No. 22-1699

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTHONY BOEN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS APPELLEE

DAVID CLAY FOWLKES
United States Attorney

BRANDON T. CARTER
Assistant United States Attorney
United States Attorney's Office
Western District of Arkansas
414 Parker Ave
Fort Smith, Arkansas 72901
(479) 783-5125

KRISTEN CLARKE
Assistant Attorney General

ELIZABETH P. HECKER
JASON LEE
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-1915

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Defendant-appellant Anthony Boen, the elected Sheriff of Franklin County, Arkansas, violently assaulted two pretrial detainees while they were being held in the county jail. A jury convicted Boen under 18 U.S.C. 242 of depriving those detainees of their constitutional right to be free from unreasonable force. The district court imposed concurrent sentences of 48 months' imprisonment.

On appeal, Boen challenges two evidentiary rulings by the district court, the legal standard used in a jury instruction defining "bodily injury," the sufficiency of the evidence showing that he had caused the two pretrial detainees to suffer bodily injury, the application of an enhancement under the Sentencing Guidelines for obstruction of justice, and the substantive reasonableness of his sentence. Each of these arguments lacks merit. The court did not err in making the evidentiary rulings that Boen challenges. Nor did the court err, much less plainly, in giving the jury instruction regarding bodily injury. There was abundant evidence establishing that Boen had caused his victims bodily injury. And finally, Boen's obstructive actions justified application of the sentencing enhancement, and none of Boen's arguments overcomes the presumption of reasonableness accorded to his within-Guidelines sentence.

This Court should affirm Boen's convictions and sentence. Because the issues presented on appeal are straightforward, oral argument is unnecessary.

TABLE OF CONTENTS

PAGE

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

GUIDELINES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-1699

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTHONY BOEN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This appeal is from the entry of final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered its final judgment against defendant-appellant Anthony Boen on March 23, 2022. Boen timely appealed on March 31, 2022. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether the district court abused its discretion by preventing Boen from eliciting testimony that would have explained why one of his victims had been shackled to a bench at the time Boen assaulted him.

United States v. *Monteleone*, 77 F.3d 1086 (8th Cir. 1996)

2. Whether the district court erred in admitting copies of the Franklin County Jail's use-of-force and inmates' rights policies.

United States v. *Proano*, 912 F.3d 431 (7th Cir. 2019)

United States v. *Brown*, 934 F.3d 1278 (11th Cir. 2019), cert. denied, 140 S. Ct. 2826 (2020)

United States v. *Rodella*, 804 F.3d 1317 (10th Cir. 2015), cert. denied, 137 S. Ct. 37 (2016)

3. Whether the district court plainly erred when instructing the jury that the element of "bodily injury" in 18 U.S.C. 242 is satisfied where the victim suffered "injury to the body" or "physical pain."

United States v. *Finney*, No. 21-10558, 2021 WL 5984905 (11th Cir. Dec. 16, 2021) (per curiam)

United States v. *Perkins*, 470 F.3d 150 (4th Cir. 2006)

United States v. *LaVallee*, 439 F.3d 670 (10th Cir. 2006)

United States v. *Bailey*, 405 F.3d 102 (1st Cir. 2005)

4. Whether the evidence was sufficient to support a finding that Boen's assaults of pretrial detainees resulted in bodily injury.

United States v. *Blakeney*, 876 F.3d 1126 (8th Cir. 2017),
cert. denied, 139 S. Ct. 98 (2018)

5. Whether the district court erred in applying a sentencing enhancement for obstruction of justice.

Sentencing Guidelines § 3C1.1

United States v. *Shaw*, 965 F.3d 921 (8th Cir. 2020),
cert. denied, 141 S. Ct. 1248, and 141 S. Ct. 1253 (2021)

United States v. *McMannus*, 496 F.3d 846 (8th Cir. 2007),
abrogated on other grounds by *Pepper* v. *United States*, 562 U.S. 476 (2011)

6. Whether Boen's sentence was substantively reasonable.

United States v. *Davis*, 20 F.4th 1217 (8th Cir. 2021)

United States v. *Vera-Gutierrez*, 964 F.3d 733 (8th Cir. 2020),
cert. denied, 141 S. Ct. 1252 (2021)

STATEMENT OF THE CASE

1. Procedural History

A federal grand jury in the Western District of Arkansas returned a three-count indictment against Boen, charging him with willfully depriving three pretrial detainees of their constitutional right to be free from the use of unreasonable force by a law enforcement officer, in violation of 18 U.S.C. 242. After a six-day trial, the jury convicted Boen on two of those three counts—specifically, the counts

relating to pretrial detainees Brandon English and Zachary Greene. The district court sentenced Boen to two terms of imprisonment of 48 months, to run concurrently. The court also imposed a two-year term of supervised release, a fine of $4800, and a special assessment of $200. The court entered judgment on March 23, 2022. Boen timely appealed.

2. Factual Background

a. Defendant-appellant Anthony Boen was the elected Sheriff of Franklin County, and in that capacity, he oversaw the Franklin County Jail. Sent. Tr. 114-115.[1] During the time period in question, the jail had a policy governing the use of force by detention officers. Tr., Vol. II, 409; Tr., Vol. III, 710. The use-of-force policy instructs that "[u]nder no circumstances will any officer use kicks or blows to the head, neck, [or] groin * * * to subdue or restrain any detainee," nor will an officer "use physical force against any detainee who is physically restrained." Tr.,

[1] "Sent. Tr. __" refers to the sentencing hearing transcript by page number. "Pretrial Mots. Conf. Tr. __" refers to the July 23, 2021 pretrial motions conference transcript by page number. "Tr., Vol. __, __" refers to the trial transcript by volume and page number. "Rule 29 Hr'g Tr. __" refers to the November 16, 2021 motions hearing by page number. "Initial PSR" and "Revised Final PSR" refer to the initial and final presentence investigation reports, respectively, by page number. "R.Doc. __, at __" refers to the docket entry number and page number of documents filed in the district court. "Br. __" refers to the page number of Boen's opening brief. "Add. __" refers to Boen's addendum.

Vol. III, 712. All personnel in the Franklin County Sheriff's Office (FCSO) were given a copy of the policy and were required to comply with it. Tr., Vol. II, 409.

During this time period, the jail also had an "inmate's rights policy," which was posted on the wall of the jail's booking area. Tr., Vol. III, 689-690. As relevant here, the policy states that inmates detained in the jail "have a right * * * not [to] be subjected to unlawful attempts to obtain statements and/or confessions while they are incarcerated." Tr., Vol. III, 690.

b. In November 2018, Detective Kevin Hutchison of the FCSO was investigating a string of thefts and a commercial burglary. Tr., Vol. III, 602. As part of his investigation, he interviewed Brandon English, a "small-statured" and "[r]eal skinny" young man with "[l]ong, straight hair," who was being detained at the jail for possessing stolen property. Tr., Vol. III, 601-603. Hutchison interviewed English twice, but English provided no "information that was useful" to the detective's investigation. Tr., Vol. III, 603, 605. Afterwards, Hutchison informed Boen that English "hadn't really told [him] anything," and Boen decided that English would be interviewed a third time. Tr., Vol. III, 606, 669. This time, Boen would participate and "talk to [English]" himself. Tr., Vol. III, 669.

English's third interview occurred one or two days later. Tr., Vol. III, 606. Hutchison brought English to an office where Boen and FCSO Chief Deputy Travis Ball were waiting. Tr., Vol. III, 606-607. English sat down in an open

chair next to Boen and asked, "[s]o what's up?" Tr., Vol. III, 648, 672. "Almost instantly," Boen stood up, grabbed the front part of English's shirt, and "slammed [English] down on the floor." Tr., Vol. III, 648, 673. English's head hit the office's hard, linoleum floor, and he laid there, "on his back on the floor," "still in a seated position in the chair." Tr., Vol. III, 608, 615, 649.

Boen grabbed English's hair, "pok[ed] him in the chest," called him "a piece of shit," and told him, in an "angry" and "[e]levated voice," "[y]ou're going to stop stealing in my fucking county or you're going to get the fuck out of here." Tr., Vol. III, 615, 648. This lasted for "60 seconds or better." Tr., Vol. III, 648. All the while, English "[j]ust la[id] there," not attempting to "fight back in any way." Tr., Vol. III, 615. After English got up, he rubbed the part of his head where Boen had been "holding onto his hair," "as if to say it hurt." Tr., Vol. III, 619.

English was released from the Franklin County Jail a few days after Boen assaulted him. Tr., Vol. III, 650. On the advice of a friend, English took some photographs to document his injuries. Tr., Vol. III, 650. Those photos show "handprints" on English's chest and other "bruising." Tr., Vol. III, 651. In addition to those injuries, English "lost a substantial amount of [his] hair." Tr., Vol. III, 649.

Sometime later, Boen learned that the FBI was investigating his assault of English. Tr., Vol. III, 620. During a conversation with Detective Hutchison, Boen

stated to Hutchison that the FBI "[didn't] have anything with Brandon English," and then asked, "[c]orrect, right[?]" Tr., Vol. III, 620. As he said "right," Boen "looked at [Hutchison]" and "sh[ook] his head yes." Tr., Vol. III, 620. This made Hutchison "[u]ncomfortable" because he "knew that [what had happened] was wrong," but Boen was "insinuat[ing]" that Hutchison should "agree with [Boen] that there wasn't anything to be said or done with that incident." Tr., Vol. III, 621.

c. Mere weeks after Boen assaulted English, he assaulted another pretrial detainee in the Franklin County Jail. The incident occurred after Boen and others attended a dinner hosted by one of Boen's friends, Christopher Roberson, who worked as a software representative. Tr., Vol. III, 691; Tr., Vol. IV, 784; Tr., Vol. V, 1018; see also Tr., Vol. V, 1014-1017. The FCSO had just installed some software sold by Roberson, and Roberson was "treating" Boen and others in the office to dinner. Tr., Vol. III, 691; Tr., Vol. IV, 750, 784. Among them was Chief Deputy Ball. Tr., Vol. III, 692.

After the group arrived at the restaurant, Boen received a call from the jail, informing him that a detainee, Zachary Greene, had bitten another detainee. Tr., Vol. III, 694.[2] Because the situation had been "resolved" and there was no

[2] The detainee was a "trustee" at the jail. Tr., Vol. III, 694. Trustees are pretrial detainees who are given greater freedom of movement within the jail. See Tr., Vol. IV, 781 (describing trustees as having "free rein of all the property"); see also Tr., Vol. V, 995. Trustees are "appoint[ed]" by the Sheriff. Tr., Vol. IV, 782.

"emergency at the jail," the group proceeded into the restaurant and ate dinner. Tr., Vol. III, 694; Tr., Vol. IV, 837. The dinner lasted between 90 minutes and two hours. Tr., Vol. III, 696. Afterwards, the group dropped off one of diners at her home and then stopped by a liquor store to purchase beer. Tr., Vol. III, 696.

The group then proceeded to the Franklin County Jail, arriving almost three hours after Greene had bitten the other detainee. Tr., Vol. III, 697. Upon entering the jail, Boen, Ball, and Roberson headed straight to the room where Greene was being held. Tr., Vol. III, 698. Dubbed "the shower room" because a shower curtain separated it from the adjoining hallway (Tr., Vol. III, 698), the room was a "small" space, "[a]pproximately four feet" deep, and housed a low bench (Tr., Vol. III, 698-699; Tr., Vol. IV, 909). While the space "just inside the doorway" of the shower room was visible on a hallway security camera, no camera captured the interior of the room. Tr., Vol. III, 703-704.

When Boen and the two others arrived at the shower room, they found Greene "shackled to the bench" and lying on a mattress with "his head propped up against" the room's back door. Tr., Vol. III, 703. Standing in the doorway of the room, Boen said in an "angry" and "[e]levated" voice that he was giving Greene an "eviction notice." Tr., Vol. III, 705-708. Boen picked up a cup of water that was sitting on the bench and threw the water in Greene's face. Tr., Vol. III, 706. Then, Boen "leaned into the room" and struck the right side of Greene's face "four or

five" times using the back of his closed fist. Tr., Vol. III, 706-707; Tr., Vol. IV, 763. Greene did not respond or try to stand; rather, he stayed still, "sitting up" on the mattress. Tr., Vol. III, 708. Before he left the shower room, Ball noticed "blood around [Greene's] mouth area." Tr., Vol. III, 708.

Officers in the Franklin County Jail's dispatch room heard Boen assault Greene. The dispatch room is "[r]oughly 30 to 50 feet" from the shower room, and is lined with soundproofing carpeting to help dispatching officers hear their radios. Tr., Vol. IV, 839, 841. A dispatcher in the room watching the jail's security-camera feed saw Boen arrive at the shower room and start "talking * * * to [Greene]." Tr., Vol. IV, 837-838. Then, despite the dispatch room's "soundproof[ing]" and its distance from the shower room, the dispatcher heard "yelling" and "slapping sounds," "like skin to skin," coming from the hallway leading to the shower room. Tr., Vol. IV, 838-839, 841. Another jailer in the dispatch room who was watching the jail's security monitors also saw Boen "at the door of the shower room" and could hear "yelling" and a "thud-like sound" from the direction of the shower room. Tr., Vol. V, 1011-1013.

Sometime over the next 30 to 60 minutes (Tr., Vol. III, 712), Boen assaulted Greene a second time. Boen brought another deputy, Dalton Miller, to the shower room. Tr., Vol. IV, 895-896. Inside, Greene was still "shackled to the bench and * * * sitting down in the corner" of the room. Tr., Vol. IV, 897.

Boen grabbed Miller's sleeve and "pulled [him] towards the wall." Tr., Vol. IV, 896. From where Boen had positioned him, and because of his size (standing 6 feet, 4 inches tall and weighing 340 pounds), Miller "block[ed] any kind of view" that the hallway security camera "would have [had] of the shower room." Tr., Vol. IV, 897. Boen asked Miller, "can I trust you?" and then "leaned in towards" Greene and struck him "three to four times" in the face with a closed fist. Tr., Vol. IV, 897-898. This "shock[ed]" Miller, who exclaimed, "[w]hat are you doing?" Tr., Vol. IV, 899. Boen stopped hitting Greene and "spat on [him]." Tr., Vol. IV, 899.

Boen's assault of Greene made Miller "very uncomfortable." Tr., Vol. IV, 900. Miller "wanted to leave the jail" immediately and headed back towards the dispatch room, but Boen followed behind and "repeatedly" asked him, "can I trust you[?]" Tr., Vol. IV, 900. Miller interpreted this as an effort to "sweep everything under the rug." Tr., Vol. IV, 901. Before Miller left the jail, Boen asked him to come by Boen's house. Tr., Vol. IV, 901. Miller said that he would, but had no intention of actually doing so. Tr., Vol. IV, 901-902. Instead, Miller left the jail and went on patrol. Tr., Vol. IV, 901-902. While he was out, Miller received an "urgent"-sounding message, saying that he "need[ed] to come to [Boen's] house right now." Tr., Vol. IV, 902. Miller "turned around" and "went to [Boen's]

house," fearing that if he did not do so, he "possibly [would] be fired." Tr., Vol. IV, 902.

Miller arrived at the house and found Boen drinking and seemingly intoxicated. Tr., Vol. IV, 903. Boen again "repeatedly" asked "if he could trust" Miller. Tr., Vol. IV, 904. Miller found this "intimidating * * * almost like [Boen] was questioning [him]." Tr., Vol. IV, 905. Later in the night, Boen said to Miller, with regard to his assault of Greene, "[t]hat's what they elect us to do." Tr., Vol. III, 714.

Two days after the assault, Greene was examined by an FCSO contract nurse. Tr., Vol. III, 693; Tr., Vol. IV, 932, 935. She noted "[b]umps" and "bruises to his face and head, as well as a black eye and swelling around his eye socket." Tr., Vol. IV, 946. Greene told the nurse that the injuries were caused by "somebody's fist." Tr., Vol. IV, 938, 942. Boen was present during part of Greene's medical examination. Tr., Vol. IV, 947.

Boen later learned that the FBI was investigating his assault of Greene and had issued subpoenas for individuals to testify before a grand jury. Tr., Vol. III, 715-716. Boen discussed the FBI's investigation with Chief Deputy Ball, emphasizing that only the two of them and the software representative, Roberson, had been present when Boen assaulted Greene, and therefore, it was their "word against everyone else's." Tr., Vol. III, 716. Additionally, Boen told Ball that if

Ball were called to testify before the grand jury, he should say that "Greene jumped up and got in [Boen's] face and [Boen] had put [Greene] back down." Tr., Vol. III, 716.

With the FBI's assistance, Ball later recorded a phone conversation with Boen. Tr., Vol. III, 717. On the call, Boen reiterated that they and the software representative had been "the only witnesses" to the assault and "there wasn't anything on camera." Tr., Vol. III, 720. Consequently, Boen said, "it's mine and your word against, you know, everybody else's" because "nobody was even there when it, you know—when we did that." Tr., Vol. III, 720-721.

3. Pretrial And Trial Proceedings

a. In November 2019, a federal grand jury returned a three-count indictment against Boen. R.Doc. 1, at 1-3. Counts 2 and 3 charged Boen with willfully depriving English and Greene, respectively, of their constitutional right to be free from the use of unreasonable force by a law enforcement officer. R.Doc. 1, at 2-3.[3] Prior to trial, Boen filed a motion in limine that sought, with respect to the

[3] Count 1 charged Boen with willfully depriving another pretrial detainee of his constitutional right to be free from unreasonable force. R.Doc. 1, at 2. Specifically, the indictment alleged that Boen punched the detainee multiple times in the head and body while the detainee was handcuffed and shackled in the back of a patrol vehicle. R.Doc. 1, at 2. The jury found Boen not guilty of this count (Tr., Vol. VI, at 1178), and it is not at issue in this appeal.

charge involving Greene, the exclusion of "any mention" of "[s]hackling and/or chaining [of] inmates to a bench as irrelevant." R.Doc. 54, at 4.

The district court denied Boen's motion. Add. 11. Discussing the motion at the pretrial conference, Boen's counsel acknowledged that Greene had "definitely [been] shackled to the bench" when the conduct charged in Count 3 allegedly occurred. Pretrial Mots. Conf. Tr. 11. But he argued that mentioning this fact would "inflame the Jury," which would find the shackling to be "in and of itself * * * a violation of somebody's rights." Pretrial Mots. Conf. Tr. 10-11. The court rejected this argument, concluding that "Greene [having been] affixed to the bench" was "intrinsic to the issues" raised in Count 3 and "gives context to whether" Boen had used "reasonable or unreasonable force." Pretrial Mots. Conf. Tr. 14. The court further concluded that the probative value of evidence establishing that Greene had been shackled "greatly outweigh[ed] any unfair prejudice." Pretrial Mots. Conf. Tr. 14. The court made clear, however, that Boen's counsel could "object at trial if the Government ma[de] gratuitous references to shackling or chaining of inmates." Add. 11; see also Pretrial Mots. Conf. Tr. 14.

The government also filed a motion in limine. R.Doc. 55. As relevant here, it sought, under Federal Rule of Evidence 609, to preclude questioning about the conduct for which Greene had been arrested. R.Doc. 55, at 12-14. Boen "agree[d]

that Rule 609 applie[d]" (Pretrial Mots. Conf. Tr. 45; see also R.Doc. 59, at 3), and so the district court granted the government's request (Pretrial Mots. Conf. Tr. 45).

b. During trial, the jury learned that Greene had been shackled to the bench in the shower room and heard why that had been necessary. In its opening statement, the government explained that because "a shower curtain * * * close[d] the entrance to the [shower] room," officers "shackle [detainees] by the leg" to the bench in the room "when they have to house an inmate there." Tr., Vol. II, 230. Testimony from other officers reiterated this point. A dispatcher told the jury that detainees housed in the shower room are secured "[b]y a leg shackle" to make sure "they stay in the room when they are there." Tr., Vol. IV, 830. And Deputy Miller explained that detainees are "shackled from their ankle to the bench" because the shower room has no "door that closes it in." Tr., Vol. IV, 888.

During his cross-examination of Chief Deputy Ball, Boen's counsel elicited testimony explaining why Greene had been detained in the shower room, as opposed to some other cell in the jail. Specifically, defense counsel asked a series of "broad questions" regarding why the FCSO "ha[d] to house inmates in different locations." Tr., Vol. IV, 772; see also Tr., Vol. IV, 769-771. This was intended to explain to the jury that Greene had been held in the shower room because "different groups of people were all occupying all of the other cells." Tr., Vol. IV,

773; see also Tr., Vol. IV, 764 (explaining that forthcoming questions would address "why a person would be in th[e] [shower] room").

Government counsel objected at the end of that line of questioning, arguing that Boen's counsel was attempting to raise the specific criminal charges for which Greene had been detained, in violation of the district court's ruling on the government's motion in limine. Tr., Vol. IV, 772; see also Tr., Vol. IV, 774. Boen's counsel disavowed such a purpose and stated that he had already asked his "last question on th[e] subject matter" of why "any inmate would be housed in that little, bitty room shackled to a bench." Tr., Vol. IV, 772-773. In light of that representation, the court denied the government's objection. Tr., Vol. IV, 773 ("So he's not asking any more questions.").

Later in the parties' discussion with the district court, however, Boen's counsel suggested that he might "[g]o again" and question Chief Deputy Ball further on why he might "need to house an inmate * * * in the shower room." Tr., Vol. IV, 774. The government objected, arguing that the question had "been asked and answered already." Tr., Vol. IV, 774. The court agreed and stated, "It has. So let's move on." Tr., Vol. IV, 774.

c. During its case-in-chief, the government sought to introduce copies of the FCSO's use-of-force and inmates' rights policies. Tr., Vol. II, 403-408; Tr., Vol. III, 679-689. Section 242 prohibits only "willful[]" conduct, 18 U.S.C. 242, and

the government argued that the two policies were relevant to show that Boen's assaults of English and Greene had been willful in part "because he violated the [FCSO's] polic[ies] in using force in the manner in which he did." Tr., Vol. II, 403; see also Tr., Vol. III, 686-687. The district court agreed, concluding that the policies were "relevant to the willfulness prong of the mental state required as part of the government's burden of proof." Tr., Vol. III, 682.

Boen's counsel objected that the evidence might confuse the jury when determining whether Boen had "violated [his victims'] Constitutional rights." Tr., Vol. III, 680-681. In particular, he suggested that jurors might be unsure which standard—the constitutional standard or those in the use-of-force and inmates' rights policies—they should "apply to th[e] case." Tr., Vol. III, 680. The district court rejected this argument, concluding that any confusion "[was] capable of being cured with a limiting instruction." Tr., Vol. III, 684. Accordingly, before testimony resumed, the court gave the following limiting instruction regarding the inmates' rights policy:

> So you are about to hear evidence, or see what has been received into evidence as the inmate rights policy as just described, Government's Exhibit 7. In considering this inmate's rights policy in place at the Franklin County Jail as described, you should not consider this inmate rights policy when you decide whether the defendant's use of force was objectively reasonable or unreasonable, but you may consider the inmate rights policy when you decide what the defendant intended at the time that he acted, which is to say as proof of the second element on willfulness, and that's the same second element in each of the three counts.

Tr., Vol. III, 689-690. The court gave similar limiting instructions when the use-of-force policy was introduced into evidence and discussed in witnesses' testimony. See Tr., Vol. II, 408-409; Tr., Vol. III, 711. The court also included those limiting instructions in its final jury instructions. R.Doc. 89, at 15-16; see also Tr., Vol. V, 1095.

d. After the close of evidence, the jury deliberated and returned guilty verdicts on Counts 2 and 3 of the indictment, finding that Boen had deprived English and Greene of their constitutional right to be free from the use of unreasonable force. Tr., Vol. VI, 1178-1179. Two weeks later, Boen filed a motion for judgment of acquittal, or in the alternative, for a new trial. R.Doc. 90. In the motion, he argued, *inter alia*, that the district court should set aside his guilty verdict on Count 3 because, based on the evidence at trial, it would have been impossible for him to have assaulted Greene in the manner charged. R.Doc. 90, at 5-7. Boen contended that the evidence established that he "never stepped foot inside the [shower] room," but instead, had stood "outside of" the room while Greene lay inside "with his head * * * propped u[p] on the back wall." R.Doc. 90, at 6. And given "the depth of the room," Boen argued that it would have been a "physical impossibility" for Boen to have struck Greene from where he was standing. R.Doc. 90, at 6.

The district court rejected this argument, concluding that by the time Boen began yelling at Greene and "the altercation began," Greene could have been "positioned differently" in the shower room. Rule 29 Hr'g Tr. 73. The court also cited testimony that, during Boen's two assaults of Greene, Greene had been "sitting up, not lying down," and "in that small space, sitting up closes the gap by a couple of feet." Rule 29 Hr'g Tr. 73. Consequently, the court concluded that the jury's "common sense" could have led it "easily to conclude that there was no impossibility here." Rule 29 Hr'g Tr. 73.

4. Sentencing

a. The United States Probation Office prepared a presentence investigation report (PSR) and calculated Boen's recommended range under the Sentencing Guidelines. The PSR summarized evidence that had been introduced at trial, including (1) Boen's statements to Detective Hutchison, "insinuating" that Hutchison should "agree with [Boen] that nothing had happened [with regard to English], and that there was nothing to be said or done with the incident"; (2) Boen's statements to Chief Deputy Ball, "in which Boen stated that if anyone asked, Greene 'jumped up and got in his face and he had put him back down'"; (3) the recorded phone call between Boen and Ball, in which Boen stated that only he, Ball, and Roberson had "witnessed" Boen's assault of Greene "and that nothing was on camera"; and (4) Boen's questions to Deputy Miller after Boen's second

assault of Greene, in which Boen repeatedly asked, "can I trust you?" Initial PSR 14, 17-20.

Despite acknowledging this evidence, the PSR stated that it had "no information indicating [Boen] impeded or obstructed justice." Initial PSR 22. Accordingly, it did not recommend any sentencing enhancement for obstruction of justice. Initial PSR 23. The PSR calculated Boen's total offense level as 22, which, with a criminal history category of I, resulted in a recommended Guidelines range of 41 to 51 months' incarceration. Initial PSR 31.

b. The government objected to the PSR, arguing that its calculation of Boen's offense level "erroneously omits a 2-level adjustment for Boen obstructing the investigation and prosecution of his crimes." R.Doc. 117, at 2 (citing Sentencing Guidelines § 3C1.1). As support for such an adjustment, the government cited testimony from officers who had witnessed Boen's assaults and who had recounted at trial Boen's "repeated[] pressure[]" for them to "provide false information to federal investigators and the grand jury." R.Doc. 117, at 11.

The Probation Office did not resolve the government's objection, electing to "defer[] to the discretion of the Court." Initial PSR Add. 1.

Boen also filed a sentencing memorandum seeking a downward variance. R.Doc. 118, at 3-5. In his memorandum, Boen asked the district court to sentence

him to "no more than 18-24 months" of incarceration. R.Doc. 118, at 3 (emphasis omitted).

c. The district court held a sentencing hearing and heard argument on the parties' objections to the PSR and their sentencing memoranda. The court agreed with the government that the two-level sentencing enhancement for obstruction of justice under Section 3C1.1 was warranted. Sent. Tr. 24. But it chose to take "the most conservative approach possible" and applied the enhancement only to Count 3. Sent. Tr. 31.

In finding that Boen had engaged in obstruction for purposes of Count 3, the district court "[hung] its hat" on the recorded call between Boen and Chief Deputy Ball. Sent. Tr. 30. Although "excerpts" from the call had been admitted at trial, the court noted that it had "listen[ed] to the entirety" of the conversation during the pretrial proceedings. Sent. Tr. 21-22. With that background, the court understood that when Boen referred to the fact that only he, Ball, and Roberson had been present when Boen assaulted Greene, the "unspoken inference" was that "we're friends and we have the ability to align our stories, and since we were the only eyewitnesses, there wouldn't be anyone else to contradict what we say." Sent. Tr. 23. In the context of the entire call, the court interpreted Boen's comments to mean, "as long as we tell the same story, we don't have anything to be worried about." Sent. Tr. 23. Thus, the court found that Boen's actions "clearly"

constituted "an attempt to obstruct or impede the administration of justice with respect to an investigation that Mr. Boen then and there knew was ongoing." Sent. Tr. 24; see also Sent. Tr. 133-134 (finding that Boen was "literally * * * interfering with the federal investigation trying to influence testimony and interfering with these witnesses").

The district court resolved the remaining objections raised by the parties and calculated Boen's total offense level as 22. Sent. Tr. 72, 79.[4] With a criminal history category of I, this resulted in a recommended Guidelines range of 41 to 51 months' incarceration. Sent. Tr. 79. Next, the court considered the sentencing factors in 18 U.S.C. 3553(a) and cited a number of aggravating factors that could be "easily weigh[ed] * * * to justify an upward variance." Sent. Tr. 122, 144. This included Boen's "particularly egregious" and "premeditated" assaults of pretrial detainees, a "theme of intimidation of subordinates," a "pattern of thinking

[4] The objections to the PSR sustained by the district court did not ultimately change Boen's total offense level from that set forth in the PSR—a total offense level of 22. In addition to applying the two-level sentencing enhancement on Count 3 for obstruction of justice, the court sustained two of Boen's objections to the PSR, which resulted in (1) reduction of the base offense levels for Counts 2 and 3 from 12 to 10 because the offenses did not involve two or more participants, and (2) removal of a two-level enhancement that had been applied to Count 2 for restraint of the victim during the course of the offense. Sent. Tr. 59-60, 71. After all this, the adjusted offense level for Count 2 was 16, four levels lower than that which had been calculated in the PSR, while the adjusted offense level for Count 3 remained 20. Sent. Tr. 77-78. Under the multiple-count adjustment process in Section 3D1.4 of the Sentencing Guidelines, this resulted in a total offense level of 22. Sent. Tr. 78-79; see also Revised Final PSR 25-26.

that [he was] above the law," and a fundamental lack of "acceptance of responsibility," "respect for the badge," and "respect for the oath" that law enforcement officers take to defend the Constitution. Sent. Tr. 128-129, 133, 135. The court also discussed potential mitigating factors, but concluded that they could not "justify a downward variance." Sent. Tr. 144.

Ultimately, the district court imposed a within-Guidelines sentence of 48 months' incarceration on both counts, to run concurrently. Add. 3. The court also imposed a two-year term of supervised release, a fine of $4800, and a special assessment of $200. Add. 4, 7. The court entered judgment on March, 23, 2022. Add. 2-8.

SUMMARY OF ARGUMENT

1. Neither of the evidentiary rulings challenged by Boen reflects any error by the district court. First, Boen asserts that the court prevented him from eliciting testimony that would have explained why Greene had been chained to a bench when Boen assaulted him. But the court did no such thing. Boen never attempted to elicit such testimony, and in the sidebar discussion he cites, the court simply instructed defense counsel to "move on" from an already exhausted line of questioning. Tr., Vol. IV, 774. Even if this Court were to disagree and find that the district court erred by not allowing Boen to introduce testimony explaining why Greene had been shackled, that error was harmless because *the government*

elicited such contextualizing testimony in its direct examination of witnesses. Moreover, contrary to Boen's suggestion, none of the government's references to Greene's shackling during trial wafted "unwarranted innuendo into the jury box." Br. 14 (citation omitted).

Nor did the district court err in admitting the jail's use-of-force and inmates' rights policies into evidence. Boen does not dispute that those policies were relevant to whether he willfully subjected English and Greene to unreasonable force. Rather, he contests the court's decision to admit the policies given an alleged absence of evidence establishing his familiarity with them. Boen also asserts that the policies confused the jury regarding the standard they were to apply when deciding whether he deprived English and Greene of their constitutional rights. But there was sufficient evidence for the jury to find that Boen knew about the policies, and the numerous limiting instructions given by the court mitigated any risk of jury confusion. Furthermore, as above, even if the court erred in admitting these policies, that error was harmless in light of the overwhelming evidence establishing that Boen willfully deprived English and Greene of their constitutional right to be free from unreasonable force.

2. The jury had sufficient evidence on which to find that Boen caused English and Greene bodily injury. Boen contends that, contrary to the district court's jury instructions, the government had to prove that the bodily injuries he

inflicted on English and Greene were greater than *de minimis*. But Section 242's statutory context and relevant case law show that the court did not plainly err in instructing the jury that "*any* * * * injury to the [body]," or even mere "physical pain," suffices to establish bodily injury. R.Doc. 89, at 14 (emphasis added). Under this standard, there was sufficient evidence establishing that Boen's assaults caused English and Greene bodily injury. Testimony described how English suffered physical pain, bruising, and significant hair loss after Boen slammed him to the ground, prodded his chest, and grabbed his hair, while Greene experienced physical pain, bruising, and abrasions after Boen struck him in the face seven to nine times with a closed fist.

Boen argues that, based on the testimony at trial, it was impossible for him to have struck Greene, and therefore, Greene suffered no bodily injury. Specifically, Boen contends that, from where he was standing in the doorway of the shower room, he could not have reached Greene, who was lying on a mattress with his head against the room's back wall, four feet away. But the evidence established that Boen could have struck, and did indeed strike, Greene multiple times. Chief Deputy Ball and Deputy Miller both testified that Boen "leaned into the [shower] room" to strike Greene (Tr., Vol. IV, 763), who was, by that time, sitting up and thus "close[r]" to Boen "by a couple of feet" (Rule 29 Hr'g Tr. 73).

Moreover, multiple individuals in the jail's dispatch room heard Boen assault Greene when it happened.

3. The district court correctly applied a sentencing enhancement for Boen's obstruction of justice. There was no clear error in the court's finding that Boen had encouraged Chief Deputy Ball to give the FBI false information about Boen's assault of Greene. And under this Court's binding case law, that conduct warranted application of a two-level enhancement under Section 3C1.1 of the Sentencing Guidelines. None of the authorities Boen cites proves otherwise.

4. The district court imposed a sentence that was substantively reasonable. Boen's arguments on this question fail to identify any defect in the court's sentencing analysis, and they cannot overcome the presumption of reasonableness accorded to Boen's within-Guidelines sentence.

For these reasons, the Court should affirm Boen's convictions and sentence.

ARGUMENT

I

NEITHER OF THE EVIDENTIARY RULINGS CHALLENGED BY BOEN EVINCE ANY ERROR BY THE DISTRICT COURT

Boen challenges two evidentiary rulings by the district court: (1) its exclusion of cumulative testimony discussing why Greene had been held in the shower room, instead of a detention cell, and (2) its admission of the Franklin

County Jail's use-of-force and inmates' rights policies into evidence. These challenges are meritless and should be rejected.

A. Standard Of Review

Where a defendant timely objected to a district court's evidentiary ruling, the ruling is reviewed for abuse of discretion. See *United States* v. *Drapeau*, 827 F.3d 773, 776 (8th Cir. 2016); see also *Retz* v. *Seaton*, 741 F.3d 913, 917 (8th Cir. 2014) ("[E]videntiary rulings should only be overturned if there was a clear and prejudicial abuse of discretion." (citation omitted)). This standard affords "substantial deference" to the district court's decision. *Katzenmeier* v. *Blackpowder Prods., Inc.*, 628 F.3d 948, 951 (8th Cir. 2010).

If the Court finds that the district court abused its discretion in an evidentiary ruling, it must determine whether the error was harmless. See *United States* v. *Oliver*, 987 F.3d 794, 799 (8th Cir. 2021). "An evidentiary error is harmless when, after reviewing the entire record, [the appellate court] determine[s] that the substantial rights of the defendant were unaffected, and that the error did not influence or had only a slight influence on the verdict." *United States* v. *Love*, 521 F.3d 1007, 1009 (8th Cir. 2008) (citation omitted).

Where a defendant did not timely object to the admission of evidence, review is for plain error. See *United States* v. *White Bull*, 646 F.3d 1082, 1091 (8th Cir. 2011). This requires the defendant to show "there was an error, the error

is clear or obvious under current law, the error affected the party's substantial rights, and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Poitra*, 648 F.3d 884, 887 (8th Cir. 2011). An error affects a defendant's substantial rights if it "affected the outcome of the district court proceedings." *United States* v. *Callahan*, 800 F.3d 422, 426 (8th Cir. 2015) (citation omitted).

B. Boen's Argument That The District Court Abused Its Discretion By Prohibiting Him From Eliciting Testimony Contextualizing Greene's Shackling Fails In Multiple Respects

In his first evidentiary challenge, Boen contends that the district court abused its discretion when it prevented him from eliciting testimony that would have provided "contextual background" for why Greene had been shackled to a bench in the shower room. Br. 8. He further argues that this error warrants reversal of both of his counts of conviction. Br. 16. These arguments fail for three reasons.

1. Contrary to Boen's suggestion (Br. 10-16), he never attempted to elicit such contextualizing testimony. During the pretrial conference, government counsel specifically noted that they "wouldn't have any objection" if defense counsel sought to "contextualize the reasons that the jail would use" shackles on individuals held in the shower room. Pretrial Mots. Conf. Tr. 13. The district court also expressly noted that defense counsel could object "if the Government

ma[de] gratuitous references to shackling or chaining of inmates." Add. 11; see also Pretrial Mots. Conf. Tr. 14. But Boen never raised such an objection.

Boen asserts in his opening brief that during his cross-examination of Chief Deputy Ball, the district court "prevented [him] from pursuing a brief line of questioning" to "flesh * * * out" why Greene had been shackled to a bench in the shower room (Br. 12), but this misrepresents the focus of Boen's proposed questions. Boen did not seek to pose additional questions regarding the fact of Greene's *shackling*, but rather, the reasons why Greene had been held in the jail's shower room, as opposed to a detention cell. See Tr., Vol. IV, 773-774. Due to "the nature of his charges," Greene had to be kept "separate[] from the other [detainees] for his own safety." Pretrial Mots. Conf. Tr. 10. There was an "isolation cell" in the jail, but another inmate was already being housed there, and so officers detained Greene in the shower room instead. Pretrial Mots. Conf. Tr. 10. During his cross-examination of Chief Deputy Ball, defense counsel attempted to elicit testimony explaining this point. Tr., Vol. IV, 764 ("Why was Zachary Greene being housed in this particular holding cell?"). The follow-up questions that defense counsel proposed asking also focused on this point. Tr., Vol. IV, 774 ("What different facilities did you have?" and "[w]hy would you need to house an inmate, any inmate, in the shower room?"). Neither of these questions relates to the *separate* issue of why Greene had been shackled.

The district court prevented defense counsel from posing his follow-up questions because, as government counsel pointed out, they had been "asked and answered already." Tr., Vol. IV, 774. As part of his cross-examination, defense counsel had subjected Chief Deputy Ball to a lengthy series of questions that discussed "the purpose" of the shower room and "why a person would be in that room." Tr., Vol. IV, 764; see also Tr., Vol. IV, 764-771. And defense counsel represented to the court that he had completed all of his intended questioning on that topic. See Tr., Vol. IV, 772 ("That was actually my last question on that subject matter."); see also Tr., Vol. IV, 773 ("So he's not asking any more questions."). Accordingly, this line of inquiry was already exhausted when the court instructed defense counsel to "move on." Tr., Vol. IV, 774.

2. Even if the Court were to accept Boen's unfounded argument that the district court abused its discretion by preventing him from eliciting testimony that "contextual[ized]" Greene's shackling (Br. 8), that error would be harmless given other contextualizing statements and testimony the jury heard at trial that served the same purpose. Government counsel expressly noted in his opening statement that when officers "house an inmate [in the shower room], they shackle them by the leg to th[e] bench" in the room. Tr., Vol. II, 230. Subsequent testimony explained the reason for this. A dispatcher told the jury that detainees held in the shower room are secured "[b]y a leg shackle" to ensure "they stay in the room

when they are there." Tr., Vol. IV, 830. And Deputy Miller reiterated this point, testifying that detainees held in the shower room "are shackled from their ankle to [a] bench" because the room has no "door that closes it in." Tr., Vol. IV, 888. This testimony "provide[d] [the] context" that Boen wrongly suggests was lacking at trial. Br. 13 (quoting *United States* v. *Guzman*, 926 F.3d 991, 1000 (8th Cir. 2019)).

3. Boen also argues that the government made excessive and gratuitous references to Greene's shackling. Br. 12-13, 15. But because Boen failed to contemporaneously object to the government's statements of which he now complains, plain-error review applies to this challenge. See *White Bull*, 646 F.3d at 1091.

The district court did not plainly err in permitting the government to raise the fact that Greene had been shackled when Boen assaulted him because—as the court had previously found and as Boen does not now appear to dispute—this fact was highly relevant to the charged conduct. Specifically, "Greene [having been] affixed to the bench" was "intrinsic to the issues" raised in Count 3 and "[gave] context to whether" Boen had used "reasonable or unreasonable force." Pretrial Mots. Conf. Tr. 14. Moreover, as the court found, the probative value of this evidence "greatly outweigh[ed] any unfair prejudice." Pretrial Mots. Conf. Tr. 14. The government's references to Greene having been shackled when Boen assaulted

him thus were entirely appropriate because they were germane to an issue on which the government bore the burden of proof. Accordingly, the court committed no error, much less one that was clear or obvious, and certainly the government's references to Greene's shackling did not affect Boen's substantial rights or the outcome of the trial.

Contrary to Boen's argument (Br. 15-16), the proceedings here bear no resemblance to those in *United States* v. *Monteleone*, 77 F.3d 1086 (8th Cir. 1996). In that case, this Court found reversible error because the prosecutor had questioned the defendant's character witness about alleged instances when the defendant had committed perjury when testifying before a grand jury, but the prosecutor had lacked "a good faith basis for believing" that such perjury "was likely to have been known in the relevant community." *Id.* at 1089-1090. The Court held that the district court had abused its discretion in permitting this questioning because it suggested that the defendant was "both an uncharged criminal and an unprincipled liar." *Id.* at 1091. Here, on the other hand, the government in no way suggested that Boen had been personally responsible for shackling Greene to a bench in the shower room. To the contrary, as discussed above, the government *elicited* testimony establishing that shackling was routinely used by FCSO officers to secure detainees housed in the shower room.

C. The District Court Did Not Err In Admitting The Jail's Use-Of-Force And Inmates' Rights Policies

Contrary to Boen's second evidentiary challenge, the district court committed no error in admitting the Franklin County Jail's use-of-force and inmates' rights policies. Br. 27-30. For the first time on appeal, Boen contends that these policies were irrelevant because there was no evidence that he was "familiar[] with the[m]." Br. 29. He further argues that admission of the policies "created an unacceptable risk that the jury would 'mistake violations of the [policies] for a constitutional violation.'" Br. 29-30 (quoting *Tanberg* v. *Sholtis*, 401 F.3d 1151, 1164 (10th Cir. 2005)). These arguments are unpersuasive.

1. Admission of the policies on relevance grounds was not plain error because there was evidence from which the jury could have reasonably concluded that Boen was familiar with them. First, testimony established that these were official Sheriff's Office documents. The FCSO had adopted the use-of-force policy as early as 2017, and it had posted the inmates' rights policy on the wall of the jail's booking area for "as long as [Chief Deputy Ball] c[ould] recall." Tr., Vol. II, 410; Tr., Vol. III, 689. Second, officers testified that copies of these policies were given to individuals working in and held at the jail as a matter of practice. All FCSO personnel were "given a copy" of the use-of-force policy and required to follow it. Tr., Vol. II, 409; see also Tr., Vol. III, 676-677 (testimony that the use-of-force policy is "known" to "every deputy in the Sheriff's office"

because they are "given a copy of it" when "they are hired"). And detainees were given a copy of the inmates' rights policy "whenever they [were] first booked in[to]" the jail. Tr., Vol. III, 689. A jury could have reasonably concluded from this evidence that Boen, as Sheriff, was familiar with both policies.

2. Nor did admission of the policies constitute an abuse of discretion because the numerous limiting instructions given by the district court mitigated any risk of jury confusion. When moving to admit the policies, the government argued that they were relevant to show that Boen's use of excessive force against English and Greene had been willful. R.Doc. 77, at 1. The court agreed (Tr., Vol. III, 682), and case law amply supports that conclusion, see *United States* v. *Proano*, 912 F.3d 431, 439 (7th Cir. 2019) (explaining that "evidence of departmental policies can be relevant to show intent in [Section] 242 cases"); see also *United States* v. *Brown*, 934 F.3d 1278, 1296-1297 (11th Cir. 2019), cert. denied, 140 S. Ct. 2826 (2020); *United States* v. *Rodella*, 804 F.3d 1317, 1337-1338 (10th Cir. 2015), cert. denied, 137 S. Ct. 37 (2016).

The district court acknowledged that admitting the policies might raise some risk of jury confusion as to whether a violation of the policies necessarily constituted a constitutional violation, but it concluded that any potential confusion "[was] capable of being cured with a limiting instruction." Tr., Vol. III, 684. The court gave such limiting instructions when it admitted the policies and when they

were discussed in witnesses' testimony. See Tr., Vol. II, 408-409; Tr., Vol. III, 689-690, 711. For example, the court instructed the jury that they could not consider the inmates' rights policy when deciding whether Boen's "use of force was objectively reasonable or unreasonable"; rather, they could only consider the policy when determining Boen's "inten[t] at the time that he acted, which is to say as proof of the second element on willfulness." Tr., Vol. III, 690. The court repeated these limiting instructions in its final jury instructions. R.Doc. 89, at 15-16; see also Tr., Vol. V, 1095.

Courts repeatedly have held in unreasonable-force cases that a district court does not abuse its discretion in admitting evidence of departmental policies, accompanied by appropriate limiting instructions. See, *e.g.*, *Proano*, 912 F.3d at 440-441 (finding the risk of jury confusion "minimal" where the district court gave a materially identical limiting instruction regarding evidence of police officer training and departmental policies); *Rodella*, 804 F.3d at 1338 (finding no abuse of discretion where a limiting instruction regarding evidence of official training was given prior to closing arguments); see also *United States* v. *Tyler*, 124 F. App'x 124, 129 (3d Cir. 2005) (holding that testimony about violations of use-of-force policies prejudiced the defendant only "slightly, if at all" where the district court "instructed the jury that it should not consider as determinative of [the defendant's] guilt or innocence any violation of the use of force policy").

3. Based on a single out-of-circuit case, Boen asserts, in conclusory fashion, that admission of the use-of-force and inmates' rights policies "created an unacceptable risk" of jury confusion. Br. 30 (citing *Tanberg*, 401 F.3d at 1164). In that opinion, the Tenth Circuit considered an excessive-force claim under 42 U.S.C. 1983 and affirmed a district court's decision to exclude evidence of a police department's "Standard Operating Procedures" relating to officers' use of force. *Tanberg*, 401 F.3d at 1161-1162, 1167. That case is distinguishable for three reasons.

First, unlike here, evidence regarding the police department's standard operating procedures was not proffered to show that the defendant had acted willfully when using constitutionally excessive force. Rather, the plaintiffs in *Tanberg* sought to use the police department's "[standard] operating procedures as evidence of the [Fourth Amendment] constitutional standard." *Tanberg*, 401 F.3d at 1164. The Tenth Circuit found that this would have raised a significant risk of jury confusion: because part of those procedures "duplicate[d] the [Fourth Amendment] reasonableness standard," admission of the procedures would have "tempt[ed] the jury to conclude" that if an officer violated the procedures, the officer "must also have violated legal requirements." *Id.* at 1163-1165. No such risk of "confus[ing] legal and administrative standards," *id.* at 1164, was present here where the district court told the jury that the use-of-force and inmates' rights

policies were relevant only for determining what Boen had "intended" at the times in question, and that the jury should "*not* consider" the policies when "decid[ing] whether [Boen's] use of force was objectively reasonable or unreasonable" (Tr., Vol. III, 690 (emphasis added)).

Second, the plaintiffs in *Tanberg* sought to introduce "not only evidence of the [police department's standard operating procedures] themselves," but also evidence of the department's finding that the defendant had "violated the [procedures]." *Tanberg*, 401 F.3d at 1164. The Tenth Circuit concluded that this would have been "a confusing, and ultimately needless, task." *Ibid.* In contrast, here, the government did not attempt to introduce any opinion testimony about whether Boen violated the FCSO's use-of-force or inmates' rights policies.

Third, *Tanberg* did not consider whether a limiting instruction, along the lines of those that the district court gave in this case, might have mitigated any jury confusion. See *Tanberg*, 401 F.3d at 1161-1165. As discussed above, other case law—including subsequent Tenth Circuit case law arising in the Section 242-context—has approved materially identical limiting instructions as mitigating any risk of confusion or unfair prejudice. See *Rodella*, 804 F.3d at 1338; see also p. 34, *supra*.

4. Finally, even if the district court abused its discretion in admitting the use-of-force and inmates' rights policies, that error was harmless, as abundant

evidence established that Boen had willfully deprived English and Greene of their constitutional right to be free from unreasonable force. As the court noted, Boen's assaults of the victims had been "premeditated." Sent. Tr. 129; see also pp. 5, 7-10, *supra*. And multiple witnesses gave firsthand accounts of how Boen subjected those men to unreasonable force while they were detained in the Franklin County Jail. When English was sitting in a chair, Boen grabbed his shirt and "slammed [him] down on the floor," causing English's head to hit the "hard" linoleum floor beneath him. Tr., Vol. III, 608, 648-649. And while Greene was shackled to a bench in the shower room, Boen struck him a total of seven to nine times with a closed fist, hard enough for the blows to be heard "[r]oughly 30 to 50 feet" away in the jail's "soundproof[ed]" dispatch room. Tr., Vol. III, 706-707; Tr., Vol. IV, 838-839, 841, 898; Tr., Vol. V, 1013. Moreover, after both assaults, Boen attempted to cover up his conduct by insinuating that other officers should give false testimony to the FBI. See pp. 6-7, 11-12, *supra*. Given this evidence, any error by the court in admitting the use-of-force and inmates' rights policies was harmless, as it "did not influence or had only a slight influence on the [jury's] verdict[s]." *Love*, 521 F.3d at 1009 (citation omitted).

II

THE JURY HAD SUFFICIENT EVIDENCE ON WHICH TO FIND THAT BOEN CAUSED ENGLISH AND GREENE BODILY INJURY

Next, Boen challenges his convictions under 18 U.S.C. 242 on two bases. First, he argues that the element of "bodily injury" in Section 242 requires "more than *de minimis* bodily injury" (Br. 23), despite not having objected at trial to the jury instruction regarding bodily injury. Second, Boen argues that the district court erred when it denied his motion for judgment of acquittal because he caused English only *de minimis* bodily injury for purposes of Count 2, and because it was "impossible" for him to have assaulted Greene in the manner charged in Count 3. Br. 24-27. The Court should reject these arguments.

A. Standards Of Review

Although jury instructions are typically reviewed for abuse of discretion, where a party failed to object to an instruction at trial, this Court reviews for plain error. See *United States* v. *Weckman*, 982 F.3d 1167, 1174 (8th Cir. 2020).

This Court "review[s] de novo the sufficiency of the evidence to sustain a conviction, viewing the evidence in a light most favorable to the verdict and accepting all reasonable inferences supporting the verdict." *United States* v. *Colton*, 742 F.3d 345, 348 (8th Cir. 2014) (per curiam). The Court must affirm "[i]f there is an interpretation of the evidence that would allow a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt." *United*

States v. *Blakeney*, 876 F.3d 1126, 1131 (8th Cir. 2017) (citation omitted; brackets in original), cert. denied, 139 S. Ct. 98 (2018). "Reversal is not appropriate '[e]ven where the evidence rationally supports two conflicting hypotheses.'" *Ibid.* (citation omitted; brackets in original). Rather, reversal "is required 'only if no reasonable jury could have found guilt beyond a reasonable doubt.'" *Ibid.* (citation omitted). Because of this "strict" standard, *Colton*, 742 F.3d at 348 (citation omitted), "[a] defendant challenging the sufficiency of the evidence 'confronts a high hurdle,'" *United States* v. *Bell*, 477 F.3d 607, 614 (8th Cir. 2007) (citation omitted).

B. Section 242's Element Of Bodily Injury Can Be Satisfied By A Showing Of Any Injury To The Body Or Physical Pain

Under Section 242, any person who, under color of law, willfully deprives a person of constitutional rights may be incarcerated for up to one year. 18 U.S.C. 242. If "bodily injury results" from the violation, the defendant may be incarcerated for up to ten years. *Ibid.* Boen argues that Section 242's element of "bodily injury" requires "more than *de minimis* bodily injury" (Br. 23), effectively raising a belated challenge to the jury instructions used at trial. His challenge fails because the district court did not err, much less plainly so, in instructing the jury that any injury to the body, no matter how temporary, and physical pain can both suffice to establish bodily injury under the statute. See R.Doc. 89, at 14.

1. In its jury instructions, the district court defined the phrase "bodily injury" to mean

> (A) a cut, abrasion, bruise, burn or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the bodily [sic], no matter how temporary.

R.Doc. 89, at 14. As the court noted, this instruction "tracks the [Eighth Circuit] model [jury] instruction." R.Doc. 87, at 20. Boen never objected to the instruction. See Tr., Vol. V, 1080 (defense counsel stating that, apart from one unrelated instruction, "[a]ll the other instructions are acceptable to the defense"); see also Tr., Vol. IV, 973; Tr., Vol. V, 1078-1081. Accordingly, plain-error review applies to Boen's argument that the court misinstructed the jury on the bodily-injury element. See *Weckman*, 982 F.3d at 1174.

2. Section 242's statutory context and applicable case law demonstrate that the district court did not plainly err in defining "bodily injury." Though Section 242 sets forth no definition for "bodily injury," four other sections of Title 18 contain nearly identical definitions of the phrase for purposes of other criminal prohibitions. See 18 U.S.C. 831(g)(5); 18 U.S.C. 1365(h)(4); 18 U.S.C. 1515(a)(5); 18 U.S.C. 1864(d)(2). Like the court's instruction, they define "bodily injury" to mean "a cut, abrasion, bruise, burn, or disfigurement"; "physical pain"; "illness"; "impairment of a function of a bodily member, organ, or mental faculty"; or "any other injury to the body, no matter how temporary." *E.g.*, 18 U.S.C.

831(g)(5). Citing these provisions, numerous circuit courts have endorsed the district court's definition of "bodily injury" under Section 242. See, *e.g.*, *United States* v. *Bailey*, 405 F.3d 102, 111 (1st Cir. 2005); *United States* v. *Tyler*, 124 F. App'x 124, 127 (3d Cir. 2005); *United States* v. *Perkins*, 470 F.3d 150, 161 (4th Cir. 2006); *United States* v. *Gonzales*, 436 F.3d 560, 575 (5th Cir.), cert. denied, 547 U.S. 1139, 547 U.S. 1180 and 549 U.S. 823 (2006); *United States* v. *Wilson*, 344 F. App'x 134, 142 (6th Cir. 2009), cert. denied, 558 U.S. 1132 (2010); *United States* v. *Finney*, No. 21-10558, 2021 WL 5984905, at *1 (11th Cir. Dec. 16, 2021) (per curiam); see also *United States* v. *DiSantis*, 565 F.3d 354, 362 (7th Cir. 2009) (upholding on plain-error review a jury instruction using this definition of "bodily injury").

These statutory provisions and case law make clear that Section 242 does not require a showing that the alleged bodily injury is greater than *de minimis*. Rather, "any * * * injury to the body, no matter how temporary," or even "physical pain" alone, will suffice. 18 U.S.C. 831(g)(5)(B) and (E). Indeed, two courts of appeals specifically have rejected the proposition that "there should be a de minimis exception to the definition of 'bodily injury.'" *United States* v. *Coughlin*, 609 F. App'x 659, 660 n.2 (1st Cir. 2015); see also *United States* v. *LaVallee*, 439 F.3d 670, 688 (10th Cir. 2006) (holding that "the government need

not prove that an individual suffered a certain level or type of injury" under Section 242).

Boen's arguments do not warrant a contrary conclusion. He admits that this Court has already rejected the proposition that 42 U.S.C. 1983 requires greater than *de minimis* injury where the claim is based on an alleged violation of a person's Fourth Amendment rights. Br. 22-23 (citing *Chambers* v. *Pennycook*, 641 F.3d 898 (8th Cir. 2011)). And his sole support for requiring "more than *de minimis*" bodily injury under Section 242 is a nonbinding opinion from the Fifth Circuit. See Br. 22 (citing *United States* v. *Brugman*, 364 F.3d 613 (5th Cir.), cert. denied, 543 U.S. 868 (2004)).

Boen's reliance on that opinion is unavailing because "[n]onbinding authority alone is insufficient to make a legal proposition clear or obvious under current law" for purposes of plain-error review. *United States* v. *Ruzicka*, 988 F.3d 997, 1009 (8th Cir. 2021); see also *FDIC* v. *Kansas Bankers Sur. Co.*, 840 F.3d 1167, 1171-1172 (10th Cir. 2016) (holding that "reliance on non-binding authority" is insufficient to demonstrate plain error); *United States* v. *Gonzalez*, 792 F.3d 534, 538 (5th Cir. 2015) (observing that a "lack of binding authority is often dispositive in the plain-error context"). And even the Fifth Circuit recognizes that mere "physical pain," absent any "visible manifestation of injury," can "constitute 'bodily injury' sufficient to overcome the *de*

minimis threshold." *United States* v. *Diaz*, 498 F. App'x 407, 412 (5th Cir. 2012). Accordingly, Boen's out-of-circuit authority does not demonstrate that the district court plainly erred in defining "bodily injury" to include any injury to the body, no matter how temporary, or physical pain. R.Doc. 89, at 14.

C. Sufficient Evidence Established That Boen Caused English And Greene Bodily Injury

Regardless of whether this Court applies the definition of "bodily injury" set forth in multiple sections of Title 18 and used by a majority of the circuit courts, or the "more than *de minimis*" standard for which Boen advocates (Br. 22), there was sufficient evidence at trial for the jury reasonably to conclude that Boen inflicted bodily injury on English and Green.

1. The evidence showed that English suffered bodily injury in multiple ways. Most obviously, English experienced physical pain when Boen "slammed [him]" to the ground, causing his head to hit the office's linoleum floor, and when Boen "grabbed him by the hair." Tr., Vol. III, 608, 615, 619, 648-649. English also suffered bruising where Boen "pok[ed] him in the chest." Tr., Vol. III, 615, 651. And he experienced "other injury to [his] bod[y]" (R.Doc. 89, at 14) when he "lost a substantial amount of [his] hair" as a result of Boen's assault (Tr., Vol. III, 649).

Boen asserts that he caused English only *de minimis* bodily injuries (Br. 26), but does so by disregarding evidence in the record and failing to construe the

evidence in the light most favorable to the verdict, as case law requires. See *Colton*, 742 F.3d at 348. Boen describes English's chair as having "flip[ped] over" (Br. 26) but ignores that he himself "threw [English] straight down" to the floor while English was sitting in the chair (Tr., Vol. III, 657). Boen cites testimony from Detective Hutchison, suggesting that English "did not hit his head on the floor or cry out in pain." Br. 26. But English specifically testified that his head hit the ground, and Hutchison described how English rubbed the part of his head where Boen had been holding onto his hair, "as if to say it hurt." Tr., Vol. III, 619, 649. Boen further argues that the photograph English took to document the harm he suffered shows only *de minimis* injuries. Br. 26 (citing Add. 27). But at trial, English used the photograph to show the jury where Boen had left "handprints" and "bruising" on his chest that were still visible several days later. Tr., Vol. III, 651; see also Tr., Vol. III, 652-653 (exchange between defense counsel and English, discussing how English had circled a "horizontal mark" showing "bruised skin" in a photograph taken days after the assault).

2. Likewise, there was ample evidence from which the jury could reasonably have concluded that Boen inflicted bodily injury on Greene. Chief Deputy Ball testified that he watched Boen strike Greene in the face "four or five" times with a closed fist (Tr., Vol. III, 706-707), and the sounds of those blows were audible to individuals "30 to 50 feet" away in the jail's dispatch room (Tr., Vol.

IV, 838-839; Tr., Vol. V, 1013). And following Boen's assault, Ball saw "blood around [Greene's] mouth area." Tr., Vol. III, 708. Similarly, Deputy Miller told the jury how, not more than an hour later, Boen hit Greene in the face another "three to four times" with a closed fist. Tr., Vol. IV, 898. Two days after these assaults, the nurse who examined Greene observed "[b]umps" and "bruises to his face and head, as well as a black eye and swelling around his eye socket." Tr., Vol. IV, 946. At a minimum, this evidence supports a finding that Greene suffered physical pain, bruising, and cuts or abrasions—any of which suffices to establish bodily injury. See R.Doc. 89, at 14.

Boen discounts this evidence. Boen acknowledges Chief Deputy Ball's first-person description of how he assaulted Greene. Br. 25. But Boen contends that the testimony is "unworthy of belief" because it would have been "impossible" for him, standing at the entrance of the shower room, to have struck Greene while Greene was "lying down with his head propped against the far wall" of the room (Br. 25), "[a]pproximately four feet" away (Tr., Vol. IV, 909).

As the district court pointed out, however, the jury's "common sense * * * could have led them easily to conclude that there was no impossibility." Rule 29 Hr'g Tr. 73. Although Greene was lying against the far wall of the shower room when Boen first arrived (Tr., Vol. III, 703), "a jury could certainly imagine a situation where [Greene's] body was positioned differently after the yelling and the

altercation began" (Rule 29 Hr'g Tr. 73). See also Tr., Vol. III, 706 (describing how Boen told Greene that he was issuing "an eviction notice" and threw water in Greene's face). And as the court correctly noted, there was testimony that, during both of Boen's assaults, "Greene was sitting up, not lying down," which would have "close[d] the gap by a couple of feet." Rule 29 Hr'g Tr. 73; see also Tr., Vol. III, 708 (Ball's testimony that Greene "may have been more sitting up at that point"); Tr., Vol. IV, 899 (Miller's testimony about how Greene "tr[ied] to defend himself"). Moreover, both Chief Deputy Ball and Deputy Miller testified that Boen "leaned into the room" when striking Greene, which would have closed the gap further. Tr., Vol. IV, 763, 898. Finally, Boen's suggestion that he "could not have spanned the distance that separated him from English" (Br. 25) is belied by Deputy Miller's testimony that he, himself, could have touched the back wall of the shower room while standing in the doorway to the room (Tr., Vol. IV, 909).

Boen argues in the alternative that, "at most," he inflicted only *de minimis* bodily injuries on Greene (Br. 26), citing testimony suggesting that Greene "looked the same" before and after Boen assaulted him (Br. 25). As an initial matter, this argument fails because, as explained at pp. 40-43, *supra*, *any* injury to the body suffices to show bodily injury under Section 242. But even if Section 242's bodily-injury requirement demanded more than *de minimis* injury, the physical pain caused by seven to nine closed-fist strikes to the face exceeds a *de minimis*

level and is sufficient on its own to establish bodily injury under the statute. See *Diaz*, 498 F. App'x at 412.

Boen further argues that photographs of Greene taken during a medical examination conducted days after Boen's assault show only *de minimis* injuries. Br. 26. But as noted, the nurse who took the photographs documented "[b]umps, bruises to [Greene's] face and head * * * a black eye and swelling around his eye socket" during her examination (Tr., Vol. IV, 946)—all of which qualify as bodily injury (see R.Doc. 89, at 14). Boen points to statements made by Greene during the examination that his injuries had been caused by "one of the other inmates." Br. 26. But a jury could reasonably have found that the fact that Boen was present during part of Greene's examination (Tr., Vol. IV, 947) might have made Greene reluctant to disclose the true source of his injuries to the nurse. Accordingly, none of Boen's arguments demonstrates that the jury lacked evidence on which to find that he inflicted bodily injury on Greene.

III

THE DISTRICT COURT CORRECTLY APPLIED A SENTENCING ENHANCEMENT FOR BOEN'S OBSTRUCTION OF JUSTICE

Boen contests the application of a two-level sentencing enhancement for obstruction of justice, but his arguments reveal no error by the district court.

A. Standard Of Review

This Court reviews a district court's application of the Sentencing Guidelines *de novo* and its factual findings for clear error. See *United States* v. *Belfrey*, 928 F.3d 746, 750 (8th Cir. 2019). Where a district court imposes a sentencing enhancement for a defendant's obstruction of justice, this Court gives "great deference" to that decision and will "revers[e] only when the district court's findings are insufficient." *United States* v. *Zambrano*, 971 F.3d 774, 782 (8th Cir. 2020) (citation omitted).

B. The District Court Did Not Clearly Err In Finding That Boen Had Attempted To Obstruct Justice

The district court correctly applied a two-level sentencing enhancement for obstruction of justice, based on its finding that Boen had attempted to dissuade Chief Deputy Ball from providing the FBI with accurate information about Boen's assault of Greene. Section 3C1.1 of the Sentencing Guidelines permits a two-level enhancement when the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice." Sentencing Guidelines § 3C1.1. This Section adopts "a broad view of obstruction," which "can vary in nature and seriousness, and does not require a direct threat." *United States* v. *Maurstad*, 35 F.4th 1139, 1146 (8th Cir. 2022) (citing Sentencing Guidelines § 3C1.1, comment. (nn.3, 4(A))). District courts thus have "broad discretion to apply section 3C1.1 to a wide range of conduct." *United States* v. *Sanders*, 4 F.4th 672, 679 (8th Cir.

2021) (citation omitted), cert. denied, 142 S. Ct. 1161 (2022). This includes "attempts to prevent others from communicating evidence of wrongdoing to law enforcement officers." *United States* v. *Shaw*, 965 F.3d 921, 928 (8th Cir. 2020), cert. denied, 141 S. Ct. 1248, and 141 S. Ct. 1253 (2021). Accordingly, this Court has affirmed application of the enhancement where a defendant "direct[ly] attempt[ed] to stifle incriminating testimony." *Ibid.*

Under this case law, the district court did not err in applying the sentencing enhancement here. After learning that the FBI was investigating his assault of Greene, Boen reminded Chief Deputy Ball that they and Boen's friend Roberson had been "the only witnesses" to the assault and "there wasn't anything on camera." Tr., Vol. III, 720. As Boen said, this meant that it was "[their] word against * * * everybody else's." Tr., Vol. III, 720-721. The court found, based on the "entirety" of the conversation, that this was a "clear[] * * * attempt to obstruct or impede the administration of justice" because the "unspoken inference" of Boen's message was that so long as Ball told the FBI "the same story" that Boen did, there was "[nothing] to be worried about." Sent. Tr. 22-24. And the false story that Boen wanted Ball to tell was that Greene had "jumped up and got in [Boen's] face," when, in actuality, Greene had been lying shackled on a mattress before Boen struck him. Tr., Vol. III, 706, 716. The court thus correctly found that, "at a bare minimum," Boen's call with Ball "establishe[d] by a preponderance

of the evidence that there was an attempted obstruction of justice as it relates to Count Three." Sent. Tr. 24.

Boen argues that the district court should not have applied the obstruction-of-justice enhancement because it requires "much more sinister conduct," like making "threats or promises" or "demand[ing]" that a person give particular testimony. Br. 32. Boen's contention runs counter to this Court's binding precedent, see pp. 48-49, *supra*, and it conflicts with the commentary to the Sentencing Guidelines, see Sentencing Guidelines § 3C1.1, comment. (n.4(A)) (noting that the enhancement applies where a defendant "unlawfully influenc[es]" a witness through "indirect[]" means). Indeed, Boen's interpretation is contradicted by the authority that Boen himself cites. See *United States* v. *McMannus*, 496 F.3d 846, 851 (8th Cir. 2007) (concluding that "the district court erred to the extent it held that evidence of overt threats or intimidation is required in order to apply the enhancement"), abrogated on other grounds by *Pepper* v. *United States*, 562 U.S. 476 (2011); see also Br. 32 (citing *McMannus*). Accordingly, Boen provides no basis on which to find that the court erred in applying the obstruction-of-justice enhancement.

IV

BOEN'S SENTENCE IS SUBSTANTIVELY REASONABLE

Finally, Boen's challenge to the substantive reasonableness of his sentence fails because his arguments neither suffice to overcome the presumption of reasonableness accorded to Boen's within-Guidelines sentence nor undermine the district court's cogent explanation for why the sentence it chose to impose is reasonable.

A. Standard Of Review

This Court reviews the substantive reasonableness of a sentence for abuse of discretion. See *United States* v. *Zambrano*, 971 F.3d 774, 783 (8th Cir. 2020). Abuse of discretion is found where a district court "(1) fails to consider a relevant factor [under 18 U.S.C. 3553(a)] that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in weighing those factors commits a clear error of judgment." *United States* v. *Davis*, 20 F.4th 1217, 1220 (8th Cir. 2021) (citation omitted). Review for substantive reasonableness is "'narrow and deferential[,]' and '[i]t will be the unusual case when [this Court] reverse[s] a district court sentence * * * as substantively unreasonable.'" *United States* v. *Shakal*, 644 F.3d 642, 645 (8th Cir. 2011) (citation omitted; first and second brackets in original). Moreover, when "the sentence imposed is within the advisory guideline

range, [this Court] accord[s] it a presumption of reasonableness." *United States* v. *Vera-Gutierrez*, 964 F.3d 733, 738 (8th Cir. 2020) (citation omitted), cert. denied, 141 S. Ct. 1252 (2021).

B. The District Court Imposed A Substantively Reasonable Sentence

Boen's challenge to the substantive reasonableness of his sentence is unavailing. He identifies no defect in the district court's analysis of the Section 3553(a) sentencing factors, and this alone warrants dismissal of Boen's challenge. See, *e.g.*, *United States* v. *Bivens*, 830 F. App'x 495 (8th Cir. 2020). Boen also fails to offer any explanation for why the presumption of reasonableness accorded to his within-Guidelines sentence is overcome in this case, which is equally fatal to this aspect of his appeal. See *Vera-Gutierrez*, 964 F.3d at 738.

Instead, Boen casts aspersions on the motives of Chief Deputy Ball and Detective Hutchison. Br. 33. But defense counsel made these points in his closing argument (Tr., Vol. V, 1118-1119), and the jury rejected them, choosing to credit those individuals' testimony about Boen's assaults of English and Greene. And even now, Boen offers no reason to disbelieve their accounts, apart from a vague insinuation that "things have worked out well for" Ball and Hutchison following Boen's convictions. Br. 33.

Next, Boen repeats his unfounded argument that he inflicted only *de minimis* injuries on English and Greene and argues that his "beatings" of them were not

"vicious." Br. 34 (quoting R.Doc. 117, at 1). For the reasons already discussed, this argument entirely mischaracterizes the evidence at trial. See pp. 43-47, *supra*. Indeed, during Boen's sentencing hearing, the district court pointed out that his assault of Greene was "particularly egregious." Sent. Tr. 128.

But more fundamentally, Boen's two arguments fail to demonstrate any abuse of discretion because they ignore the broader reasons why the district court found it appropriate to impose a sentence at the "middle to upper end" of Boen's recommended Guidelines range. Sent. Tr. 144. As the court recounted, Boen's assaults of English and Greene were not "one-off situation[s]," but rather, were emblematic of how Boen "viewed [himself] in the role of Sheriff" and how he communicated to detainees that "no one messes with the King's jail." Sent. Tr. 127, 130. His conduct demonstrated a "pattern of thinking that [he was] above the law," could "interfer[e] with * * * witnesses," and could "decide how the undesirables would be run out of town." Sent. Tr. 133-135. Especially given his position as the "elected County Sheriff," these "common theme[s] that [ran] through [Boen's] offense conduct" led the court to conclude that, "through its sentence," it needed to "send a message to law enforcement that this type of conduct is unacceptable." Sent. Tr. 124, 131, 136.

Neither of Boen's arguments undermines this reasoning, which was the basis for the district court's decision and which persuasively explains why the sentence the court imposed is substantively reasonable.

CONCLUSION

For the foregoing reasons, this Court should affirm Boen's convictions and sentence.

Respectfully submitted,

DAVID CLAY FOWLKES
United States Attorney

BRANDON T. CARTER
Assistant United States Attorney
United States Attorney's Office
Western District of Arkansas
414 Parker Ave
Fort Smith, Arkansas 72901
(479) 783-5125

KRISTEN CLARKE
Assistant Attorney General

s/ Jason Lee
ELIZABETH P. HECKER
JASON LEE
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-1915

CERTIFICATE OF COMPLIANCE

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

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,740 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f);

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word 2019 in a proportionally spaced typeface (Times New Roman) in 14-point font; and

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version 1.2.3412.0) and is virus-free according to that program.

s/ Jason Lee
JASON LEE
Attorney

Date: September 14, 2022

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, I will transmit by Federal Express ten paper copies of the foregoing brief to the Clerk of the Court and one paper copy to the following counsel of record pursuant to Local Rule 28A(d):

Marcus Neil Bozeman
Bozeman Law Firm
400 West Capitol Avenue, Suite 1700
Little Rock, Arkansas 72201

s/ Jason Lee
JASON LEE
Attorney