracy charged in Count One, and you find beyond a reasonable doubt that during the time that defendant was a member of that conspiracy another coconspirator committed the offense in Count Two, Three, or Four, and that the offense in Count Two, Three, or Four was committed to achieve an objective of or was a foreseeable consequence of that conspiracy, then you may find that defendant guilty of Count Two, Three, or Four, even though the defendant may not have participated in any of the acts which constitute the offenses described in Counts Two, Three, or Four.

Vol. 1 at 483; Vol. 2 at 2339; see Tenth Circuit, Criminal Pattern Jury Instructions No. 2.21 (2011 ed.). The slamming of Rice on his head at his meet-and-greet was an objective of and certainly foreseeable consequence of the conspiracy in which Brown was deeply involved.

Apart from co-conspirator liability, the district court was also correct in concluding that the evidence was sufficient to convict Brown of Count 2 directly and as an aider-and-abettor. Brown's presence during the Jace Rice meet-and-greet was not disputed at trial. Vol. 2 at 1355, 1571-1572, 1747-1748. As discussed above, this Court has held that a defendant may be convicted of deprivation of rights under Section 242 based on a failure to intervene. See, *e.g.*, *Serrata*, 425 F.3d at 896 (upholding conviction under 18 U.S.C. 242 where correctional officer "stood within arm's reach and watched the attack" on an inmate); see also cases cited at pp. 40-41, *supra*. Brown's presence and non-intervention at Jace Rice's meet-and-greet could reasonably have been viewed by the jury as an active inducement for MCJ jailers to use excessive force.

C. The Evidence Was Sufficient To Prove That Brown Had The Requisite Mental State In Depriving Inmates Of Their Eighth Amendment Rights

In arguing that the government failed to prove the necessary mental element for conviction under both Counts 1 and 2, Brown blurs the mental state required for a deprivation of rights under the Eighth Amendment with the willfulness requirements of 18 U.S.C. 241 and 242. Brown Br. 38-41. We address each requirement in turn.

1. Eighth Amendment

In Counts 1 and 2, defendants were accused of depriving (and conspiring to deprive) inmates of their Eighth Amendment right to be free from cruel and unusual punishment. As Brown agrees (Br. 39-41), the Supreme Court in *Whitley v. Albers* established that it is “the ‘unnecessary and wanton infliction of pain’” that “constitutes cruel and unusual punishment forbidden by the Eighth Amendment.” 475 U.S. 312, 319 (1986) (citation and internal quotation marks omitted); see Vol. 1 at 467, 473-474 (jury instructions). Whether a use of force is excessive turns on “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.” *Whitley*, 475 U.S. at 320-321 (citation omitted); accord *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

Citing the deference owed to jail administrators, Brown maintains the evidence is insufficient to prove that he acted in bad faith and that defendants’ use

of force was not for the purpose of institutional security. Brown Br. 41-43. Brown fundamentally misunderstands the limits placed on the discretion jail officials may exercise. While acknowledging that prison administrators should be accorded deference in how they preserve order, discipline, and security in a prison, *Whitley*, 475 U.S. at 321-322, the Court emphasized that such deference is not unbounded and “does not insulate from review actions taken in bad faith and for no legitimate purpose,” *id.* at 322.

The evidence at trial established that (1) at the direction and under the supervision of defendants (and in the case of Potts’s meet-and-greet, with Brown’s own personal involvement) jailers “threw” and “slammed” four inmates head-first or face-first to the concrete while the inmates were fully-restrained and not resisting; (2) Barnes, with Brown’s support, assaulted Jeremy Armstead, who was doing nothing to warrant any use of force; and (3) the use of force by Barnes and Brown on Alton Murphy served irrationally to escalate, rather than de-escalate, the situation, undermining any claimed purpose of maintaining safety and order. See pp. 6-12, *supra*. This evidence is more than enough to sustain the convictions under *Whitley*.

Brown argues that the evidence established merely that the inmates “were not posing a physical threat at that time.” Brown Br. 42. But this admission practically concedes the point. What happened at MCJ over and over again was

not a matter of a jail administrator simply making “the wrong decision in weighing his options.” Brown Br. 42-43. Witness after witness testified about the violent manner in which shackled and compliant inmates were flung from transport vehicles to the concrete—uncontroverted evidence establishing the utter lack of legitimate law enforcement purpose animating defendants’ repeated conduct. Indeed, the entire security rationale for moving inmates from the vehicle to the ground and then indiscriminately piling jailers on top of them—ostensibly so their restraints could be switched out for those belonging to MCJ—was a sham that created chaos, hurt inmates, increased safety and escape risks, and contravened the procedure established by Sheriff Pearson. Vol. 2 at 1365-1366, 1375, 2022-2027, 2034, 2057. The use of force constituted the “unnecessary and wanton infliction of pain” because it had no penological justification. See *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (discussing “unnecessary and wanton infliction of pain” in context of evaluating whether officials acted with “deliberate indifference”) (citations omitted).

Brown protests that not one witness testified that defendants’ actions “were taken for a sadistic or malicious purpose.” Brown Br. 45. But no one would expect jailer witnesses to use such a legalistic phrase; instead, jailers described circumstances in which restrained and compliant inmates were physically abused,

affording a more than sufficient basis for the jury to find that defendants possessed the requisite mental state.

As this Court has recognized, “malicious, sadistic intent” may be inferred “from the conduct itself where ‘there can be no legitimate purpose’ for the officers’ conduct.” *Serna v. Colorado Dep’t of Corr.*, 455 F.3d 1146, 1152 (10th Cir. 2006) (citing *Smith v. Cochran*, 339 F.3d 1205, 1213 (10th Cir. 2003)). In *Hope*, the Supreme Court found the Eighth Amendment violation “obvious” where “[a]ny safety concerns had long since abated” by the time the inmate was handcuffed to a hitching post, where he “had already been subdued, handcuffed, [and] placed in leg irons” and there was a “clear lack of an emergency situation.” 536 U.S. at 738. Such punitive treatment “amounts to gratuitous infliction of ‘wanton and unnecessary’ pain.” *Ibid.*; see also *id.* at 743 (accepting premise that “physical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable eighth amendment violation”) (citation omitted).

Numerous other decisions refute Brown’s supposition that it does not matter whether the inmate-victims are posing a threat at the time so long as the stated purpose of a use of force is “jail security.” In *Green v. Branson*, 108 F.3d 1296, 1301 (10th Cir. 1997), for example, this Court ruled that a rational jury could find that defendants “wantonly” inflicted serious injury on a prisoner where he “did not provoke the use of force” and instead “laid helpless in handcuffs and leg-irons.”

And in *Skrtich v. Thornton*, 280 F.3d 1295 (2002), the Eleventh Circuit emphasized that, although a prisoner's history may have warranted extra precautions in moving him, once the prisoner was incapacitated it was "not constitutionally permissible for officers to administer a beating as punishment" for his past misconduct. *Id.* at 1302; see also *Pelfrey v. Chambers*, 43 F.3d 1034, 1037 (6th Cir. 1995); *Phelps v. Coy*, 286 F.3d 295, 301 (6th Cir. 2002).

In short, the unjustified assaults carried out under color of law against Jace Rice and other inmates at the meet-and-greets, who were fully restrained and subdued, and against other inmates posing no physical threat, served no legitimate penological purpose. The jury was entitled to infer malicious, sadistic intent from such conduct, *Serna*, 455 F.3d at 1152, and thus find that Brown had the requisite mental state for an Eighth Amendment violation for purposes of Counts 1 and 2.

2. *Willfulness*

The statutes under which defendants were convicted, 18 U.S.C. 241 and 242, impose an additional mens rea requirement distinct from that required to establish a violation of the underlying constitutional right. Section 242 requires that the deprivation of rights be "willful[]," 18 U.S.C. 242, which means that defendants acted with the specific intent "to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Screws v. United States*, 325

U.S. 91, 104 (1945). The Supreme Court has interpreted Section 241 to impose the same specific intent requirement. *Anderson v. United States*, 417 U.S. 211, 223 (1974); *United States v. Guest*, 383 U.S. 745, 753-754 (1966).

A willful act is one committed either “in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.” *Screws*, 325 U.S. at 104. The Court found the defendants’ purpose of depriving another of a constitutional right “plain” from the wrongful conduct that in fact caused such a deprivation—there, in *Screws*, the denial of a right to trial in a court of law. *Id.* at 106; accord *Reese*, 2 F.3d at 881. A defendant must have a bad purpose, but there is no need for the defendant to be “thinking in constitutional terms.” *Screws*, 325 U.S. at 106. Nor is there a requirement that the defendant recognize the unlawfulness of his acts. *Apodaca v. United States*, 188 F.2d 932, 937-938 (10th Cir. 1951). Willfulness may be shown by circumstantial evidence so long as the purpose may “be reasonably inferred from all the circumstances attendant on the act.” *Screws*, 325 U.S. at 106; accord *United States v. Bradley*, 196 F.3d 762, 769 (7th Cir. 1999). The jury was properly instructed on this element. Vol. 1 at 464, 467, 470, 475.

The evidence at trial was more than sufficient to permit the jury to find that Brown (as well as Barnes) acted willfully for purposes of Counts 1 and 2. The testimony of jailers who participated in the meet-and-greets, as well as the

testimony of those who witnessed the assaults on Jeremy Armstead and Alton Murphy (including Armstead himself), readily establish that defendants knew there was no legitimate law enforcement purpose for the degree of force employed. Not only was the force unnecessary and wanton, as discussed above, but it is clear that defendants acted willfully because they (1) slammed fully-restrained and non-resisting inmates into the concrete head-first or face-first (or directed or tolerated that conduct); (2) ignored the training that jailers received regarding when it was appropriate to use force against inmates; (3) followed procedures, particularly in throwing inmates to the ground outside the jail to switch out their restraints, that exacerbated safety and escape risks; (4) engaged in repeated efforts to cover up the true nature and circumstances of the force used; (5) repeatedly threatened to fire or demote, and retaliated against, jailers who reported abuse; and (6) in Brown's case, lied to the FBI about the nature of the force used during the meet-and-greets. See pp. 6-15, *supra*.

Just as the Eighth Amendment violation in *Hope v. Pelzer* was “obvious” where “[a]ny safety concerns” had abated and given “the clear lack of an emergency situation,” 536 U.S. at 738, and just as willful intent was inferred in *Screws* from the “plain” violation of constitutional protections, 325 U.S. at 106, so too here was the jury entitled to find that both defendants acted willfully, given the complete absence of a legitimate purpose for the use of force in the incidents

described at trial. “Such intentionally wrongful conduct, because it contravenes a right definitely established in law, evidences a reckless disregard for that right; such reckless disregard, in turn, is the legal equivalent of willfulness.” *Reese*, 2 F.3d at 881. Likewise, the jury could have inferred that defendants acted with specific intent to violate inmates’ rights from the evidence that jailers used force on inmates in a manner inconsistent with their training. *United States v. Rodella*, No. 15-2023, 2015 WL 6735896, at *17 (10th Cir. Nov. 4, 2015); *United States v. Dise*, 763 F.2d 586, 588 (3d Cir. 1985); see Vol. 2 at 1377-1378, 1380-1381, 1541, 1610, 1619, 1757, 1796-1797, 1860-1861, 1924-1925.

That defendants’ conduct was willful is particularly evident from their painstaking efforts to hide it. If defendants did nothing wrong, then it should not have mattered whether jailers wrote accurate reports, documented inmates’ injuries, or reported incidents to the Sheriff, and it should not have mattered if Brown accurately described to the FBI how the jail treated incoming inmates at the meet-and-greets. But it *did* matter to both defendants because they well knew that what they did was wrong and unlawful, and yet they persisted in that conduct. See *United States v. House*, 684 F.3d 1173, 1202 (11th Cir. 2012) (jury could infer willfulness from defendant’s attempts to conceal his actions by making false statements in incident reports to prevent detection by superiors), cert. denied, 133 S. Ct. 1633 (2013).

In support of his argument that the government failed to prove willfulness, Brown cites *United States v. Shafer*, 384 F. Supp. 496 (N.D. Ohio 1974), in which the district court found insufficient evidence of willfulness on the part of National Guardsmen in connection with the Kent State University shootings. Brown Br. 44-45. The contrast between that case and this one could not be more striking. In *Shafer*, the court refused to infer specific intent to deprive an individual of his rights from “the confused, momentary behavior of a group of frightened guardsmen devoid of any genuine leadership,” 384 F. Supp. at 502, and found no motive “beyond fear, panic, and exhaustion,” *id.* at 503. Barnes’s and Brown’s conduct here presents a case study of a deliberate and methodical pattern of abusive conduct by defendants in which they repeatedly perpetrated, supervised, orchestrated, encouraged, and condoned the use of violence against restrained and compliant inmates, and then covered their tracks afterwards.

The jury easily was entitled to find that Brown acted with the requisite willfulness.

III

THE DISTRICT COURT PROPERLY DENIED BROWN’S MOTION FOR A NEW TRIAL BASED ON ASHLEY MULLEN’S TESTIMONY REGARDING THE ASSAULT ON AN UNIDENTIFIED INMATE

Brown argues that the district court erred in denying his motion for new trial in light of Ashley Mullen’s testimony about the August 2009 assault on an

unidentified inmate—testimony the court instructed the jury to disregard. Vol. 1 at 468; Vol. 2 at 2329-2330; see *Brown Br.* 46-47. Rule 33 authorizes trial courts to grant a motion for new trial “if the interest of justice so requires.” Fed. R. Crim. P. 33(a). Ordinarily, the denial of such a motion is reviewed for abuse of discretion. *United States v. Herrera*, 481 F.3d 1266, 1270 (10th Cir. 2007).

In this case, however, defendants did not object at trial to the district court’s curative instruction as insufficient or move for a mistrial. When the district court informed counsel during the trial that it had decided to exclude Mullen’s testimony about this incident, Barnes’s counsel agreed that the court should strike the testimony and admonish the jury; Brown’s counsel did not comment. See Vol. 2 at 2258-2259. After the jury instructions were read, defendants’ counsel objected to the court’s failure to give defendants’ proposed alternative instructions on different subjects, and moved for a mistrial because of that failure, but they neither objected to the curative instruction on the incident described by Mullen nor asked for a mistrial on the ground that the curative instruction was inadequate. Vol. 2 at 2343-2344. Where, as here, Brown’s complaint is that “even after the district court’s [curative] instructions to the jury, there remained a modicum of uncured prejudice sufficient to imperil his right to a fair trial,” he was required to make a contemporaneous objection to the district court’s curative instruction or move for a mistrial. *United States v. Lucas*, 477 F. App’x 486, 491 (10th Cir. 2012)

(unpublished) (quoting *United States v. Taylor*, 514 F.3d 1092, 1096 (10th Cir. 2008)). This Court will review a district court's denial of a motion for new trial only for plain error where the defendant has failed to make a contemporaneous objection. *United States v. Toro-Pelaez*, 107 F.3d 819, 828 (10th Cir. 1997).

The district court did not plainly err or abuse its discretion in denying the motion for new trial. See Vol. 1 at 614. Even when properly preserved, a motion for new trial is "regarded with disfavor and should only be granted with great caution," *United States v. Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999), and if "warranted by 'exceptional' circumstances," *United States v. Tarango*, 396 F.3d 666, 672 (10th Cir. 2005).

Brown argues that under Rule 33, the court may take into account the credibility of witnesses and that Mullen's "graphic description provided was so lacking in credibility that no rational juror could believe this event occurred." Brown Br. 47. Brown's argument is analytically confused. It is unclear whether Brown is arguing that *this* Court should consider the credibility of Mullen's testimony, but what is clear is that in reviewing the denial of a Rule 33 motion, this Court does "not revisit evidence, reevaluate witness credibility, or attempt to reconcile seemingly contradictory evidence." *Tarango*, 396 F.3d at 672. Instead, this Court concerns itself with whether or not the district court's disposition of the motion "constituted a clear abuse of discretion." *Ibid.* The district court *twice*

stated that it did not exclude Mullen's testimony concerning Overt Act (a) on the ground that it was not believable. Vol. 2 at 2263-2264, 2312-2313. But it is hard to see why the credibility of Mullen's testimony even matters at this point, since the court instructed the jury to disregard it. Vol. 1 at 468; Vol. 2 at 2329-2330.

The assault Mullen described by defendants on the unidentified inmate was direct evidence of the charged conspiracy, and the United States maintains it would have been well within the district court's discretion to have permitted the jury to consider the evidence. The district court excluded it, however, because the "evidence was so amorphous that its—its probative value is substantially outweighed [by] the unfair prejudice that it could have on the jury." Vol. 2 at 2258. Brown complains that having heard it, "the jury could not set this testimony aside." Brown Br. 47. As the district court reasoned in denying post-trial relief, however, jurors are presumed to follow clear instructions to disregard evidence, and the court found that the evidence in question "does not rise to the level which would rebut the presumption." Vol. 1 at 614. This Court "presume[s] jurors will remain true to their oath and conscientiously follow the trial court's instructions." *United States v. Carter*, 973 F.2d 1509, 1513 (10th Cir. 1992) (citing *Ellis v. Oklahoma*, 430 F.2d 1352, 1356 (10th Cir. 1970)).

There is no reason to believe the jury could not follow the district court's instruction. "We presume that jurors will follow clear instructions to disregard

evidence unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant." *United States v. Caballero*, 277 F.3d 1235, 1243 (10th Cir. 2002) (citations and internal quotation marks omitted); accord *United States v. Sanders*, 929 F.2d 1466, 1470 (10th Cir. 1991); *United States v. Peveto*, 881 F.2d 844, 859 (10th Cir. 1989). As the district court pointed out, this is especially true where, as here, the curative instruction "pertained to 'testimonial evidence from a single witness that was amenable to easy segregation in the minds of the jury.'" Vol. 1 at 614 (quoting *Caballero*, 277 F.3d at 1243). Even when a court dismisses an entire count of an indictment, a cautionary instruction has been deemed sufficient. *Peveto*, 881 F.2d at 859.

Nor were the excluded evidence or the government's comments on the anticipated testimony in its opening statement "devastating" to Brown or likely to inflame the jury. Far from being "the only evidence in the case arguably demonstrating malicious or sadistic intent," as Brown claims (Br. 37), the excluded incident, although a serious assault, was just one more example of unjustified violence used by defendants or their subordinates against restrained or non-resisting inmates. Given that the jury already heard evidence of Barnes assaulting Jeremy Armstead while Brown trained a taser on Armstead; of both defendants assaulting Alton Murphy; of both defendants supervising, directing, and failing to

intervene—with Brown directly participating on one occasion—as jailers repeatedly threw fully restrained inmates head-first to the ground, such that Jace Rice’s head hit the concrete like “a watermelon”; and of defendants’ efforts to conceal the violence afterward, nothing about Mullen’s testimony regarding this one incident was likely to inflame the jury.

In addition, the verdict itself illustrates deliberate thought on the part of the jury, rather than emotional action. The jury *acquitted* Brown of Count 3, likely because of conflicting testimony regarding whether Brown was present for Gary Torix’s meet-and-greet. See *United States v. Cassano*, 132 F.3d 646, 651-652 (11th Cir. 1998) (concluding that split verdict demonstrated jury’s ability to sift through evidence and make individualized determinations). Accordingly, the district court did not abuse its discretion, much less plainly err, in denying Brown’s motion for new trial on account of the excluded evidence.

IV

THE GOVERNMENT DID NOT PRESENT EXPERT TESTIMONY THROUGH LAY WITNESSES

Both Brown and Barnes argue that the district court improperly allowed the government to present expert testimony through lay witnesses, in violation of Federal Rules of Evidence 701 and 702. Brown Br. 48-57; Barnes Br. 50-59. Brown makes the broader argument. He claims that the testimony by various MCJ deputies that the amount of force used in particular incidents was inconsistent with

the training they had received at CLEET was based upon specialized knowledge and training, bringing into play the requirements of Rule 702. Accordingly, Brown argues, these jailers actually testified as experts in violation of Rule 701. Brown Br. 48-49. Barnes, on the other hand, attacks only the admission of George Roberson's testimony describing what he taught jailers about when it is appropriate to use force against inmates and a disagreement he had with Barnes on that subject. Barnes Br. 52-59; see also Brown Br. 52-53. Neither argument has merit.

A. *The Admission Of Jailers' Testimony That Specific Uses Of Force At MCJ Were Inconsistent With Their Training Is Subject To Review Only For Plain Error, And In Any Event, The Testimony Complied With Rule 701*

The district court admitted testimony from several deputies who had attended CLEET. Those deputies testified that the amount of force used during certain incidents described at trial violated the training they had received there. Brown argues that this evidence was expert testimony received in violation of Rule 701 because it was based on "specialized knowledge and training," which should have triggered the standards of Rule 702 and notice requirements of Federal Rule of Criminal Procedure 16. Brown Br. 48-49. Brown claims that the prejudicial impact of this testimony was "dramatic" because "[a] use of force may involve a deviation from CLEET training but not be a violation of the Eighth Amendment." Brown Br. 55.

1. As an initial matter, it is not clear that Brown (or Barnes) contemporaneously objected on these grounds to the testimony of all these deputies. Brown does not identify in his argument which specific testimony (other than George Roberson's) he believes was improperly admitted. In his Statement of Facts (at 20), however, Brown identifies six witnesses who he claims testified over defense objection that certain uses of force by jail employees did not comport with their CLEET training. A review of the cited transcript excerpts (Brown Br. 20 nn.20-25) shows that in only one instance—during Michael Gray's testimony—did Barnes's counsel contemporaneously object to testimony relating to CLEET training on the ground that the government was improperly soliciting expert testimony. Vol. 2 at 1461-1465. After a sidebar discussion, the government asked no further questions of Gray on the topic. Vol. 2 at 1465-1467.

For other testimony excerpts identified by Brown, the evidence either was admitted without objection (Vol. 2 at 1377-1378 (Dustin Applegate)); was admitted over objections other than Rules 701/702 (Vol. 2 at 1379-1380 (Applegate), 1541 (Daniel Smith), 1796-1797 (Brandi Hoover), 1860-1861 (Kenneth Tucker)); or did not involve testimony that the use of force was inconsistent with CLEET training (Vol. 2 at 1898-1899, 1919-1920 (Ashley Mullen)). See Brown Br. 20 & nn.20-25. Only days after much of this testimony

was admitted did Barnes's counsel complain about this line of questioning on the ground that the jailers had not been qualified as experts. Vol. 2 at 1973-1974.

It is well-established in this Circuit that “[t]he specific ground for reversal of an evidentiary ruling on appeal must . . . be the same as that raised at trial.” *United States v. Powers*, 578 F. App’x 763, 767 (10th Cir. 2014) (unpublished) (quoting *United States v. Ramirez*, 348 F.3d 1175, 1181 (10th Cir. 2003)); see Fed. R. Evid. 103(a). In *Powers*, this Court held that the defendant’s challenge to the district court’s admission of alleged expert testimony was subject to review only for plain error even though the defendant made “numerous timely and specific objections at trial,” because “the Rule 701 issue that he presses on appeal was not the basis for any of them.” 578 F. App’x at 767-768. Likewise, it is not apparent that, at the time the particular testimony cited by Brown was admitted, the defense was objecting that a lay witness was offering expert testimony in violation of Rule 701. Accordingly, this argument is subject to review only for plain error.

2. Under any standard, however, there was no abuse of discretion or error. Rule 701 requires that lay witness opinion testimony be “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701; see *United States v. Contreras*, 536 F.3d 1167, 1170 (10th Cir. 2008).

The testimony of MCJ jailers that specific uses of force described at trial were inconsistent with their CLEET training or involved more force than necessary, in light of that training, easily meets these standards. For starters, these jailers were all eyewitnesses who personally observed the uses of force about which they were testifying. Their statements were not technical or complex, but were based on both their training and everyday, common-sense observations. Take, for example, Daniel Smith who, when asked how the treatment of Gary Torix compared to his training at CLEET, responded: “It—I mean, when somebody is handcuffed and shackled, I mean, they’re no threat. I mean, especially if they’re calm, if they are not resisting to—I mean, you can’t just drag them out of the car and slam them onto the ground.” Vol. 2 at 1541. Or Brandi Hoover, who, when asked how the treatment of Herbert Potts compared with what Hoover learned at CLEET and in jail school, answered: “There was more force used than necessary.” Vol. 2 at 1796-1797.

The testimony here closely resembles statements ruled properly admitted in *United States v. Perkins*, 470 F.3d 150 (4th Cir. 2006). In that case, two officers who witnessed the defendant’s kicking of a driver testified about their departmental training in defensive tactics and the use of force; one officer testified that he saw no law enforcement “reason for the kicks,” while the other officer testified that the kicks were not “reasonable.” *Id.* at 153. Because the officers’

testimonies was “based on their contemporaneous perceptions” and because their observations were “common enough and require[d] such a limited amount of expertise,” the Fourth Circuit found the officers’ statements were properly deemed lay witness opinions. *Id.* at 156 (citation omitted). And because their testimony was “framed in terms of their eyewitness observations and particularized experience as police officers,” the court had “no trouble” finding their opinions admissible under Rule 701. *Ibid.* Likewise, the Ninth Circuit found no Rule 701 violation in admitting a co-defendant’s statement that he “couldn’t see or understand what justified the other officers’ behavior” in the Rodney King beating, where the statement was based on the officer’s “first-hand observations.” *United States v. Koon*, 34 F.3d 1416, 1426, 1429-1430 (1994), *aff’d in part and rev’d in part* on other grounds, 518 U.S. 81 (1996).

The decisions Brown cites (Br. 50-55) are far removed from the facts here. In *James River Insurance Co. v. Rapid Funding, LLC*, 658 F.3d 1207 (10th Cir. 2011), this Court found that a witness’s testimony regarding a property valuation was based on “technical or specialized knowledge” on matters “beyond the realm of common experience” and which required “the special skill and knowledge of an expert witness.” *Id.* at 1214 (citation omitted). In that case, the witness’s valuation was not based on common observations but required technical judgment in choosing among different types of depreciation, was based in part on his

professional experience in real estate, and relied on a technical report by an outside expert. *Id.* at 1214-1215. This highly technical evidence bears no resemblance to the challenged deputies' testimony here that they knew from their training that more force than necessary was used.

The decision in *United States v. Freeman*, 730 F.3d 590 (6th Cir. 2013), is equally inapposite. There the Sixth Circuit held that a case agent's testimony interpreting recorded conversations was improperly admitted under Rule 701 where the agent "never specified *personal* experiences that led him to obtain his information." *Id.* at 596. The Sixth Circuit distinguished *Freeman* in a later case, finding no Rule 701 error where federal agents "established a personal-knowledge basis for their lay opinion testimony." *United States v. Kilpatrick*, 798 F.3d 365, 381 (6th Cir. 2015); accord *United States v. Morris*, 573 F. App'x 712, 722 (10th Cir. 2014) (unpublished). Here, as in *Morris*, the challenged testimony from MCJ jailers was based on their "first-hand perceptions." 573 F. App'x at 722.

The testimony in this case that particular uses of force departed from jailers' training was helpful to the jury, see Fed. R. Evid. 701(b), in establishing defendants' intent, both for purposes of satisfying the Eighth Amendment's "unnecessary and wanton infliction of pain" requirement and the "willfulness" requirement of 18 U.S.C. 241 and 242. See, e.g., *United States v. Rodella*, No. 15-2023, 2015 WL 6735896, at *17 (10th Cir. Nov. 4, 2015) (violation of training is

relevant to show defendant's intent); *United States v. Dise*, 763 F.2d 586, 588 (3d Cir. 1985) (same); cf. *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (reasonableness of officer's actions must be assessed "in light of the officer's training"). That the jailers testified about whether uses of force comported with their training did not convert their lay testimony into expert opinions. As this Court recently recognized, "lay witnesses may, consistent with Rule 701(a), testify broadly regarding an employer's practices, policies, and procedures, so long as their testimony is derived from personal knowledge and experience." *Powers*, 578 F. App'x at 771; see also *United States v. Caballero*, 277 F.3d 1235, 1247 (10th Cir. 2002) (upholding admission of government employee testimony regarding INS procedures or operations "of which they had first-hand knowledge").

Brown contends that the district court attempted to "cure" the problematic nature of the CLEET testimony (Br. 20) by instructing the jury regarding the purpose for which the jury could consider it:

You have heard testimony regarding training provided by CLEET (the Council on Law Enforcement Education and Training). You are instructed that such training does not define the constitutional boundaries by which treatment of inmates is to be judged. Those definitions are provided elsewhere in these instructions. In other words, even if you find that Raymond Barnes or Christopher Brown did not follow generally accepted procedures or their training that does not mean that they violated anyone's constitutional rights. The evidence regarding CLEET training was presented for your consideration to the extent you find it useful in determining the defendant's state of mind, intent and knowledge.

Vol. 1 at 479; Vol. 2 at 2337. That instruction was not given to “cure” an error (because there was none) but to address the very argument that Brown makes here—that admission of the jailers’ testimony regarding their training “misled the jury concerning the standard to be applied. Instead of making a decision based upon a finding of wanton and sadistic conduct, the jury appears to have made a decision based upon violation of CLEET standards.” Brown Br. 49.

This argument is meritless. The district court specifically instructed the jury that the testimony regarding training “does not define the constitutional boundaries” and that if the jury found that Barnes or Brown “did not follow generally accepted procedures or their training *that does not mean that they violated anyone’s constitutional rights.*” Vol. 1 at 479 (emphasis added). The court emphasized that the evidence regarding CLEET training was admitted to help the jury “in determining the defendant’s state of mind, intent and knowledge.” Vol. 1 at 479. That instruction correctly states the purpose for which the jailers’ testimony regarding their training could be considered, see *Rodella*, 2015 WL 6735896, at *17 (citing similar instruction with approval), and there is no reason to believe the jury could not follow it.

Finally, Brown argues that the evidence should have been excluded under Federal Rule of Evidence 403. With respect to most of the testimony excerpts he cites (see Brown Br. 20 & nn.20-25), however, no Rule 403 request was even

made. In any event, Brown's argument that the CLEET training evidence was "extremely prejudicial" and thus should have been excluded because it led the jury to make "a decision based upon violation of CLEET standards" (Br. 49), is, as discussed above, refuted by the court's instruction to the jury limiting the purpose for which the jury could consider this evidence.

Even if the issue were subject to ordinary appellate review rather than for plain error, there was no error in admitting the testimony. In addition, although there was no error, it is important to keep in mind that, where, as here, "there is an abundance of evidence regarding the defendant's guilt," any "nonconstitutional error" that arises from the improper admission of lay testimony under Rule 701 "will be deemed harmless." *United States v. Banks*, 262 F. App'x 900, 909 (10th Cir. 2008) (unpublished) (citing *United States v. Solomon*, 399 F.3d 1231, 1238 (10th Cir. 2005)).

B. The Admission Of George Roberson's Testimony Did Not Violate Rule 701

Both Barnes and Brown contend that the admission of George Roberson's testimony violated Rule 701 because Roberson testified as an expert, not as a lay witness. Brown Br. 52; Barnes Br. 50-59. The district court's admission of his testimony is reviewed for abuse of discretion. *Contreras*, 536 F.3d at 1170.

There was no abuse of discretion. Roberson was in charge of training for the Muskogee County Sheriff's Department, and he taught classes at MCJ's "jail

school” about the use of force. Vol. 2 at 2151-2153. However, the government did not seek *any* opinions, expert or otherwise, from Roberson. Instead, the government elicited only factual statements regarding what Roberson taught and about statements that he and Barnes made to each other, all of which were relevant to defendants’ intent.

The purpose and limits of Roberson’s testimony were carefully delineated in advance by the district court and counsel for the parties. Before Roberson testified, Barnes’s counsel expressed concerns at a conference outside the presence of the jury that the government would attempt to use Roberson “as an expert witness.” Vol. 2 at 1977. Government counsel denied offering him for that purpose (Vol. 2 at 1978), and stated that “[w]e’re not going to elicit expert testimony at all” (Vol. 2 at 1979). Instead, she explained she was going to ask Roberson about what he taught jailers during the relevant time period and about specific conversations he had had with Barnes regarding the use of force. She explained that this evidence would be relevant to the government’s proof of willfulness. Vol. 2 at 1978-1979.

Barnes’s counsel responded that he had no objection to the government asking those kinds of questions. Vol. 2 at 1982-1983. “If, frankly, she’s going to talk about what Mr. Roberson taught and statements that Mr. Barnes made to him, that’s fine.” Vol. 2 at 1983. Instead, Barnes’s counsel was concerned about the government asking the witness hypothetical questions, such as whether a particular

use of force would be consistent with what jailers learned at CLEET. Vol. 2 at 1982. Government counsel reassured the court that she would not ask hypothetical questions. Vol. 2 at 1984. The court concluded that the parties had “reached a little bit more of an agreement here,” and with respect to “the hypothetical situation * * * there won’t be any of that.” Vol. 2 at 1985.

Consistent with that plan, Roberson testified that he taught classes at jail school on both the use of force and report writing, classes sometimes attended by Barnes and Brown. Vol. 2 at 2153. Barnes complains that the prosecutor asked questions regarding Roberson’s training at the outset to “establish his credentials” (Br. 52), but those initial questions were not meant to qualify Roberson as an expert but to provide context for his testimony about what he taught jailers at jail school. Vol. 2 at 2151-2152.

Roberson then described the general principles that he taught regarding when it was appropriate to use force on inmates (*e.g.*, that force may be used “[i]f the inmate was aggressive towards them or a threat towards them”). Vol. 2 at 2154. He also testified regarding a disagreement he had with Barnes when Barnes told detention officers during a class that it was acceptable to strike inmates who were in the officers’ “personal space.” Vol. 2 at 2155. Roberson testified that he told Barnes that it was wrong to “escalate” the situation and strike an inmate who

is “not a threat to you,” and told Barnes that if he continued to teach that way, the FBI would “come knocking on your door.” Vol. 2 at 2155-2156.

The district court kept a tight rein on Roberson’s testimony. For example, government counsel began one question in a way that suggested she might be about to ask a hypothetical question. See Vol. 2 at 2158 (“Say you have a situation where a detention officer and inmate may get into it—.”). The district court sustained the ensuing objection and reminded government counsel of the previous discussion they had had about avoiding hypotheticals and “what-if[s].” Vol. 2 at 2158. At another point, government counsel asked Roberson to describe what Barnes taught in his report-writing class. Vol. 2 at 2159-2160. After Roberson responded, “It was not taught correctly,” the court immediately chastised the witness because he had not been asked for his “opinion of whether it was correct or not” but only what Roberson heard Barnes teach his staff. The court admonished Roberson, “Please don’t throw out your opinions unless you’re asked for them, sir.” Vol. 2 at 2160.

Roberson did not testify as an expert. Rules 701 sets parameters on testimony that is given “in the form of an opinion.” Fed. R. Evid. 701. Roberson offered no opinions; he was a fact witness. “[W]itnesses need not testify as experts simply because they are experts—the nature and object of their testimony determines whether the procedural protections of Rule 702 apply.” *Caballero*, 277

F.3d at 1247. Just as the challenged witnesses properly testified in *Caballero* to “relevant, readily-understandable INS procedures or operations of which they had firsthand knowledge,” *ibid.*, so, too, here it was appropriate for Roberson to describe the basic principles governing the use of force against inmates that he taught at MCJ, which were equally “relevant” and “readily-understandable” and about which he had “firsthand knowledge.” And just as the testimony of the witnesses in *Caballero* “expressed neither a lay nor an expert opinion, as distinguished from a statement of fact,” *ibid.*, the same was true of Roberson.

Indeed, this Court has upheld the admission of testimony from non-expert witnesses with far more specialized, technical knowledge than Roberson where they provided relevant factual testimony rather than offering opinions. In *United States v. Orr*, 692 F.3d 1079 (10th Cir. 2012), the defendant was convicted based in large part on misrepresentations he made to investors and the EPA regarding the results of tests performed on his alternative fuel. *Id.* at 1082-1083. At trial, the district court admitted the testimony of scientists who had participated in testing defendant’s fuel but limited them “to testifying as to what [defendant] asked them to do, what they did and what they told [defendant].” *Id.* at 1089.

Nonetheless, the defendant in *Orr* argued on appeal that the admission of this non-expert testimony was error because the scientists’ statements were based on “specialized knowledge.” 692 F.3d at 1089-1090. This Court rejected the

argument. As the Court noted, “[i]t matters not whether [the scientists] could have been designated as experts at trial” because at issue was whether defendant intentionally misrepresented the results from the testing. *Id.* at 1090. This fact made relevant what the scientists told the defendant. The Court applauded the trial court for “walk[ing] a careful line between allowing these witnesses to testify based on first-hand knowledge and disallowing opinions based on their expertise.” *Ibid.* Similarly, the district court here, just as the trial court did in *Orr*, “carefully controlled” the evidence presented to the jury. *Id.* at 1091.

Nor did Roberson’s recounting of his dispute with Barnes “erect[] a legal standard for the jury to consider” (Barnes Br. 55) or have anything to do with providing an expert opinion. In *Morris*, this Court found no Rule 701/702 violation when the government asked the accountant to explain his thinking in drafting emails to his client warning him of potential illegality, because that testimony “shed light on whether [the client] knew that the scheme was illegal.” 573 F. App’x at 716-717, 722. Roberson’s testimony here similarly shed light on Barnes’s knowledge and intent regarding the potential illegality of MCJ’s aggressive use of force on inmates not posing a threat.

Far from abusing its discretion, the district court properly admitted Roberson’s carefully delimited testimony. Even if the court erred in admitting

Roberson's testimony (which it did not), given the strong evidence of defendants' guilt, such error would be harmless. See p. 67, *supra*.

V

THE CUSTODIAL STATUS OF THE INMATES IDENTIFIED IN THE INDICTMENT IS NOT AN ELEMENT OF DEFENDANTS' OFFENSES UNDER 18 U.S.C. 241 AND 242, AND THE GOVERNMENT WAS NOT REQUIRED TO PROVE THAT STATUS TO THE JURY

Barnes makes the novel argument that his convictions are not supported by sufficient evidence because the government did not prove to the jury that the inmate-victims were convicted prisoners covered by the Eighth Amendment's protection against cruel and unusual punishment. Barnes Br. 18-36. As discussed below, this argument fails for several reasons.

As the indictment specified, four of the inmate-victims (Gary Torix, Jeremy Armstead, Alton Murphy, and Riley Starr) were convicted prisoners, and two (Jace Rice and Herbert Potts) were pretrial detainees. Vol. 1 at 286 (¶¶ 6-7). There is no dispute that the source of inmates' constitutional protection from excessive force differs depending on their custodial status: Convicted prisoners are protected by the Eighth Amendment's Cruel and Unusual Punishments Clause, while pretrial detainees are protected by the Fourteenth Amendment's Due Process Clause. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015). "After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S.

312, 319 (1986) (citation and internal quotation marks omitted). But pretrial detainees—unlike convicted prisoners—“cannot be punished at all, much less ‘maliciously and sadistically.’” *Kingsley*, 135 S. Ct. at 2475 (citations omitted); see *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Thus, as the Supreme Court clarified in a decision issued after trial in this case, a defendant’s “state of mind” need not be proved to establish excessive use of force involving a pretrial detainee, *Kingsley*, 135 S. Ct. at 2472; all that must be shown is that the force used was “objectively unreasonable,” *id.* at 2473.¹³

Under Tenth Circuit precedent at the time, Eighth Amendment standards provided “the benchmark” for excessive force claims, including those involving pretrial detainees. See Vol. 1 at 216 (U.S. Trial Brief) (citing *Sawyer v. Green*, 316 F. App’x 715, 717 n.2 (10th Cir. 2008) (unpublished); *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998)). For that reason, the government assumed the heavier burden of proving a constitutional violation under Eighth Amendment

¹³ Barnes suggests the indictment is unclear regarding whether Rice and Potts, who “were inmates held in the MCJ awaiting resolution [o]f their charges” (Vol. 1 at 286), had received probable-cause determinations, which would determine whether they were protected by the Fourth Amendment or the Due Process Clause. Barnes Br. 19-20, 23. Although we do not believe the indictment is unclear, the standard would be the same regardless of which of these constitutional protections applies: Arrestees and pretrial detainees are both protected from law enforcement officers’ objectively unreasonable use of force. See *Kingsley*, 135 S. Ct. at 2473; *Graham v. Connor*, 490 U.S. 386, 388 (1989).

standards in connection with *all* inmate-victims, rather than under Eighth Amendment standards for four convicted prisoners and Due Process Clause standards for two pretrial detainees.

Unsurprisingly, Barnes and Brown wholeheartedly embraced this decision. Both the government and the defense agreed that the Eighth Amendment prohibition on “cruel and unusual punishment” provided the relevant standard on which the jury should be instructed for purposes of the conspiracy and deprivation of rights counts (Counts 1-3). Compare Vol. 1 at 163, 167-168, 170, 172-173, 345-346, 348-349 (government’s proposed instructions), with Vol. 1 at 278, 333, 398 (Barnes’s proposed instructions). During the jury instruction conference, Barnes’s counsel pressed for his alternative versions of the instructions but did not contest the applicability of Eighth Amendment standards. Vol. 2 at 2292-2294, 2297-2298. Ultimately, the jury instructions given by the district court relied on Eighth Amendment standards. Vol. 1 at 464, 467, 470-471, 473-474. After the court read them to the jury, both defendants’ counsel reiterated their objections to the court’s failure to give Barnes’s proposed instructions describing Eighth Amendment standards, but neither objected on the ground that the Eighth Amendment standards were *inapplicable* to any of the inmate-victims. Vol. 2 at 2343-2344.

Barnes now contends, however, that the government was required *to prove to the jury* that the inmate-victims were convicted prisoners entitled to Eighth Amendment protection. This argument is unpersuasive for multiple reasons, the most important of which is that an inmate-victim's custodial status is not an element of 18 U.S.C. 241 or 242 that must be proved to the jury. Nor is it an element of the underlying Eighth Amendment violations, and the jury instructions did not make it so. In any event, defendants *benefited* from the court's and the government's agreed-upon reliance on the far more defense-friendly Eighth Amendment standards and cannot be heard to complain about it now.

A. *Barnes's Sufficiency Argument Is Reviewable Only For Plain Error*

Barnes suggests that his sufficiency argument is preserved for appellate review because, during oral argument on his Federal Rule of Criminal Procedure 29 motion for judgment of acquittal at the close of the evidence, his counsel commented:

I don't think they put on any evidence with regard to an Eighth Amendment violation that any of these inmates were already convicted. The Eighth Amendment applies only to individuals that are already convicted. So pretrial detainees the Eighth Amendment is not applicable to. I think they tried to incorporate the Fourteenth Amendment, and they've cited Section 242. So we're dealing specifically with the statute under 242 that applies Eighth Amendment scrutiny, notwithstanding the fact that they've not offered proof as to whether they were convicted or not.

Vol. 2 at 2201. It is unclear from these remarks that Barnes was arguing that the evidence was insufficient to convict as opposed to quarreling with the constitutional standards on which he expected the jury to be instructed. Certainly Barnes's written, pre-verdict Rule 29 motion (Vol. 1 at 351-359), which was then being argued, said nothing about the evidence being insufficient because the government did not prove the victims were convicted prisoners. And Barnes explicitly admits that the district court's denial of his motion was appropriate at that point. Barnes Br. 28.

In Barnes's view, the sufficiency problem did not arise until the jury was instructed that it was required to find that Barnes deprived the inmate-victims of their rights under the Eighth Amendment. Barnes Br. 29. If that is the case, then it was incumbent on Barnes to bring this deficiency to the district court's attention after the jury was so instructed and at a minimum, when Barnes filed his post-verdict motion for judgment of acquittal.

But Barnes's post-verdict Rule 29 motion, like his pre-verdict motion, was silent on this issue. Instead, he argued that the evidence was insufficient to demonstrate that defendants acted with "malicious or sadistic intent" or "willfully"; that a conviction based on the evidence presented would violate due process; and that the government had not overcome the deference given to jail administrators. Vol. 1 at 520, 531-540. Where, as here, a defendant challenges the

sufficiency of the evidence on specific grounds, “all grounds not specified in the motion are waived.” *United States v. Goode*, 483 F.3d 676, 681 (10th Cir. 2007) (quoting *United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir. 2003)). Because of this forfeiture, Barnes’s claim of insufficient evidence is reviewable only for plain error. *Id.* at 681 & n.1; accord *United States v. Schulte*, 741 F.3d 1141, 1148 (10th Cir. 2014); *Kimler*, 335 F.3d at 1141.

B. The Custodial Status Of The Inmate-Victims Is Not An Element Of The Offense That The Government Must Prove To The Jury, And The Jury Instructions Did Not Make It One

There was no error, plain or otherwise. It is apparent that neither of the statutes under which Barnes was convicted, 18 U.S.C. 241 and 242, requires proof of the custodial status of inmate-victims, and Barnes concedes as much. Barnes Br. 28. Furthermore, the jury instructions for Counts 1 through 3 embraced the Eighth Amendment’s cruel-and-unusual-punishment standard (Vol. 1 at 464, 467, 470-471, 473-474), but the jury was never instructed that it was required to make a determination of the victims’ custodial status.

Barnes invokes this Circuit’s law-of-the-case doctrine (Barnes Br. 29), which “hold[s] the government to the burden of proving each element of a crime as set out in a jury instruction to which it failed to object, even if the unchallenged jury instruction goes beyond the criminal statute’s requirements.” *United States v. Williams*, 376 F.3d 1048, 1051 (10th Cir. 2004) (citing *United States v. Romero*,

136 F.3d 1268, 1272-1273 (10th Cir. 1998)). Under this doctrine, *if*—without objection from the government—the jury had been instructed that, in order to find defendants guilty of the conspiracy and deprivation of rights counts, it must find beyond a reasonable doubt that the inmate-victims were convicted prisoners, then the government would be held to that requirement.

Barnes’s argument is baffling because the jury was given no such instruction. Cf. *Romero*, 136 F.3d at 1269 (unopposed jury instructions that government “most prove the non-Indian status of the alleged victims” made victims’ non-Indian status an element of government’s case). To be sure, as Barnes argues (Br. 30-32), the jury instructions for Counts 1 through 3 embraced Eighth Amendment standards. But the instructions assumed—based on the agreement of the government and both defendants—that Eighth Amendment standards applied. See Vol. 1 at 467, 473 (instructing jury that “[a]ll persons in custody have a constitutional right to be free from cruel and unusual punishment at the hands of correctional officers”). The jury was *never* instructed that it was required to make a determination of the victims’ custodial status. The law-of-the-case doctrine is inapposite.

Nor would an instruction requiring the jury to make such a determination have correctly stated the law. The custodial status of an inmate-victim is not a required element either under 18 U.S.C. 241 or 242 or to prove the underlying

Eighth Amendment violation. The custodial status of an inmate determines the choice of legal standards, but that choice is for the court. We are aware of no authority—and Barnes cites none—that requires the government to prove the custodial status of an inmate-victim beyond a reasonable doubt *to the jury* as a precursor to finding a constitutional violation. In *United States v. LaVallee*, 439 F.3d 670, 684-688 (10th Cir. 2006), for example, this Court upheld jury instructions given under 18 U.S.C. 241 and 242, which, as here, were based on Eighth Amendment standards, and those instructions did not require the jury to find that the victims were convicted prisoners.

C. Any Error Would Afford No Basis For Relief

Barnes does not challenge the jury instructions on the ground that the jury was instructed on the wrong standards: *i.e.*, that instead of (or in addition to) being instructed on cruel-and-unusual-punishment standards, the jury should have been instructed on the due process standard that defendants subjected the pretrial detainees to objectively unreasonable force. *Kingsley*, 135 S. Ct. at 2473. Of course, any challenge by Barnes to the instructions’ reliance on Eighth Amendment standards would be “invited error” for which appellate review is not available, given that the defense embraced the applicability of these standards, and Barnes requested *his own* Eighth Amendment instructions. See, *e.g.*, *United States v. Sturm*, 673 F.3d 1274, 1281 (10th Cir. 2012) (party is precluded by the invited-

error doctrine from arguing that the district court erred in adopting a proposition “that the party had urged the district court to adopt”).

Nonetheless, any such error, even if it had not been invited, would still afford no basis for relief. The Eighth Amendment standard sets a much higher bar for the government than a due process standard because the “unnecessary and wanton infliction of pain” standard requires the government to prove defendants’ mental state, see Part II.C., *supra*, while a due process standard does not. *Kingsley*, 135 S. Ct. at 2472; see *Porro v. Barnes*, 624 F.3d 1322, 1325-1326 (10th Cir. 2010) (recognizing that Eighth Amendment standards are “more restrictive” for prisoners). As the Supreme Court has explained, “[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.” *Whitley*, 475 U.S. at 319.

But, as the Court further noted, a determination that a use of force is “unnecessary” is closely related to one that it is “unreasonable.” *Whitley*, 475 U.S. at 319. Indeed, virtually the same factors cited by the Court in *Kingsley* as bearing on the reasonableness of the force used, were identified in the instructions here as factors for the jury to consider in determining whether defendants engaged in the unnecessary and wanton infliction of pain. Compare Vol. 1 at 467, 474 (“In making this determination, you should consider all the circumstances of the incident, including the need for the application of force, the amount of force used

in response to that need, the extent of injury suffered, the threat reasonably perceived by the officers, and any efforts made to temper the severity of the forceful response.”), with *Kingsley*, 135 S. Ct. at 2473 (citing factors bearing on reasonableness).

That the government shouldered the *additional* burden of proving defendants’ mental state is hardly grounds for Barnes to complain. Moreover, in finding defendants guilty of violating inmates’ rights to be free from cruel and unusual punishment, the jury necessarily found that defendants inflicted “punishment” on the inmates, which due process forbids with respect to pretrial detainees. *Schall v. Martin*, 467 U.S. 253, 269 (1984). Given the overwhelming evidence that Barnes engaged in and supervised both the wanton and unnecessary use of force *and* the objectively unreasonable use of force, any error could not have affected his “substantial rights.” See *United States v. McGlothin*, 705 F.3d 1254, 1267 (10th Cir.), cert. denied, 133 S. Ct. 2406 (2013). Moreover, where an error does not “seriously affect[] the fairness, integrity, or public reputation of judicial proceedings,” an insufficient-evidence claim will fail on the fourth requirement of the plain-error standard. *Goode*, 483 F.3d at 682 (citation omitted); see *United States v. Olano*, 507 U.S. 725, 736 (1993). Where, as here, the evidence was overwhelming that Barnes violated the victims’ constitutional rights *under any*

standard, the final plain-error requirement is not satisfied. See *Johnson v. United States*, 520 U.S. 461, 469-470 (1997).

VI

THE JURY WAS PROPERLY INSTRUCTED ON THE EIGHTH AMENDMENT STANDARDS

Barnes argues that the district court misdescribed the elements of the conspiracy and deprivation of rights counts by instructing the jury that it need find only that Barnes acted “maliciously *or* sadistically,” when both findings were required. Barnes Br. 36-50.

A. *Barnes’s Challenge To The Jury Instructions’ “Maliciously Or Sadistically” Formulation Is Subject To Review Only For Plain Error*

Although Barnes claims that this issue is subject to de novo review because he objected to the district court’s Eighth Amendment instructions, Barnes never brought to the district court’s attention his concern with the instructions’ use of “maliciously *or* sadistically” in the disjunctive, and never objected to the instructions on that ground. Accordingly, Barnes’ challenge to this aspect of the instructions is reviewable only for plain error, and there was no such error.

The government and Barnes offered competing proposed jury instructions on Eighth Amendment standards, but the “maliciously *or* sadistically” formulation did not appear until the district court provided the parties its own instructions (Vol. 1 at 467, 474 (emphasis added)), which were discussed during the jury instruction

conference (Vol. 2 at 2283-2303). See Vol. 1 at 163, 167-168, 170, 172-173, 345-346, 348-349 (government's proposed instructions); Vol. 1 at 278, 333, 398 (Barnes's proposed instructions). During the conference, neither defendant argued that the court's proposed Eighth Amendment instructions incorrectly used the phrase "maliciously *or* sadistically" (Vol. 1 at 467, 474 (emphasis added)), or objected to the instructions on that ground. See Vol. 2 at 2292-2294, 2297-2298; see also Vol. 2 at 2343-2344 (defense objection following court's reading of jury instructions).

Rule 30(d) of the Federal Rules of Criminal Procedure provides that "[a] party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the *specific objection and the grounds for the objection* before the jury retires to deliberate." Fed. R. Crim. P. 30(d) (emphasis added). It is settled that "[i]n the absence of any objection that puts the district court clearly on notice as to the asserted inadequacy of a proposed jury instructions," this Court will review the instruction only for plain error. *United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998). "A generalized objection to an instruction is insufficient to preserve a specific objection on appeal." *United States v. Davis*, 284 F. App'x 564, 567 (10th Cir. 2008) (unpublished) (citing *United States v. Bornfield*, 184 F.3d 1144, 1146 n.2 (10th Cir. 1999)); see also *United States v. Begay*, 550 F. App'x 604, 610 (10th Cir.

2013) (unpublished). That Barnes requested an alternate instruction is not enough to “put the district court clearly on notice as to the asserted inadequacy of the jury instruction.” *United States v. Magleby*, 241 F.3d 1306, 1309 n.1 (10th Cir. 2001) (citation omitted); accord *Jones v. United States*, 527 U.S. 373, 388 (1999).

Because Barnes failed to object to the instructions on the ground on which he now complains, this issue is reviewed only for plain error.

B. The Jury Instructions’ Use Of “Maliciously Or Sadistically” Was Not Plain Error

The jury instructions’ use of “maliciously or sadistically” was not error, much less plain error. To be sure, the phrase appears more commonly in the conjunctive, see *Hudson v. McMillian*, 503 U.S. 1, 6 (1992); *Whitley v. Albers*, 475 U.S. 312, 320 (1986), but there is no requirement that a jury considering whether a use of force is excessive in violation of the Eighth Amendment specifically be instructed that it must find that a defendant acted both “maliciously” and “sadistically.”

It is the “unnecessary and wanton infliction of pain” that “constitutes cruel and unusual punishment forbidden by the Eighth Amendment.” *Whitley*, 475 U.S. at 319 (internal citations omitted) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)); see Vol. 1 at 467, 474 (instructing jury on requirement of “unnecessary and wanton infliction of pain”). The Supreme Court has used the phrase “maliciously and sadistically” to elaborate on the meaning of the “unnecessary and

wanton” requirement, explaining the dichotomy between force that is constitutional and force that is not. As the Court has elucidated, the “core judicial inquiry” is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson*, 503 U.S. at 7; *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (per curiam).

The inquiry is thus focused on whether a defendant’s purpose in using force was a good-faith effort to maintain order or whether it was to cause harm. As the jury was correctly instructed here, many factors shed light on this inquiry, see *Hudson*, 503 U.S. at 7; *Whitley*, 475 U.S. at 321; Vol. 2 at 467, 474 (citing factors), and so long as the instructions convey this central issue, there is no error. See *United States v. Powell*, 226 F.3d 1181, 1193 (10th Cir. 2000) (citation omitted) (when considering challenge to jury instructions, this Court reviews record “as a whole to determine whether the instructions state the law which governs and provide[] the jury with an ample understanding of the issues and standards applicable”).

That a violation of Eighth Amendment standards requires no talismanic recitation of the phrase “maliciously *and* sadistically” in the jury instructions is evident from the various formulations of Eighth Amendment standards that have been incorporated into pattern jury instructions and upheld by courts. For example, the Fifth Circuit’s pattern jury instruction for Eighth Amendment

(Excessive Force) claims uses the same disjunctive phrasing as the instruction given here. See Fifth Circuit Pattern Jury Instructions (Civil Cases) No. 10.7 (2014) (“Whether a use of force against a prison inmate is excessive depends on whether the force was applied in a good-faith effort to maintain or restore discipline, or whether it was done maliciously or sadistically to cause harm.”).

The Eleventh Circuit uses “maliciously” alone and “maliciously *or* sadistically.” Eleventh Circuit Civil Pattern Jury Instructions No. 5.3 (2013) (“You must decide whether any force used in this case was excessive based on whether the force, if any, was applied in a good-faith effort to maintain or restore discipline, or instead whether it was applied *maliciously* to cause harm. * * * Of course, officers may not *maliciously or sadistically* use force to cause harm regardless of the significance of the injury to the prisoner.”) (emphasis added). The Seventh Circuit’s instructions do not use either word. Federal Civil Jury Instructions of Seventh Circuit No. 7.15 (2005 rev.).

Variations in the formulation also have been upheld by the courts. See, *e.g.*, *United States v. Daniels*, 281 F.3d 168, 179-180 n.10 (5th Cir. 2002) (citing with approval jury instruction using “maliciously or sadistically” in case charging defendants with violations of 18 U.S.C. 242). Another court found no plain error where the trial court instructed the jury that it must consider whether force was

used “maliciously for the very purpose of causing harm.” *Baker v. Delo*, 38 F.3d 1024, 1026 (8th Cir. 1994).

Barnes argues that without the “and” connecting these two words there was a danger that the jury would not have found that Barnes acted as a “sadist.” Barnes Br. 48. Barnes has no reason to worry. He is wrong that there is no violation of the Eighth Amendment unless the defendant is “engaging in extreme or excessive cruelty or delighting in cruelty.” Barnes Br. 48 (quoting Vol. 1 at 477). The Supreme Court repeatedly has made clear that among the “unnecessary and wanton” inflictions of pain that violate the Eighth Amendment are “those that are ‘totally without penological justification.’” *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citations omitted); accord *Hope v. Pelzer*, 536 U.S. 730, 737 (2002). As discussed above, the multiple incidents involving the use of force on restrained and non-resisting inmates were “totally without penological justification.” There is no need for these incidents also to have involved “extreme or excessive cruelty” or for Barnes to have delighted in them for the jury to find that Barnes violated the Eighth Amendment.

Even if it were required that Barnes have acted “sadistically,” the evidence at trial overwhelmingly established that he did. Barnes’s own direct physical assaults on inmates—and his supervision and tolerance of assaults on inmates—when there was no legitimate reason for the use of force, constituted “excessive

cruelty.” See, e.g., *United States v. Miller*, 477 F.3d 644, 647 (8th Cir. 2007) (reasonable jury could conclude that defendant’s “unjustified attack” on prisoner “constituted ‘excessive cruelty’ and was therefore sadistic”).¹⁴ And the jury also heard evidence that Barnes “bragg[ed]” about the meet-and-greets “like he enjoyed the physical contact of the meet and greet” and “[t]hat the inmate was injured.” Vol. 2 at 1523-1524.

Thus, even if the instructions constituted plain error, which they did not, Barnes cannot show that the error affected “substantial rights,” which “usually means that the error ‘must have affected the outcome of the district court proceedings.’” *United States v. Cotton*, 535 U.S. 625, 632 (2002) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). Nor would such an error have “seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings,” where, as here, the evidence that Barnes acted both maliciously *and* sadistically is overwhelming. See *Johnson v. United States*, 520 U.S. 461, 469-470 (1997).

¹⁴ Barnes argues that there was no evidence that he personally “applied unconstitutional force to the four relevant inmates” during the meet-and-greets. Barnes Br. 47. Apart from overlooking the abundant evidence that he explicitly directed the violence that occurred during certain meet-and-greets, Barnes inexplicably disregards the evidence regarding his personal participation in the assaults on Armstead and Murphy.

C. The District Court Properly Instructed The Jury Regarding The Deference Owed To Jail Administrators

Barnes also contends that the district court should have given his proposed jury instruction on the deference afforded prison officials (see Vol. 1 at 280), and that the district court's instruction on the issue was incomplete and inaccurate.

Barnes Br. 36-37, 41-44. This claimed error is not listed in Barnes's statement of the issues. See Barnes Br. 1-2.

This Court reviews a district court's refusal to give a requested jury instruction for abuse of discretion. *United States v. Faust*, 795 F.3d 1243, 1251 (10th Cir. 2015). The Court will reverse "only if prejudice results" from that refusal. *Ibid.* (citation omitted).

There was no abuse of discretion here. At the jury instruction conference, both sides offered variations on the "deference" theme. See Vol. 2 at 2285-2286 (government); Vol. 2 at 2298 (Barnes) (citing Vol. 1 at 280). The district court struck a balance between the proposals, instructing the jury with respect to both the conspiracy and deprivation of rights counts:

In considering these factors, you should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a jail. It does not insulate from review actions taken in bad faith and for no legitimate purpose.

Vol. 1 at 467, 474. These statements are taken nearly verbatim from *Whitley*, 475 U.S. at 322.

Barnes complains that the court did not also include his proposed statement that the deference to prison officials extends to “prophylactic or preventive measures intended to reduce the incidence” of breaches of order. Barnes Br. 41 (quoting *Whitley*, 475 U.S. at 322). This concept, however, is already clear from the instructions. The jury was instructed that it should defer to prison officials “in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security,” and that it should consider factors such as “the need for the application of force” and “the threat reasonably perceived by the officers.” Vol. 1 at 467, 474.

Again, the question for this Court is whether “as a whole, the instructions correctly state the governing law and provide the jury with an ample understanding of the issues and the applicable standards.” *United States v. Visinaiz*, 428 F.3d 1300, 1308 (10th Cir. 2005). They did. The district court did not abuse its discretion, and the instruction it gave did not prejudice defendants.

VII

THE SENTENCES THE DISTRICT COURT IMPOSED ON BOTH DEFENDANTS WERE PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE

The district court erred in granting significant, unexplained, and unwarranted downward variances from Barnes’s and Brown’s advisory Sentencing Guidelines range of 70-87 months. Barnes’s sentence of 12 months’ imprisonment and

Brown's sentence of 6 months' imprisonment are less than 20% (Barnes) and 10% (Brown) of the bottom of the recommended Guidelines range. These are extraordinarily light and unjustified sentences for jail administrators who engaged in repeated flagrant misconduct, including physical abuse of inmates, in willful disregard of inmates' constitutional rights.

This Court reviews sentences for reasonableness under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 41, 46 (2007); *United States v. Smart*, 518 F.3d 800, 806 (10th Cir. 2008). Appellate review of reasonableness includes both a procedural component, which focuses on "whether the district court committed any error in calculating or explaining the sentence," and a substantive component, which focuses on "whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. 3553(a)." *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009) (citations omitted).¹⁵ A failure to adequately explain the chosen sentence is

¹⁵ Among the statutory factors to be considered are "the nature and circumstances of the offense and the history and characteristics of the defendant"; the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training"; the kinds of sentence and the sentencing range established under the sentencing guidelines; and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(1), (2), (4), and (6).

procedural error. *Smart*, 518 F.3d at 803 (citing *Gall*, 552 U.S. at 50). As discussed below, the sentences imposed on Barnes and Brown were both procedurally and substantively unreasonable. This Court should vacate both sentences and remand for resentencing.

A. *Defendants' Sentences Were Procedurally Unreasonable*

The district court violated 18 U.S.C. 3553(c)(2) and committed clear procedural error when it failed to state both in court and in a written statement the *specific* reasons for imposing sentences that varied so far below the Guidelines range.

During each sentencing hearing, government counsel objected to the variance and asked the district court to enumerate and apply the Section 3553(a) factors to the specific cases to create an appropriate record for appeal. Vol. 2 at 1095-1096, 1098-1099, 1138. The court denied the government's request each time, remarking during Brown's hearing: "I think I've been affirmed on that before, that I'm not required to do it." Vol. 2 at 1138. The district court was incorrect: it was required to do so.

Section 3553(c) provides in part that:

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

* * * * *

(2) * * * is outside the range, described in subsection (a)(4) [the Guidelines range], the *specific reason* for the imposition of a sentence different from that described, which reasons must also be stated with *specificity* in a statement of reasons form.

18 U.S.C. 3553(c) (emphasis added). “[W]hen imposing a sentence *outside* the Guidelines range, the * * * statute requires a district court to state ‘the *specific* reason for the imposition of a sentence . . . , which reasons must also be stated with specificity in the written order of judgment and commitment.’” *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1200 (10th Cir. 2007) (emphasis omitted) (quoting 18 U.S.C. 3553(c)(2)); accord *United States v. Fraser*, 647 F.3d 1242, 1246 (10th Cir. 2011). The Supreme Court has explained that “a major departure should be supported by a more significant justification than a minor one.” *Gall*, 552 U.S. at 50.

Accordingly, this Court has held that the district court commits procedural error when it “fail[s] to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *United States v. Mendoza*, 543 F.3d 1186, 1191 (10th Cir. 2008) (citing *Gall*, 552 U.S. at 51). To satisfy Section 3553(c)(2), the district court “must describe the salient facts of the

individual case, including particular features of the defendant or of his crime, and must explain for the record how these facts relate to the § 3553(a) factors.” *Id.* at 1192.

In *Mendoza*, the government argued that the sentencing court did little more than recite the Section 3553(a) factors, “without specifically connecting them to the facts of the case in order to explain why they supported a downward variance.” 543 F.3d at 1192. This Court agreed. Although the district court’s statement in that case “contained references to most of the relevant factors, it did not articulate one *fact* about Mendoza or his crime.” *Ibid.* (footnote omitted). The Court stated that, lacking grounding in “the particularized facts of the case or Mendoza’s specific crime,” the district court’s statements about why it chose the lesser sentence it imposed “did not amount to ‘specific reasons’ for a downward variance.” *Ibid.* This Court also explained that a “specific” statement pursuant to Section 3553(c)(2) “must be particularized rather than general and must address the facts of the individual case.” *Id.* at 1194. Likewise, the Court concluded that the failure to include the specific reasons for a variance in a written statement of reasons was clear error. *Id.* at 1195-1196.¹⁶

¹⁶ Because in *Mendoza* the government had not raised below the procedural sufficiency of the district court’s verbal statement of reasons or challenge the court’s failure to provide written reasons, however, this Court reviewed only for
(continued...)

The district court's explanation here of its reasons for varying so dramatically downward from the advisory Guidelines range is wholly inadequate under these standards. While the court asked various questions of both sides on matters that are relevant under the statutory factors, it is impossible to tell from the court's rote statements what the court's actual reasons for granting the downward variances were, other than the fact that these defendants had no criminal records and were unlikely to re-offend. Vol. 2 at 1089-1090, 1093-1094, 1160-1162, 1165-1166. As in *Mendoza*, the district court "did little more than recite the § 3553(a) factors, without specifically connecting them to the facts of the case." 543 F.3d at 1192. The court's written Statements of Reasons for Barnes and Brown, which provide explanations nearly identical to those provided in open court, fare no better. See Supp. R. 3-4, 7-8.

Finally, the district court was required to make an "individualized assessment" of the facts presented. *Gall*, 552 U.S. at 50. The reasons the court gave for the sentences imposed on Barnes and Brown, however, were virtually identical, even though these two defendants are differently situated and, indeed, the court imposed a sentence on Barnes that was twice as long as the one it imposed on Brown. See *United States v. Chavez*, 723 F.3d 1226, 1232 (10th Cir. 2013) (a

(...continued)

plain error, and concluded that the government failed to show how the errors affected its substantial rights. 543 F.3d at 1190-1191, 1194-1197.

district court commits procedural error “by failing to offer an individualized assessment of how the factors apply in a particular criminal defendant’s case”).

B. Defendants’ Sentences Were Substantively Unreasonable

Although this Court should vacate and remand for resentencing because of procedural unreasonableness, the sentences are also substantively unreasonable. In the interests of judicial economy and to provide guidance for the district court on remand, the government urges this Court to address this issue. See *United States v. Morgan*, Nos. 13-6025, 13-6052, 2015 WL 6773933, at *21 (10th Cir. Nov. 6, 2015) (unpublished) (addressing substantive reasonableness of sentence, despite procedural error, “because we easily conclude the sentence is substantively unreasonable, and in this case intolerable”).

Appellate review of sentences for substantive reasonableness focuses on “whether the length of the sentences is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a).” *Friedman*, 554 F.3d at 1307 (citation omitted). A reviewing court may take into account both the degree of variance from the Guidelines range, *Gall*, 552 U.S. at 47, and whether the record distinguishes defendants from “run-of-the-mill” offenders, *Friedman*, 554 F.3d at 1309.

Barnes and Brown were found guilty of conspiring to violate—and of violating—the rights of inmates in their custody. As the Supreme Court has

recognized, the Sentencing Guidelines “seek to embody the § 3553(a) considerations, both in principle and in practice,” and “it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.” *Rita v. United States*, 551 U.S. 338, 350 (2007). There is nothing in the nature and circumstances of these serious offenses, which include physical abuse of inmates in defendants’ care and custody, or the defendants’ personal characteristics that the district court identified, that justifies these very light sentences. Like many law enforcement officers convicted of violating 18 U.S.C. 241 and 242, Barnes and Brown have no prior criminal histories and view termination of employment as punishment enough. Yet the Guidelines calculations for these defendants already take into account their lack of criminal histories by placing them into a criminal history category of I. Just like many law enforcement officers who willfully deprived individuals of their constitutional rights (see cases cited below), these defendants’ crimes warrant significant prison sentences.

As this Court has recognized, “in many instances, committing a crime while acting under color of law will result in a higher sentence * * * rather than a lower sentence.” *United States v. LaVallee*, 439 F.3d 670, 708 (10th Cir. 2006). Defendants’ positions as the first and second in command at the jail hardly provide a compelling reason to impose *shorter* sentences—quite the opposite. Not only did

Barnes and Brown personally assault inmates, but they abused their roles as supervisors in directing and encouraging employees to carry out violent conduct, instructing them to prepare inaccurate and misleading incident reports, and threatening them with termination or other retaliation for accurately reporting misconduct. An officer who uses his position of authority to induce his subordinates to injure inmates is certainly at least as culpable as the jailers doing his bidding.

The Eleventh Circuit's decision in *United States v. McQueen*, 727 F.3d 1144 (2013), is particularly instructive. In that case, the district court had sentenced a sergeant, Alexander McQueen, to a 12-month prison term and a corrections officer, Steven Dawkins, to a 1-month prison term for a serious assault on several inmates—both sentences far below the advisory Guidelines ranges of 151-188 months for McQueen and 15-21 months for Dawkins. *Id.* at 1150. The Eleventh Circuit held that the sentences were “substantively unreasonable because they are wholly insufficient to achieve the purposes of sentencing set forth by Congress in § 3553(a).” *Id.* at 1157. “For starters,” the court explained, “the sentences of McQueen and Dawkins completely fail to ‘reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.’” *Ibid.* (quoting 18 U.S.C. 3553(a)(2)(A)). The Eleventh Circuit emphasized that a violation of 18 U.S.C. 241 is “a particularly serious offense,” *ibid.*, and that “[t]he

evils against which this civil rights statute is directed especially include correctional officers who flagrantly beat inmates * * * placed by the law in their charge,” *id.* at 1158.

The short sentences imposed here are palpably inadequate for a jail’s first and second in command, who inflicted on inmates as a matter of policy brutal assaults to scare them into submission and then intimidated staff not to report or document their misconduct. It should not need to be said, but while Barnes makes light of the injuries the inmate-victims suffered (Br. 49-50), head-first and face-first slams to the concrete are serious offenses that inflict significant pain and present an obvious risk of serious injury. To the extent the district court implied that it is a mitigating factor that “a culture of fear and intimidation is probably necessary to keep control in a jail” (Vol. 2 at 1077, 1142), the court condoned a culture of gratuitous violence that went well past any legal or civilized line.

The district court’s failure to address how key Section 3553(a) factors supported its decision to vary so far downward from the advisory Guidelines range—rather than just list the factors (Vol. 2 at 1094, 1165-1166)—underscores the substantive unreasonableness of these sentences. For example, the court’s “failure to explain how the offense’s severity factored into its decision to issue a lower sentence” rendered the sentences unreasonable. See *United States v. Hooper*, 566 F. App’x 771, 773 (11th Cir. 2014) (unpublished) (finding that

district court did not adequately consider the seriousness of Hooper's conviction under 18 U.S.C. 242, "particularly in light of Hooper's abuse of police power and the vulnerability of a restrained arrestee"). Equally important, although government counsel urged the district court to impose substantial sentences for deterrence purposes (Vol. 2 at 1087-1089, 1137, 1143), the court never explained whether or how its sentences would "afford adequate deterrence to criminal conduct," 18 U.S.C. 3553(a)(2)(B), rather than just deterrence of Barnes and Brown specifically. See *Morgan*, 2015 WL 6773933, at *22-23 (finding sentence unreasonable where district court failed to consider how it would satisfy need for "general deterrence" or need for sentence "to promote respect for the law and to provide just punishment for the offense").

This was also a key failing of the below-Guidelines sentences imposed in *McQueen*. Recognizing that "[g]eneral deterrence . . . is one of the key purposes of sentencing," the Eleventh Circuit ruled that these sorts of extremely light sentences "wholly fail to adequately deter criminal conduct." *McQueen*, 727 F.3d at 1158 (citation omitted). As the court explained, "[p]risoners are uniquely vulnerable to officials who control every aspect of their lives," yet "violent abuse by corrections officers against inmates may easily go undetected and unpunished." *Ibid.* (citation omitted). Because "[t]he ability to unearth these crimes by law enforcement officers in a prison setting is particularly difficult, * * * the extraordinarily

lenient sentences in this case sap the goal of general deterrence.” *Id.* at 1158-1159.

As the Eleventh Circuit correctly observed, “the federal courts have treated violations of § 241 by police or corrections officers as serious crimes meriting far higher sentences than the sentences issued here.” *Id.* at 1160 (citing cases).¹⁷

The district court asked questions during the sentencing hearings that suggested it was concerned that Barnes and Brown, as former corrections officers, would be vulnerable in prison. The court did not cite this risk as a reason for its decision to vary from the Guidelines range, but it would not have justified these huge variances in any event. Courts have used susceptibility to abuse in prison as a basis for departing downward in situations where media coverage of the incident

¹⁷ Federal courts regularly impose terms of imprisonment on law enforcement and corrections officers for violations of 18 U.S.C. 241 or 242—even on non-supervisory officers—that are significantly longer than the sentences imposed here. See, e.g., *United States v. Wilson*, 686 F.3d 868 (8th Cir. 2012) (120 months), cert. denied, 113 S. Ct. 873 (2013); *United States v. McCoy*, 480 F. App’x 366 (6th Cir. 2012) (unpublished) (120 months); *United States v. Owens*, 437 F. App’x 436 (6th Cir. 2011) (unpublished) (63 months); *United States v. Carson*, 560 F.3d 566 (6th Cir. 2009) (33 months); *United States v. Lopresti*, 340 F. App’x 30 (2d Cir. 2009) (unpublished) (51 months); *United States v. Miller*, 477 F.3d 644 (8th Cir. 2007) (78 months); *LaVallee*, 439 F.3d at 679 (41 months and 30 months); *United States v. Bailey*, 405 F.3d 102 (1st Cir. 2005) (41 months). Even the 21-month sentence given the defendant in *United States v. Strange*, 370 F. Supp. 2d 644 (N.D. Ohio 2005), exceeds the sentences imposed here, despite the district court’s decision in that case to vary downward from the Guidelines range in part because in the jail in which the defendant worked, “punitive beatings were apparently condoned and even ordered by superior officers.” *Id.* at 651. In this case, Barnes and Brown *were* the superior officers.

was overwhelming, such as the case involving Rodney King, see *Koon v. United States*, 518 U.S. 81, 111-112 (1996), but generally have declined to depart absent exceptional circumstances, which are not present here. See, e.g., *United States v. Thames*, 214 F.3d 608, 614 (5th Cir. 2000) (pre-*Booker* case rejecting downward departure for former police officer because of absence of “extenuating circumstances”); *United States v. Strange*, 370 F. Supp. 2d 644, 649 (N.D. Ohio 2005) (rejecting downward departure for former deputy sheriff because his was “not an exceptional case”); cf. *LaVallee*, 439 F.3d at 708 (upholding downward departure for prison guards in notorious case “outside the heartland” of the Guidelines while recognizing that “[t]he fact that police officers are susceptible to abuse in prison does not, alone, warrant a downward departure”). As the Fifth Circuit stated, “a defendant’s status as a law enforcement officer is often times more akin to an aggravating as opposed to a mitigating sentencing factor, as criminal conduct by a police officer constitutes an abuse of a public position.” *Thames*, 214 F.3d at 614. Although these cases involved downward departures rather than variances, recognition of the aggravated—not mitigating—nature of defendants’ offenses similarly should have guided the district court’s exercise of discretion here.

Finally, the district court stated at both sentencing hearings that it had examined its prior history of sentencing in deprivation of rights cases and was

satisfied that the sentences it was imposing in Barnes's and Brown's cases would avoid unwarranted sentencing disparities. Because the court did not provide any information about the cases to which it was referring, that statement cannot support the sentences imposed in this case. Even apart from that, the statement is flawed because "the need to avoid unwarranted sentencing disparities among defendants," 18 U.S.C. 3553(a)(6), concerns *national* disparities between defendants with similar criminal histories convicted of similar criminal conduct. *United States v. Conatser*, 514 F.3d 508, 521 (6th Cir. 2008). Here, the district court's sentences actually *create* disparities with defendants convicted of similar criminal conduct across the county.

CONCLUSION

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

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests oral argument in this case.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations permitted by this Court in its order dated November 9, 2015, because it contains 24,719 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 2007 in 14-point Times New Roman font.

s/ Bonnie I. Robin-Vergeer
BONNIE I. ROBIN-VERGEER
Attorney

Date: November 18, 2015

CERTIFICATE OF DIGITAL SUBMISSION

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

s/ Bonnie I. Robin-Vergeer
BONNIE I. ROBIN-VERGEER
Attorney

Date: November 18, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS PLAINTIFF- APPELLEE/CROSS-APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I certify that on November 19, 2015, I will cause seven paper copies of the same to be sent by Federal Express overnight to the Court.

s/ Bonnie I. Robin-Vergeer
BONNIE I. ROBIN-VERGEER
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ADDENDUM

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18 U.S.C. 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

- (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
- (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 U.S.C. 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense,

the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission[,] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.— Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.— Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Federal Rule of Evidence 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Federal Rule of Evidence 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

ATTACHMENT A

AO 245B (Rev. 09/11) Judgment in Criminal Case
Sheet 2 Imprisonment

Judgment Page 2 of 5

DEFENDANT: Raymond A. Barnes
CASE NUMBER: CR-13-00017-001-RAW

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 12 months and 1 day on Count 1, 12 months and 1 day on Count 2 and 12 months and 1 day on Count 3 of the Indictment. The terms imposed on each of Counts 1, 2 and 3 shall be served concurrently.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 12 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

AO245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 3 Supervised Release

Judgment Page 3 of 5

DEFENDANT: Raymond A. Barnes
CASE NUMBER: CR 13 00017 001 RAW

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

2 years on each of Counts 1, 2 and 3 of the Indictment. The terms of supervised release shall run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) The defendant shall support his or her dependents and meet other family responsibilities;
- 5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) The defendant shall notify the probation officer within seventy two hours of being arrested or questioned by a law enforcement officer;
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the Probation Office.

AO 245B (Rev. 09/11) Judgment in a Criminal Case
 Sheet 5 Criminal Monetary Penalties

Judgment Page 4 of 5

DEFENDANT: Raymond A. Barnes
 CASE NUMBER: CR 13 00017 001 RAW

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$ 0.00	\$ 0.00

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

TOTALS \$ _____ \$ _____

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Raymond A. Barnes
CASE NUMBER: CR-13-00017-001-RAW

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:
Said special assessment of \$300 shall be paid through the United States Court Clerk for the Eastern District of Oklahoma, P.O. Box 607, Muskogee, OK 74402, and is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

ATTACHMENT B

UNITED STATES DISTRICT COURT

Eastern District of Oklahoma

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CRIMINAL CASE

V.

CHRISTOPHER A. BROWN

Case Number: CR 13 00017 002 RAW

USM Number: 06156 063

J. Lance Hopkins

Defendant's Attorney

Date of Original Judgment: March 11, 2015
 (Or Date of Last Amended Judgment)

Reason for Amendment:

- Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- Direct Motion to District Court Pursuant 28 U.S.C. § 2255 or 18 U.S.C. § 3559(c)(7)
- Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- pleaded guilty to count(s) _____
- pleaded nolo contendere to count(s) _____ which was accepted by the court.
- was found guilty on count(s) *1, 2 and 4 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:241	Conspiracy Against Rights	May 2011	1
18:242	Deprivation of Rights Under Color of Law	March 26, 2010	2
18:1001	False Statement	September 28, 2011	4

The defendant is sentenced as provided in pages 2 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) 3 of the Indictment

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 11, 2015

Date of Imposition of Judgment

E.O.D. March 25, 2015

Date

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
Sheet 2 Imprisonment

(NOTE: Identify Changes with Asterisks (*))

Judgment Page 2 of 5

DEFENDANT: Christopher A. Brown
CASE NUMBER: CR-13-00017-002-RAW

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 6 months on Count 1, 6 months on Count 2 and 6 months on Count 4 of the Indictment. The terms imposed on each of Counts 1, 2 and 4 shall be served concurrently.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Christopher A. Brown
CASE NUMBER: CR-13-00017-002-RAW

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
3 years on each of Counts 1, 2 and 4 of the Indictment. The terms of supervised release shall run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) The defendant shall support his or her dependents and meet other family responsibilities;
- 5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) The defendant shall notify the probation officer within seventy two hours of being arrested or questioned by a law enforcement officer;
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.
- 14) The defendant shall submit to urinalysis testing as directed by the Probation Office.

DEFENDANT: Christopher A. Brown
CASE NUMBER: CR-13-00017-002-RAW

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

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 not later than _____, or
 in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
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