

**Oral Argument Not Requested**  
**No. 22-6203**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MATTHEW WARE,

Defendant-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA  
THE HONORABLE STEPHEN P. FRIOT, NO. 5:21-CR-323-F

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BRIEF FOR THE UNITED STATES AS APPELLEE

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## TABLE OF CONTENTS

	PAGE
STATEMENT OF RELATED CASES	
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUE.....	2
STATEMENT OF THE CASE.....	2
1. <i>Factual Background</i> .....	2
2. <i>Procedural History</i> .....	5
SUMMARY OF ARGUMENT .....	8
ARGUMENT	
THE DISTRICT COURT’S WITHIN-GUIDELINES SENTENCE IS SUBSTANTIVELY REASONABLE .....	9
CONCLUSION.....	12
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF DIGITAL SUBMISSION	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

<b>CASES:</b>	<b>PAGE</b>
<i>United States v. Blair</i> , 933 F.3d 1271 (10th Cir. 2019).....	9-10
<i>United States v. Budder</i> , 76 F.4th 1007 (10th Cir. 2023).....	10
<i>United States v. Lawless</i> , 979 F.3d 849 (10th Cir. 2020).....	10
<i>United States v. Martinez</i> , 610 F.3d 1216 (10th Cir.), cert. denied, 562 U.S. 1019 (2010).....	9
<i>United States v. Miller</i> , 978 F.3d 746 (10th Cir. 2020).....	9
<i>United States v. Ramirez-Plata</i> , 749 F. App'x 762 (10th Cir. 2019) .....	11
<i>United States v. Walker</i> , 844 F.3d 1253 (10th Cir. 2017) .....	10-11
<i>United States v. Williams</i> , 10 F.4th 965 (10th Cir. 2021) .....	9
<b>STATUTES:</b>	
18 U.S.C. 2.....	6
18 U.S.C. 242.....	2, 5-6
18 U.S.C. 3231 .....	1
18 U.S.C. 3553(a) .....	7-11
18 U.S.C. 3742.....	2
28 U.S.C. 1291 .....	2
<b>GUIDELINES:</b>	
Sentencing Guidelines § 2H1.1(a)(2) .....	6

<b>GUIDELINES (continued):</b>	<b>PAGE</b>
Sentencing Guidelines § 2H1.1(b).....	6
Sentencing Guidelines § 3D1.4.....	6

## **STATEMENT OF RELATED CASES**

There are no prior or related appeals.

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BRIEF FOR THE UNITED STATES AS APPELLEE

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**STATEMENT OF JURISDICTION**

This appeal is from the entry of final judgment in a criminal case in the Western District of Oklahoma. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant-appellant Matthew Ware on December 6, 2022. 1R.295-301.<sup>1</sup> Two days later, Ware filed a timely notice of

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<sup>1</sup> “\_\_R.\_\_” refers to the Record on Appeal, originally filed on March 1, 2023, and supplemented on May 5, 2023, by volume (represented by the first

appeal. 1R.302-303. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

### **STATEMENT OF THE ISSUE**

Whether the district court's imposition of a within-Guidelines sentence of 46 months' imprisonment for depriving three pretrial detainees of their rights while acting under color of law, in violation of 18 U.S.C. 242, was substantively reasonable.

### **STATEMENT OF THE CASE**

#### *1. Factual Background*

The Kay County Detention Center (KCDC) is a jail located in Newkirk, Oklahoma, that houses both pretrial detainees and inmates. 2R.60. The defendant, Matthew Ware, served as a Lieutenant and then as an Acting Captain at the facility. 2R.60. His convictions in this case stem from two incidents in which his orders deprived three pretrial detainees of their rights and resulted in their injuries.

The first incident concerned the "Security Threat Group" (STG) pod, a special housing unit of eight cells within KCDC for detainees and inmates who were known gang members. 3R.137, 139, 186. Ware, who had originally created the STG pod, ultimately decided which inmates would be housed there, in which

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number) and page (represented by the second number). "Br. \_\_\_\_" refers to Ware's opening brief by page number.

cells, and when they would be allowed out of their cells for meals or recreation.

3R.137-139, 142, 214, 245, 248. Ware assigned white inmates associated with the United Aryan Brotherhood, a white supremacist gang, to the four cells on the bottom row of the STG pod, and inmates of color associated with other gangs to the four cells on the top row of the STG pod. 3R.140-141, 188, 217, 246-247, 254-255, 305. Because of the “[v]olatile” relationship between the detainees housed on the different rows of the STG pod (3R.141), they were never allowed out of their cells at the same time. See 3R.142, 189, 218, 249, 255, 305.

D.W. and M.M., two Black pretrial detainees, were assigned to a cell on the top row of the STG pod due to their association with a gang.<sup>2</sup> 3R.143. Ware did not like D.W. 3R.257. The two had “some exchange of words,” in which “[D.W.] threatened Matt Ware and then Matt Ware turned around and also threatened [D.W.].” 3R.146-147.

On May 17, 2017, Ware ordered D.W. and M.M. to be moved from the top to the bottom row of the STG pod. 3R.218-219, 306. Black gang members in the STG pod had never before been housed on the bottom row with the members of the white supremacist gang. 3R.141, 248. D.W. “didn’t want to move,” anticipating “issues with all the Aryans downstairs,” but he complied without incident. 3R.220.

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<sup>2</sup> This brief refers to crime victims by their initials to protect their privacy.



The junior officer who moved them assumed that, even if D.W. and M.M. were housed on the bottom row, they would remain on lockdown. See 3R.220.

Later that day, however, Ware issued an order for everyone on the bottom row—D.W., M.M., and members of the United Aryan Brotherhood—to be released together the next morning. 3R.145, 221, 260, 306. In the meeting in which Ware made this order, several junior officers protested and predicted violence. 3R.145, 222, 260. Ware “kind of shrugged it off” and responded: “Well, if they want to act like animals, we’ll treat them like animals and lock them back down.” 3R.222.

On May 18, 2017, Ware maintained his order to let everyone in the bottom row of the STG pod out of their cells at the same time. 3R.265. When D.W. and M.M. ventured out of their cells for lunch, they were assaulted by members of the United Aryan Brotherhood. 3R.191-192. One inmate was “on top of [D.W.][,] continuing to batter him,” while another inmate was “going at it” with M.M. 3R.191-193. D.W., who had “a gash” beneath his eye, had to be transported to the hospital for seven stitches. 3R.150-151, 267. M.M. had “bruises and marks across his body.” 3R.267.

The second incident occurred almost a year later on January 31, 2018, when Ware was serving as Acting Captain. 3R.269-270, 393. Ware ordered C.D. and his cellmate to be brought down to the booking room after receiving a note from

C.D. insulting Ware and his leadership of the KCDC. See 3R.317-318, 342. At first, C.D. was “properly restrained” on a bench in the booking area. 3R.348. But then, Ware read C.D.’s note aloud for the junior officers and, “[i]n a sadistic manner,” told them to “go make him comfortable.” 3R.344. Based on his tone, the officers understood this as “an order to make [C.D.] uncomfortable” by using handcuffs as punishment. 3R.344-345; see also 3R.275 (explaining that “it wasn’t uncommon for us to get told to stretch people out”).

Following Ware’s order, C.D. “was stretched out with one hand to his left almost as far as it could go and one hand to the right almost as far as it could go.” 3R.351; see also 3R.327, 396, 399. When the junior officer apologized to C.D. for handcuffing him in this position, he responded “I know, you’re only doing as you’re told.” 3R.355. C.D. sat in this outstretched position for approximately an hour and a half, during which time Ware walked by four times without releasing him. 3R.421-422. When C.D. was finally released, he had pain, redness, indentations, and some skin peeling where the handcuffs had been. 3R.403.

## *2. Procedural History*

A federal grand jury returned a three-count indictment against Ware. Counts 1 and 2 charged that Ware, while acting under color of law, willfully deprived D.W. and M.M., respectively, of their right to be free from a correction officer’s deliberate indifference to a substantial risk of harm, in violation of 18 U.S.C. 242.

1R.11-13. Count 3 charged that Ware, while acting under color of law, willfully deprived C.D. of his right to be free from a correction officer's use of excessive force in violation of 18 U.S.C. 242 and 18 U.S.C. 2. 1R.13-14. Each count specified that Ware's offense resulted in bodily injury. 1R.11-14.

After a three-day trial, a jury found Ware guilty on all counts. 1R.249; see also 2R.66. Each count carried a maximum sentence of not more than ten years' imprisonment. 18 U.S.C. 242; see also 2R.79.

The assigned United States Probation Officer prepared a presentence investigation report (PSR) in advance of sentencing. 2R.57-90. The Probation Officer calculated an offense level of 21 and a criminal history category of I.<sup>3</sup> 2R.70-72, 74. As a result, the advisory Guidelines range of imprisonment was 37 to 46 months. 2R.79.

At the sentencing hearing, the district court adopted the Probation Officer's calculation of the advisory Guidelines range as 37 to 46 months' imprisonment. 3R.477-478. The United States asked for a Guidelines sentence of 46 months' imprisonment, stressing, "in particular, the need to promote respect for the law and the need to deter other officers from undertaking similarly egregious conduct."

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<sup>3</sup> Each count carried a base offense level of 12, Sentencing Guidelines § 2H1.1(a)(2), to which the Probation Officer added six points because of Ware's position, *id.* § 2H1.1(b), and three points for the combined offense level, *id.* § 3D1.4. 2R.70-72.

3R.489; see generally 1R.250-265 (U.S. Sentencing Memo.). Ware asked for a downward variance to a sentence of time served, “which [was] just under eight months” at that time (3R.492), highlighting “his ties to the community, long-standing marriage, [and] adult children,” as well as his lack of criminal history. 3R.490; see generally 1R.266-274 (Ware Sentencing Memo.).

The district court considered the sentencing factors set forth in 18 U.S.C. 3553(a).<sup>4</sup> See 3R.497-500. The court recognized that Ware’s “history and characteristics cut rather strongly in his favor,” specifically noting that he had ties to the community, had previously served his country in the military, and had no criminal history. 3R.496-497. But the court struggled to reconcile this portrait of a trusted family man with the “egregious” nature and circumstances of the offense “because it was so cruel and so intentional.” 3R.497. “He has been as generous, if you will, with his mind and his heart and his energy outside of the Kay County Jail as he was cruel within the confines [of] the Kay County Jail.” 3R.483. The court

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<sup>4</sup> The statutory factors include (1) the nature and circumstances of the offense, (2) the history and characteristics of the defendant, (3) the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment, (4) the need to afford adequate deterrence, (5) the need to protect the public from future crimes of the defendant, (6) the need to provide the defendant with training or treatment, (7) the sentencing range established for the applicable offense, (8) any pertinent policy statements issued by the Sentencing Commission, (9) the need to avoid unwarranted sentencing disparities, and (10) the need to provide restitution to any victims. See 18 U.S.C. 3553(a).

highlighted that “[a]ll of this was at the hands of \* \* \* not only a law enforcement officer, but \* \* \* a law enforcement officer in a management position, in a command position.” 3R.495; see also 3R.497. “Law enforcement officers who would be tempted to be cruel, as Mr. Ware was so unquestionably cruel, need to be deterred by some understanding that there is a chance that you’re going to be investigated and prosecuted” and that “there will be consequences.” 3R.498.

“Taking into account all of those considerations,” the district court entered a Guidelines sentence of 46 months’ imprisonment followed by three years of supervised release. 3R.499-500. The court entered judgment (1R.295-301), and Ware filed a timely notice of appeal (1R.302-303).

### **SUMMARY OF ARGUMENT**

This Court should affirm Ware’s sentence. The district court did not abuse its discretion in weighing the sentencing factors under 18 U.S.C. 3553(a), and Ware’s within-Guidelines sentence is presumptively reasonable. Ware’s argument (Br. 8-10) that the district court accorded insufficient weight to his personal characteristics and lack of criminal history fails to overcome this presumption of reasonableness. The district court properly considered these sentencing factors along with others and determined that a within-Guidelines sentence of 46 months was reasonable, particularly given the nature of Ware’s offense and the need to

promote respect for the law and general deterrence. On appeal, this Court does not reweigh the sentencing factors. Instead, because Ware fails to cite any authority or point to anything in the record suggesting an abuse of discretion, this Court should affirm Ware's sentence as substantively reasonable.

## **ARGUMENT**

### **THE DISTRICT COURT'S WITHIN-GUIDELINES SENTENCE IS SUBSTANTIVELY REASONABLE**

This Court reviews the substantive reasonableness of a sentence for abuse of discretion. *United States v. Williams*, 10 F.4th 965, 977 (10th Cir. 2021). In this analysis, the Court “afford[s] substantial deference to the district court,” and asks “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. Martinez*, 610 F.3d 1216, 1227 (10th Cir.) (citations and alterations omitted), cert. denied, 562 U.S. 1019 (2010); see also *United States v. Blair*, 933 F.3d 1271, 1274 (10th Cir. 2019). Recognizing that a range of sentences might be reasonable, this Court reverses “only when the district court renders a judgment that is arbitrary, capricious, whimsical or manifestly unreasonable.” *Martinez*, 610 F.3d at 1227 (internal quotation marks and citation omitted). A sentence, like Ware's, that is within the Guidelines range is subject to a rebuttable presumption of reasonableness. *United States v. Miller*, 978 F.3d 746, 754 (10th Cir. 2020).

Ware's argument that his within-Guidelines sentence was "unreasonably harsh" falls far short of rebutting this presumption and establishing substantive unreasonableness. See Br. 8-10. He stresses his "commendable personal characteristics," including "his military service, volunteerism, consistent gainful employment, and his loving support for his family," as well as his lack of criminal history and low risk for recidivism. Br. 9. Ware does not claim that the district court improperly ignored these factors; indeed, he admits that the district court considered them. See Br. 9-10. Instead, Ware argues only that these factors "deserved more weight" in the sentencing calculation. See Br. 9-10.

This Court, however, "do[es] not reweigh the sentencing factors." *Blair*, 933 F.3d at 1274; see also *United States v. Budder*, 76 F.4th 1007, 1017 (10th Cir. 2023) (refusing defendant's request to "re-weigh factors already presented to the district court"); *United States v. Lawless*, 979 F.3d 849, 856 (10th Cir. 2020) (same). For the purposes of appeal, "it is enough that the district court thoroughly weighed each of these § 3553(a) factors, reached a logical conclusion, and detailed its reasoning." *Lawless*, 979 F.3d at 856-857.

Ware's cursory citation (Br. 8) to *United States v. Walker*, 844 F.3d 1253 (10th Cir. 2017), does not suggest otherwise. In that case, this Court concluded that a sentence of "33 days in pretrial detention" for "admittedly robbing two banks as an armed career offender" was "an unreasonably short sentence." *Id.* at 1259.

Walking through the sentencing factors, the Court found that the district court had “focused almost exclusively on [the defendant]’s newfound sobriety” and “effectively failed to give *any* weight to the congressional values of punishment, general deterrence, incapacitation, respect for the law, and avoidance of unwarranted sentencing disparities.” *Ibid.* (emphasis added). Far from endorsing a reweighing of the factors that the district court considered, *Walker* stands for the unsurprising proposition that a sentence can be substantively unreasonable if a district court effectively ignores all but one factor. See *ibid.*; see also *United States v. Ramirez-Plata*, 749 F. App’x 762, 764 (10th Cir. 2019) (distinguishing *Walker* because “the district court \* \* \* evaluated all the statutory factors set out in § 3553(a)”).

Here, as Ware concedes (Br. 9-10), the district court took note of exactly the factors that he urges before this Court. Indeed, the district court recognized that Ware’s “history and characteristics cut in [his] favor.” 3R.497. The district court simply found these factors outweighed by “the nature and circumstances of the offense \* \* \* , the need to promote respect for the law, and the need for adequate deterrence.” 3R.499.

The district court’s weighing of these factors was reasonable. While “laudable,” Ware’s “ties to the community, the support for community organizations, [and] the fact that [he] has been a trusted family member” were “not



all that extraordinary.” 3R.496-497. “But what [was] extraordinary [was] Mr. Ware’s cruelty and \* \* \* his warped concept of command and the fact that he did this as a law enforcement officer and, in that sense, sullied the badge of all those who wear [it].” 3R.497. The court found it “both overwhelming and breathtaking as to the sheer cruelty that Mr. Ware had in his mind and heart as he exposed these inmates to serious harm.” 3R.482. And, even if Ware would not be in a position to inflict similar harm in the future, the court explained that his sentence needed to promote respect for the law and adequate deterrence among other law enforcement officers “who would be tempted to be cruel.” 3R.498.

### CONCLUSION

For the foregoing reasons, this Court should affirm Ware’s sentence.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 2,582 words according to the word processing program used to prepare the brief.

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 Microsoft Word for Microsoft 365 in Times New Roman 14-point font.

s/ Alisa C. Philo  
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Dated: September 28, 2023

## **CERTIFICATE OF DIGITAL SUBMISSION**

I certify that the electronic version of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, prepared for submission via ECF, complies with the following requirements.

1. All required privacy redactions have been made under Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5;
2. With the exception of any redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the clerk; and
3. The ECF submission has been scanned for viruses with the most recent version of Crowdstrike Endpoint Detection and Response (Version 7.1.17312.0) and is virus-free according to that program.

s/ Alisa C. Philo  
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Dated: September 28, 2023

## **CERTIFICATE OF SERVICE**

I hereby certify that on September 28, 2023, I electronically filed the foregoing BRIEF OF THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via this Court's CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

I further certify that, pursuant to Tenth Circuit Rule 31.5, seven paper copies of the foregoing brief will be sent to the Clerk of the Court within five business days following receipt of notice that the electronic filing is compliant.

s/ Alisa C. Philo  
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