No. 22-10566

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIE M. BURKS, III,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. *Willie M. Burks, III*, No. 22-10566

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States certifies that, in addition to those identified in the brief filed by defendant-appellant, the following persons may have an interest in the outcome of this case:

1. Bortnick, Yael, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Calderon, Tovah R., U.S. Department of Justice, Civil Rights Division, counsel for the United States; and
3. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Yael Bortnick
YAEL BORTNICK
Attorney

Date: August 12, 2022

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument is unnecessary in this case because the defendant's sufficiency-of-the-evidence and sentencing arguments do not raise any complex or novel issues. This appeal can be easily resolved on the briefs.

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RULE:

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STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant Willie M. Burks, III, on February 4, 2022. Doc. 212.[1]

[1] Citations to "Doc. __, at __" refer to the documents in the district court record, as numbered on the docket sheet, and page numbers within those documents. For exhibits and documents that are not available on the district court docket, this brief uses the following citations: "App. __, at __" refers to the volume number and PDF page number of documents in the appellant's appendix; "Tr. __, at __" refers to the volume number and page number of the trial transcript; "Sent. Tr. __" refers to the page number of the sentencing transcript; "GX __" refers to government exhibits admitted at trial; and "Br. __" refers to page numbers in Burks's opening brief. GX 34-37 and 75 are video recordings that have already been transmitted to this Court in native format as part of Volume I of appellant's appendix.

On February 18, 2022, Burks filed a timely notice of appeal from the court's judgment. Doc. 219. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports Burks's conviction under 18 U.S.C. 242 for failing to intervene in a subordinate officer's assault on a handcuffed inmate.

2. Whether Burks's within-Guidelines sentence of 108 months was procedurally and substantively reasonable.

STATEMENT OF THE CASE

This appeal arises from a criminal civil rights prosecution of a law enforcement officer for failing to intervene to stop a fellow officer's excessive use of force. Willie M. Burks, III, a supervisory correctional officer, stood and watched while his subordinate beat a handcuffed inmate (Chris Hampton) with his fists, feet, and a baton. A jury convicted Burks of one count of deprivation of rights under color of law, in violation of 18 U.S.C. 242. The district court sentenced Burks to 108 months' imprisonment.

At trial, the government introduced video evidence showing Burks's failure to intervene in the assault as well as corroborating testimony from three correctional officers who were present during the assault and witnessed Burks's

inaction. On appeal, Burks challenges the sufficiency of the evidence supporting his conviction and the procedural and substantive reasonableness of his sentence.

1. Factual Background

a. Burks was the shift commander in charge at Elmore Correctional Facility on Saturday, February 16, 2019. Tr. II, at 12, 122. That morning, correctional officer Leon Williams brought two inmates, Cortney Rolley and Chris Hampton, to the shift office to report them for bringing contraband into the facility. Tr. II, at 15, 18-19. Williams and another correctional officer, Ulysses Oliver, went to review a security video of the incident. Tr. II, at 20, 124-125. Meanwhile, Burks handcuffed Rolley and Hampton behind their backs and placed them in the observation room, a locked cell across a narrow hallway from the shift office. Tr. II, at 126-127, 217; GX 37, at 6:35-7:15, 13:00-13:50.

The security video, which showed Rolley and Hampton retrieving contraband, infuriated Oliver. Tr. II, at 125. Oliver and Williams returned to the shift office, where Burks and two other correctional officers then on duty—Cheryl Watson and Bryanna Mosley—were working. Tr. II, at 19, 126, 181; Tr. III, at 45. Oliver grabbed the keys to the observation room, unlocked the door, and yanked Rolley—who was handcuffed and compliant—into the hallway. Tr. II, at 20, 126-127; GX 34, at 0:01-0:16; GX 36, at 0:23-0:31. Oliver "began striking [Rolley]

with [his] fists, kicking him, and [he] took out [his] collapsible baton and started beating [Rolley] with that." Tr. II, at 21, 127; GX 34, at 0:16-0:26.

When the assault started, Mosley—who had followed Oliver into the hallway—walked back into the shift office and stood behind Burks. Tr. II, at 205-206; GX 37, at 25:00-25:10. From the shift office, Mosley could hear the assault in the hallway: "I was hearing * * * fists making its contact points" and "the sound of the baton," which was "a very distinctive sound." Tr. II, at 209. Burks admitted that he could hear "a scuffle" in the hallway. Tr. III, at 128-129. Through a window above his desk, Burks could also see Oliver's "baton come up and down." Tr. III, at 131-132; App. III, at 2; App. IV, at 7-8.

Despite "know[ing] that a beating was taking place in that hallway," Burks remained at his desk. Tr. II, at 28, 210-211; Tr. III, at 131. Just as Oliver finished assaulting Rolley, Burks steadily walked to the door of the shift office "to see what was going on"; he did not hurry. Tr. III, at 131; Tr. II, at 30, 210-211; GX 34, at 0:55-1:04; see also GX 75, at 0:55-1:04 (identifying Burks). Burks stood in the hallway without saying or doing anything as Oliver walked back into the observation room and pulled Hampton—who, like Rolley, was in handcuffs and not resisting—into the hallway. Tr. II, at 30-31, 33, 134-135, 232; GX 34, at 0:55-1:10.

Just a few feet away from and in full view of Burks, Oliver proceeded to beat Hampton several times with his baton until Hampton fell to the ground. Tr. II, at 145-146; GX 34, at 1:05-1:38. Oliver then continued to strike Hampton with his baton and kick Hampton as he lay handcuffed on the floor. Tr. II, at 145-146; GX 34, at 1:20-1:38.

Burks "knew [he had] an obligation to intervene" (Tr. III, at 66), and he had the ability to do so (Tr. II, at 37, 135-138), but he did not verbally or physically do anything to stop Oliver from assaulting Hampton (Tr. II, at 36, 41-42, 135, 143-144). No officer ever heard Burks tell Oliver to stop. Tr. II, at 38, 76, 129, 235. Rather, Oliver, Williams, and Mosley all heard Burks say "it's fair" as he watched Oliver beat Hampton. Tr. II, at 41, 137-139, 214. According to Mosley, "it sounded like [Burks] found [the assault] funny." Tr. II, at 234-235.

Oliver continued to hit and kick Rolley and Hampton as they stood up and walked back into the observation room. Tr. II, at 146, 148; GX 34, at 1:38-1:49; GX 36, at 2:00-2:10. Burks followed the inmates into the observation room and began removing their handcuffs. GX 36, at 2:10-2:17.

Oliver walked into the room with his baton extended, stood over Burks, and yelled at Rolley and Hampton. GX 36, at 2:17-2:45; Tr. II, at 148-151. Burks did not do or say anything to protect the inmates from Oliver. Tr. II, at 153-155. Instead, Burks again told Rolley and Hampton, "it's fair." Tr. II, at 149, 153.

After Burks finished removing the handcuffs, Oliver, leaning in front of Burks, shoved his baton into Hampton's face, lacerating Hampton under his eye. GX 36, at 2:45-3:00; Tr. II, at 154. Burks did nothing. GX 36, at 2:45-3:00. Instead, he simply followed Oliver out of the observation room. GX 36, at 3:00-3:15.

b. The assaults left Hampton and Rolley with significant injuries. Tr. II, at 113; App. I, at 154, 157. Lisa Brady, a registered nurse, examined Hampton and Rolley immediately after the assaults. Tr. II, at 90-91. She observed that Rolley had swelling above his right eye, broken blood vessels in his left eye, a knot between his eyebrows, and significant swelling to his upper, outer thigh. Tr. II, at 92; App. I, at 143-153. Brady was also concerned that Rolley's right elbow was possibly broken. Tr. II, at 102. Hampton's left eye was bleeding and required stitches, and his right forearm had significant swelling. Tr. II, at 104-107; App. I, at 134-142.

c. Oliver immediately took responsibility and insisted, over Burks's objection, on reporting himself to the captain and the warden. Tr. II, at 42, 156-157. The day of the assaults, Oliver prepared a statement about what happened. Tr. II, at 159. Burks instructed Oliver to "make sure [Oliver] put in [that statement] that [Burks] gave [Oliver] a direct order to stop." Tr. II, at 160. Although he did not remember ever hearing Burks direct him to do so, Oliver

complied with Burks's instruction and wrote that he "was told to stop" by Burks. Tr. II, at 160-161; App. I, at 158.

2. Procedural History

a. A federal grand jury returned an indictment against Burks. Doc. 1. The indictment charged Burks with one count of depriving Hampton of his civil rights, in violation of 18 U.S.C. 242 (Count 1). Doc. 1, at 1. The indictment also charged Burks with perjury for lying under oath before a grand jury, in violation of 18 U.S.C. 1623 (Count 2). Doc. 1, at 2-5. The government later dismissed Count 2. Doc. 132.

b. Oliver, Williams, and Mosley were charged separately, and each pleaded guilty to two counts of deprivation of rights under color of law, in violation of 18 U.S.C. 242, for their roles in the assaults on Rolley and Hampton. App. II, at 27; App. III, at 59, 74. Oliver was sentenced to 30 months' imprisonment, and Williams and Mosley were each sentenced to one year of probation. See App. IV, at 37-42.

c. Burks pleaded not guilty and was tried before a jury. See Doc. 212, at 1. The government presented testimony from five witnesses, including Oliver, Williams, and Mosley; Brady, the nurse who treated Rolley and Hampton; and an Alabama Department of Corrections training officer. See Docs. 104-105 (Tr. I-II). Burks testified in his own defense. See Tr. III, at 29. Burks moved for a directed

verdict after the government rested and again at the end of trial, but the district court denied the motions. Tr. II, at 238-239; Tr. III, at 143. The jury found Burks guilty of violating 18 U.S.C. 242. Doc. 167.

Burks filed a renewed motion for judgment of acquittal or, in the alternative, a motion for a new trial. Docs. 175-176. The court denied the motion. Doc. 191.

d. In advance of sentencing, the U.S. Probation Office prepared a presentence investigation report (PSR). The PSR calculated a base offense level of 14 under Sentencing Guidelines § 2H1.1(a)(1), which cross references "the offense level from the offense guideline applicable to any underlying offense." PSR 7. The PSR determined that the "underlying offense" was aggravated assault and applied Sentencing Guidelines § 2A2.2 to establish the base offense level, and then added a four-level increase under Sentencing Guidelines § 2A2.2(b)(2)(B) because Oliver used a dangerous weapon—his baton—during the assault, and a three-level increase under Sentencing Guidelines § 2A2.2(b)(3)(A) because Hampton sustained bodily injury from the assault, for a total base offense level of 21. PSR 7. The PSR then added a six-level increase under Sentencing Guidelines § 2H1.1(b)(1) because the offense was committed under color of law, a two-level increase under Sentencing Guidelines § 3A1.3 because the victim was physically restrained, and a two-level increase under Sentencing Guidelines § 3C1.1 for obstruction of justice. PSR 7-8. With a criminal history category of I and a total

offense level of 31, the Guidelines range was 108 to 135 months. PSR 13. Because of the statutory maximum, the upper limit was reduced to 120 months. PSR 13.

At the sentencing hearing, Burks objected to the use of aggravated assault as the underlying offense, the four-level increase for use of a dangerous weapon, and the two-level increase because the victim was physically restrained. Sent. Tr. 9-10. Burks argued that he had not personally assaulted the inmates, used a deadly weapon, or restrained the victim. Sent. Tr. 10. Burks also objected to the two-level increase for obstruction of justice because, he argued, he told the truth during the trial. Sent. Tr. 10.

The district court denied Burks's objections. Sent. Tr. 17. The court explained that Burks should be held accountable for the assault with the baton because he was "a supervisor who stood there, said it was fair, [and] did nothing." Sent. Tr. 17-18. After reviewing the video evidence, the court found it "evident that [Burks] was condoning what was going on." Sent. Tr. 17. In sum, the court emphasized that Rolley and Hampton "were beaten, and [Burks] agreed with it[,] * * * the jury found it, and every enhancement here applies." Sent. Tr. 19.

In sentencing Burks, the court adopted the PSR's factual findings. Sent. Tr. 61. The court "considered and consulted the sentencing guidelines and the arguments of counsel and evaluated the reasonableness of [the] sentence through

the lens of Section 3553 of Title 18 of the United States Code." Sent. Tr. 61. The court then imposed a 108-month sentence, which it found "sufficient but not greater than necessary" to comply with Section 3553. Sent. Tr. 61-62.

Burks moved the court to reconsider his sentence. Doc. 216. Burks argued, in part, that the PSR's findings were unfair because he expressed remorse, and he objected to the calculation of the Sentencing Guidelines range. Doc. 216, at 3-5. Burks also argued that his sentence was not fair or consistent with Mosley's lesser sentence. Doc. 216, at 5-6. The court denied the motion. Doc. 218.

d. Burks timely appealed the judgment of conviction and his sentence. Doc. 219.

SUMMARY OF ARGUMENT

This Court should affirm Burks's convictions and 108-month, within-Guidelines sentence. Burks's challenges to the sufficiency of the evidence supporting his conviction for failing to intervene in the assault and to the reasonableness of his sentence lack merit.

Although Burks has failed to adequately brief the issue on appeal, the evidence admitted at trial was more than sufficient to support Burks's conviction under 18 U.S.C. 242 for failing to intervene in a fellow officer's excessive use of force. The video evidence and testimony of three eyewitnesses established that Burks violated 18 U.S.C. 242 when he stood by, doing nothing, and watched as

Oliver assaulted Hampton. According to the witnesses' consistent testimony, Burks said "it's fair," explicitly condoning the assault. In failing to intervene to protect Hampton, despite having the clear ability and opportunity to do so, Burks willfully deprived Hampton of his constitutional right to be free from cruel and unusual punishment. The district court's judgment upholding the jury's verdict should be affirmed.

Burks's sentence was procedurally reasonable. The district court correctly applied the aggravated assault guideline, Sentencing Guidelines § 2A2.2, to calculate Burks's Sentencing Guidelines range. Although Burks did not personally beat Hampton, under Section 242, willfully failing to intervene to halt an assault when a law enforcement officer has a realistic opportunity to do so is no less a crime than committing such an assault. The guideline governing Section 242 convictions, Sentencing Guidelines § 2H1.1(a)(1), directs the court to use the base offense level for the underlying offense, which in this case was an aggravated assault because the violence committed against Hampton was a felonious assault involving the use of a dangerous weapon (a baton) with the intent to cause (and did cause) bodily injury. Burks's argument to the contrary merely repeats his meritless challenge to the sufficiency of the evidence.

Burks's bottom-of-the-Guidelines sentence was also substantively reasonable. First, the fact that Oliver, Williams, and Mosley received substantially

shorter sentences does not demonstrate that Burks was subjected to a trial penalty. Those officers were not similarly situated to Burks because they pleaded guilty and cooperated with the government. Similarly, Burks's other disparity arguments do not render his sentence unreasonable because he ignores the applicable legal standard, which requires him to compare his sentence to those of defendants who engaged in similar conduct. Instead, Burks focuses on data from the Sentencing Commission's website that lacks any details about the underlying offense conduct. Burks, therefore, has not established that the data is reflective of truly comparable offensive conduct. Finally, this Court should reject Burks's invitation to re-weigh the 18 U.S.C. 3553(a) factors. The district court properly evaluated the reasonableness of Burks's sentence through the lens of Section 3553, and Burks has established no reason to disturb the bottom-of-the-Guidelines sentence.

ARGUMENT

I

SUFFICIENT EVIDENCE SUPPORTS BURKS'S CONVICTION UNDER 18 U.S.C. 242

A. Standard Of Review

This Court reviews de novo challenges to the sufficiency of the evidence. *United States* v. *Brown*, 934 F.3d 1278, 1294 (11th Cir. 2019), cert. denied, 140 S. Ct. 2826 (2020); accord *United States* v. *Reeves*, 742 F.3d 487, 497 (11th Cir. 2014). In so doing, the Court "view[s] the evidence in [the] light most favorable to

the jury verdict and draw[s] all inferences in its favor." *Brown*, 934 F.3d at 1294 (quoting *Reeves*, 742 F.3d at 497). The Court is "obliged to affirm the conviction[] if a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Reeves*, 742 F.3d at 497. This Court, however, does not review arguments that have been waived on appeal. See, *e.g.*, *Continental Tech. Servs., Inc.* v. *Rockwell Int'l Corp.*, 927 F.2d 1198, 1199 (11th Cir. 1991) (per curiam).

B. Burks Waived His Sufficiency Challenge On Appeal

As an initial matter, this Court may decline to address Burks's argument (Br. 17-23) that "the Jury in this case erred when it found [him] [g]uilty, even though the evidence presented overwhelming doubt as to his guilt." Burks's "argument" merely repeats his recitation of the facts and fails to cite any legal authority to support his contentions.

An appellant brief, however, must include the reasons for appellant's contentions, "with citations to the authorities * * * on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). And this Court has held that a party waives an argument if the party "fail[s] to elaborate or provide any citation of authority in support" of the argument. *Flanigan's Enters., Inc.* v. *Fulton Cnty.*, 242 F.3d 976, 987 n.16 (11th Cir. 2001) (per curiam), cert. denied, 536 U.S. 904 (2002); see also *Hamilton* v. *Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) ("A passing reference to an issue in a brief is not enough, and the failure to make

arguments and cite authorities in support of an issue waives it."). Because Burks's sufficiency challenge fails to cite or discuss any legal authorities, as required by Federal Rule of Appellate Procedure 28(a)(8)(A), this argument should be deemed waived on appeal and not considered on the merits.

C. A Reasonable Jury Could Easily Conclude That Burks Failed To Intervene In Violation Of 18 U.S.C. 242

Even if considered on the merits, overwhelming and consistent evidence established that Burks witnessed an unjustified assault, had the opportunity and ability to intervene, and failed to do so. Section 242 makes it a criminal offense for a person acting under color of law willfully to deprive a person of a right protected by the Constitution or laws of the United States. 18 U.S.C. 242. The Supreme Court has recognized that an inmate has an Eighth Amendment right to be free from cruel and unusual punishment, and that a correctional officer has a concomitant constitutional duty to protect an inmate from such harm. See *Hudson* v. *McMillian*, 503 U.S. 1, 5 (1992). As a result, a law enforcement officer violates Section 242 when he observes the use of unjustified force against a person in his custody, has the opportunity to intervene, and willfully chooses not to do so.[2] See

[2] Burks does not dispute that Oliver's assault of Hampton while he was handcuffed and compliant would qualify as excessive force under the Eighth Amendment, which, in a custodial setting, prohibits force that is applied "maliciously and sadistically to cause harm." See *Sears* v. *Roberts*, 922 F.3d 1199, 1205 (11th Cir. 2019) (quoting *Hudson*, 503 U.S. at 7).

United States v. *Reese*, 2 F.3d 870, 887-888 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994); accord *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 924-925 (11th Cir. 2000) (applying same principle in 42 U.S.C. 1983 suit); *Byrd* v. *Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986) (same).

Consistent with these principles, and without objection from Burks (see Tr. III, at 161), the district court instructed the jury that to find Burks guilty under Section 242, it must find, that Burks (1) acted under color of state law; (2) deprived Hampton of a right secured by the Constitution or laws of the United States; (3) acted willfully; and (4) that the offense either resulted in bodily injury to Hampton or involved the use of a dangerous weapon. Tr. III, at 200-201. The court explained that the second element would be met if the jury found that Burks "witnessed another correctional officer subjecting Chris Hampton to cruel and unusual punishment, and he chose not to intervene to stop it, despite having a realistic opportunity to do so." Tr. III, at 200.

The jury's verdict here must be upheld because the evidence clearly demonstrated that Burks, a supervisory correctional officer, had both the ability and opportunity to intervene to stop the assault against Hampton. See Tr. II, at 135-138. Burks testified that he was taught that he had "a duty to step in and stop unjustified force." Tr. III, at 59. Notwithstanding this duty, and as captured on video, Burks stood by and did nothing as he watched Oliver beat Hampton with his

fists, feet, and baton. GX 34, at 1:05-1:49. Specifically, despite, as Burks testified, "know[ing] that a beating was taking place in that hallway" (Tr. III, at 131), the video shows that Burks steadily walked to the door of the shift office just as Oliver finished assaulting Rolley. GX 34, at 0:55-1:04. Williams (Tr. II, at 30), Oliver (Tr. II, at 135), and Mosley (Tr. II, at 210) all consistently testified that Burks "just stood there" while Oliver walked into the observation room and pulled out Hampton, corroborating what the jury saw on the video (see GX 34, at 1:04-1:09). Williams, Oliver, and Mosley further testified that Burks not only failed to intervene, but that he condoned the assault by stating "it's fair" as Oliver shoved Hampton into the wall and proceeded to beat him. Tr. II, at 41, 220; GX 34, at 1:05. Indeed, as the video showed, and as Oliver testified, Burks was standing just three feet away from him as Oliver beat Hampton several times with his baton, until Hampton fell to the floor. GX 34, at 1:05-1:18; Tr. II, at 145-146. As shown on the video, Burks then watched, shuffling his feet, as Oliver continued to strike Hampton with his baton and kick Hampton as he lay handcuffed on the floor. GX 34, at 1:20-1:38. Finally, rather than moving to intervene, the video shows Burks moved out of the way as Oliver continued to hit and kick Rolley and Hampton as they stood up and walked back into the observation room. GX 34, at 1:38-1:49. Viewing the evidence in the light most favorable to the government, see *Brown*,

934 F.3d at 1294, a reasonable jury could find based on the video evidence and the witness testimony that Burks failed to intervene in violation of Section 242.

b. Burks's argument (Br. 20) that the jurors should have found him not guilty because there was "an overwhelming amount of [r]easonable [d]oubt" is unavailing. Specifically, Burks argues (Br. 20-21) that the "video alone provides substantial reasonable doubt as to whether Mr. Burks told Oliver to stop" because the video shows "Burks'[s] jaw moving." Burks concludes that this means "it is *likely* he told Oliver to stop." Br. 21 (emphasis added). But Oliver, Williams, and Mosley testified that when Burks spoke, he did not tell Oliver to stop; he said "it's fair." Tr. II, at 41, 137-139, 214. And "all conflicts in the evidence must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." *United States* v. *Cochran*, 683 F.3d 1314, 1322 (11th Cir.) (quoting *United States* v. *Pearson*, 746 F.2d 787, 794 (11th Cir. 1984)), cert. denied, 568 U.S. 969 (2012).

Moreover, while Burks attacks (Br. 21-22) the veracity of the testimony of Oliver, Mosley, and Williams, this Court may not revisit the jury's credibility determinations unless a witness's testimony is incredible as a matter of law. *United States* v. *Isaacson*, 752 F.3d 1291, 1304 (11th Cir. 2014), cert. denied, 574 U.S. 1095 (2015). For testimony to be incredible as a matter of law, it must either be "unbelievable on its face" or relate to "facts that [the witness] physically could

not have possibly observed or events that could not have occurred under the laws of nature." *United States* v. *Steele*, 178 F.3d 1230, 1236 (11th Cir.) (quoting *United States* v. *Calderon*, 127 F.3d 1314, 1325 (11th Cir. 1997) (alteration in original), cert. denied, 528 U.S. 933 (1999). The fact that Oliver, Mosley, and Williams "changed their stories" and "hoped to enhance their plea deals" does not make their testimony that Burks said "it's fair" incredible. See, *e.g.*, *Isaacson*, 752 F.3d at 1304 (citing *Calderon*, 127 F.3d at 1325). Their prior inconsistent statements and status as cooperating witnesses were all made known to the jury (see, *e.g.*, Tr. II, at 44-45, 54, 119-120, 159-160, 215-216), "and the jury was entitled to weigh their testimonies accordingly." *United States* v. *Flores*, 572 F.3d 1254, 1263 (11th Cir.), cert denied, 558 U.S. 1015 (2009).

c. Burks's other arguments are similarly unavailing. Regardless of whether "there was no written protocol" for how to respond to an officer-on-inmate assault (Br. 21), Burks had a constitutional duty to intervene. See *Sears* v. *Roberts*, 922 F.3d 1199, 1205-1206 (11th Cir. 2019) (holding that an officer present at the scene "who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held personally liable for his nonfeasance" under the Eighth Amendment) (citation omitted). Moreover, Burks admitted in his trial testimony that he "knew what [Oliver] was doing was wrong" (Tr. III, at 42) and that he "knew that [he had] an obligation to intervene" (Tr. III, at 66).

Likewise, the fact that Burks had a "back condition" and "was afraid he would get hurt" (Br. 22-23) is of no consequence. The jury heard, and clearly rejected, Burks's argument that, given his back condition, he should be excused from physically intervening because he was afraid of getting hurt. Tr. III, at 103, 106. Moreover, Burks himself acknowledged in his testimony that his fear of getting hurt did not negate his duty to intervene. Tr. III, at 103.

Finally, Burks contends (Br. 22-23) that if the facts had been different—if he had known about Oliver's anger issues or if other officers had intervened—he would not "have been in trouble." Of course, none of these hypothetical scenarios changes what did occur: Oliver assaulted a handcuffed inmate, while Burks stood by and condoned the assault through his words and inaction. See GX 34, at 0:55-1:38.

In short, the jury heard, and clearly rejected, Burks's incredible claims that he told Oliver to stop beating Hampton or that he had good excuses for not doing more to intervene in the assault. The jury was entitled to credit the video evidence and the testimony of the other witnesses over Burks's self-serving statements, and the credited evidence was more than sufficient to support the jury's verdict. This Court should affirm Burks's conviction.

II

BURKS'S 108-MONTH, WITHIN-GUIDELINES SENTENCE IS PROCEDURALLY AND SUBSTANTIVELY REASONABLE

A. Standard Of Review

This Court reviews the reasonableness of a district court's sentencing decision under a deferential abuse-of-discretion standard. See *Gall* v. *United States*, 552 U.S. 38, 51 (2007); *United States* v. *Livesay*, 587 F.3d 1274, 1278 (11th Cir. 2009). Reasonableness review consists of two components, procedural and substantive. See *Gall*, 552 U.S. at 51. First, this Court must determine "whether the district court committed any 'significant procedural error.'" *United States* v. *Overstreet*, 713 F.3d 627, 636 (11th Cir.) (quoting *United States* v. *Turner*, 626 F.3d 566, 573 (11th Cir. 2010)), cert. denied, 571 U.S. 896 (2013). A sentence may be procedurally unreasonable, for example, if the district court improperly calculated the Guidelines range. See *United States* v. *Pugh*, 515 F.3d 1179, 1190 (11th Cir. 2008).

Second, this Court must determine whether the sentence imposed was substantively reasonable under the totality of the circumstances, including the factors listed in 18 U.S.C. 3553(a). See *Pugh*, 515 F.3d at 1190; *United States* v. *Alvarado*, 808 F.3d 474, 496 (11th Cir. 2015). This review is "deferential," *United States* v. *Talley*, 431 F.3d 784, 788 (11th Cir. 2005), and the Court "will not second guess the weight (or lack thereof) that the [district court] accorded to a given factor

* * * as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *United States* v. *Snipes*, 611 F.3d 855, 872 (11th Cir. 2010) (citation omitted), cert. denied, 131 S. Ct. 2962 (2011). Burks bears the burden of establishing that his sentence is unreasonable. See *Pugh*, 515 F.3d at 1189.

B. The District Court Properly Applied The Aggravated Assault Guideline

Burks argues (Br. 23-25) that the district court should not have used the aggravated assault guideline to calculate his base offense level because he neither assaulted Hampton nor acted in conspiracy with Oliver. By failing to intervene, however, Burks is accountable under Section 242 and the Guidelines for his subordinate officer's conduct regardless of whether the assault legally constitutes or was charged as a conspiracy. Accordingly, use of the aggravated assault guideline and related enhancements was proper. [3]

a. As discussed, see pp. 14-15, *supra*, there is no distinction in criminal liability under Section 242 between a willful failure to prevent an assault under color of law and an assault committed under color of law. Section 242 prohibits the willful "deprivation of any rights, privileges, or immunities secured or

[3] Although Burks notes (Br. 24) that he objected at sentencing to certain enhancements related to the aggravated assault guideline, his brief on appeal does not contain any argument with respect to the enhancements. See Br. 23-25.

protected by the Constitution or laws of the United States" under color of law. 18 U.S.C. 242. Inmates and pretrial detainees have a constitutional right to be free of lawless violence while in the government's custody, and officers have a duty to protect against such violence. See *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *United States* v. *Reese*, 2 F.3d 870, 887-888 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994). Accordingly, courts have consistently held that officers like Burks have "a legal obligation to act to prevent the assault" of inmates and have "flatly reject[ed] any suggestion otherwise." *United States* v. *Serrata*, 425 F.3d 886, 896 (10th Cir. 2005); see also *United States* v. *Broussard*, 882 F.3d 104, 110 (5th Cir. 2018) (holding that the defendant is accountable "for the substantive offense if the evidence shows awareness of a constitutional violation and no effort to prevent the violation"); *United States* v. *Scott*, 833 F. App'x 884, 887-888 (2d Cir. 2020) (recognizing that it is "well-settled that an officer has a duty to intervene to protect an individual under the control and custody of the state from excessive force"). Willfully disregarding the duty to intervene to stop an assault is thus no less a violation of Section 242 than assaulting an inmate. Burks is responsible for this violation and the consequences thereof.

b. Burks misreads the Guidelines to "imply" that in a failure-to-intervene case, the aggravated assault guideline should not be used as the underlying offense

unless "there is a finding [that] the defendant acted in conspiracy with the person who committed the underlying offense." Br. 24 (citing Sentencing Guidelines § 2H1.1, comment. (n.1)). Not so.

Under the Guidelines, the base offense level for a violation of Section 242 is "the offense level from the offense guideline applicable to any underlying offense." Sentencing Guidelines § 2H1.1(a)(1). The application notes make clear that the "'[o]ffense guideline applicable to any underlying offense' means the offense guideline applicable to any *conduct* established by the offense of conviction that constitutes an offense under federal, state, or local law." Sentencing Guidelines § 2H1.1(a)(1) comment. (n.1) (emphasis added). Relevant *conduct* includes not only the actions of the defendant himself, but also any acts that he aided or abetted, Sentencing Guidelines § 1B1.3(a)(1)(A), and any foreseeable acts of others that were "within the scope of the jointly undertaken criminal activity," regardless of whether the joint criminal activity legally constitutes or is charged as a conspiracy, Sentencing Guidelines § 1B1.3(a)(1)(B). The focus is on "the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator." Sentencing Guidelines § 1B1.3, comment. (n.1).

In light of these provisions, it was appropriate for the Guidelines calculation to be premised on the entire course of conduct and ultimate consequences of Burks's failure to intervene, including Oliver's conduct that occurred while Burks was in the hallway. Burks willfully chose not to intervene even though he "knew [he had] an obligation to intervene" (Tr. III, at 66), and he had the ability to do so (Tr. II, at 37, 135-138). Burks's failure to intervene was an "omission," and, under the Guidelines, he is responsible for "all harm that resulted from" it. See Sentencing Guidelines § 1B1.3(a)(1)(B) and (a)(3). The harm that resulted from Burks's failure to act was the aggravated assault on Hampton.

c. The district court and PSR correctly concluded that the guideline applicable to the underlying offense was the aggravated assault guideline, Sentencing Guidelines § 2A2.2. Aggravated assault occurs where, among other circumstances, there is a "felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon; [or] (B) serious bodily injury." Sentencing Guidelines § 2A2.2 comment. (n.1). It is undisputed that Oliver beat Hampton with a baton with the intent to cause bodily injury and that the beating led to bodily injury to Hampton (see Tr. II, at 104-107; App. I, at 134-142); therefore, there is no dispute that Oliver committed the underlying offense of aggravated assault.

Because the beating resulted from Burks's failure to intervene, the district court properly applied the aggravated assault guideline and the related enhancements. Accordingly, the district court committed no procedural error, and this Court should affirm the district court's calculation of the Guidelines range. See *Broussard*, 882 F.3d at 110 (5th Cir. 2018) (affirming district court's use of aggravated assault as underlying offense in Guidelines calculation in Section 242 failure-to-intervene case); *Serrata*, 425 F.3d at 907 (affirming application of the aggravated assault guideline to an officer who was convicted of violating Section 242 because of his failure to intervene in his fellow officers' assault of an inmate).

C. The District Court's Bottom-Of-The-Guidelines Sentence Is Substantively Reasonable And Does Not Create Any Unwarranted Sentencing Disparities

This Court ordinarily expects a within-Guidelines sentence to be a reasonable one. See *United States* v. *Dixon*, 901 F.3d 1322, 1351 (11th Cir. 2018), cert. denied, 139 S. Ct. 854, and 139 S. Ct. 1392 (2019). The district court imposed the lowest possible prison sentence within the Guidelines range, 108 months. See PSR 13; Sent. Tr. 61-62. The low-end nature of Burks's sentence, which is well below the statutory maximum, is further indicative of its reasonableness. See *United States* v. *Coglianese*, 34 F.4th 1002, 1009 (11th Cir. 2022).

Burks has not established any basis to rebut the expectation that his sentence is reasonable. Rather, Burks contends (Br. 25-26) that his sentence amounts to a

substantively unreasonable "trial penalty," as evidenced by comparing his sentence to that of Oliver, Williams, and Mosley. Burks also contends (Br. 27-30) that the sentence was generally unreasonable given the factors set forth in 18 U.S.C. 3553(a). Neither argument has merit.

1. Any Disparity In Sentences Between Burks And His Co-Defendants Does Not Demonstrate A Trial Penalty Because They Were Not Similarly Situated

Burks's sentence is not substantively unreasonable simply because it is significantly higher than the sentences imposed on Oliver (30 months), Williams (one year of probation), and Mosley (one year of probation). See App. IV, at 37-42. Burks is correct that he should not "be punished by a more severe sentence because he unsuccessfully exercises his constitutional right to stand trial." Br. 26 (quoting *United States* v. *Devine*, 934 F.2d 1325, 1338 (5th Cir. 1991)). He errs, however, in "rely[ing] upon [his] co-defendants' sentences as a yardstick" for his own. *Devine*, 934 F.2d at 1338. A "disparity between the sentences imposed on codefendants is generally not an appropriate basis for relief on appeal." *United States* v. *Cavallo*, 790 F.3d 1202, 1237 (11th Cir. 2015) (alteration omitted) (quoting *United States* v. *Regueiro*, 240 F.3d 1321, 1325-1326 (11th Cir. 2001)).

Section 3553(a)(6) requires a district court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." This Court, however, will not find an

"unwarranted" sentence disparity where co-defendants are not similarly situated. *United States* v. *Holt*, 777 F.3d 1234, 1270 (11th Cir.) (quoting *United States* v. *Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009)), cert. denied, 576 U.S. 1062 (2015). The Sentencing Guidelines allow for offense-level reductions for those who accept responsibility for their offense (§ 3E1.1) and downward departures for those who provide substantial assistance to the government (§ 5K1.1). Thus, "for purposes of [Section] 3553(a)(6), a defendant who cooperates with the Government and pleads guilty is not 'similarly situated' to his co-defendant who proceeds to trial." *Cavallo*, 790 F.3d at 1237. There is, therefore, "no unwarranted disparity even when the sentence the cooperating defendant receives is substantially shorter." *Docampo*, 573 F.3d at 1101 (internal quotation marks and citation omitted).

Here, as Burks himself admits (Br. 25-26), he was not similarly situated to Oliver, Williams, or Mosley because they each pleaded guilty. Thus, Burks—who forced the Government to prove his guilt at trial—has not demonstrated an improper "trial penalty." See *United States* v. *Gillespie*, 27 F.4th 934, 944 (4th Cir. 2022) (holding that a disparity between the appellant's sentence and that of his co-conspirators did not demonstrate a trial penalty where the appellant chose not to cooperate with the government), petition for cert. pending, No. 21-8089 (docketed

Jun. 8, 2022); *United States* v. *Cano-Flores*, 796 F.3d 83, 90 (D.C. Cir. 2015) (same), cert. denied, 578 U.S. 935 (2016).

2. The District Court Properly Considered The Section 3553(a) Sentencing Factors

Burks also challenges (Br. 27-30) the substantive reasonableness of his sentence on a number of other bases, essentially asking this Court to re-weigh the Section 3553(a) factors. The weight given to any particular sentencing factor, however, "is a matter within the district court's discretion, and this Court will not substitute its judgment in weighing the relevant factors." *Alvarado*, 808 F.3d at 496. Moreover, when a district court correctly calculates the Guidelines range, this Court will disturb its finding "only if" it is firmly convinced that the court "committed a clear error of judgment in weighing the [Section] 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States* v. *Wetherald*, 636 F.3d 1315, 1322 (11th Cir.) (internal quotation marks and citation omitted), cert. denied, 565 U.S. 926 (2011). Here, the district court made clear that it properly "evaluated the reasonableness of [its] sentence through the lens of Section 3553." Sent. Tr. 61. Burks has offered no reason to disturb his bottom-of-the-Guidelines sentence.

a. According to Burks (Br. 28-29), the "primary issue" with his sentence is that it "dwarfs sentences for Individual Rights and Assault cases in the 11th Circuit[.]" The question, however, is not whether there is a disparity between

Burks's sentence and those received by others, the question is whether there is an *unwarranted* disparity. See 18 U.S.C. 3553(a)(6). Burks has not shown that his bottom-of-the Guidelines sentence creates an unwarranted disparity.

"A well-founded claim of disparity * * * assumes that apples are being compared to apples." *Docampo*, 573 F.3d at 1101 (citation omitted). Burks's argument relies on data from the United States Sentencing Commission's Interactive Data Analyzer which shows the sentences for "Individual Rights offenses" and for "Assault offenses" from 2019-2021 within the Eleventh Circuit for those with a similar criminal history to Burks.[4] Br. 28-29; App. IV, at 35-36. This data—which was never presented to the district court—does not include the details of the defendants' conduct, whether they cooperated with the government, or whether any Guidelines enhancements were applied. App. IV, at 35-36; see also Doc. 216, at 5-6 (Motion to Reconsider Sentence) (arguing that Burks's sentence "appears to be one of the longest sentences given to a supervisor" but citing only Mosley's sentence as evidence of a disparity). Therefore, Burks has not shown that this data represents an "apples-to-apples" comparison. See *United States* v. *Kachkar*, No. 19-12685, 2022 WL 2704358, at *9 (11th Cir. July 12, 2022)

[4] Although the exhibits are blurry and hard to read, it appears that the data on which Burks relies is limited to those sentences which fall within Zone D of the Sentencing Table. See App. IV, at 35-36.

(finding no abuse of discretion where a district court disregarded a table showing the sentences imposed on other fraud offenders because it did not include details of the offense conduct).

Moreover, nothing "require[s] a district court to consult the Sentencing Commission's collected data before issuing a sentence." *United States* v. *Hymes*, 19 F.4th 928, 935 (6th Cir. 2021); see also *United States* v. *Cameron*, 835 F.3d 46, 51 (1st Cir. 2016) (holding that the Sentencing Guidelines, rather than a national sentencing average, is the proper starting point in sentencing a defendant), cert. denied, 137 S. Ct. 691 (2017). Rather, when a court correctly calculates a defendant's Guidelines range, it has "necessarily [given] significant weight and consideration to the need to avoid unwarranted disparities." *United States* v. *Hill*, 643 F.3d 807, 885 (11th Cir. 2011)) (quoting *Gall*, 552 U.S. at 54)), cert. denied, 566 U.S. 970 (2012).

In sum, the district court did not abuse its discretion in declining to reduce Burks's bottom-of-the-Guidelines sentence based on data with which it was never presented and which contains no details about the underlying offense conduct.

b. Burks's other arguments essentially ask this Court to re-weigh the other Section 3553(a) factors. This Court should decline to do so. See *Holt*, 777 F.3d at 1270. In any event, Burks's arguments are without merit.

Burks contends (Br. 27-28) that the circumstances of the offense "should fall in [his] favor" because, he claims, (1) he was not aware of the first assault, (2) ADOC had no protocol for him to follow, and (3) he "told Oliver to stop." See 18 U.S.C. 3553(a)(1) (requiring sentencing court to consider "the nature and circumstances of to the offense"). Burks also argues (Br. 29) that the societal need for the sentence imposed should "mitigate in [his] favor." See 18 U.S.C. 3553(a)(2) (requiring sentencing court to consider a sentence's purposes). But for each argument, Burks simply directs the Court to take notice of his sufficiency argument set forth earlier in his brief. Br. 28-29. As discussed above, Burks's sufficiency argument fails because overwhelming evidence supported the jury's verdict. These factors, therefore, do not demonstrate that his sentence is unreasonable.

Burks next argues (Br. 28) that his personal characteristics "should also mitigate in his favor," noting his lack of criminal history or "substantial write ups in his job." See 18 U.S.C. 3553(a)(1) (requiring sentencing court to consider the "characteristics of the defendant"). The district court's Guidelines calculation, however, already accounted for Burks's lack of criminal history. See PSR 8-9. And the court "adopt[ed] the factual statements contained in the [PSR]," which contained detailed information regarding Burks's personal characteristics. Sent. Tr. 61.

Finally, Burks notes (Br. 29-30) that with "the addition of the underlying offense and the sentencing enhancements," he was not eligible for a probationary sentence. As previously discussed, Burks's offense level was properly calculated. With a criminal history category of I and a total offense level of 31, Burks's offense fell into "Zone D" of the Sentencing Table. See Sentencing Table, Sentencing Guidelines § 5A. The Guidelines do not authorize a sentence of probation where the applicable Guidelines range is in Zone D of the Sentencing Table. See Sentencing Guidelines §§ 5B1.1 comment. (n.2), 5C1.1(f). The district court did not abuse its discretion when it failed to consider a probationary sentence because probation was not one of the "kinds of sentences" available under the Guidelines. 18 U.S.C. 3553(a)(3) and (4).

In sum, the district court considered and properly applied the facts, the Sentencing Guidelines, and the Section 3553(a) factors. Burks has failed to show that his bottom-of-the-Guidelines sentence is substantively unreasonable. This Court should affirm.

CONCLUSION

For the reasons stated above, this Court should affirm Burks's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

(1) complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,466 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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

s/ Yael Bortnick
YAEL BORTNICK
Attorney

Date: August 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2022, I electronically filed the forgoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. I further certify that seven paper copies of the foregoing brief were sent to the Clerk of the Court by Federal Express.

s/ Yael Bortnick
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