Nos. 08-1196, 08-1197, 08-1198

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JON BARTLETT, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS APPELLEE

LORETTA KING
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
DIRK C. PHILLIPS
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-4876

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JURISDICTIONAL STATEMENT

Appellants' jurisdictional statements are complete and correct.

STATEMENT OF ISSUES

1. Whether sufficient evidence exists to support the conspiracy convictions.

2. Whether the district court properly denied a request to introduce expert testimony.

3. Whether the district court properly denied a request to admit testimony from a prior proceeding, or, in the alternative, for severance.

4. Whether the district court properly limited cross-examination of former officers.

5. Whether the district court properly limited cross-examination of the victims.

6. Whether the district court properly instructed the jury regarding objects of the conspiracy.

7. Whether the district court properly refused a request for a lesser-included-offense instruction.

8. Whether Masarik's sentence is reasonable.

9. Whether Spengler's sentence is reasonable.

10. Whether Bartlett's sentence is reasonable.

STATEMENT OF THE CASE

On October 19, 2006, a federal grand jury returned an indictment charging former Milwaukee Police Department (MPD) officers Jon Bartlett, Andrew Spengler, Daniel Masarik, Ryan Packard, and Ryan Lemke with conspiracy against rights in violation of 18 U.S.C. 241 (Count I) and deprivation of rights under color of law in violation of 18 U.S.C. 2 and 18 U.S.C. 242 (Count II). (R.1:1-4).[1] The right at issue is the right "not to be subjected to unreasonable seizure * * *, which includes the right to be free from the unreasonable use of force by a person acting under the color of law." (R.1:2). On July 6, 2007, Lemke pled guilty to a Superseding Information charging him with deprivation of rights

[1] References to "R.__:__" refer to the docket number and page number of items filed as part of the district court record; references to "Br. __" refer to defendants' opening appellate briefs.

under color of law in violation of 18 U.S.C. 2 and 18 U.S.C. 242. (R.129; R.143).[2]

The other four defendants proceeded to trial. On July 26, 2007, Bartlett, Masarik, and Spengler were convicted on both counts. (R.159-161). Packard was acquitted on both counts. (R.162).

On November 29, 2007, the district court sentenced both Masarik and Spengler to 188 months' imprisonment, and sentenced Bartlett to 208 months' imprisonment. (R.201-203). The court did not impose a fine on defendants, but ordered that they be jointly and severally liable for restitution in the amount of $16,364.63. (R.201-203). This appeal followed.

STATEMENT OF FACTS

The following facts are set forth in the light most favorable to the government.

1. Overview

This case centers on events that took place outside Spengler's Milwaukee home during the early morning hours of Sunday, October 24, 2004. Defendants – then members of the MPD – were off duty that evening and attended a party at the home. Alcohol was plentiful (R.222:422-424; R.223:762-763, 792; R.233:1741),

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[2] In addition to Lemke, three other former MPD officers – Jon Clausing, Joseph Schabel, and Joseph Stromei – also pled guilty to federal charges. Clausing pled guilty to deprivation of rights under color of law (18 U.S.C. 242). E.D. Wisc. No. 2:06-cr-00256-JPS (R.35). Schabel pled guilty to deprivation of rights under color of law (18 U.S.C. 242) and obstruction of justice (18 U.S.C. 1512(b)(3)). E.D. Wisc. No. 2:06-cr-00256-JPS (R.31). Stromei pled guilty to obstruction of justice (18 U.S.C. 1512(b)(3)). E.D. Wisc. No. 2:06-cr-00274-CNC (R.11).

and there is evidence that all three defendants were intoxicated. (R.223:793; R.225:1338, 1372; R.226:1680-1681).

A group of four individuals – Frank Jude, Lovell Harris, Katie Brown, and Kirsten Antonissen – arrived at the party at approximately 2:40 a.m., but stayed for only a few minutes. (R.221:52, 59). Shortly after they departed, defendants came to believe one or more members of the group stole a police badge from the home.

Based on this mistaken belief, defendants and others from the party followed the group to Antonissen's pickup truck and used their authority as police officers to prevent them from leaving. They then forcibly removed Jude and Harris from the truck and assaulted them. They also vandalized both the truck and a car belonging to Jude.

2. The Victims' Arrival And Brief Stay At The Party

Brown and Antonissen were invited to Spengler's party by a friend. (R.221:127; R.231:306-308). They, in turn, invited Jude and Harris to join them. (R.221:223-224; R.231:308-309). Brown and Antonissen traveled to the party in Antonissen's pickup truck. (R.231:309). Jude and Harris arrived in Jude's car. (R.231:309).

The four entered the party together. (R.221:193-194, 224; R.231:311-312; R.224:1231). Upon doing so, some in the group immediately felt uncomfortable (R.221:127-128; R.231:244-245; R.224:1238-1240), as most guests stopped and stared at the group. (R.221:54-55; R.231:312; R.224:1241). Brown testified that "[i]t * * * was really uncomfortable and weird." (R.221:55). Jude explained that

Spengler's guests looked at the group as if they "came from another planet." (R.224:1241).

Once inside, Brown and Antonissen headed to the restroom. (R.221:56; R.222:362). Jude and Harris waited for them outside the restroom door. (R.221:56). Around this time, Spengler – whom one witness described as "a little bit tense and frantic" – began asking guests whether they invited or otherwise knew Jude or Harris. (R.222:550-551).

Spengler and at least one other defendant approached Jude and Harris. (R.221:196; R.231:237; R.222:550-551).[3] Spengler asked Jude who he was, who he arrived with, who he knew at the party, and whether he brought anything with him to drink. (R.224:1191-1192, 1235-1237). Three or four larger men came from the kitchen and stood behind Spengler at some point during his conversation with Jude. (R.224:1192). Jude felt uncomfortable and got "a bad vibe" because of the way the men stared at him. (R.224:1192).

Brown and Antonissen emerged from the restroom to find Jude and Harris waiting outside the door. (R.221:57-58, 128-129; R.231:313-314; R.224:1192-1193). Jude indicated that he was uncomfortable, asking Antonissen whether they were welcome at the party and whether the people there were racists. (R.231:314-

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[3] Trial testimony is not clear as to whether the person with Spengler was Bartlett (R.221:196; R.231:237), or Masarik (R.222:551-552, 598-599). It is possible that both were with him at the time, as one guest testified that there were two men with Spengler (R.222:598-599), and Jude likewise testified that others were with Spengler during this conversation (R.224:1192).

315; R.222:363-364; R.224:1192-1193).[4] In response, Antonissen suggested they leave. (R.231:314-315; R.224:1192-1193). They were in the house for approximately five minutes. (R.221:95; R.231:316; R.222:446).

3. Seizure Of The Victims

Moments after the four victims left the party, Spengler announced that his police badge and wallet-style badge holder were missing. (R.222:447). This prompted approximately eight to ten people to go after the four. (R.222:552-553; R.223:796-797).

In their hurry to leave, Jude and the others decided to take Antonissen's truck and come back later to retrieve Jude's car. (R.231:317-318). Antonissen sat behind the wheel with Brown on the passenger side. Jude and Harris sat in the back. (R.221:60; R.222:383-385). Before they could depart, Bartlett, Spengler, and Masarik – together with approximately 12 others – emptied out onto Spengler's porch and began making their way to the street. (R.221:61, 64, 200; R.231:293-294, 317; R.224:1195-1196).

Upon reaching the truck, Spengler told Antonissen and the others inside the vehicle that "[e]verything was fine up until you guys came and now my badge is missing." (R.221:61-62). The crowd then surrounded the truck and began rocking it back and forth. (R.221:66-68; R.231:318-319; R.222:386). A man at the front

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[4] Jude is biracial, Harris is African-American, and Brown and Antonissen are both white. Most people attending the party – including Bartlett, Masarik, and Spengler – were white.

of the truck punched out one of the headlights. (R.221:68; R.231:275-276, 321-322).

Members of the crowd – which included Bartlett, Spengler, and Masarik – identified themselves as police officers and told Antonissen not to leave. (R.221:201-202; R.231:293-295; R.222:386-387; R.223:859-860). Bartlett even brandished a knife, telling Antonissen he would flatten her tire if she attempted to move the truck. (R.222:427; R.223:798-799, 869-870). Antonissen offered to call the police, but was directed not to do so. (R.231:321).

Spengler told them to exit the truck. He and others began asking about his badge. (R.221:67, 202; R.231:318-321; R.222:620-621; R.223:797; R.224:1195-1196). Brown testified the crowd was "[y]elling, screaming, being aggressive," and was "very, very angry." (R.221:68-69). Those inside the truck responded that they did not have – or know anything about – a missing badge. (R.223:797-798).

Brown was the first to exit the vehicle. (R.221:70-71; R.231:324). She immediately approached the man who had punched the headlight. (R.221:70). As she did so, she held her purse open in an effort to prove she did not have what they were looking for. (R.221:70). Some in the crowd dumped out the contents of Brown's purse and searched her. (R.221:71-72).

Antonissen was next out of the truck. (R.231:324). She was ordered to relinquish her keys, escorted to the back of the truck, and searched. (R.231:326-327).

Once Antonissen exited, the rear door of the truck's cab was opened and two to four men pulled Jude out by his legs, forcibly removing him from the truck as he held onto a headrest inside the cab. (R.221:71; R.231:324-325; R.224:1196-1197). As they pulled Jude from the truck, they questioned him about the location of the badge. (R.222:623-624).

At some point, Spengler returned to the house and retrieved a gun from his bedroom. Jill Kieselhorst[5] testified that Spengler was more agitated than before and was in a hurry to go back outside. (R.222:554). Kieselhorst saw Spengler tuck the gun into his pants before returning outside, prompting another guest to warn Spengler not to "do anything stupid." (R.222:554, 573-574).

4. Harris's Departure

Around the time Jude was pulled from the driver side of the truck, Bartlett and Jon Clausing, another MPD officer, made their way to the passenger side. (R.223:861-862). Bartlett opened the door. (R.223:861-862). Bartlett and Clausing pulled Harris from the truck and searched him. (R.223:799-801, 864-865). Harris began yelling in an effort to wake the neighbors so there would be witnesses to the incident. (R.221:206). In response, he was told "Nigger, shut up, it's our world," and "Nigger, we can kill you." (R.221:205).

After searching him, Bartlett and Clausing held knives to the back of Harris's neck and pulled him several car lengths up the street. (R.221:207-208;

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[5] Kieselhorst was then an 18-year-old neighbor who Spengler invited to the party and subsequently dated for a brief period. (R.222:541-543).

R.223:801-803, 869-870). When they stopped, Clausing – whose knife remained pointed toward Harris's back – directed Harris to sit on the curb with his legs crossed. (R.221:209-210). With Harris seated, Bartlett headed back toward the truck where Jude and the others were located. (R.223:803). Clausing began using his knife to poke Harris in the back and in the head, asking him, "Nigger, who you think you is?" (R.221:211-212).

Clausing then reached from behind and used his knife to slowly cut Harris's cheek. (R.221:212; R.223:805). At trial, Harris described the cutting motion as "slow and demented," as if Clausing "was taking his time enjoying it." (R.231:281-282). Clausing then told Harris to stand up, saying something to the effect of "let me stick this knife in your ass, nigger." (R.221:212; R.231:282). Harris, who testified that he was "scared for [his] life," stood up as directed, but then ran from the scene. (R.221:212; R.223:806). Clausing began to give chase, but changed his mind after a few steps and returned to the area around Antonissen's truck. (R.223:807-808, 880-881).

5. Defendants' Assault On Jude

a. The Initial Phase Of The Assault

Back in the vicinity of the truck, a group of about five men began shoving Jude, who was now standing in the street. (R.221:74; R.231:327; R.222:626; R.223:879). As they did so, Spengler, Bartlett, Masarik, and others repeatedly asked Jude about the location of the badge, and he repeatedly told them he did not know what they were talking about and did not have anything. (R.221:75, 111-

112; R.231:328-329; R.222:625; R.223:805-806). They also asked Jude about Harris's whereabouts. (R.231:328-329). As this was occurring, others began searching the truck. (R.221:75-76, 204).

An argument ensued between Jude and the crowd surrounding him. At some point during this argument, Packard and Masarik began holding onto Jude's arms. (R.222:450-451). Spengler then grabbed Jude as well and, along with others, forced him to the ground. (R.222:452; R.223:810, 887-888; R.224:1201-1202, 1251-1252, 1258-1259).

Approximately five people were close to Jude, and another ten or so were within a five-foot radius. (R.221:81, 139-140; R.222:345-346). Holding his arms behind his back, the group punched Jude and took turns kicking him in the side and head. (R.221:82; R.231:339; R.222:627; R.223:769; R.224:1201-1202; R.233:1715-1717). As they did so, members of the group questioned Jude about the badge. (R.222:347-348; R.223:814; R.233:1769). Spengler in particular acted as the "spokesperson" for the group, telling Jude to "give up the badge." (R.222:454).

Masarik stood at Jude's head while Bartlett climbed on Jude's back and Lemke covered his legs. (R.223:811, 892-893). Spengler and Stromei also were by Jude's head. (R.223:811, 892-893). Bartlett used his forearm to press down on Jude's back and began punching and kicking Jude's thighs. (R.222:452-453; R.223:811-812). Masarik punched Jude in the torso. (R.222:452-453). Spengler punched Jude in the shoulder (R.223:812), and may also have kicked Jude in the

legs. (R.222:454). Clausing punched Jude two to three times in the calf. (R.223:894).

Antonissen described the blows as "powerful hits." (R.222:346-347). Jude did not resist or say anything at this point. (R.222:347). His face "was covered in blood," and Antonissen testified that she saw blood spurt into the air at one point when someone kicked Jude. (R.222: 348, 399). She also remembered seeing blood on the ground. (R.222: 348, 399). She testified she was unable to watch the entire assault because "it was gruesome." (R.231:338).

Brown similarly testified that the group used "a lot of force," and confirmed that all five men in Jude's immediate vicinity "had physical contact with him." (R.221:82). Jill Kieselhorst explained that she saw approximately five people punching Jude "pretty hard," while those who were not striking Jude held him down. (R.222:559). As this was happening, she could hear what she characterized as "[v]ery angry" yelling. (R.222:559-560).

Clausing testified that the punching and kicking did not stop after these initial blows. (R.223:815). Rather, it continued despite the fact that Jude was on the ground and largely motionless. (R.222:562-563; R.223:767-768, 994-995, 998). Defendants used the blows to attempt to elicit information about the whereabouts of the allegedly stolen badge. (R.223:815). Bartlett and Spengler in particular struck Jude as they questioned him about the badge. (R.223:816; R.233:1769).

One of the men put Jude in a "headlock" and began to choke and strangle him. (R.231:330-332; R.222:392; R.224:1203-1204). The man choked him to the point at which Jude believed he would die. (R.224:1203-1204). As this happened, Jude's assailants continued to question him regarding Harris and the location of the badge. (R.231:331-332). Jude continued to tell them he did not know what they were talking about, and the men, in return, continued to strike him. (R.231:331-332). Jude eventually lost consciousness. (R.224:1203).

Clausing testified that he knew it obviously was wrong to strike a suspect in order to obtain information, but failed to put a stop to it in part because he was "just kind of going along with everybody." (R.223:816). Clausing also testified that the group acted as police officers with a common purpose – to find the badge. (R.223:832-833, 966-967).

b. The 911 Calls

Brown and Antonissen both made 911 calls on their cell phones during the initial phase of the assault. Brown placed the first call near the outset of the incident – at approximately 2:48 a.m. – in an effort to have on-duty officers come to the scene. (R.221:77-79, 103-104). It was during this call that defendants took Jude to the ground. (R.221:79-80).

Antonissen spoke with a 911 operator on three separate occasions during a relatively short time period. Her first call to 911 lasted from 2:51 a.m. until almost 2:53 a.m. (R.231:336-338). Audiotape of the call was played at trial, and

Antonissen can be heard describing Jude being held by the neck and beaten. (R.231:337-338).

Antonissen made a second 911 call from 2:53 a.m. to 2:54 a.m., but no recording of this call was found. (R.222:392-393). She testified that she remembered telling the 911 operator "to send something bigger than cops" because it was the police who were assaulting Jude. (R.222:393).

Antonissen also received a return call from the 911 operator, which was played for the jury. (R.222:350). During the call, Antonissen can be heard telling the 911 operator "they're beating the shit out of him." (R.222:351). She also told the operator that members of the crowd were "try[ing] to keep [her] away from [her] cell phone." (R.222:350). She reiterated this point at trial, testifying that "[w]e were told throughout the night not to use our cell phones." (R.222:350). Brown offered similar testimony, explaining that Spengler threatened to "kick [her] ass" if she called 911. (R.221:90-91).

This final 911 call ended when someone realized Antonissen was on the phone and warned Spengler. (R.221:90; R.222:357). Spengler told Antonissen to hang up. (R.221:90; R.222:357). When she refused to comply, he twisted her arm behind her back and then knocked the phone from her hand. (R.221:90; R.222:357).

c. The Arrival Of On-Duty Officers

In response to these 911 calls, MPD dispatched on-duty officers to the scene. They began arriving at approximately 3:00 a.m. (R.224:1046-1047). This

prompted members of the crowd to begin warning one another about the arrival of on-duty officers and discussing a cover story involving a traffic stop to explain why they were in the street. (R.222:352-353).

All three defendants still were around Jude when the first on-duty officers – Joseph Schabel[6] and Nicole Martinez[7] – arrived. (R.224:1046-1047, 1050-1051, 1145-1146). The assault continued despite their arrival. (R.221:88-89; R.222:354, 358). Jude was lying on his stomach as members of the crowd – including Masarik – continued to kick him in the head. (R.222:355; R.223:819; R.227:1868-1869).

As Schabel approached, Spengler told him "the fucker's got my badge." (R.227:1869). In response, Schabel said "You motherfucker," then "stomped" on Jude's head two or three times. (R.227:1869-1875). Bartlett and Masarik also kicked Jude in the face at least twice each. (R.222:628-629; R.223:914, 971-972; R.227:1888-1892).

Bartlett removed a knife from his pocket, stating "I'm gonna find this badge," and used it to cut Jude's jacket and pants off in order to determine whether he was hiding the badge in his clothing. (R.223:825-827, 913, 917). As he did so,

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[6] Schabel knew Spengler prior to the incident and had in fact been invited to the party that night. (R.227:1886-1887). He met Masarik a few days before the incident. (R.227:1889).

[7] By the time of trial, Nicole Martinez's name had changed to Nicole Belmore. (R.224:1042). She is referred to throughout this brief as Martinez.

Bartlett asked Jude where the badge was and "where's the other nigger at[?]" (R.224:1204-1205).

Shortly after his arrival, Schabel handcuffed Jude. (R.227:1888-1889, 1891). But this also did not end the assault. (R.224:1075-1076, 1208-1209; R.232:1290). After Jude was handcuffed, Spengler punched him in the face at least twice, asking "where's my fucking badge[?]" (R.227:1895-1896). Martinez testified that she saw Bartlett kick and punch Jude in the head after he was handcuffed, and that she heard "[c]racking noises" coming from Jude's body after these blows. (R.224:1053-1055, 1077, 1117, 1174).[8] Martinez further testified that Jude did nothing to provoke these attacks by Bartlett, and that she intervened by pushing Bartlett and telling him something to the effect of "knock it off, it's done, he's handcuffed, it's over." (R.224:1055, 1078).

At some point after Jude was handcuffed, Masarik tapped Martinez on the shoulder, telling her "I'm really sorry you have to see this." (R.224:1055-1056, 1087, 1146). Masarik then spread Jude's legs and kicked Jude in the crotch. (R.223:823-824, 913; R.224:1055-1056, 1087, 1206-1207).[9] Martinez testified that the kicks caused the "whole lower end of [Jude's] body" to go "up in the air."

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[8] Schabel similarly testified that he heard what he "believed * * * to be" the sound of bones cracking in Jude's face. (R.227:1912).

[9] Spengler also kicked Jude in the crotch at some point during the assault. (R.222:628).

(R.224:1055-1056, 1206-1207). As this was happening, others continued to hit Jude from all directions. (R.224:1206-1207).

d. Additional Brutality Toward Jude

The most chilling aspects of defendants' behavior went far beyond the punches and kicks described above. For example, as Schabel was handcuffing Jude, Bartlett took a pen from Schabel and told Jude, "you're gonna tell me where the badge is or I'm gonna put this pen in your ear." (R.223:821-822, 906-907; R.227:1893-1894, 1874). When Jude failed to respond, Bartlett used "a slow stabbing motion" to insert the writing end of the pen approximately three-quarters of an inch into Jude's ear, causing Jude – who was handcuffed – to squirm and scream in pain. (R.223:822-824, 910-911, 955; R.227:1893-1895). This was done to both ears. (R.224:1206). As it was happening, others continued to strike Jude. (R.223:822-824, 910-911).

At another point after Jude was handcuffed, Bartlett drew his knife and held the blade to Jude's neck, asking, "nigger, where's the badge at?" and telling Jude he would "fucking kill [him]" if Jude did not turn over the badge. (R.224:1054-1055, 1078-1079, 1132-1134, 1204). Jude again reiterated that he did not have the badge and did not know what Bartlett was talking about. (R.224:1054, 1204).

Those assaulting Jude also bent back two of his fingers in an effort to obtain information regarding the badge. (R.224:1205-1206). The first "was bent back and it snapped." (R.224:1205). When Jude could not tell them where the badge

was, they moved on to a second finger. (R.224:1205-1206). Jude testified that "[i]t was like torture." (R.224:1205).

At one point, while Jude lay on the ground, Lemke stood on Jude's head with both feet. (R.222:628-629; R.223:825, 911-912).

At another point, Spengler held a gun to Jude's head and said, "I'm the fucking police, I can do whatever I want to do. I could kill you." (R.224:1207-1208, 1265-1266). Jude tried to tell him yet again that he did not have the badge, but, by this time, was spitting up blood and had difficulty speaking. (R.224:1207-1208).

Witnesses testified that Jude did not fight back at any point during the assault. (R.221:85, 111-112; R.231:332; R.222:562, 626; R.223:768, 810, 814-815, 819; R.224:1057-1058; R.227:1894-1895).[10] Jude himself denied ever having fought, threatened, harmed, or "mouth[ed] off" to anyone, and similarly denied any attempt to do so. (R.224:1209-1210, 1261). Indeed, as described above, he was restrained much of time while being beaten. (R.221:82, 85; R.222:511, 559).

Jude testified that he begged defendants to stop and "cried like a baby" during the assault. (R.224:1206-1207, 1209). He screamed, telling them that he neither had the badge nor knew who did. (R.221:85). And he yelled for them to "please, stop, please." (R.221:114). No badge was ever recovered, and the

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[10] One witness testified that Jude threw a few punches during an early stage of the incident, but did not hit anyone. (R.222:451).

victims denied taking a badge or seeing anyone else take a badge. (R.221:70, 138-139, 195-196; R.231:323; R.222:435; R.224:1215-1216).

6. Immediate Aftermath Of The Assault

When the beating ended, Jude was left "[c]old" and "naked" in the street. (R.224:1205). He was placed under arrest, and Officer Eddie Albritton arrived in a patrol wagon at approximately 3:09 a.m. to transport him from the scene. (R.226:1657-1659). Albritton testified that, as he approached, the men around Jude "all appeared to be under the influence of something." (R.226:1680). They "seemed wild" and "out of control." (R.226:1680-1681, 1685-1686). Albritton also noted that the men appeared to be upset and that their speech was slurred. (R.226:1681).

As Jude was being led away, he appeared unable to walk without assistance. (R.222:359). His face was "completely covered in blood," he had no coat on, and what was left of his pants were down around his ankles. (R.221:91; R.222:359; R.226:1559-1560). There also was a puddle of blood near the truck where the assault occurred that was still visible the next morning. (R.221:91-92; R.222:359, 563; R.226:1685). Once in the wagon, Jude spat up blood. (R.232:1288).

Before the wagon left to take Jude to the hospital, Sgt. Corstan Court – a police supervisor who arrived at the scene shortly after 3:00 a.m. – observed Spengler. (R.222:674-675). He testified that Spengler was walking in the street, shaking his head, holding his hands up, and saying "that nigger stole my badge." (R.223:704-705, 731-734).

Det. William Smith arrived on the scene at approximately 5:15 a.m. (R.225:1333-1334). Shortly thereafter, he interviewed Spengler. (R.225:1335-1336). Smith described Spengler as "highly intoxicated," "totally uncooperative," "belligerent," "very, very agitated," and smelling of alcohol. (R.225:1338, 1357-1358).[11] Smith testified that at one point during the interview he believed Spengler was going to hit him. (R.225:1357-1358). During his interview with Det. Smith, Spengler claimed not to remember who was with him at his party. (R.225:1340).

7. Damage To The Victims' Property

During the course of the assault, a member of the crowd announced that he found keys for a Saturn automobile. (R.231:328). Two men then headed off to find Jude's vehicle. (R.231:328). Antonissen testified that they found it in short order, and that she saw one man going through the inside of the car and another looking in the trunk. (R.231:328).

After Jude was placed in the wagon, Schabel interviewed Brown and she identified Jude's car. (R.227:1896). As Schabel approached the car he encountered Bartlett, who asked Schabel whether he was looking for the car.

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[11] Sgt. Shelley Metzler – another MPD officer on the scene that night – also noticed that Spengler was intoxicated. (R.225:1372). She testified that his eyes "were red, watery, glassy," and he "had a strong odor of alcoholic beverage upon his breath." (R.225:1372). She also noted that he fell asleep several times and began snoring while sitting in her squad car, and that she rolled down her car window because the smell of alcohol on Spengler's breath was so strong. (R.225:1372-1375, 1377).

(R.227:1897). Bartlett told Schabel that they already had "tossed" the car, and warned Schabel not to sit in the seats. (R.227:1897). Schabel testified that the car was "a complete mess inside" when he reached it. (R.227:1897).

When Jude's sister picked up his car the day after the assault, it did not start properly and would not go faster than 15 miles per hour. (R.223:1007-1008). There were no such problems the night before. (R.223:1007, 1014). In addition, the seats were cut open and antifreeze had been poured on them. (R.223:1016-1019). There was damage to the stereo equipment as well. (R.223:1023-1024; R.224:1187-1188).

Damage also was done to Antonissen's truck. A headlight was broken, a side mirror was broken off, and a portion of the truck was dented as the result of Antonissen being thrown against the vehicle. (R.222:359).

8. Injuries To Jude And Harris

Neither Jude nor Harris had any visible injuries earlier that evening. (R.231:305-306). Both had significant injuries by the end of the evening.

Harris suffered from a 3.4 centimeter cut to his right cheek that was consistent with the type of cut one might see from a knife. (R.226:1504-1505).

Jude's injuries were more extensive. Dr. Kathleen Shallow – the emergency-room physician who treated Jude – testified that she took the unusual step of photographing Jude's injuries because "[t]here were too many * * * to document." (R.226:1479). Specifically, Jude had injuries to his scalp, face, ears,

neck, chest, abdomen, back, upper extremities, lower extremities, buttocks, and perineum (*i.e.*, genital area). (R.226:1479-1480).

The injuries to Jude's ear canal could not be diagnosed in the emergency room because they could not control the bleeding. (R.226:1490). They later determined that Jude had lacerations in his ear canal. (R.226:1491). Dr. Shallow testified that such injuries could not have been accidental, as there were similar injuries to both ears that appeared to be the result of an object being poked into Jude's ears. (R.226:1491-1492). She explained that the injuries could have been caused by a ballpoint pen. (R.226:1529-1531). Jude testified that his ears bled for eight or nine days after the assault. (R.224:1206).

Dr. Shallow testified that she has worked in an emergency room for more than 20 years, and had never before seen ear injuries this severe. (R.226:1491). She also had never before seen someone brought into the emergency room in the custody of police officers who was injured as badly as Jude. (R.226:1502-1503).

Jude had multiple hand injuries, including abrasions, swelling, bruising, and a subsequently-diagnosed fracture. (R.226:1492). He had swelling and bruising on his back, legs, and arms. (R.226:1492-1493). He had "gross swelling and bruising" in his left eye, which was swollen to such an extent that Dr. Shallow was unable to open the eyelid more than one or two millimeters to examine the eye. (R.226:1493-1494). She was able to determine, however, that Jude suffered from subconjunctival hemorrhage of the eye. (R.226:1494-1496).

A CT scan showed a broken nose and a fracture in the wall of Jude's sinus cavity. (R.226:1496-1497). Jude also had a concussion. (R.226:1499-1500). He had multiple injuries to his face, including blunt trauma to his head and face, abrasions, contusions, and lacerations. (R.226:1485, 1501-1502). Dr. Shallow testified that these injuries likely were the result of the punching and kicking Jude reported. (R.226:1501-1502).

Finally, Dr. Shallow testified that Jude was "very notably upset, anxious, almost terrified" following the assault that night. (R.226:1515). At one point, he grabbed Dr. Shallow's hand and asked her not to leave him alone or discharge him because he was afraid his attackers would "finish the job." (R.226:1515-1516).

SUMMARY OF ARGUMENT

On appeal, defendants challenge various aspects of their convictions and sentences. All of defendants' arguments fail. This Court therefore should affirm the judgments below.

A. Bartlett's Appeal

Bartlett challenges (1) the sufficiency of the evidence to support his conspiracy conviction; (2) alleged procedural errors in his sentencing, including the adequacy of the district court's explanation of his sentence, the accuracy of his guideline calculation, and the purported need to consider alleged sentencing disparities; and (3) the substantive reasonableness of his sentence. Each argument fails.

1. There is abundant evidence to support the conspiracy convictions. Defendants acted together as police officers to seize the victims in order to find the missing badge. This was confirmed by co-conspirator Clausing's admission that he and others acted as a group toward the common goal of finding the missing badge. Moreover, defendants and other conspirators coordinated their actions over a period of approximately 20 minutes. Bartlett's argument to the contrary misconstrues both the facts and relevant case law.

2. Bartlett's procedural challenges to his sentence fail for a number of reasons. First, Bartlett's procedural challenges were not properly preserved below. He waived or forfeited any challenge to both the sufficiency of the district court's explanation and the court's guidelines calculation, and cannot satisfy the requirements of plain-error review with respect to either. In addition, this Court affirms sentences even in the absence of a proper explanation where, as here, the record provides "more than adequate" support for the court's findings.

3. Bartlett's substantive claims that his sentence is excessive and unreasonable also fail. The district court was not required to expressly address the issue of unwarranted disparities under 18 U.S.C. 3553(a)(6), and Bartlett's sentence is not excessive or unreasonable.

B. Masarik's Appeal

Masarik challenges (1) the district court's denial of his request to present expert testimony regarding the fallibility of eyewitness identifications; (2) the district court's refusal to permit him to introduce testimony from a prior

proceeding or, in the alternative, to sever his trial from that of his co-defendants; and (3) the reasonableness of his sentence. Each argument fails.

1. The district court followed the proper analysis in denying Masarik's proffered expert testimony. And its decision is consistent with this Court's well-established disfavor of expert testimony regarding the fallibility of eyewitnesses. Moreover, this Court previously affirmed a district court ruling precluding the same expert from offering similar testimony under nearly identical circumstances.

The district court's exclusion of the proffered expert also is supported by additional factors, including the use of cautionary instructions, the presence of corroboration, and the opportunity for cross-examination of the eyewitnesses.

2. The district court properly denied Masarik's request to admit prior testimony from three co-conspirators or, alternatively, for severance. The prior testimony is inadmissible because it fails to satisfy either Rule 804(b)(1) or Rule 807 of the Federal Rules of Evidence, and the alternative request for severance fails because Masarik did not sufficiently establish that his co-conspirators would have offered exculpatory testimony if severance were granted. Masarik's subsequent request to admit prior testimony from a fourth individual also fails because it does not satisfy either Rule 804(b)(1) or Rule 807.

3. The district court properly applied the aggravated-assault guideline to determine Masarik's base offense level. And it sentenced him within the applicable guideline range. His sentence thus is entitled to a presumption of reasonableness, and Masarik has not overcome that presumption. Indeed, his

claim of unwarranted disparity improperly relies upon comparisons with fellow defendants who pled guilty and cooperated with the government.

C. Spengler's Appeal

Spengler challenges (1) the district court's decision to limit his cross-examination of two co-conspirators; (2) the district court's decision not to allow him use of the victims' prior convictions for impeachment; (3) the district court's conspiracy instruction; (4) the district court's decision not to give a lesser-included-offense instruction; and (5) the reasonableness of his sentence. Each argument fails.

1. The district court did not abuse its discretion in limiting cross-examination of two co-conspirators. There was ample evidence bearing on the credibility of both witnesses.

2. The district court applied the correct standard and properly excluded Harris's prior conviction under Federal Rule of Evidence 403. The court admitted one prior conviction for Jude, and the remaining convictions were properly excluded under Federal Rule of Evidence 609.

3. It is well established that disjunctive instructions are appropriate even when indictments charge conjunctively. Accordingly, the district court's conspiracy construction did not constitute error, let alone plain error. There was ample evidence that Spengler violated the civil rights of both men. Thus, the jury would have reached the same conclusion even if instructed in the conjunctive.

4. Lesser-included-offense instructions are appropriate only when the evidence supports a finding on the lesser – but not the greater – charge. Here, that would require finding that the actions of Spengler and his co-conspirators violated the victims' civil rights, but did not lead to "bodily injury" or involve "the use, attempted use, or threatened use of a dangerous weapon." 18 U.S.C. 242. No rational jury could have reached such a conclusion in this case.

5. Spengler's sentence is reasonable. In addition, the district court adequately considered Spengler's arguments at sentencing, and was not required to expressly address each of them on the record. Moreover, the district court did not err in declining to reduce Spengler's sentence based on his alleged susceptibility to abuse in prison. Finally, Spengler was not entitled to separate notice regarding the possibility of an above-guidelines sentence, but, as a practical matter, did in fact receive such notice.

ARGUMENT

I

SUFFICIENT EVIDENCE EXISTS TO SUPPORT THE CONSPIRACY CONVICTIONS

(Bartlett and Masarik)[12]

A. Standard Of Review

"A challenge to the sufficiency of the evidence to support a conviction poses a nearly insurmountable burden." *United States* v. *Bogan*, 267 F.3d 614, 623 (7th Cir. 2001) (internal quotations omitted). "An appellate court will not weigh the evidence or assess the credibility of the witnesses." *United States* v. *Moore*, 425 F.3d 1061, 1072 (7th Cir. 2005) (internal quotations omitted). Rather, "[w]hen reviewing a sufficiency of the evidence claim, [this Court] view[s] the evidence and all reasonable inferences that can be drawn from it in the light most favorable to the government." *Bogan*, 267 F.3d at 623. "Only where the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt, may an appellate court overturn the verdict." *Ibid.*

B. The Record Contains Ample Evidence To Support The Conspiracy Convictions

"The nub of a conspiracy is an agreement, and the government can prove the agreement by showing an understanding – explicit or implicit – among

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[12] Bartlett raises this issue at pages 13-24 of his brief. Masarik adopts Bartlett's argument at page 75 of his brief.

coconspirators to work together to commit the offense." *United States* v. *Wantuch*, 525 F.3d 505, 519 (7th Cir. 2008) (internal quotations omitted). "A jury is not limited to direct evidence and may find an agreement to conspire based upon circumstantial evidence and reasonable inferences drawn from the relationship of the parties, their overt acts, and the totality of their conduct." *Ibid.* Indeed, "[c]ircumstantial evidence is often the only proof from which a defendant's involvement in a conspiracy may be inferred." *United States* v. *Schumpert*, 958 F.2d 770, 773 (7th Cir. 1992). The record in this case contains ample evidence to support the jury's verdict.

That defendants "work[ed] together to commit the offense," *Wantuch*, 525 F.3d at 519, is beyond dispute. In convicting them under 18 U.S.C. 242 (Count II), the jury necessarily concluded that they acted under color of law – a finding defendants do not challenge on appeal. Indeed, Jude and the others were told from the outset that they were dealing with police officers. (R.221:67; R.222:387). And Clausing, a member of the conspiracy, testified that he and others – including Bartlett, Masarik, and Spengler – acted as police officers that evening. (R.223:832-833). Clausing also testified that the off-duty officers in the street acted as a group with the common purpose of finding the badge (R.223:966-967), and that the goal of punching Jude "was to elicit information about where the badge was." (R.223:815).

Bartlett's testimony similarly indicates he believed he put himself on duty the moment he decided to detain the people in the truck, and that others put

themselves on duty that night as well. (R.222:426-427, 433).[13] Bartlett defined putting oneself on duty as "taking affirmative police action." (R.222:433). See also R.222:434 ("It's just a matter of taking that police action. That's what puts you on duty."). Bartlett even used the term "we" at points during his testimony to describe what occurred. See R.222:428-429 ("I walked over to where * * * Clausing and * * * Harris were and I realized again at that point that we needed to separate them."); R.222:429 ("So we took * * * Harris and we walked north approximately two car lengths.").

Further, testimony from Lt. Stephen Basting – who oversees training of MPD officers at the police academy (R.225:1378-1380) – established that officers are taught "that police work is a coordinated activity," and that they "have to rely upon [their] fellow officers to follow the rules and procedures as they're taught." (R.225:1416-1417). This "ensures some predictability of action" so officers "know what to expect." (R.225:1417).[14]

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[13] Bartlett elected not to testify in this case, but testified in his prior state court trial. Portions of his testimony from the state case were admitted into evidence below. (R.222:422-437).

[14] Lt. Basting explained how MPD officers are trained to work together to subdue a prone subject. See R.225:1399-1401 (discussing how to position officers at the prone subject's head, arms, and legs, including "laying across the legs"). Significantly, defendants employed some of these techniques in their assault on Jude. See R.223:811-813 (once Jude is on the ground, Bartlett is on Jude's back, Lemke is over Jude's legs, and Spengler, Stromei, and Masarik are near Jude's head). See also R.222:452-453; R.223:892-893.

The fact that defendants acted together as police officers seizing the victims is more than sufficient, standing alone, to support the conspiracy convictions. Indeed, it is difficult to imagine a scenario in which multiple officers acting together under color of law to seize suspects would not be working in a coordinated fashion with a shared understanding. That is all that is required. See *United States* v. *Bailey*, 510 F.3d 726, 729 (7th Cir. 2007) (agreements "often exist[] merely in a shared understanding or coordinated activity").

The conspiracy finding is further supported by the length of time covered by defendants' actions. This was not a spontaneous incident that quickly ended. Rather, it lasted approximately twenty minutes, as the 911 calls began around 2:48 a.m. (R.221:77-79, 103-104) and Officer Albritton did not arrive to take Jude into custody until approximately 3:09 a.m. (R.226:1657-1659). Accordingly, this too belies Bartlett's claim that events unfolded without sufficient time for coordination or shared understanding.

Moreover, the evidence of coordination was considerable. Testimony established that, at the outset, defendants and others worked together to stop the truck from leaving. (R.221:61-62, 66-68, 101-102, 136-138, 201-202; R.231:293-295, 318-319; R.222:386-387, 427-428; R.223:798-799, 859-860, 869-870). They then removed the victims from the vehicle and searched them. (R.221:70-72, 203-204; R.231:278-279, 324-327; R.222:623-624; R.223:799-801, 861-866; R.224:1196-1197). They also (1) searched the truck (R.221:75-76, 79, 204; R.231:327; R.222:489, 501-502); (2) attempted to keep Brown and Antonissen

from using their cell phones to call 911 (R.221:90-91; R.222:350); (3) assaulted Jude for the purpose of locating and recovering the purportedly missing police badge (R.231:331-332; R.222:347-348, 454; R.223:814-815, 821-827, 906-907, 910-911, 913, 917, 955; R.224:1054-55, 1078-1079, 1132-1134, 1203-1208; R.233:1769; R.227:1874, 1893-1896); and (4) discussed a potential cover story regarding a traffic stop (R.222:352-353). Finally, they purposely damaged Antonissen's truck and Jude's car. (R.223:1007-1008, 1016-1019, 1023-1024; R.224:1187-1188; R.227:1896-1897).[15]

Contrary to Bartlett's assertion (Br. 14-16), the foregoing evidence – viewed in light of the "reasonable inferences drawn from the relationship of the parties, their overt acts, and the totality of their conduct," *Wantuch*, 525 F.3d at 519 – is more than sufficient to support the jury's verdict. See *Bogan*, 267 F.3d at 623 ("Only where the record contains *no evidence*, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt, may an appellate court overturn the verdict.") (emphasis added).

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[15] In addition to these actions, there were specific instances of spoken coordination as well. See, *e.g.*, R.223:864-865 (Bartlett and Clausing decided together to search Harris after removing him from the truck, saying something to the effect of "let's pat him down"); R.223:802-803 (after Bartlett and Clausing walked Harris up the street at knifepoint, Bartlett instructed Clausing to watch Harris); R.224:1078-1079 (Masarik helped Bartlett locate his knife); R.233:1722-1723 (at Bartlett's direction, Stromei went into Spengler's home to look for handcuffs); R.222:454-455 (Spengler instructed Jodi Kamermayer – a former officer present that evening who was not charged as part of this case – to search Brown and Antonissen); R.222:501-502 (someone instructed Kamermayer to search the truck).

C. Bartlett's Argument Misconstrues Relevant Case Law

Based on a survey of only three cases, Bartlett concludes that "courts have uniformly rejected" conspiracy charges stemming from what he refers to as "spontaneous confrontations that escalate[] into a beating." Br. 11-12, 16-20. That argument misreads the case law.

1. Case Law Supports The Conspiracy Convictions

The government routinely brings conspiracy charges under 18 U.S.C. 241 in circumstances similar to those at issue here. See, *e.g.*, *United States* v. *Velazquez*, 246 F.3d 204, 207-209 (2d Cir. 2001) (prison guards pled guilty to a Section 241 violation related to a prisoner beating that lasted approximately one minute); *United States* v. *Lopez Andino*, 831 F.2d 1164, 1166 (1st Cir. 1987) (defendant police officers found guilty of violating Section 241 based on a beating and interrogation that lasted approximately thirty minutes).[16] Courts also have upheld factually-similar conspiracy convictions outside the civil-rights context. See *United States* v. *Bridgeman*, 523 F.2d 1099, 1111 (D.C. Cir. 1975) (affirming conspiracy conviction and rejecting inmate's claim that he acted spontaneously in joining prison escape attempt); *United States* v. *Barber*, 442 F.2d 517, 523 (3d Cir. 1971) (sustaining conspiracy conviction for members of group that attacked

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[16] See also *United States* v. *Guadalupe*, 402 F.3d 409, 414 (3d Cir. 2005) ("There are a multitude of cases in which prison administrators have been prosecuted under 18 U.S.C. §§ 241 and 242."); *United States* v. *Davis*, 810 F.2d 474, 476-477 (5th Cir. 1987); *United States* v. *Bigham*, 812 F.2d 943, 947-948 (5th Cir. 1987).

FBI agents in order to free an individual from their custody; the government established both "concert of action that did not come about by sheer coincidence" and overt acts).

2. The Cases Upon Which Bartlett Relies Are Inapposite

The three cases Bartlett cites (Br. 16-20) in support of his position are easily distinguished. *United States* v. *Garcia*, 151 F.3d 1243 (9th Cir. 1998), involved a shooting between members of two rival gangs. 151 F.3d at 1244-1245. But there was little evidence regarding the events that preceded the shooting, and the court concluded the evidence did not establish that the parties "work[ed] together understandingly, with a single design for the accomplishment of a common purpose," as required to support a conspiracy conviction. *Id.* at 1245 (internal quotations omitted). In contrast, here, there is ample evidence that defendants and others "work[ed] together understandingly, with a single design for the accomplishment of a common purpose," *Garcia*, 151 F.3d at 1245 – *i.e.*, to locate and recover the missing badge, cover up their illegal acts, and harm the victims and their property.

Commonwealth v. *Kennedy*, 453 A.2d 927 (Pa. 1982), involved the beating of a landlord by one of his tenants and another man. *Id.* at 928. As in *Garcia*, there was little evidence in *Kennedy* as to the purpose behind the beating. See *Kennedy*, 453 A.2d at 930. Although not cited or discussed by Bartlett, the Pennsylvania Superior Court later distinguished *Kennedy* in a case factually similar to this one. See *Commonwealth* v. *French*, 578 A.2d 1292 (Pa. Super. Ct.

1990). *French* involved a case in which four people assaulted a man, then clashed with police officers that came to his aid. *Id.* at 438-439. Relying on *Kennedy*, the appellant in *French* argued – as Bartlett does here – that the "evidence proved only a spontaneous, impulsive confrontation between appellant, her cohorts and the police, and the evidence therefore was insufficient to show conspiracy." *French*, 578 A.2d at 1294. The Superior Court rejected that argument, concluding that *Kennedy* was distinguishable because the co-conspirators in *French* "acted as a group in concert." *French*, 578 A.2d at 1294. Thus, viewed in context, these state cases hurt – rather than help – Bartlett's argument, as *Kennedy* is distinguishable here for the same reasons it was distinguishable in *French*.

In *Lyons* v. *Adams*, 257 F. Supp. 2d 1125 (N.D. Ill. 2003), there was little, if any, evidence of common purpose. It appears that one of the defendants got into a fight, and others simply joined in, 257 F. Supp. 2d at 1128-1129, likely without knowing how or why the fight began. This, again, distinguishes *Lyons* from this case, where there was ample evidence of coordination and common purpose.

Simply put, none of these cases are on point. None involve the level of cooperation and consistency of purpose at issue in this case. And none involve a conspiracy that extends to property damage and an effort to cover up the assault, as is the case here. Bartlett's argument therefore fails.

D. Bartlett's Substantive Conviction Stands Even If This Court Determines That There Is Not Sufficient Evidence To Support The Jury's Verdict On The Conspiracy Charge

Because the jury was told that it could consider the foreseeable acts of his co-conspirators in determining his guilt on the substantive offense if it also found him guilty of conspiracy, Bartlett contends (Br. 22-24) that reversal of the conspiracy conviction under 18 U.S.C. 241 (Count I) would necessitate reversal of the substantive conviction under 18 U.S.C. 242 (Count II) as well. For the reasons stated above, there is ample evidence to support Bartlett's conspiracy conviction. However, even if this Court disagrees, it would have no impact on Bartlett's conviction for the substantive violation.

As Bartlett notes (Br. 23), this Court has not set forth the standard the government must satisfy in order to preserve the defendants' convictions in the absence of a conspiracy. But there is no need to address the issue in this case. Even if this Court were to apply the most stringent standard – *i.e.*, proof beyond a reasonable doubt, see *United States* v. *Olano*, 62 F.3d 1180, 1199 (9th Cir. 1995) – it easily is satisfied here.

By his own admission, Bartlett was present for the entire assault. (R.222:434). And testimony from others established that Bartlett (1) brandished a knife, telling Antonissen he would flatten her tire if she attempted to move the truck (R.222:427-428; R.223:798-799, 869-870); (2) helped Clausing pull Harris from the truck and search him (R.221:203-204; R.231:278-279; R.223:799-801, 864-865); (3) punched and kicked Jude, and questioned him about the missing

badge (R.222:452-453; R.223:811-812, 816; R.233:1769); (4) used a knife to cut Jude's jacket and pants off in order to determine whether he was hiding the badge in his clothing (R.223:825-827, 913, 917; R.224:1204-1205); (5) kicked and punched Jude in the head after Jude was handcuffed (R.224:1053-1055, 1077, 1117, 1174); (6) inserted a pen into Jude's ears in an attempt to elicit information regarding the missing badge, causing him to squirm and scream in pain (R.223:821-824, 906-907, 910-911, 955; R.224:1206; R.227:1893-1895, 1874); and (7) held a knife to Jude's neck, asking "nigger, where's the badge at?" and telling Jude he would "fucking kill [him]" if he did not turn over the badge (R.224:1054-1055, 1078-1079, 1132-1134, 1203-1204).

Thus, the conspiracy instruction had no impact on Bartlett's conviction on the substantive count (violation of 18 U.S.C. 242). Under any conceivable standard, Bartlett would have been convicted of violating Jude's civil rights even absent a conspiracy.

II

THE DISTRICT COURT DID NOT ERR IN REFUSING TO PERMIT EXPERT TESTIMONY REGARDING EYEWITNESS IDENTIFICATIONS

(Masarik)[17]

A. Standard Of Review

Daubert v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993),

[17] Masarik raises this issue at pages 22-56 of his brief.

requires "a two-step analysis when a party proffers expert scientific testimony." *United States* v. *Hall*, 165 F.3d 1095, 1101-1102 (7th Cir. 1999). First, a "district court must consider whether the testimony has been subjected to the scientific method; it must rule out subjective belief or unsupported speculation." *Id.* at 1102 (internal quotations omitted). Next, "the district court must determine whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue." *Ibid.* (internal quotations omitted). Both requirements must be satisfied in order for expert testimony to be admissible. See *United States* v. *Allen*, 390 F.3d 944, 949 (7th Cir. 2004) (under *Daubert*, "expert testimony must be both relevant and reliable").

This Court "review[s] *de novo* the question whether the district court properly applied the legal framework," and "review[s] decisions to admit or exclude expert testimony * * * for abuse of discretion." *United States* v. *Parra*, 402 F.3d 752, 758 (7th Cir. 2005). In conducting its review, this Court "afford[s] great deference to the trial court's determination of the admissibility of evidence." *United States* v. *Crotteau*, 218 F.3d 826, 831 (7th Cir. 2000) (quoting *United States* v. *Walton*, 217 F.3d 443, 449 (7th Cir. 2000)). Masarik therefore carries "a heavy burden," as this Court "will not reverse unless the record contains no evidence on which [the district court] rationally could have based [its] decision, or where the supposed facts found are clearly erroneous." *Id.* at 832 (quoting *Walton*, 217 F.3d at 449).

B. The District Court's Ruling

The district court made findings regarding reliability, usefulness, and the amount of time Masarik's proffered expert testimony would consume. Specifically, the court noted that it was "not satisfied" the proffered expert would "be testifying based upon factors that can be tested" or "satisfy the requirements for proffering so-called expert testimony to a jury." (R.239:45). The court further found that, although "the witness would be offering testimony to assist the jury," "jurors are constantly required to assess the credibility of various witnesses and can determine based upon direct and cross examination whether or not a witness is to be believed." (R.239:45).

The court elaborated further on the minimal value of the testimony, noting that "[a]n expert does not really lend that much more to the trial when he or she testifies that people are affected by the number of times they see a particular person or the circumstances where they [see] a particular person or the things that may have occurred on or about the time of the incident at issue." (R.239:46). The district court then concluded that "it would not be appropriate * * * to open the door to extensive examination and cross examination of a witness whose testimony really does nothing more than tell the jury what the jury is required to do. That is, scrutinize the facts and circumstances that have a bearing on a witness's testimony." (R.239:46). The court also noted that, in addition to consuming "approximately 45 minutes" of trial time during examination, "an untold amount of time would be consumed by cross examination," and permitting

such testimony also "would certainly open the door to additional testimony from the government from someone who might have similar credentials," which also would "consume trial time." (R.239:45).

Finally, the court noted that "there is a general instruction in the packet of instructions that talks about the factors that a jury may consider in determining whether or not to believe a particular witness or a number of witnesses," concluding that "those instructions are sufficient under the circumstance." (R.239:46-47). The court invited Masarik's trial counsel to offer additional instructions. (R.239:47). The record does not indicate that Masarik offered any additional instructions on this point.

C. The District Court's First-Part Analysis Provides No Basis For Reversal

Masarik's assertion that the district court failed to conduct a sufficient first-part analysis focuses primarily on his claim that the district court did not make detailed factual findings regarding the issue of reliability. Br. 36-39. Specifically, Masarik takes issue with the district court's statement regarding the testability of the proffered expert's work, asserting that "[t]here is no requirement in *Daubert* that limits an expert's testimony to 'factors that can be tested.'" Br. 37.

Masarik is correct that *Daubert* does not *require* testability as a prerequisite to admissibility in every case. But it employs "a flexible test" that expressly identifies testability as a core element of the inquiry:

> *Daubert* * * * outlines a number of factors that a trial court should consider in deciding whether expert testimony is reliable, specifically (1) *whether the theory*

> *on which it is based can be tested*, (2) whether the theory or technique has been subject to peer review, (3) the rate of error of the technique and the existence of standards to control the technique's operation, and (4) whether it is generally accepted.

United States v. *George*, 363 F.3d 666, 672 (7th Cir. 2004) (citing *Daubert*, 509 U.S. at 593-595) (emphasis added).

Indeed, this Court has even required proof of testability in some circumstances. See *Durkin* v. *Equifax Check Servs., Inc.*, 406 F.3d 410, 421 (7th Cir. 2005) ("[A]n expert must offer good reason to think that his approach produces an accurate estimate using professional methods, *and this estimate must be testable*.") (quoting *Zenith Elecs. Corp.* v. *WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005)) (emphasis added). Accordingly, Masarik's assertion (Br. 38) that "[t]he district court erred as a matter of law by applying a test that appears nowhere in *Daubert* and that is inconsistent with this court's precedent" is patently incorrect.

Moreover, the cases upon which Masarik relies (Br. 37-38) involve law enforcement officers giving expert testimony based on experience or specialized knowledge acquired outside an academic setting. These cases are inapposite, as they address situations in which testability is not likely to be an issue. By contrast, where, as here, a social scientist proffers testimony based on research and study, it is perfectly appropriate for a district court to consider whether the proffered expert's work is capable of being tested or replicated by others. Thus, the district court properly fulfilled its obligation to "consider whether the testimony has been

subjected to the scientific method" and "rule out subjective belief or unsupported speculation." *Hall*, 165 F.3d at 1102 (internal quotations omitted).

Finally, Masarik also faults the district court (Br. 36-39) for not expending greater effort on its first-part analysis. District courts, however, are not required to conduct a first-part inquiry where the evidence is excludable under *Daubert's* second part. See *Hall*, 165 F.3d at 1103 n.4. Indeed, because a "district court can exclude *reliable* expert testimony under Rule 702, requiring [it] to first decide whether the proffered testimony satisfies *Daubert's* reliability prong would be a needless exercise." *Ibid.* As explained below, the proffered testimony also is excludable under the second part of *Daubert*. Thus, even if deficient, the district court's first-part analysis cannot serve as a basis for reversal.

D. The District Court Did Not Abuse Its Discretion In Concluding That The Proffered Expert Testimony Failed To Satisfy The Second Part Of Daubert

1. This Court's Case Law Strongly Disfavors Expert Testimony Regarding Eyewitness Identifications

Masarik's claim that the district court abused its discretion runs counter to this Court's decisions. See, *e.g.*, *United States* v. *Carter*, 410 F.3d 942, 950 (7th Cir. 2005) ("[T]here is a long line of Seventh Circuit cases holding that district courts did not commit abuses of discretion by excluding expert testimony regarding the reliability of eyewitness identifications.") (internal quotations omitted); *Hall*, 165 F.3d at 1104 ("This Court has a long line of cases which reflect our disfavor of expert testimony on the reliability of eyewitness identification.").

As this Court has said, "the credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury – determining the credibility of witnesses." *Carter*, 410 F.3d at 950 (quoting *Hall*, 165 F.3d at 1107). In addition, "expert testimony regarding the potential hazards of eyewitness identification – regardless of its reliability – will not aid the jury because it addresses an issue of which the jury already generally is aware, and it will not contribute to their understanding of the particular factual issues posed. These hazards are well within the ken of most lay jurors." *United States* v. *Larkin*, 978 F.2d 964, 971 (7th Cir. 1992) (citation and internal quotations omitted). See also *United States* v. *Daniels*, 64 F.3d 311, 315 (7th Cir. 1995).

These decisions bind the panel in this case. See *United States* v. *Lemons*, 302 F.3d 769, 772-773 (7th Cir. 2002).[18] Moreover, this Court refused to reconsider this line of cases when asked to do so in the past, see *Hall*, 165 F.3d at 1106-1107, and has continued to follow it in recent years. See *Carter*, 410 F.3d at 950. Accordingly, this Court should reject Masarik's invitation (Br. 27) to again reconsider its case law in this area.

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[18] This Court has, on occasion, reconsidered circuit precedent at the panel stage when presented with "compelling reasons," such as a ruling that has not been accepted by any other circuit. See *Russ* v. *Watts*, 414 F.3d 783, 788 (7th Cir. 2005); *United States* v. *Hill*, 48 F.3d 228, 232 (7th Cir. 1995). The government respectfully submits that it would not be appropriate to do so here.

2. The District Court Acted Within Its Discretion In Excluding The Proffered Expert Testimony

In addition to the historic disfavor of expert testimony regarding eyewitness fallibility, several additional factors weigh heavily in favor of concluding the district court did not abuse its discretion.

a. This Court Affirmed The Exclusion Of Testimony By Masarik's Proffered Expert In A Similar Case

Masarik's proffered expert was Dr. Otto Maclin. This Court previously upheld the exclusion of expert testimony by Dr. Maclin under nearly identical circumstances. See *United States* v. *Welch*, 368 F.3d 970 (7th Cir. 2004), cert. granted and judgment vacated and remanded on other grounds, 543 U.S. 1112 (2005). In *Welch*, "the government's case depended almost exclusively on eyewitness identifications and Dr. Maclin would have testified that none of these identifications were as credible as they seemed to be." *Id.* at 973. Nevertheless, this Court was "not persuaded by [defendant's] arguments that the proposed testimony would have assisted the jury" in *Welch*. *Id.* at 974.

Indeed, while noting that "expert testimony is helpful to the jury if it concerns a matter beyond the understanding of the average person, assists the jury in understanding facts at issue, or puts the facts in context," this Court "d[id] not believe that Dr. Maclin's proposed testimony fit[] into any of these categories." *Welch*, 368 F.3d at 974. Instead, "Dr. Maclin's only purpose" in *Welch* "was to question the credibility of the witnesses." *Id.* at 975. And, "[a]s this Court has often stated, determining the credibility of witnesses is one of the jury's critical

functions and is 'generally not an appropriate subject matter for expert testimony.'" *Id.* at 975 (quoting *Hall*, 165 F.3d at 1107). Accordingly, this Court ruled that the district court in *Welch* "acted properly by excluding Dr. Maclin's testimony." *Ibid.* No basis exists for reaching a contrary conclusion in this case.

b. Additional Factors Support The District Court's Ruling

This Court has recognized that the following additional factors, when present, further support the exclusion of expert testimony regarding eyewitness identifications: "1) the opportunity for cross-examination; 2) the use of a cautionary instruction; and 3) the presence of corroborating evidence." *United States* v. *Crotteau*, 218 F.3d 826, 832 (7th Cir. 2000) (citing *Hall*, 165 F.3d at 1107-1108). See also *Carter*, 410 F.3d at 950-951. These factors are present here and serve to reinforce the district court's ruling.

i. Use Of Cautionary Instructions

The district court gave two cautionary instructions in this case. First, the court instructed jurors that, "[i]n evaluating the testimony of any witness, [they] may consider, among other things * * * the ability and opportunity the witness had to see, hear, or know the things that the witness testified about; * * * the witness's memory; * * * [and] the reasonableness of the witness's testimony in light of all the evidence in the case." (R.149:7).

Second, the court told jurors that "[i]dentification testimony is an expression of belief or impression by the witness"; that they "should consider whether, or to what extent, the witness had the ability and the opportunity to observe the person

at the time of the offense and to make a reliable identification later"; and that they "should also consider the circumstances under which the witness later made the identification." (R.149:9). In so doing, the court reminded jurors that "[t]he government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime charged." *Ibid.*

These two instructions are identical to Seventh Circuit Pattern Jury Instructions 1.03 and 3.08, and to instructions given in *Crotteau*. See *Crotteau*, 218 F.3d at 832. In *Crotteau*, this Court described the instructions as "certainly sufficient," and held that they "properly cautioned the jury to carefully weigh all of the circumstances surrounding [the witness's] identification of [defendant] * * * before reaching any conclusion." *Crotteau*, 218 F.3d at 832-833. Thus, they plainly were sufficient in this case as well.

ii. Corroborating Evidence

This is not a case in which there was only one eyewitness. Rather, no fewer than six eyewitnesses placed Masarik at the scene during the relevant time period. See, *e.g.*, R.221:65-66, 84-85, 177 (Brown); R.221:199, 202-205; R.231:276-277 (Harris); R.222:450-453, 532-533 (Kamermayer); R.222:608, 629 (Mariah Gagnon); R.223:808-811, 823-824 (Clausing); R.224:1050-1051 (Martinez). And Jill Kieselhorst testified that she did *not* see Masarik in the house at any point after Jude and the others left (R.222:554-555), which is where Masarik claimed to be during the assault. Moreover, the evidence regarding his involvement in the

assault was overwhelming. See, *e.g.*, R.222:450-453, 628; R.223:811, 819, 914; R.224:1055-1056, 1087; R.227:1868-1869, 1888-1892.

Thus, each eyewitness identification in this case is corroborated by other identifications. In order for Dr. Maclin's testimony to alter the outcome, the jury would have had to conclude that every one of these eyewitnesses was mistaken.

iii. The Opportunity For Cross-Examination

"[A]ny weaknesses in eyewitness identification testimony ordinarily can be exposed through careful cross-examination of the eyewitnesses." *Hall*, 165 F.3d at 1107. Here, each of the six eyewitnesses who identified Masarik was cross-examined regarding the reliability of their identification. See R.221:162-164, 178 (Brown); R.231:294-296, 299-301 (Harris); R.222:532-533 (Kamermayer); R.222:635-638 (Gagnon); R.223:987-990 (Clausing); R.224:1146-1167 (Martinez). Masarik also called Ryan Lemke to the stand for purposes of identification.[19] And Masarik himself testified, denying any involvement in the assault. (R.227:1957-1969, 1979-1980). Masarik's trial counsel then argued at length in his closing that the eyewitnesses were mistaken. (R.229:97-117).

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[19] Masarik's defense was based in part on the theory that he and Lemke look alike, and that eyewitnesses therefore confused them. See R.244:3-4; R.227:1952-1954; R.229:126. This theory had little merit, as witnesses who knew Lemke testified that they did not confuse the two. See R.223:824 (Clausing previously worked with Lemke and had no doubt about his ability to distinguish Lemke from Masarik); R.222:453 (Kamermayer knew Lemke prior to the party and did not believe she confused him with Masarik). Nevertheless, the district court permitted Masarik to call Lemke to the stand so the jury could see him (Lemke invoked his Fifth Amendment right and did not testify beyond simply stating his name). (R.228:2066).

Accordingly, Masarik had ample opportunity to expose the weaknesses in eyewitness testimony and argue this issue to the jury. See *Crotteau*, 218 F.3d at 832.

E. No Due Process Violation

Masarik's argument (Br. 54-55) that the exclusion of his proffered expert violated his right to put on a defense also fails. This Court reviews due process claims de novo. *United States* v. *Robinson*, 14 F.3d 1200, 1202 (7th Cir. 1994).

In exercising their right to present witnesses, defendants "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973). Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998) (internal quotations omitted).

In order for this Court to rule in Masarik's favor, it would have to conclude that the use of Federal Rule of Evidence 702 to exclude expert testimony regarding the fallibility of eyewitness identifications is "arbitrary or disproportionate to the purposes," *Scheffer*, 523 U.S. at 308, that Rule 702 is designed to serve. Any such ruling is foreclosed by the long line of decisions from this Court affirming the exclusion of expert testimony indistinguishable from that offered here. See *Carter*, 410 F.3d at 950; *Hall*, 165 F.3d at 1107. See also *Barker* v. *Fleming*, 423 F.3d 1085, 1089 n.1 (9th Cir. 2005) (holding, in the

context of habeas review, that "the fundamental right of a defendant to offer the testimony of witnesses" was not violated by "the exclusion of expert testimony on eyewitness identification"). Moreover, Masarik put on a full defense. Accordingly, Masarik's due process argument fails.

F. Any Error Was Harmless

Erroneous evidentiary rulings are subject to harmless-error review. *United States* v. *Schalk*, 515 F.3d 768, 774 (7th Cir. 2008). This includes erroneous exclusions of expert testimony. *United States* v. *Christian*, 342 F.3d 744, 750 (7th Cir. 2003). The existence of overwhelming evidence often renders errors harmless. See *United States* v. *Wesela*, 223 F.3d 656, 659 (7th Cir. 2000); *United States* v. *Marshall*, 75 F.3d 1097, 1109 (7th Cir. 1996). Moreover, this Court need not address the substance of Masarik's argument if it concludes that any resulting error was harmless. See *United States* v. *Ortiz*, 474 F.3d 976, 981-982 (7th Cir. 2007).

As explained above, see pp. 45-46, *supra* (Section II.D.2.b.ii.), the evidence against Masarik was overwhelming, as six different eyewitnesses identified him, and a seventh indicated he was not in the home (as he claimed) during the assault. Accordingly, any error in excluding Dr. Maclin's testimony was harmless.

III

THE DISTRICT COURT ACTED PROPERLY IN REFUSING TO ADMIT SELECTED TESTIMONY FROM A PRIOR PROCEEDING AND DENYING THE ALTERNATIVE REQUEST TO SEVER

(Masarik)[20]

Masarik made two separate requests regarding admission of prior testimony. First, one business day before trial, Masarik filed a motion seeking to admit prior state court testimony from Packard, Lemke, and Bartlett (all of whom invoked their Fifth Amendment right not to testify). (R.133). This motion included an alternative request for severance. (R.133). Later, during trial, Masarik sought to admit prior testimony from Michelle Grutza, an MPD officer who was not charged but nevertheless invoked her Fifth Amendment right not to testify. (R.147).

A. Standard Of Review

This Court reviews both the district court's denial of the request for admission of prior testimony and the alternative request for severance for abuse of discretion. See *United States* v. *Reed*, 227 F.3d 763, 766 (7th Cir. 2000) (admission of prior testimony); *United States* v. *Magana*, 118 F.3d 1173, 1186 (7th Cir. 1997) (severance).

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[20] Masarik raises this issue at pages 56-75 of his brief.

B. The District Court Did Not Abuse Its Discretion In Excluding The Prior Testimony From Masarik's Co-Defendants

1. The Proffered Testimony Is Not Admissible Under Federal Rule Of Evidence 804(b)(1)

Rule 804(b)(1) permits courts to admit statements by an unavailable declarant if they meet the following criteria:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, *or, in a civil action or proceeding, a predecessor in interest,* had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fed. R. Evid. 804(b)(1) (emphasis added).

Thus, a civil proceeding is the only context in which prior testimony may be admitted against a party not involved in the prior proceeding. See *United States* v. *Carson*, 455 F.3d 336, 380 (D.C. Cir. 2006); *United States* v. *Jackson-Randolph*, 282 F.3d 369, 381 (6th Cir. 2002); *United States* v. *Peterson*, 100 F.3d 7, 12-13 (2d Cir. 1996); *United States* v. *Deeb*, 13 F.3d 1532, 1535 (11th Cir. 1994). See also Fed. R. Evid. 804(b)(1) Advisory Committee Notes.

The district court rejected Masarik's argument, noting that "[t]his is not a civil proceeding; this is a criminal proceeding." (R.244:6). This is a correct interpretation of the rule, and therefore cannot amount to an abuse of discretion.

2. The Proffered Testimony Is Not Admissible Under Federal Rule Of Evidence 807

a. Requirements For Admission Under Rule 807

The requirements for admission under Rule 807 are "(1) circumstantial guarantees of trustworthiness; (2) materiality; (3) probative value; (4) the interests of justice; and (5) notice." *United States* v. *Ochoa*, 229 F.3d 631, 638 (7th Cir. 2000). "[H]earsay not within an enumerated exception is presumptively unreliable, and the burden of overcoming that presumption falls on the party seeking to introduce the evidence. *Doe* v. *United States*, 976 F.2d 1071, 1079 (7th Cir. 1992).[21] "Trial courts have a considerable measure of discretion in deciding when a hearsay statement fits the residual exception," and this Court will "reverse only when no reasonable person could take the view of the trial court." *United States* v. *Dumeisi*, 424 F.3d 566, 574 (7th Cir. 2005).

Moreover, this Court places "emphasis on narrowly construing the residual provision to prevent it from becoming the exception that swallows the hearsay rule." *Akrabawi* v. *Carnes Co.*, 152 F.3d 688, 697 (7th Cir. 1998). When combined with the deferential standard of review, this means appellants challenging such rulings "step[] up to the plate on this issue with two strikes already called." *Ibid.*

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[21] Some cases cited in this discussion address former Rules 803(24) and 804(b)(5). "Rule 807 is a recodification of former Rules 803(24) and 804(b)(5)." *Ochoa*, 229 F.3d at 638. "[T]he same requirements for admitting evidence under these prior residual exceptions to the hearsay rule apply to 807." *Ibid.*

b. The District Court Did Not Abuse Its Discretion

A fair reading of the district court's ruling with regard to the motion to admit prior testimony of Packard, Lemke, and Bartlett indicates that it concluded that four of the five requirements for admission under Rule 807 were not satisfied in this case.

First, the court concluded there were not sufficient circumstantial guarantees of trustworthiness. See R.141:2 (court was "not persuaded that there are circumstantial guarantees of trustworthiness equivalent to the [*sic*] those supporting the hearsay exceptions in Rules 803 and 804"); R.244:5 (court was "not satisfied that Mr. Masarik has shown that there is any guarantee of trustworthiness with respect to the statements").

Second, the evidence was not sufficiently probative. See R.141:1-2 ("[T]here are a number of individuals allegedly present, and the court is not satisfied that there are no other sources of evidence equally or more probative."); R.244:5 (Masarik "does not suggest that there is no one other than the Defendants * * * in this case who could testify regarding his presence, or absence from the scene.").

Third, the interests of justice do not favor admission. See R.141:1 ("[T]he government did not have an opportunity to challenge the testimony by cross-examination."). Finally, the government did not receive sufficient notice. See R.141:1-2 (noting that the motion was filed on July 6, 2007 – only "one business

day before the commencement of trial" and "months after the March 1, 2007, deadline for filing motions"); R.244:5 (describing motion as "rather tardy").

The district court's decision is correct. First, with regard to trustworthiness, Masarik's assertion (Br. 66) that the witnesses at issue had no incentive to assist him when testifying in state court is incorrect. As MPD officers, it unquestionably would not have been in their interest to admit they were present, saw Masarik harm Jude, yet did nothing to stop him. Nor is the fact that they testified under oath (Br. 66) conclusive with respect to the question of trustworthiness. See *United States* v. *Snyder*, 872 F.2d 1351, 1355 (7th Cir. 1989) (district court abused its discretion when it "relied solely on the nature of the grand jury proceeding to supply the necessary circumstantial guarantees of trustworthiness").

Other relevant factors – such as the extent to which these witnesses testified based on personal knowledge and whether their statements can be corroborated, see *United States* v. *Hall*, 165 F.3d 1095, 1110-1111 & n.8 (7th Cir. 1999) – cannot be determined because the proffered testimony is not part of the record on appeal.[22] Accordingly, there is no basis for determining that the district court abused its discretion in concluding that the testimony did not have sufficient circumstantial guarantees of trustworthiness.

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[22] Masarik delivered copies of the relevant transcripts for Packard, Lemke, and Bartlett to the district judge's chambers. (R.133; R.134). But the transcripts were never filed with the clerk's office and do not appear in the district court's docket. See E.D. Wisc. Local Rule 5.2 ("All legal papers must be filed in the office of the Clerk of Court and not in the chambers of the judge or magistrate judge.").

Second, with regard to the probative value of the evidence, the material fact at issue was whether Masarik participated in the assault, and there was ample probative evidence with respect to that issue. Indeed, at least six different witnesses testified that Masarik was present at the scene and/or participated in the assault. See, *e.g.*, R.221:65-66, 84-85, 177 (Brown); R.221:199, 202-205; R.231:276-277 (Harris); R.222:450-453, 532-533 (Kamermayer); R.222:608, 629 (Gagnon); R.223:808-811, 823-824 (Clausing); R.224:1050-1051 (Martinez). And Jill Kieselhorst testified that she did *not* see Masarik in the house at any point after Jude and the others left (R.222:554-555), which is where Masarik claimed to be during the assault.

Moreover, Masarik's assertion (Br. 64) that the proffered testimony "was more probative of that fact than any other evidence Masarik could have produced" also is incorrect. Masarik took the stand and unequivocally denied any participation in the assault. (R.227:1957-1969, 1979-1980). He thus was able to put before the jury the most probative evidence available on this point – his own testimony. The jury obviously did not find his testimony credible.

The two remaining factors found lacking by the district court – the interests of justice and proper notice – do not merit discussion beyond what was said by the district court. See R.141:1-2; R.244:5-6. Thus, the district court did not abuse its discretion in refusing to admit the proffered testimony under Rule 807.

C. The District Court Did Not Abuse Its Discretion In Excluding Prior Testimony From A Fourth Witness

The district court rejected Masarik's request to admit Grutza's prior testimony for substantially the same reasons (excluding tardiness) it rejected his earlier request. See R.227:2029. Masarik's argument regarding Grutza's testimony therefore fails for substantially the same reason it failed with respect to the prior testimony of Packard, Lemke, and Bartlett: Masarik is unable to satisfy the requirements of Federal Rules of Evidence 804(b)(1) or 807. See pp. 50-54, *supra* (Section III.B.).

D. No Due Process Violation

Masarik contends (Br. 69-71) the exclusion of the prior testimony also violates his due process rights. This Court reviews due process claims de novo. *United States* v. *Robinson*, 14 F.3d 1200, 1202 (7th Cir. 1994).

This argument fails for the same reason that Masarik's due process argument with respect to the exclusion of his proffered expert fails: the district court properly applied the rules of evidence. See pp. 47-48, *supra* (Section II.E).

E. The District Court Did Not Abuse Its Discretion In Denying Masarik's Alternative Request For Severance

In denying the alternative request for severance, the court noted that it was "tardy." (R.244:6). It also noted that it already had denied a prior severance motion. (R.244:6; R.141:2). The district court further observed that Masarik "failed to show how, if at all, severance, under the circumstance, would be

beneficial," and that he also failed to show "that he has [*sic*] suffered any undue prejudice if this case is not severed." (R.244:6).

1. Requirements For Severance

The starting place for this Court's analysis is "the presumption that co-defendants who are indicted together are normally tried together." *United States* v. *Lopez*, 6 F.3d 1281, 1285 (7th Cir. 1993). "[J]oint trial[s] give[] the jury the best perspective on all the evidence and therefore increase[] the likelihood of a correct outcome." *United States* v. *Chrismon*, 965 F.2d 1465, 1476 (7th Cir. 1992) (quoting *United States* v. *Buljubasic*, 808 F.2d 160, 1263 (7th Cir. 1987)). Moreover, "[t]he presumption in favor of joint trials is especially strong when the defendants are charged with conspiracy." *Chrismon*, 965 F.2d at 1476. Accordingly, "[c]riminal defendants who claim that a district court abused its discretion by denying a severance motion bear a heavy burden on appeal." *Lopez*, 6 F.3d at 1285.

This Court "will reverse a district court's decision to deny severance only when the court's decision results in actual prejudice to the party appealing its decision." *Lopez*, 6 F.3d at 1285. "To show actual prejudice, a defendant must demonstrate that he or she was unable to obtain a fair trial without severance, not just that a separate trial would have offered a better chance for acquittal." *Ibid.* Where, as here, defendants seek "[t]o obtain a severance in order to take advantage of exculpatory evidence," they "must show that (1) the codefendant's testimony would be exculpatory, (2) the codefendant would in fact testify, and (3) the

testimony would bear on the defendant's case." *United States* v. *Williams*, 31 F.3d 522, 528 (7th Cir. 1994).

2. Masarik Is Unable To Satisfy The Requirements For Severance

As the district court noted, Masarik does not satisfy the most basic requirement for severance – demonstrating prejudice. See *Lopez*, 6 F.3d at 1285; (R.244:6).

Masarik also is unable to satisfy the specific requirements regarding severance for the purpose of obtaining exculpatory testimony: "[b]efore a severance can be granted, [defendant] must offer some independent support that [the co-defendant] would indeed offer exculpatory testimony." *United States* v. *Boykins*, 9 F.3d 1278, 1290 (7th Cir. 1993). Where a defendant "fails to present anything that would lead [this Court] to believe that [the co-defendant] would in fact testify and that, if he did testify, [the co-defendant's] testimony would be exculpatory," affirmance is appropriate. *Ibid.*

Masarik fails on both counts. First, as noted above, the proffered testimony is not part of the record on appeal. Masarik therefore is unable to establish that it is exculpatory. In addition, even Masarik's own description of the testimony indicates that it may establish nothing more than the fact that the witnesses did not see Masarik involved in the altercation – not that he was not involved. See R.133:2 (indicating that the prior testimony of Packard, Lemke, and Bartlett would "state that defendant Masarik was not involved in physical contact with Mr. Jude

or, at a minimum, was not seen by these individuals who have testified to their direct involvement with Mr. Jude) (emphasis added).

To the extent the proffered testimony would only establish that Masarik's co-defendants claimed not to have seen him during portions of the incident, it would not be sufficiently exculpatory to warrant severance. Cf. *United States* v. *Wilson*, 481 F.3d 475, 482-483 (7th Cir. 2007); *United States* v. *Gonzalez*, 933 F.2d 417, 425 (7th Cir. 1991); see also *United States* v. *Darden*, 70 F.3d 1507, 1527 (8th Cir. 1995). Moreover, the simple fact that proffered testimony tends to undercut the government's case is not a sufficient basis for severance. See *United States* v. *Flick*, 719 F.2d 246, 249 (7th Cir. 1983).

Second, and more fundamentally, Masarik did not sufficiently establish that his co-defendants would testify even if severance were granted. "Before a severance can be granted, [defendant] must offer some independent support that [the co-defendant] would indeed offer exculpatory testimony." See *Boykins*, 9 F.3d at 1290. In some cases, this support comes in the form of an affidavit. See *Lopez*, 6 F.3d at 1285 ("lack of any affidavit" from co-defendant indicating that he would testify after his own trial and offer exculpatory testimony was "a glaring omission in the record"); *Chrismon*, 965 F.2d at 1476 (denial of severance was appropriate where defendant failed to provide an affidavit from co-defendant indicating that he would testify if severance were granted).

Here, however, no such independent support exists. While their state-court testimony was available to the district court, the fact that they offered such

testimony in the state-court proceeding does not establish that they would have done so in the federal proceeding. Indeed, Bartlett and Packard – both of whom testified in the state proceedings – were not even willing to testify in their own defense in this case. Likewise, Grutza was not charged in either the state or federal proceedings, yet still refused to testify in the federal trial.

At bottom, Masarik offers nothing more than conjecture in support of his assertion that his co-defendants would have testified favorably on his behalf if severance were granted. This is insufficient to overcome the district court's ruling.

F. Any Error Was Harmless

Any error by the district court with regard to exclusion of prior testimony is subject to harmless-error review. See *United States* v. *Schalk*, 515 F.3d 768, 774 (7th Cir. 2008) ("We shall not overturn erroneous evidentiary rulings if the error is harmless."). So too is the district court's decision to deny severance. See *United States* v. *Souffront*, 338 F.3d 809, 831 (7th Cir. 2003). This Court need not address the substance of Masarik's argument if it concludes that any resulting error was harmless. See *United States* v. *Ortiz*, 474 F.3d 976, 981-982 (7th Cir. 2007).

As explained above, see pp. 45-46, 48, *supra* (Sections II.D.2.b.ii. and II.F), the evidence against Masarik was overwhelming. Neither the admission of testimony from a prior proceeding nor severance would have changed that.

Accordingly, any error in the district court's exclusion of prior testimony and denial of severance was harmless.

IV

THE DISTRICT COURT DID NOT ERR IN LIMITING CROSS-EXAMINATION OF FORMER OFFICERS

(Spengler)[23]

A. Standard Of Review

"In general, [this Court] review[s] a trial court's limitation on the extent of cross-examination for abuse of discretion. However, where limitations directly implicate the Sixth Amendment right of confrontation, [this Court] review[s] the limitation de novo." *United States* v. *Smith*, 454 F.3d 707, 714 (7th Cir. 2006) (citations omitted).

Accordingly, "when deciding whether limits on cross-examination are permissible, [this Court] must first distinguish between the core values of the Confrontation Clause and more peripheral concerns which remain within the trial court's ambit." *Smith*, 454 F.3d at 714. "If the 'core values' of the Confrontation Clause remain intact, [this Court] merely ensure[s] that the district court's exercise of its wide discretion in limiting cross-examination was not abusive." *United States* v. *Reyes*, 542 F.3d 588, 593 (7th Cir. 2008). See also *United States* v. *Manske*, 186 F.3d 770, 778 (7th Cir. 1999).

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[23] Spengler raises this issue at pages 24-31 of his brief.

B. The District Court's Ruling

Spengler sought to admit testimony indicating, *inter alia*, that Clausing and Schabel took polygraph examinations; their stories changed after these examinations; the changes occurred "because the government was dissatisfied with their previous statements"; and the government did not administer further polygraphs to the men after their stories changed. (R.155:4-5).

The government opposed Spengler's request based in part on the fact that such evidence "ha[d] minimal, if any, probative value and the potential for prejudice, particularly for confusing the issues and misleading the jury, outweigh[ed] any probative value it might have." (R.223:781). At bottom, the proffered testimony "show[ed] the view of the government with regard to the statements at issue," which, as the government noted, has no bearing on witness credibility. (R.223:781). The district court accordingly denied Spengler's motion under Rule 403. (R.223:781).

C. Because The District Court's Ruling Does Not Affect A Core Function Of The Confrontation Clause, This Court's Review Is For Abuse Of Discretion

"The right to cross-examine adverse witnesses * * * is not absolute." *United States* v. *Cavender*, 228 F.3d 792, 798 (7th Cir. 2000). Rather, "[t]he Confrontation Clause guarantees only an opportunity to conduct a thorough and effective cross-examination during which the defense has a chance to discredit the witness, 'not cross-examination that is effective in whatever way, and to whatever

extent, the defense might wish.'" *Ibid.* (quoting *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)).

Thus, as this Court has held, "[l]imiting a party's right to cross-examine for the purposes of impeachment is more a peripheral concern than a core value." *United States* v. *Jackson*, 51 F.3d 646, 652 (7th Cir. 1995) (citations and internal quotations omitted). See also *United States* v. *Robbins*, 197 F.3d 829, 844 (7th Cir. 1999). "In determining whether the Sixth Amendment is implicated in a cross-examination denial, [this Court] focus[es] on whether there was sufficient information presented to the jury for its appraisal of the witness." *United States* v. *Scott*, 145 F.3d 878, 888 (7th Cir. 1998). See also *United States* v. *McLee*, 436 F.3d 751, 761 (7th Cir. 2006) ("[O]nce a witness has been exposed through cross-examination as having a motive to lie, a district court enjoys greater freedom to limit cross-examination that merely seeks to add additional layers of motivation to those already established."); *United States* v. *Sasson*, 62 F.3d 874, 882 (7th Cir. 1995).

That standard is easily satisfied here. Turning first to Clausing, he admitted during direct and cross-examination that he lied repeatedly during the investigation. See, *e.g.*, R.223:934 ("lied to the FBI and the United States Attorney's Office"); R.223:938-939 (told "more of the truth" and "lied a little bit less" during second interview with FBI); R.223:959-960 (continued to lie to the government even after receiving a letter telling him that he would not be

prosecuted if he provided truthful information).[24] Spengler's trial counsel in particular focused on the incentive for Clausing to lie to curry favor with the government, eliciting the fact that the government would "evaluate [his] truthfulness and then make appropriate recommendations to the sentencing judge." (R.223:957).

Likewise, Schabel made multiple admissions during cross-examination, including the fact that he previously lied under oath. See, *e.g.*, R.227:1914-1916 (lied under oath three separate times during state proceedings); R.227:1882 (admits his conviction was the result of an obstruction charged based on false statements made under oath); R.227:1850-1851 (during a meeting with police detectives, his story changed after he took a break and spoke with his attorney); R.227:1852-1853 (when asked, failed to admit to detectives that he acted unprofessionally).

In view of the foregoing, it is clear defendants took full advantage of their opportunities to attack the credibility of Clausing and Schabel. The jury accordingly had ample bases from which to appraise their testimony. See *Jackson*,

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[24] See also R.223:789 (was not completely truthful during his initial interviews with the FBI); R.223:848 (did not tell the truth to law enforcement until sometime during Fall 2006); R.223:932 ("submitted a bunch of lies to the chief of police, [his] boss" regarding the incident); R.223:932-933 (is not sure how many lies he told during his initial interview with the FBI); R.223:936 (lied to the FBI regarding whether he "saw Schabel punch or kick" Jude); R.223:937-938 (lied to FBI regarding whether he punched Harris and about how Harris was cut); R.223:944 (during third interview with the FBI, he lied "less than the first two times"); R.223:947 ("lies were getting less and less as time went on").

51 F.3d at 652; *Scott*, 145 F.3d at 888. At most, Spengler was denied the chance to further develop these same points. Thus, his core Sixth Amendment rights were not violated. See, *e.g.*, *Manske*, 186 F.3d at 778 ("When a defendant is allowed to expose an individual's particular motive to lie, it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point down to the jury.") (internal quotations omitted); *Scott*, 145 F.3d at 888 ("So long as cross-examination elicits adequate information to allow a jury to assess a witness's credibility, motives, or possible bias, the Sixth Amendment is not compromised.").[25] Abuse of discretion therefore is the appropriate standard for this Court's review of the district court's ruling. See *Smith*, 454 F.3d at 714; *United States* v. *Nelson*, 39 F.3d 705, 708 (7th Cir. 1994).

D. The District Court Did Not Abuse Its Discretion In Limiting Cross-Examination Of Former Officers

Rule 403 "grants the district court broad discretion to limit the scope and extent of cross-examination when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, misleading the jury or the needless presentation of cumulative evidence." *United States* v. *Williamson*, 202 F.3d 974, 978 (7th Cir. 2000). This Court "review[s] the district court's exercise of discretion to determine whether the court provided [defendant] with a

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[25] See also *Cavender*, 228 F.3d at 798-799 (no Sixth Amendment violation where defense was permitted to, *inter alia*, "explain that [the witness] was profiting as a result of his testimony by getting a lower sentence under his plea agreement").

'reasonable chance' to discredit the witness and pursue [his] alternative theory of the case." *Ibid.* In addition, this Court "review[s] the limitations placed upon specific instances of cross-examination in the context of the entire case." *United States* v. *Akinrinade*, 61 F.3d 1279, 1285 (7th Cir. 1995) (internal quotations omitted).

As described above, the veracity of Clausing and Schabel was directly and substantially attacked at trial. And both testified regarding the terms of their plea agreements. (R.223:787-789; R.227:1885-1886). This Court repeatedly has found no abuse of discretion in cases presenting analogous circumstances. See *McLee*, 436 F.3d at 762; *United States* v. *Martin*, 287 F.3d 609, 621 (7th Cir. 2002); *Williamson*, 202 F.3d at 978; *Jackson*, 51 F.3d at 653; *Nelson*, 39 F.3d at 709.

Moreover, Spengler's trial counsel attacked Clausing's veracity in his closing. (R.234:150-154). In particular, he argued that Clausing simply told the government what it wanted to hear:

> Apparently Mr. Clausing didn't believe that the truth was what the government wanted to hear. And so he told it once because he thought they wanted to hear it, not because it was the truth. And then he told it a second time differently because he thought that's what the government wanted to hear, not because he was afraid of getting himself in trouble.

(R.234:151). In so doing, Spengler's trial counsel argued that the government stopped questioning Clausing once his story matched its theory of the case:

> [Clausing] does say we all acted as a group of individuals with the same goal, to get the badge. How convenient.

> That's precisely the government's theory. And it only took him three times to figure it out with the FBI. And that's the last statement that was needed, he's finally matched up with what the government would like people to hear.

(R.234:153-154).[26] Thus, the district court's ruling in no way affected Spengler's ability to argue this theory to the jury. See *Martin*, 287 F.3d at 621 (fact that defendant's attorney argued during closing that witness was lying to avoid prosecution partially supported conclusion that district court did not abuse its discretion in limiting cross-examination). At most, the ruling deprived Spengler of additional support for his argument, which is not enough to establish error. See *McLee*, 436 F.3d at 761.

E. Any Error Was Harmless

"A violation of the Confrontation Clause is subject to harmless error analysis." *United States* v. *Castelan*, 219 F.3d 690, 694 (7th Cir. 2000). This Court need not address the substance of Spengler's argument if it concludes that any resulting error was harmless. See *United States* v. *Ortiz*, 474 F.3d 976, 981-982 (7th Cir. 2007).

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[26] The foregoing – together with the facts set forth above, see pp. 61-64, *supra* (Section IV.C.) – clearly distinguishes this case from *United States* v. *Lynn*, 856 F.2d 430 (1st Cir. 1988), which is the primary case upon which Spengler relies (Br. 28-30). In *Lynn*, "the area of * * * potential bias" was not "fully explored by the defense," and "there were relatively few questions concerning [the witness's] continuing reasons to lie to please the government." *Id.* at 433. The district court in *Lynn* abused its discretion because it "cut[] off all cross-examination into a relevant and not fully explored area." *Id.* at 434. The same cannot be said here.

Here, there was overwhelming evidence against Spengler, even separate and apart from the testimony of Clausing and Schabel. See, *e.g.*, R.221:83, 131, 141-142 (Brown's testimony that Spengler was part of the group punching and kicking Jude); R.222:627-628 (Gagnon's testimony that Spengler kicked Jude); R.232:1302-1311 (Shannon Nelson's testimony that Spengler subsequently bragged about the assault); R.222:454 (Kamermayer's testimony that Spengler acted as a spokesperson for the group, telling Jude to give up the badge). Thus, even if the jury rejected Clausing and Schabel as not credible, there still was ample evidence of Spengler's guilt. In view of the foregoing, any error in limiting cross-examination was harmless.

V

THE DISTRICT COURT DID NOT ERR IN LIMITING CROSS-EXAMINATION OF THE VICTIMS

(Spengler)[27]

A. Standard Of Review

The same standard of review discussed above in Sections IV.A. and IV.C. applies here. Because impeachment is a peripheral concern, review is for abuse of discretion. See *United States* v. *Jackson*, 51 F.3d 646, 652 (7th Cir. 1995).

[27] Spengler raises this issue at pages 14-24 of his brief.

B. The District Court Did Not Abuse Its Discretion In Limiting Cross-Examination Regarding Harris's Prior Conviction

1. The District Court's Ruling

Spengler sought to introduce Harris's 1998 conviction for being a felon in possession of a firearm. (R.221:181-183; R.103:3). The district court denied the request, noting that "there's no suggestion that this particular conviction has any bearing on the facts of the case," and "the probative value is minimal." (R.221:182-183). The court therefore excluded the conviction under Federal Rule of Evidence 403. (R.221:183).

2. The Exclusion Of This Conviction Was Not An Abuse Of Discretion

Spengler's argument that the district court erred in excluding Harris's conviction is based on the assertion that the district court applied the wrong standard. Br. 14-17. Specifically, the district court noted that, because the conviction at issue had no "bearing on the facts of the case," "the real question [wa]s whether or not the probative value of admitting this testimony [wa]s greater than any prejudice which would result." (R.221:182-183). Seizing on this language, Spengler argues that the district court incorrectly applied the lesser standard for impeachment of a defendant – not the slightly higher standard for impeaching a witness – when it made its ruling.

Spengler's argument misreads the district court's ruling. Immediately after making the challenged statement, the district court made the following observation:

> Now, *ordinarily* under this rule you're talking about the receipt of a conviction which would have a bearing on an accused. *Here* you're not talking about an accused, you're talking about a witness.
>
> Quite frankly I think that the probative value is minimal and, therefore, I will exclude the evidence of the conviction, taking into consideration the provisions of Rule 403.

(R.221:183) (emphases added).

Read in context, it is clear the district court simply recited the standard contained in Rule 609(a)(1), noted that it did not apply here because this case involves a witness rather than a defendant, and then excluded the evidence under Rule 403, which is the only basis for exclusion with regard to witness convictions. This approach is unremarkable, and has in fact been taken by this Court. See *United States* v. *Galati*, 230 F.3d 254, 261-262 (7th Cir. 2000) (reciting the standard ordinarily applied under Rule 609(a)(1) and then applying Rule 403 to affirm the district court's exclusion of a witness's conviction). The district court implicitly found that the prejudice substantially outweighed the probative value when it excluded the evidence under Rule 403. There is no requirement that it expressly state this conclusion for the record, as opposed to simply stating that it finds the evidence excludable under Rule 403.

To accept Spengler's argument, this Court would have to accept the questionable premise on which it rests – *i.e.*, that an experienced district judge did not understand that Rule 403 requires a finding that prejudice *substantially*

outweighs probative value. Spengler's argument is based on a tortured reading of the district court's ruling. It therefore should be rejected.[28]

C. The District Court Did Not Abuse Its Discretion In Limiting Cross-Examination Regarding Jude's Prior Convictions

At issue are three prior convictions: (1) escape from criminal arrest (convicted November 5, 1996); (2) manufacture/delivery of THC (< 500 grams) (convicted November 5, 1996); and (3) bribery of a public official (convicted July 14, 1997). (R.103:3). All three resulted in sentences of probation.

The government mistakenly conceded in its motion in limine that the two convictions from November 5, 1996 arguably fell within the ten-year period set forth in Federal Rule of Evidence 609(b) because a parole revocation resulted in Jude being released from confinement on these charges on June 16, 2003. (R.103:2-3). The government, citing *United States* v. *Wallace*, 848 F.2d 1464 (9th Cir. 1988), nevertheless argued that the convictions should not be construed to fall within the ten-year period because the probation was unrelated to the underlying convictions. (R.223:1033-1034).

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[28] Spengler's argument rests solely on his claim that the district court applied the wrong standard. Br. 14-17. He makes no effort to argue in the alternative that – applying the correct standard – the district court abused its discretion by concluding that the prejudice of the prior conviction substantially outweighed its probative value. He therefore waived that argument. See *United States* v. *Hook*, 195 F.3d 299, 310 (7th Cir. 1999).

1. The District Court's Ruling

The district court ruled that defendants *could* examine Jude regarding the July 14, 1997 bribery conviction even though it fell outside the ten-year period (albeit just barely).[29] (R.224:1179). But it precluded defendants from introducing the two convictions from November 5, 1996. (R.224:1179). The court did not specifically indicate whether it agreed with the government's argument – based on *Wallace* – that the November 5, 1996 convictions should be deemed to fall outside the ten-year period because of the fact that the probation revocation was unrelated to the underlying convictions.

After the district court made its ruling, the government's trial counsel corrected the record with regard to the probation revocation, informing the court that it related to the bribery conviction (which the court already had deemed admissible), not the two November 5, 1996 convictions (which the court had excluded):

> Your Honor, may I add one thing? It doesn't change anything, but I wanted to correct something that was inaccurate in our motion. [In] our motion with respect to the conviction that you're excluding, we had indicated that there was a probation revocation on that. I checked the Wisconsin – and that's what the federal records show. I checked the Wisconsin records over the weekend, it actually shows that that probation revocation dealt with the felony bribery which you're letting in.

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[29] Jude's examination took place on July 16, 2007, two days after expiration of the ten-year period.

> So I don't think it has any effect on your ruling other than actually to make that earlier one, you know, clearly outside of the 10-year rule. So, I just wanted to make sure that I corrected what was a misunderstanding that we had in our motion.

(R.224:1180).

2. Spengler Waived Any Argument That Jude's Excluded Convictions Were Admissible Despite Falling Outside The Time Period Set By Federal Rule Of Evidence 609(b)

On appeal, Spengler argues that the district court erred in (1) allegedly applying the incorrect standard, just as he asserts it did in excluding Harris's prior conviction; and (2) potentially relying on *Wallace* to conclude that the probation revocation does not bring the two November 5, 1996 convictions within the ten-year period set forth in Rule 609(b). Br. 18-20.

Both arguments fail, however, because they overlook the government's correction of the record with regard to the probation revocation (quoted above). Spengler did not challenge – either in the proceedings below or in his brief to this Court – the government's representation that the probation revocation related to the bribery charge (which the district court deemed admissible), not the November 5, 1996 convictions (which the district court excluded). He therefore waived any such argument. See *United States* v. *Hook*, 195 F.3d 299, 310 (7th Cir. 1999).

Because there was no probation revocation – and thus no confinement – relating to the November 5, 1996 convictions, they clearly fall outside the ten-year period. Accordingly, they are inadmissible unless the district court "determine[d], in the interests of justice, that the probative value of the conviction[s] supported

by specific facts and circumstances substantially outweigh[ed] its prejudicial effect." Fed. R. Evid. 609(b). No such finding was requested below, nor is any such argument made on appeal. Accordingly, this issue has been waived. See *Hook*, 195 F.3d at 310.

D. Any Error Was Harmless

Erroneous evidentiary rulings are subject to harmless-error review. *United States* v. *Schalk*, 515 F.3d 768, 774 (7th Cir. 2008). This includes erroneous exclusions of witnesses' prior convictions. *United States* v. *Cavender*, 228 F.3d 792, 799 (7th Cir. 2000). This Court need not address the substance of Spengler's argument if it concludes that any resulting error was harmless. See *United States* v. *Ortiz*, 474 F.3d 976, 981-982 (7th Cir. 2007).

None of the convictions at issue were for crimes involving fraud or deceit. At most, admission of the excluded convictions would have called into question the general character of Jude and Harris. There would have been no impact on the character or credibility of other witnesses. And there is nothing in the testimony of either Jude or Harris that is necessary to sustain Spengler's conviction. Indeed, even if the jury discredited everything both men said, there still would have been ample evidence to support the verdict. See, *e.g.*, R.221:83, 131, 141-142 (Brown's testimony that Spengler was part of the group punching and kicking Jude); R.222:627-628 (Gagnon's testimony that Spengler kicked Jude); R.232:1302-1311 (Shannon Nelson's testimony that Spengler subsequently bragged about the

assault); R.222:454 (Kamermayer's testimony that Spengler acted as a spokesperson for the group, telling Jude to give up the badge).

Moreover, Spengler argued in closing that Jude had credibility issues relating to, *inter alia*, his conviction for bribing a public official. (R.234:166-168). So the exclusion of the other convictions did not limit Spengler's ability to argue his case. At most, it marginally limited the evidence in support of this argument. Any error in the exclusion of the prior convictions therefore was harmless.

VI

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY REGARDING OBJECTS OF THE CONSPIRACY

(Spengler)[30]

A. Standard Of Review

Defendants who fail to object to a jury instruction at trial forfeit such objections. *United States* v. *Wiley*, 475 F.3d 908, 917 (7th Cir. 2007). "Forfeited objections to jury instructions are reviewed for plain error." *Ibid.* "[U]nder the plain error standard, the party asserting the error bears the burden of persuasion on the following points: (1) that there is error, (2) that the error is plain, and (3) that the error affects substantial rights." *United States* v. *Neal*, 512 F.3d 427, 439 n.11 (7th Cir. 2008) (internal quotations omitted). "If these three conditions are met, the court may exercise its discretion to notice a forfeited error, but only if it (4)

[30] Spengler raises this issue at pages 31-35 of his brief.

seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (internal quotations omitted).

B. Disjunctive Jury Instructions Are Appropriate Even Where Indictments Charge Conjunctively

No error – plain or otherwise – occurred when the district court elected to use a disjunctive jury instruction. It is well established that "[w]hen a statute lists alternate means of violation, the general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any of the acts charged. This rule extends to a trial court's jury instructions in the disjunctive in the context of a conjunctively worded indictment." *United States* v. *Rice*, 520 F.3d 811, 817 (7th Cir. 2008) (citations and internal quotations omitted). See also *United States* v. *Jones*, 418 F.3d 726, 730 (7th Cir. 2005); *United States* v. *Durman*, 30 F.3d 803, 810 (7th Cir. 1994).

Here it is alternate objects of the conspiracy – not alternate means of violating a statute – at issue. But the same principle applies, as it also is well established that a general verdict regarding a multi-object conspiracy is valid provided evidence is sufficient to support any of the charged objects. See, *e.g.*, *United States* v. *Mann*, 493 F.3d 484, 492 (5th Cir. 2007) ("[A] general guilty verdict on a multiple-object conspiracy charge may stand even if the evidence is insufficient to sustain a conviction on one of the charged objects. The evidence only needs to be sufficient to support a conviction for one of the charged objects.")

(citation and internal quotations omitted); *United States* v. *Woodard*, 459 F.3d 1078, 1084 (11th Cir. 2006) ("[A] guilty verdict in a multi-object conspiracy will be upheld if the evidence is sufficient to support a conviction of any of the alleged objects."); *United States* v. *Coriaty*, 300 F.3d 244, 250 (2d Cir. 2002) ("We have upheld convictions for multi-object conspiracies charged in the conjunctive even when there was insufficient evidence to support one of the objects of the conspiracy."). Accordingly, the district court acted properly in using a disjunctive jury instruction.

Tellingly, Spengler fails to cite a single Seventh Circuit case in support of his argument. Instead he relies primarily on the Third Circuit's decision in *United States* v. *Beros*, 833 F.2d 455 (3d Cir. 1987). *Beros*, of course, is not binding on this Court. More to the point, however, the Third Circuit subsequently held that "[t]he *Beros* rule comes into play only when the circumstances are such that the jury is likely to be confused as to whether it is required to be unanimous on an essential element." *United States* v. *Cusumano*, 943 F.2d 305, 312 (3d Cir. 1991). Spengler offers no reason to believe that such was the case here. And there certainly is no indication that the likelihood of confusion by the jury was so great that the district court plainly erred in utilizing a disjunctive instruction. Accordingly, no basis exists for a finding of plain error.

Moreover, in arguing plain error, it is Spengler's "burden to establish that substantial rights were affected by establishing that, but for the error, the outcome of the trial probably would have been different." *United States* v. *Prude*, 489 F.3d

873, 880 (7th Cir. 2007). Spengler's brief makes no effort to address that question. It also fails to argue that the alleged error "seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings" below. *Wiley*, 475 F.3d at 917 (internal quotations omitted).

C. Any Error Was Harmless

Any error in the district court's conspiracy instruction is subject to harmless-error review. See *United States* v. *Ramsey*, 406 F.3d 426, 432 (7th Cir. 2005).

There was ample evidence that Spengler violated the civil rights of both victims. As Spengler concedes, there is evidence indicating that he helped pull Harris from the truck, yelled racial slurs at him, and threatened to kill him. Br. 35. There was ample testimony regarding his involvement in the assault on Jude as well. (R.222:628; R.223: 812, 816; R.224:1207-1208, 1266; R.227:1895-1896). And, as a member of the conspiracy, Spengler also was responsible for the foreseeable acts of his co-conspirators against both Harris and Jude. Accordingly, the jury would have reached the same result even if instructed in the conjunctive.

VII

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE A LESSER-INCLUDED-OFFENSE INSTRUCTION

(Spengler)[31]

A. Standard Of Review

"This Court's review of a district court's denial of a lesser-included-offense instruction has both a legal and a factual component." *United States* v. *Upton*, 512 F.3d 394, 402 (7th Cir. 2008). First, "[t]he defendant must * * * establish that the requested instruction is for an offense necessarily included in the one charged." *Ibid.* This is a legal question reviewed de novo. *Ibid.*

Second, "the defendant must show that a rational jury could have convicted him of the lesser offense, but not the greater." *Upton*, 512 F.3d at 402. Such a ruling "is based on the district court's estimate of the government's evidence," and is reviewed for abuse of discretion. *Ibid.* This Court "will reverse only where no reasonable person could take the view adopted by the trial court." *United States* v. *Hernandez*, 330 F.3d 964, 971 (7th Cir. 2003) (internal quotations omitted).

B. The District Court Did Not Abuse Its Discretion

The government concedes that the elements of a misdemeanor violation of 18 U.S.C. 242 are necessarily included in a felony violation of the statute. Accordingly, the only issue before this Court is whether the district court abused

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[31] Spengler raises this issue at pages 36-39 of his brief.

its discretion in concluding that the facts of this case did not warrant such an instruction.

"A defendant is entitled to a lesser included offense instruction *only* if the evidence would permit a rational jury to find guilt under the lesser charge *and to acquit on the charge alleged*." *United States* v. *Windsor*, 981 F.2d 943, 946 (7th Cir. 1992) (emphases added). See also *Schmuck* v. *United States*, 489 U.S. 705, 716 n.8 (1989). The question "is whether the proof of the element necessary for the greater crime but not for the lesser crime is sufficiently in dispute so that a rational jury could find the defendant not guilty of the greater but guilty of the lesser." *United States* v. *Chrismon*, 965 F.2d 1465, 1476-1477 (7th Cir. 1992) (internal quotations omitted). "[A] verdict on the lesser offense must be plausible as well as rational." *Id.* at 1477.

Citing *Gilson* v. *Sirmons*, 520 F.3d 1196 (10th Cir. 2008), Spengler asserts that "a trial court may properly deny a defendant's request for a lesser included offense instruction only when there is no evidence to reasonably support that conviction." Br. 37. But he offers no page cite, and the government found nothing in *Gilson* to support this assertion. At any rate, even if this is a correct statement of the law in the Tenth Circuit, it is not – as noted above – the standard used by this Court. See *Windsor*, 981 F.2d at 946; *Chrismon*, 965 F.2d at 1476-1477.

Applying the correct standard, "the element[s] necessary for the greater crime but not the lesser crime," *Chrismon*, 965 F.2d at 1476, in this case are

"bodily injury" or "the use, attempted use, or threatened use of a dangerous weapon," 18 U.S.C. 242. The statute only requires the government to establish one of these elements, but neither "is sufficiently in dispute." *Chrismon*, 965 F.2d at 1476.

Bodily injury to both Jude and Harris is readily established by Dr. Shallow's testimony. (R.226:1479-1480, 1490-1504). And there was ample testimony regarding Spengler's involvement in the assault on Jude. (R.222:628; R.223:812, 816; R.224:1207-1208, 1266; R.233:1769; R.227:1895-1896). Moreover, as a member of the conspiracy, Spengler also was responsible for the foreseeable acts of his co-conspirators against both Harris and Jude.

Use or threatened use of a dangerous weapon is satisfied by Clausing's use of a knife to cut Harris (R.221:212; R.231:281-282; R.223:805); Bartlett's use of his knife to cut off Jude's clothes and to threaten him (R.223:825-827, 913, 917; R.224:1054-1055, 1078-1079, 1132-1134, 1203-1204); and the placing of a gun to Jude's head (R.224:1207-1208, 1265-1266). Accordingly, the evidence would not "permit a rational jury to find guilt under the lesser charge and to acquit on the charged alleged." *Windsor*, 981 F.2d at 946. The district court therefore was not required to give a lesser-included-offense instruction. See *United States* v. *Boyles*, 57 F.3d 535, 545 (7th Cir. 1995) ("Where there is no doubt that the defendant is guilty of the greater crime, there is no need to instruct a jury on a lesser included offense.").

In view of the foregoing, Spengler's reliance (Br. 38-39) upon Lemke's plea bargain and Packard's acquittal is misplaced. The government's decision to enter into a plea bargain has no relevance to Spengler's request. See *Cook* v. *Schriro*, 538 F.3d 1000, 1023-1024 (9th Cir. 2008); *United States* v. *Coppola*, 526 F.2d 764, 774 (10th Cir. 1975). Likewise, the fact that the jury acquitted Packard on both felony counts at trial also is not relevant to Spengler's ability to satisfy the requirement for a lesser-included-offense instruction.

VIII

THIS COURT SHOULD AFFIRM MASARIK'S SENTENCE[32]

A. Standard Of Review

In reviewing sentences, this Court "first consider[s] whether the district court committed any procedural error." *United States* v. *Rice*, 520 F.3d 811, 819 (7th Cir. 2008). "Procedural sentencing errors are forfeited, and therefore may be reviewed only for plain error, if the defendant fails to object in the district court." *United States* v. *Burnette*, 518 F.3d 942, 946 (8th Cir. 2008).

This Court reviews the "district court's application of the Guidelines de novo and findings of fact for clear error." *United States* v. *Samuels*, 521 F.3d 804, 815 (7th Cir. 2008). "A district court's factual findings are entitled to deference unless [this Court] ha[s] a definite and firm conviction that a mistake has been made." *Ibid.* (internal quotations omitted).

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[32] Masarik raises this issue at pages 76-79 of his brief.

This Court reviews the overall sentence "for reasonableness under a deferential abuse-of-discretion standard." *United States* v. *Jackson*, 547 F.3d 786, 792 (7th Cir. 2008). "A sentence that falls within a properly calculated advisory guidelines range is presumed reasonable." *United States* v. *Panaigua-Verdugo*, 537 F.3d 722, 727 (7th Cir. 2008). However, the reverse is not true with respect to sentences falling outside the advisory guidelines. "[A] sentence outside the guidelines range must not be presumed unreasonable by the appellate court." *United States* v. *McIlrath*, 512 F.3d 421, 426 (7th Cir. 2008). Appellate courts "also may not hogtie sentencing judges with a rigid formula for determining whether the justification for an out-of-range sentence is 'proportional' to the extent of the sentence's deviation from the range." *Ibid.*

"A sentence is reasonable if the district court gives meaningful consideration to the factors enumerated in § 3553(a) and arrives at a sentence that is objectively reasonable in light of the statutory factors and the individual circumstances of the case." *Panaigua-Verdugo*, 537 F.3d at 727. In so doing, a court need not "discuss and make findings as to each of [the statutory] factors." *United States* v. *Laufle*, 433 F.3d 981, 987 (7th Cir. 2006). Rather, "[i]t is enough that the record confirms meaningful consideration of the types of factors that section 3553(a) identifies. A concise statement of the factors that caused the judge to arrive at a particular sentence, consistent with section 3553(a), will normally suffice." *Ibid.* (citation omitted).

B. Masarik's Sentence Is Reasonable

Masarik had a total offense level of 34 and criminal history category of I, placing his advisory guideline range at 151 to 188 months. (R.243:33). The district court imposed a sentence of 188 months, which, as it noted, was at the high end of the advisory guideline range. (R.243:34). It also is identical to Spengler's sentence. (R.242:85-86). Because Masarik's sentence falls within the advisory guideline range, it is entitled to a presumption of reasonableness. See *Panaigua-Verdugo*, 537 F.3d at 727.

The record clearly supports this sentence. In explaining its decision, the court noted both its discretion under *Booker* and its obligation under Section 3553 to consider other sentences. (R.243:39) (noting that it is mindful of *Booker*, "which gives [it] discretion that it did not have several years ago" and "requires [it] to look at the broad range of factors that are outlined in [Section 3553]"); (R.243:34) (recognizing that, under Section 3553, it "must look at available sentences, as well as sentences that have been imposed in other cases, so as not to impose disparate sentences").

The court stated that it was "in agreement with the Government with respect to its analysis of the factors that warrant sentence in this case, and consideration under 18 U.S.C. [3553]." (R.243:34). It therefore "adopt[ed] the arguments of the [g]overnment with respect to sentencing in this case." (R.243:34). The court recognized that it was not bound by the guidelines, but indicated its belief that "it would be a travesty if [it] * * * impose[d] a sentence under the guidelines" or

"adopt[ed] the rationale that was discussed in [*Koon* v. *United States*, 518 U.S. 81 (1996)] for going below the guideline sentence." (R.243:39).

In addressing Masarik's conduct, the court recognized that Bartlett, who received a sentence of 208 months, "was the worst of the actors," and that Masarik's sentence therefore would be lower than that imposed on Bartlett. (R.243:34). The court nevertheless concluded that Masarik was "quite brutal" and was "involved in the fray in kicking and punching and injuring Mr. Jude." (R.243:34). It also noted that Masarik "continued to obstruct justice" by committing perjury, and that his "sentence must reflect that." (R.243:35). In addition, the court weighed the seriousness of the case and the damage it caused. See R.243:35 ("[T]he Milwaukee Police Department has been put at a disadvantage because of what occurred in this case."); R.243:35 ("Citizens of this community have been shaken, and the ability of the Milwaukee Police Department to operate has been undercut by the activities that have occurred here."); R.243:39 (court believes "this case is so serious" and "is one that has done so much damage"); R.243:39-40 (Masarik "has acted in a way that this Court believes requires a harsh sentence," which means "it would not be appropriate for [it] to impose a sentence less than the one which [it] just announced.").

Thus, the district court's explanation indicates that it gave "meaningful consideration to the section 3553(a) factors," *United States* v. *Dale*, 498 F.3d 604, 612 (7th Cir. 2007) (internal quotations omitted), and that the sentence is both

appropriate and consistent with section 3553(a), *United States* v. *Price*, 516 F.3d 597, 606 (7th Cir. 2008). That is all that is required.

C. Masarik's Arguments To The Contrary Fail

1. No Unwarranted Disparity Exists

Masarik's claim of an unwarranted sentencing disparity (Br. 76-78) fails for two reasons. First, Masarik's sentence falls within the applicable guideline range. It therefore is not subject to challenge under 18 U.S.C. 3553(a)(6), which is the statutory provision covering unwarranted disparities. See *United States* v. *Shrake*, 515 F.3d 743, 748 (7th Cir. 2008) ("A sentence within a properly ascertained range * * * cannot be treated as unreasonable by reference to § 3553(a)(6).") (internal quotations omitted).

Second, Clausing and Schabel – the two comparators Masarik selected – both pled guilty and cooperated with the government. As this Court has held, "a sentencing *difference* is not a forbidden 'disparity' if it is justified by legitimate considerations, *such as rewards for cooperation*." *United States* v. *Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006) (emphasis added). Indeed, "[t]here would be considerably less cooperation – and thus more crime – if those who assist prosecutors could not receive lower sentences compared to those who fight to the last." *Ibid.* Accordingly, Masarik's claim of unwarranted disparity fails.

2. The District Court Correctly Calculated Masarik's Advisory Guideline Range

a. Masarik Forfeited Any Challenge To His Base Offense Level

Masarik next argues (Br. 78-79) that the court erred in calculating his guideline range. In presenting this issue, Masarik adopts Argument II.C from Bartlett's brief. As noted below, see pp. 107-109, *infra* (Section X.B.3.), Bartlett waived this issue, thereby foreclosing appellate review. Masarik is in a different posture. He did not affirmatively waive any objection to his guideline calculation, as Bartlett did. Rather, Masarik challenged his guideline calculation, but raised no specific objection to his base offense level. Accordingly, review is for plain error. See *United States* v. *McClellan*, 165 F.3d 535, 551-552 (7th Cir. 1999).

b. Masarik Cannot Establish Plain Error

Pursuant to the applicable provision of the guidelines, U.S.S.G. 2H1.1, the district court utilized the offense level from the underlying offense to determine Masarik's base offense level. In so doing, it identified "Aggravated Assault," U.S.S.G. 2A2.2, as the underlying offense, placing Masarik's base offense level at 14. Through his adoption of Bartlett's argument (Bartlett Br. 29-33), Masarik contends this was error because the facts do not satisfy the first definition of "Aggravated Assault" contained in Application Note 1 to Section 2A2.2, which states in part that "'[a]ggravated assault' means a felonious assault that involved * * * a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon." This argument fails.

This Court may uphold a "sentence adjustment on any grounds found in the record, regardless of the rationale used by the sentencing judge." *United States* v. *Mustread*, 42 F.3d 1097, 1104 (7th Cir. 1994). See also *United States* v. *Compton*, 82 F.3d 179, 184 (7th Cir. 1996). Here, the guidelines provide three separate definitions of "aggravated assault," and do so in the disjunctive:

> "Aggravated assault' means a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon; (B) serious bodily injury; *or* (C) an intent to commit another felony.

U.S.S.G. 2A2.2, Application Note 1 (emphasis added). Accordingly, use of the aggravated-assault guideline is appropriate if any of the three separate definitions is satisfied. See *United States* v. *Page*, 84 F.3d 38, 41 (1st Cir. 1996).

There can be no serious debate that "a felonious assault that involved * * * serious bodily injury," Section 2A2.2, Application Note 1, occurred here.[33] Jude, and, to a lesser extent, Harris, suffered serious injuries that were well documented. (R.226:1479-1480, 1490-1501, 1504-1505). Accordingly, use of the aggravated-assault guideline unquestionably was appropriate, and this Court may affirm Masarik's sentence on the ground that the evidence satisfies the second definition of "[a]ggravated assault" contained in Application Note 1.

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[33] The guidelines define "[s]erious bodily injury" as "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. 1B1.1, Application Note 1(L).

c. Masarik Forfeited Any Challenge To The District Court's Application Of A Six-Level Enhancement Based On Jude's Injuries

As noted above, Masarik's argument (Br. 75) is based on the incorporation by reference of Bartlett's argument. Bartlett (Br. 32) raises in passing a challenge to the district court's six-level enhancement for bodily injury pursuant to Section 2A2.2(b)(3)(E), asserting in a footnote that the proper enhancement should have been four levels. Masarik's incorporation of this argument fails.

Masarik raised no such objection below. He therefore forfeited this issue, and any review would be for plain error. See *McClellan*, 165 F.3d at 551-552.

In any event, the evidence of Jude's injuries is more than sufficient to justify the six-level enhancement, particularly when reviewed under a plain-error standard. See, *e.g.*, R.226:1479-1480, 1490-1502.

IX

THIS COURT SHOULD AFFIRM SPENGLER'S SENTENCE[34]

A. Spengler's Sentence Is Reasonable

Spengler had a total offense level of 32 and criminal history category of I, placing his advisory guideline range at 121 to 151 months. (R.242:88). The district court imposed a sentence of 188 months, or 37 months above the advisory guideline range. (R.242:85, 89). The fact that Spengler's sentence exceeds the

[34] Spengler raises this issue at pages 39-51 of his brief.

advisory guideline range does not mean that it is presumptively unreasonable. See *United States* v. *McIlrath*, 512 F.3d 421, 426 (7th Cir. 2008).

The record easily supports this sentence. In explaining its decision, the court cited the brutal nature of the crime. See R.242:85 (noting that a gun and knives were used, and Jude and Harris "were injured seriously"); R.242:85 (Jude's "clothing was cut from his body and he was kicked, stomped, and treated in a sub-human way.").

The court also stated that the sentence must account for the damage caused by Spengler's actions. See R.242:83-84 (the court "must acknowledge in [its] sentence the nature and consequence of the acts that [Spengler] engaged in when [he] violated the civil rights of Mr. Jude and Mr. Harris"); R.242:84 (Spengler "engaged in what Mr. Jude described as terrorism," and "[t]hat conduct * * * placed a cloud over the Police Department that [Spengler] served" and "made it more difficult for honest, hard working, law enforcement Officers to maintain the respect that they need in order to do their jobs effectively"); R.242:84 ("Confidence in our system of justice can be restored to some extent" by the court's sentence). And it noted the need for deterrence. See R.242:84 (the sentence imposed will "deter anyone who might even think for a moment that they're going to get a pass or a slap on the wrist if they abuse their badges and their responsibilities as Police Officers in this community").

The court rejected Spengler's argument that the hardship of successive trials justified a shorter sentence. See R.242:84 (no basis exists for the court "to depart

or vary a sentence in this case because of what [Spengler] ha[s] undergone as a Defendant in dealing with the State Court prosecution that preceded this one").

Finally, the court compared Spengler's sentence to those of his co-defendants, concluding that Bartlett "was the most culpable in the group," and that his sentence therefore "set[] the ceiling in this matter." (R.242:85). In so doing, the court further noted that, while distinctions exist between Masarik and Spengler, "clear reasons" exist why both "should receive the same sentence." (R.242:85-86).

Thus, the district court's explanation indicates that it gave "meaningful consideration to the section 3553(a) factors," *United States* v. *Dale*, 498 F.3d 604, 612 (7th Cir. 2007) (internal quotations omitted), and that the sentence is both appropriate and consistent with section 3553(a), *United States* v. *Price*, 516 F.3d 597, 606 (7th Cir. 2008). That is all that is required.

B. Spengler's Arguments To The Contrary Fail

1. The District Court Adequately Addressed The Factors Contained In 18 U.S.C. 3553(a)

Spengler claims (Br. 47-50) the district court failed to address two of the factors listed in section 3553(a). However, a district court "need not address each § 3553(a) factor in checklist fashion, explicitly articulating its conclusion for each factor." *United States* v. *Panaigua-Verdugo*, 537 F.3d 722, 728 (7th Cir. 2008). See also *United States* v. *Laufle*, 433 F.3d 981, 987 (7th Cir. 2006) (courts need not "discuss and make findings as to each of [the statutory] factors"). "[R]ather,

the court must simply give an adequate statement of reasons, consistent with § 3553(a), for believing the sentence it selects is appropriate." *Panaigua-Verdugo*, 537 F.3d at 728. Thus, the court's decision not to expressly address these points is irrelevant where, as here, the sentence imposed is sufficiently grounded in other section 3553(a) factors.[35]

As part of this argument, Spengler also asserts (Br. 51) that the court relied on factual findings that were contrary to the evidence. The only finding Spengler identifies is the district court's conclusion that he used a firearm during the offense. But Jill Kieselhorst, a guest at the party, testified that she saw Spengler come back in the home to retrieve his firearm. (R.222:554). And there was evidence suggesting Spengler put the gun to Jude's head and said "I'm the fucking police, I can do whatever I want to do. I could kill you." (R.224:1207-1208, 1265-1266). Accordingly, the evidence to support this finding was more than sufficient.

2. Spengler's Requests For Downward Departures Do Not Provide A Basis For Reversal

Spengler's assertion (Br. 41-44) that the district court failed adequately to address his requests for downward departures also fails.

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[35] Spengler also contends that there are unwarranted sentencing disparities between his case and others. Br. 49-50. His argument is similar to one made by Bartlett (Br. 36-39) and relies upon many of the same cases. Spengler's claim of unwarranted disparity fails for substantially the same reasons that Bartlett's similar argument fails. See pp. 112-116, *infra* (Section X.B.4.c.).

a. This Court Does Not Review Departures Apart From Its Review For Reasonableness

"In the wake of *Booker*, * * * discussion of a district court's departure decisions has been rendered obsolete." *Laufle*, 433 F.3d at 986 (internal quotations omitted). "Now that *Booker* has rendered the Guidelines advisory and district courts have much broader authority to sentence outside the recommended range, departures are beside the point." *Id.* at 987.

In view of the foregoing, the concept of "departures" is useful only to the extent that a "district court may apply those departure guidelines by way of analogy in analyzing the section 3553(a) factors." *United States* v. *Schroeder*, 536 F.3d 746, 756 (7th Cir. 2008) (internal quotations omitted). Departure decisions therefore are not part of this Court's review. See *United States* v. *Howard*, 454 F.3d 700, 703 (7th Cir. 2006); *United States* v. *Johnson*, 427 F.3d 423, 426 (7th Cir. 2005).

Accordingly, even if this Court were to conclude that the district court failed adequately to consider Spengler's downward-departure arguments, it would not amount to error. See *United States* v. *Cunningham*, 429 F.3d 673, 678 (7th Cir. 2005) ("A sentencing judge has no more duty than * * * appellate judges do to discuss every argument made by a litigant; arguments clearly without merit can,

and for the sake of judicial economy should, be passed over in silence."); see also *United States* v. *Tahzib*, 513 F.3d 692, 695 (7th Cir. 2008).[36]

b. Spengler Forfeited Any Challenge To The Adequacy Of The District Court's Analysis Of His Request For Downward Departures

Spengler's assignment of error rests on his assertion that the district court failed to respond to his requests for downward departures based on (1) the undue burden of successive prosecutions; (2) his susceptibility to abuse in prison; (3) the aberrant nature of his conduct; and (4) the nature of the offense purportedly falling outside the heartland of the guidelines. Br. 41. Even if the district court had some obligation to address these requests for downward departures, Spengler forfeited the issue by failing to object below. See *United States* v. *Farmer*, 543 F.3d 363, 371 (7th Cir. 2008). This Court's review accordingly is for plain error, *ibid.*, which Spengler cannot establish.

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[36] The government is aware of one decision in which this Court held that a district court erred post-*Booker* in failing to address a defendant's argument for a downward departure. See *United States* v. *Miranda*, 505 F.3d 785 (7th Cir. 2007). But that case is easily distinguished. The defendant in *Miranda* had been diagnosed with a "severe mental illness." *Id.* at 792. Expert testimony indicated that his hallucinations "were the primary or predominant cause" of the defendant's behavior and were treatable. *Id.* at 793. Yet the district court failed to indicate whether it credited this testimony. *Id.* at 794. Analyzing this issue in conjunction with the factors listed in Section 3553(a)(2) – and noting that the government did not "seriously challenge[] factually" the expert's conclusions – this Court reversed and remanded for further consideration. *Id.* at 793-794.

Instead of simply being a mitigating factor – as is the case with the downward departures at issue here – the downward departure at issue in *Miranda* went to the heart of both the defendant's motivation for committing the crime and the efficacy of imprisonment. See *id.* at 792-794. *Miranda* therefore does not apply here.

i. The District Court Addressed The Successive-Prosecution And Susceptibility-To-Abuse Issues

As a preliminary matter, Spengler's claim (Br. 42) that the district court failed to address his argument regarding the undue burden of successive prosecutions is factually incorrect. While recognizing the existence of anxiety and financial hardship, the district court "found * * * that there is no basis for [it] to depart or vary a sentence in this case because of what [Spengler] ha[s] undergone as a Defendant in dealing with the State Court prosecution that preceded this one." (R.242:84).

Likewise, the district court addressed the susceptibility-to-abuse concern, indicating at sentencing its "desire that the paperwork which follows the Defendants makes clear * * * that * * * these were Police Officers who need to be classified and housed in a way that will protect them from harm within the limits of the Bureau of Prison's ability. So that's going to be done." (R.242:53).[37] This further supports the district court's decision that a downward departure based on susceptibility to abuse was not necessary.[38]

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[37] The district court also addressed this issue while sentencing Bartlett. (R.241:48-49).

[38] Contrary to his argument (Br. 44-47), Spengler was not entitled to a departure based on susceptibility to abuse in prison. Such departures are "reserved for extraordinary situations." *United States* v. *Wilke*, 156 F.3d 749, 753 (7th Cir. 1998). "Mere membership in a particular class of offenders that may be susceptible to abuse in prison does not merit a departure for vulnerability to abuse in prison." *Ibid.* Rather, "[t]o qualify for a downward departure, a defendant's vulnerability must be so extreme as to substantially affect the severity of

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ii. The District Court Clearly Considered The Two Remaining Arguments

Although it did not directly address them, the district court unquestionably was familiar with Spengler's other arguments as well. The court noted that it had received the motion for downward departure. (R.242:2). Indeed, the court demonstrated its familiarity with the motion by referencing it during the sentencing hearing (and, in doing so, correctly cited the page on which a certain argument appeared) (R.242:64). Moreover, it expressed its desire to address Spengler's arguments regarding departure in the context of Section 3553 (R.242:29). And Spengler concedes that he was able to "address[] each argument in detail" during his sentencing hearing. Br. 41. Thus, his argument rests on the curious suggestion that the district court – despite reviewing his written motion and sitting through extended argument – somehow failed to consider these points.

In any event, the court need not address every argument raised by a defendant. "[T]he court must simply give an adequate statement of reasons, consistent with § 3553(a), for believing the sentence it selects is appropriate."

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[38](...continued)
confinement, such as where only solitary confinement can protect the defendant from abuse." *Ibid.* (internal quotations omitted). Spengler's argument falls far short of meeting this standard.

Moreover, "allow[ing] a departure on the basis that [defendant] is a law enforcement officer would thwart the purpose and intent of the guidelines." *United States* v. *Winters*, 174 F.3d 478, 486 (5th Cir. 1999). "The Sentencing Commission surely considered the possibility that some defendants convicted of violating a persons [*sic*] civil rights *under color of law* would be law enforcement officers," yet it "applied *greater* not lesser sentences for such crimes." *Ibid.*

Panaigua-Verdugo, 537 F.3d at 728. In so doing, "the district court must provide the reasoning behind its sentencing decision, while addressing arguments that are not so weak as not to merit discussion." *United States* v. *Castaldi*, 547 F.3d 699, 706 (7th Cir. 2008) (internal quotations omitted). At bottom, however, all that is required is that the record "confirm that the district court has given meaningful consideration to the section 3553(a) factors." *Dale*, 498 F.3d at 612 (internal quotations omitted).

In view of the foregoing, this Court repeatedly has rejected arguments similar to those asserted here. See, *e.g.*, *United States* v. *Diaz*, 533 F.3d 574, 577-578 (7th Cir. 2008) ("Although [this Court] would have welcomed a more detailed exposition of the district court's reasons for choosing the particular sentence that it imposed, [this Court] believe[d] that the district court's failure to address explicitly each of [defendant's] arguments does not amount to a material deviation from established sentencing procedures and creates no significant doubt that the court heard and weighed his submissions."); *United States* v. *Ramirez-Gutierrez*, 503 F.3d 643, 646 (7th Cir. 2007) (district court's indication "that he had read [defendant's] submission" was "enough to satisfy [this Court] that he considered the argument and rejected it"); *Dale*, 498 F.3d at 612 (district court's statement "that, when reaching its final sentencing decision, it would consider the § 3553(a) factors," followed by its listing of some of those factors, was sufficient to "demonstrate[] that the district court followed the procedures that [this Court]

ha[s] set out for determining a defendant's sentence"). This argument therefore fails.

3. No Notice Is Required Before Imposing An Above-Guidelines Sentence

Spengler next argues (Br. 47) that remand is required because the district court failed to provide notice under Federal Rule of Criminal Procedure 32(h) that it planned to impose a sentence above the advisory guideline range. This argument fails both procedurally and on the merits.

From a procedural standpoint, no notice was required. The concerns underlying Rule 32(h) no longer exist post-*Booker*, as defendants are now on notice "that sentencing courts have discretion to consider any of the factors specified in § 3553(a)." *United States* v. *Walker*, 447 F.3d 999, 1007 (7th Cir. 2006).[39] Accordingly, Rule 32(h) no longer applies, and district courts are "not required to give advance notice before imposing a sentence above the advisory Guidelines range based on the factors set forth in § 3553(a)." *Ibid.* See also *United States* v. *Borders*, 243 F. App'x 182, 183-184 (7th Cir. Aug. 10, 2007) (unpublished) (applying *Walker*).[40]

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[39] *United States* v. *Sharp*, 436 F.3d 730 (7th Cir. 2006) – the case upon which Spengler relies (Br. 47) – is not to the contrary. The portion of *Sharp* cited by Spengler involves notice regarding potential adjustments to the guidelines range, not a district court's reliance on Section 3553(a) factors to impose a sentence above the advisory guidelines.

[40] The district court cited *Walker* in rejecting Spengler's argument regarding notice. (R.242:81). Nevertheless, Spengler neither cites *Walker* in his

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In any event, Spengler did have notice. As the government's trial counsel noted below, the government urged on the court a proposed calculation of the guidelines that would have resulted in a higher guideline range. (R.242:82). The district court rejected the government's calculation. However, had it accepted the government's proposed range, Spengler's 188-month sentence would have fallen within the advisory guideline range. (R.242:82). Accordingly, Spengler's claim of unfair surprise rings hollow.[41]

X

THIS COURT SHOULD AFFIRM BARTLETT'S SENTENCE[42]

A. Bartlett's Sentence Is Reasonable

Bartlett had a total offense level of 32 and criminal-history category of III, placing his advisory guideline range at 151 to 188 months. (R.241:41). The district court imposed a sentence of 208 months, or 20 months above the advisory guideline range. (R.241:43).[43] The fact that Bartlett's sentence exceeds the

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[40](...continued)
appellate brief nor makes any attempt to distinguish it.

[41] Even if Spengler did somehow lack notice, there was no prejudice. As the district court explained in rejecting his notice argument, Spengler "certainly had more than an adequate opportunity to respond to every point raised by the [g]overnment," and it thus was questionable whether there was "anything more to be said." (R.242:80).

[42] Bartlett raises this issue at pages 24-46 of his brief.

[43] The court initially misspoke, indicating it was imposing a sentence within the guidelines. (R.241:43-44). It later clarified that it intended to impose a

(continued...)

advisory guideline range does not mean that it is presumptively unreasonable. See *McIlrath*, 512 F.3d 421, 426 (7th Cir. 2008).

The court began its explanation of the sentence by noting some of the statutory factors it must consider:

> 18 U.S.C. [3553(a)(2)] does require the Court to impose a reasonable sentence that takes account of the seriousness of the offense, the need to promote respect for the law, to exact what is just punishment. That is, no greater than is necessary under the circumstance, in addition to deterring the Defendant and others from committing the same or similar crimes, and also for the purpose of protecting the public in this and other instances where such crimes may be contemplated. Under some circumstances the Court has to also take into account the need for training and/or medical attention that may be warranted. Here there obviously is no great need for training. And there is no clear need for medical attention. So those factors are discounted.

(R.241:41-42).

The court then discussed the seriousness of Bartlett's illegal acts. See R.241:42 ("Mr. Bartlett's activities and disregard for the civil rights of Mr. Jude and Mr. Harris has torn this community, and has cast a shadow on the Police Department that he once served."); R.241:43 ("Mr. Jude has spoken directly through his counsel of his view that he was terrorized. And that he has suffered a nightmare as a result of Mr. Bartlett's conduct. Mr. Harris has essentially echoed those sentiments."). It also noted that Bartlett "went out and secured weapons

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[43](...continued)
sentence that exceeded the advisory guidelines, and that it was in fact doing so. (R.241:49-50).

while on bail, showing not only disrespect for the Court and the law, but also by violating the terms of his release." (R.241:42).

The court further noted that its sentence must reflect the severity of Bartlett's actions and the need for deterrence:

> [T]his Court does have to impose a sentence that reflects the injury that has been suffered by Mr. Harris, Mr. Jude, Miss Brown, Miss Antonissen, the Milwaukee Police Department, and this community. It must do so in order to make clear that similar conduct in the future will be dealt with severely. People must be deterred from violating civil rights in this community. Law enforcement must be trusted to follow the law diligently, without regard to persons. Citizens need to feel that they will be respected, treated with dignity, and handled in a way that is consistent with their conduct and their Constitutional rights.

(R.241:43).

The court also noted possible grounds for a lower sentence, stating that it was "certainly aware of the [*Koon* v. *United States*, 518 U.S. 81 (1996),] factors" and of "the need to ensure * * * to the extent possible the security of everyone who is held in custody." (R.241:48). But it elected to deal with the security issue not by imposing a lesser sentence, but instead by asking the Bureau of Prisons to take proper steps to provide for Bartlett's safety in prison. See R.241:48-49.

Thus, the district court's explanation indicates that it gave "meaningful consideration to the section 3553(a) factors," *United States* v. *Dale*, 498 F.3d 604, 612 (7th Cir. 2007) (internal quotations omitted), and that the sentence is both

appropriate and consistent with Section 3553(a), *United States* v. *Price*, 516 F.3d 597, 606 (7th Cir. 2008). That is all that is required.

B. Bartlett's Arguments To The Contrary Fail

1. Bartlett's Sentence Is Not Substantively Unreasonable

Bartlett's sentence is reasonable for the reasons stated above. His arguments to the contrary (Br. 39-46) merit little response, except as discussed below.

Bartlett asserts (Br. 42) that his criminal-history score overstates his criminal history because it is based on conduct that occurred after the offense at issue. As a preliminary matter, Bartlett did not object to his criminal-history score below, and therefore forfeited this issue. See *United States* v. *Farmer*, 543 F.3d 363, 371 (7th Cir. 2008).

Bartlett's argument also fails on the merits. Criminal-history scores are calculated based on "prior sentence[s]." U.S.S.G. 4A1.1. The term "prior sentence" "means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense." U.S.S.G. 4A1.2, Cmt. (n.1). "A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense." *Ibid.*

Bartlett also claims (Br. 43) his sentence is unreasonable because he would have received a lower sentence if convicted in state court. This argument also

fails. See, *e.g.*, *United States* v. *Schmitt*, 495 F.3d 860, 864 (7th Cir. 2007) (sentence that defendant "might have received had he been charged in state court" is "immaterial for federal sentencing purposes"); *United States* v. *Wurzinger*, 467 F.3d 649, 654 (7th Cir. 2006) ("Reducing a federal prisoner's sentence to accord with that of a similarly situated state convict may decrease one sentencing disparity but simultaneously enlarges another: that between the federal convict and all similarly situated federal convicts.").

2. The Adequacy Of The District Court's Explanation Of Bartlett's Sentence Cannot Serve As A Basis For Remand

Bartlett's challenge (Br. 24-28) to the adequacy of the district court's explanation of his sentence fails for two separate reasons: (1) Bartlett failed to preserve this issue, and (2) this Court may affirm the sentence even in the absence of an explanation.

a. Bartlett Waived Or Forfeited Any Right To Further Explanation Of His Sentence

i. Waiver

"Generally, a defendant who fails to raise a sentencing challenge before the sentencing court waives the issue on appeal." *United States* v. *Robinson*, 20 F.3d 270, 273 (7th Cir. 1994). A defendant who believes he is entitled to further explanation of his sentence must object at the time of sentencing, when the district court still has the opportunity to correct any alleged deficiency. Failure to do so forecloses appellate review. See, *e.g.*, *United States* v. *Patel*, 131 F.3d 1195, 1201 (7th Cir. 1997) ("Although 18 U.S.C. § 3553(c) requires the sentencing judge to

state in open court her reasons for imposing a particular sentence within the range, we have refused to remand for resentencing when the judge neglects to provide reasons but the defendant raises no objection at the time.") (citing cases); *United States* v. *Mojica*, 984 F.2d 1426, 1444 (7th Cir. 1993); *United States* v. *Strozier*, 981 F.2d 281, 282 n.1 (7th Cir. 1992).[44]

Here, although the district court initially misspoke in stating that it was imposing a within-guidelines sentence (R.241:43-44), the government promptly raised the issue and the district court corrected itself. (R.241:49-50). In particular, the district court (1) reiterated that it intended to impose a sentence of 208 months; and (2) noted that this was an above-guidelines sentence. (R.241:49-50). Bartlett's trial counsel even interjected at one point during the exchange, confirming that the total sentence was 208 months. (R.241:49).[45] At no point did Bartlett object to either the sentence itself or the adequacy of the court's explanation. And, when asked by the court whether there was "anything else,"

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[44] See also *United States* v. *Burns*, 128 F.3d 553, 556 (7th Cir. 1997); *United States* v. *Caicedo*, 937 F.2d 1227, 1236 (7th Cir. 1991); *United States* v. *Merlino*, 349 F.3d 144, 161-162 (3d Cir. 2003); *United States* v. *McCabe*, 270 F.3d 588, 590 (8th Cir. 2001).

[45] Any remaining doubt that the district court both knew that it was imposing an above-guidelines sentence and intended to do so is erased by the statements it made regarding Bartlett in subsequently sentencing Masarik. See R.243:34-35 ("In Mr. Bartlett's case I went beyond the guidelines to make sure that the seriousness of this particular crime is not lost, and to make it absolutely clear that the civil rights of citizens in this community must be respected, even if you carry a badge and a gun. Even if you are the Police. Even if you believe someone has done something wrong."); R.243:39 ("I know I'm not bound by the guidelines, as Mr. Bartlett's sentence demonstrates.").

Bartlett's trial counsel responded "No, sir." (R.241:50). Accordingly, Bartlett foreclosed appellate review by waiving any challenge to the explanation of his sentence. See *Farmer*, 543 F.3d at 371.

ii. Forfeiture

Even if this Court determines that Bartlett's actions do not rise to the level of waiver, they unquestionably constitute a forfeiture. Thus, the issue is, at most, reviewable for plain error. See *Farmer*, 543 F.3d at 371; *Burnette*, 518 F.3d at 946.

Bartlett bears the burden of persuasion with regard to plain error. See *United States* v. *Neal*, 512 F.3d 427, 439 n.11 (7th Cir. 2008). But he fails to even acknowledge the forfeiture, let alone address any of the four elements of plain error. He therefore failed to carry his burden on this issue.

Moreover, even if this Court were inclined to overlook this failure, Bartlett cannot establish that any inadequacies in the district court's explanation of its sentence affected his substantial rights, as required to establish plain error. See *Neal*, 512 F.3d at 439 n.11. In the sentencing context, courts routinely hold that defendants are unable to satisfy the substantial-rights portion of the plain-error inquiry where they cannot show they would have received a lesser sentence absent the error. See *United States* v. *Jones*, 455 F.3d 800, 809-810 (7th Cir. 2006); *United States* v. *Julian*, 427 F.3d 471, 490-491 (7th Cir. 2005); see also *United States* v. *Howe*, 538 F.3d 842, 857-858 (8th Cir. 2008); *United States* v. *Dallman*,

533 F.3d 755, 761-762 (9th Cir. 2008); *United States* v. *Rodarte-Vasquez*, 488 F.3d 316, 321-322 (5th Cir. 2007).

More specifically, courts have held that a district court's failure to provide a proper explanation of its sentence under 18 U.S.C. 3553(c) does not require remand because it does not affect substantial rights. See *United States* v. *Mangual-Garcia*, 505 F.3d 1, 16 (1st Cir. 2007) (finding no reasonable probability that a lower sentence would be imposed on remand and rejecting "a per se rule that the failure to provide an adequate explanation under § 3553(c)(1) constitutes plain error"); *United States* v. *Izaguirre-Losoya*, 219 F.3d 437, 441-442 (5th Cir. 2000) (failure to explain sentence did not affect substantial rights or "the fairness, integrity, or public reputation of judicial proceedings," and "remand to comply with the dictates of § 3553(c) would be an empty formality and waste of judicial resources"). See also *United States* v. *Gilman*, 478 F.3d 440, 448 (1st Cir. 2007); *United States* v. *Vences*, 169 F.3d 611, 613 (9th Cir. 1999).[46]

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[46] Other courts have reached a contrary conclusion, holding that "the right to meaningful appellate review" is "a 'substantial' right." *United States* v. *Blackie*, 548 F.3d 395, 402-403 (6th Cir. 2008) (citing published opinions from the Second and D.C. Circuits, and an unpublished decision from the Tenth Circuit). The approach taken in *Blackie* is inconsistent both with this Court's holding that it may affirm a sentence even in the absence of an adequate explanation, see *United States* v. *Travis*, 294 F.3d 837, 841 (7th Cir. 2002) (discussed at pp. 106-107, *infra*), and with the way this Court has handled similar situations. See *Patel*, 131 F.3d at 1201; *Mojica*, 984 F.2d at 1444; *Strozier*, 981 F.2d at 282 n.1; *Caicedo*, 937 F.2d at 1236. It also is inconsistent with precedents requiring a litigant to demonstrate prejudice in order to satisfy the substantial-rights element of plain-error review. See, *e.g.*, *United States* v. *Bek*, 493 F.3d 790, 798 (7th Cir. 2007) (to affect substantial rights, the error "*must* have affected the

(continued...)

Here, as noted above, the district court stated both that it intended to impose a sentence of 208 months and that this amounted to an above-guidelines sentence. (R.241:49-50). And it reiterated these points in subsequently sentencing Masarik. (R.243:34-35, 39). It also clearly stated its belief that Bartlett's actions warranted a sentence higher than the 188 months imposed on Masarik and Spengler. See R.243:34; R.242:85. Accordingly, even if the district court's explanation was plainly inadequate, it did not affect Bartlett's substantial rights because it did not alter his sentence.

b. This Court May Affirm Bartlett's Sentence Even In The Absence Of An Explanation

Even if not waived or forfeited, Bartlett's claim fails. Although 18 U.S.C. 3553(c) requires a district court to "give reasons for the sentence it imposed," this Court "shall uphold a sentence imposed with an incomplete statement, provided that a 'more than adequate' foundation in the record supports the district court's findings." *United States* v. *Travis*, 294 F.3d 837, 841 (7th Cir. 2002). As stated

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[46](...continued)
outcome of the district court proceedings") (emphasis added); *United States* v. *Price*, 328 F.3d 958, 960 (7th Cir. 2003) (to affect substantial rights, error "*must* be prejudicial and *must* have affected the outcome of the district court proceedings") (emphases added).

Moreover, the notion that "meaningful appellate review" is a "substantial right" for purposes of plain-error review creates an exception that threatens to swallow the rule. Most forfeited objections preclude meaningful appellate review because the district court – in the absence of an objection – is not cognizant of the need to create a record. The same argument therefore could be made in any instance of forfeiture. Accordingly, even if this Court were to reach the issue, it should reject the approach taken in *Blackie*.

above, see pp. 98-101, *supra* (Section X.A.), the record is more than adequate to support the district court's sentence. Accordingly, this Court may affirm the sentence on this basis alone, without considering the adequacy of the district court's explanation.

Moreover, this Court should do so here because remand would be a waste of judicial resources. As noted above, the district court already indicated its intent to impose an above-guidelines sentence of 208 months. (R.241:49-50). It also clearly stated its belief that Bartlett was the worst of the defendants, and that he therefore deserved a sentence significantly higher than the 188-month sentences imposed on Masarik and Spengler. See R.243:34 (Masarik would receive a lower sentence than Bartlett because Bartlett "was the worst of the actors," and "represented and continues to represent a threat that this Court had to deal with."); R.242:85 (Bartlett "was the most culpable in the group," and his sentence therefore "set[] the ceiling in this matter."). Thus, remanding this matter for further explanation from the district court will not result in a lower sentence.

3. Bartlett Affirmatively Waived Any Challenge To His Guideline Range

Bartlett next contends (Br. 29-33) the district court incorrectly calculated his guideline range. However, he affirmatively waived this argument as well, thereby foreclosing review by this Court. See *Farmer*, 543 F.3d at 371.

As Bartlett concedes, "[t]he sentencing court adopted the Guidelines calculation from the PSR." Bartlett Br. 29. At sentencing, Bartlett confirmed that he had sufficient time to review his presentence report "and to set forth, through

[his] counsel, any objections or concerns [he] may have regarding sentencing in this case." (R.241:3). Yet he filed no objections, and, when asked by the district court at sentencing, his trial counsel expressly confirmed they had no objections to the report. (R.241:3).

Bartlett accordingly waived any challenge to the calculation of his guideline range. See *United States* v. *Staples*, 202 F.3d 992, 995 (7th Cir. 2000) (statement that defendant had no objections to presentence report waived challenge to criminal-history calculation); see also *United States* v. *Martinez-Jimenez*, 294 F.3d 921, 923 (7th Cir. 2002) (by stating that he had no dispute with the court's calculation of his offense level, defendant "plainly communicated an intention to relinquish and abandon any arguments related to his offense level calculation"); *United States* v. *Richardson*, 238 F.3d 837, 841 (7th Cir. 2001) (statement by defendant's counsel that he had no objection to an enhancement constituted "waiver in the strict sense of the term," thereby barring it from "further judicial consideration" absent ineffective assistance of counsel).[47]

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[47] But see *United States* v. *Jaimes-Jaimes*, 406 F.3d 845, 847-848 (7th Cir. 2005) (distinguishing *Staples* and concluding that defendant forfeited – rather than waived – objection where there was no strategic reason for failing to object). If Bartlett's challenge to his guideline calculation was forfeited rather than waived, it is subject to plain-error review. *Id.* at 848. Bartlett cannot establish plain error for the same reason Masarik is unable to do so with regard to his identical challenge to his guideline range. See pp. 86-88, *supra* (Section VIII.C.2.).

Bartlett does not argue in this Court that this waiver is somehow invalid, nor could he. Accordingly, further review of Bartlett's guideline calculation is foreclosed. See *United States* v. *Walton*, 255 F.3d 437, 441 (7th Cir. 2001).

4. Bartlett's Sentence Is Not Excessive

a. District Courts Need Not Expressly Address Section 3553(a)(6) During Sentencing

Bartlett focuses (Br. 33-39) on the alleged disparity between his sentence and those imposed in other cases, relying heavily on *United States* v. *England*, 507 F.3d 581 (7th Cir. 2007), to argue that the district court erred in not expressly addressing the issue of unwarranted disparities under Section 3553(a)(6). Br. 33-35. *England* is inapposite. This argument therefore fails.

England presented a unique situation vastly different from the one at issue here. The defendant in that case was convicted of witness tampering and making threats, but was sentenced under the guideline for attempted murder, thereby resulting in a base offense level of 33 rather than 22. *England*, 507 F.3d at 590. As this Court noted, the discrepancy was the result of "a fairly pernicious scrivener's error" that came about because the statute had recently been amended but no corresponding change was made to the guidelines. *Id.* at 591-592. The district court in *England* "expressed its concern over the potential injustice that might occur," but nevertheless failed to do anything about it. *Id.* at 591. This Court accordingly remanded the case for resentencing. *Id.* at 592.

No such situation exists here. Bartlett did not even challenge his guideline range below. And the district court clearly was not concerned about the guidelines resulting in injustice, as it sentenced Bartlett above the advisory range.

More to the point, whatever one makes of the ruling in *England*, it cannot stand for the proposition Bartlett advances – *i.e.*, that a district court *must* address the issue of unwarranted disparities under Section 3553(a)(6). Such an expansive interpretation of *England* would force it into conflict with well-established circuit precedent. See *Laufle*, 433 F.3d at 987 (courts need not "discuss and make findings as to each of [the statutory] factors"); *Panaigua-Verdugo*, 537 F.3d at 728; *United States* v. *Castaldi*, 547 F.3d 699, 706 (7th Cir. 2008); *Dale*, 498 F.3d at 612.

Indeed, if – as Bartlett claims – *England* introduced a new requirement that all sentencing courts must expressly address unwarranted disparities under Section 3553(a)(6), it would be reflected in *Panaigua-Verdugo* and *Castaldi*, which were decided after *England*. It is not, and Bartlett's argument fails.

b. Courts Routinely Use The Aggravated-Assault Guideline In Similar Cases

As noted above, see pp. 107-109, *supra* (Section X.B.3.), Bartlett affirmatively waived any challenge to his guideline range. And, even if not waived, his argument regarding the appropriateness of the district court's use of the aggravated-assault guideline fails for the same reasons that Masarik's identical argument fails. See pp. 86-88, *supra* (Section VIII.C.2.). Bartlett again raises this

issue in connection with his claim regarding purported sentencing disparities, asserting that, even if the aggravated-assault guideline applies, "courts have rarely used this [g]uideline in similar cases." Br. 35. This is incorrect.

Bartlett concedes that Section 2H1.1 is the applicable starting point. Br. 29. Section 2H1.1(a) provides a number of options for base offense levels, one of which is to apply "the offense level from the offense guideline applicable to any underlying offense." U.S.S.G. 2H1.1(a)(1). But it instructs courts to "[a]pply the [g]reatest" of the potential options. U.S.S.G. 2H1.1(a). Thus, where the base offense level for the underlying offense – here, aggravated assault, U.S.S.G. 2A2.2 – is greater than the default offense levels provided in Section 2H1.1(a), courts *must* apply the base offense level for the underlying offense. Because the base offense level for aggravated assault is greater than the highest default offense level in Section 2H1.1(a), the district court was required to apply it in calculating Bartlett's sentence.

This is a straightforward application of the guidelines. See, *e.g.*, *United States* v. *Conatser*, 514 F.3d 508, 520 (6th Cir. 2008) (walking through the cross-reference from Section 2H1.1 to Section 2A2.2); *United States* v. *LeMoure*, 474 F.3d 37, 45 (1st Cir. 2007) (same); *United States* v. *Serrata*, 425 F.3d 886, 908 (10th Cir. 2005) (same); *United States* v. *Woodlee*, 136 F.3d 1399, 1406-1408 (10th Cir. 1998) (same). Thus, contrary to Bartlett's assertion, it is not at all unusual for courts to use the aggravated-assault guideline in cases involving assaults by police or correctional officers. See, *e.g.*, *Conatser*, 514 F.3d at 520;

Serrata, 425 F.3d at 908; *United States* v. *Johnstone*, 107 F.3d 200, 210-211 (3d Cir. 1997); *United States* v. *Reese*, 2 F.3d 870, 894-896 (9th Cir. 1993). Indeed, because Section 2H1.1(a) instructs courts to apply the greatest offense level, the guideline requires use of the offense level for aggravated assault where, as here, the facts support it.

Thus, to the extent some courts have not applied the aggravated-assault guideline under similar circumstances, see Bartlett Br. 35-36, it can mean one of two things: either the facts of those cases did not support its use, or the district courts erred in not applying it. In either event, such cases cannot be used to question the district court's proper application of the aggravated-assault guideline in this case.

c. Bartlett's Sentence Is Comparable To Those Imposed Upon Defendants In Similar Circumstances

i. The Cases Bartlett Cites Are Inapposite

Bartlett next contends that his "sentence is vastly out of proportion to sentences given to other similarly situated defendants." Br. 36. This, again, is incorrect.

In offering cases for comparison, Bartlett simply cites those involving similar charges that result in sentences lower than his. He makes no effort to look beneath the surface and consider relevant offense conduct.

This is an incorrect approach, as "the Guidelines were intended to create national uniformity, and * * * this goal remains important post-*Booker*." *United*

States v. *Newsom*, 428 F.3d 685, 689 (7th Cir. 2005). Thus, "[i]t is not enough for a defendant to argue that a few cases from any particular circuit seem to cast doubt on his sentence. In addition, one needs to know more than the crime of conviction and the total length of the sentence to evaluate disparities; *the specific facts of the crimes and the defendant's individual characteristics are also pertinent*." *Ibid.* (emphasis added).

Viewed in this light, none of the opinions upon which Bartlett relies provide sufficient grounds for comparison. For example, Bartlett's reliance on the sentences in *Serrata* (Br. 36-37) is misplaced because the opinion he cites actually vacated those sentences, and did so based in part on the fact that the district court erred in giving each of the defendants a five-level downward departure. See *Serrata*, 425 F.3d at 910-915.

Others are easily distinguished. In *United States* v. *LaVallee*, 439 F.3d 670, 702-703 (10th Cir. 2006), defendants had criminal-history categories of I and offense levels ranging from 18 to 22, and were sentenced within the corresponding guideline ranges. *Id.* at 702-703. In *United States* v. *Livoti*, 196 F.3d 322 (2d Cir. 1999), the defendant had a criminal-history category of III and offense level of 26, and was sentenced within the corresponding guideline range. *Id.* at 325. In *United States* v. *Ronda*, 455 F.3d 1273 (11th Cir. 2006), defendants had criminal-history category of I and offense levels ranging from 12 to 19, and were sentenced within the corresponding guideline ranges. *Id.* at 1301-1303.

Here, by contrast, Bartlett had a criminal-history category of III and offense level of 32. Accordingly, based on "the specific facts of [his] crimes and [his] individual characteristics," *Newsom*, 428 F.3d at 689, Bartlett began with a significantly higher guideline range than the defendants in cases upon which he relies. His sentence therefore was justifiably higher as well.

ii. Bartlett's Sentence Is Consistent With Those Imposed In Similar Cases

Even if this Court were to accept Bartlett's chosen method of arguing this issue – *i.e.*, focusing on "the crime of conviction and the total length of the sentence," as opposed to "the specific facts of the crimes and the defendant's individual characteristics," *Newsom*, 428 F.3d at 689 – there still is ample case law to support his sentence.

Courts routinely impose substantial sentences on police officers who engage in egregious conduct that violates 18 U.S.C. 242. See, *e.g.*, *United States* v. *Guidry*, 456 F.3d 493, 500 (5th Cir. 2006) (police officer guilty of kidnaping and violating the victim's right to bodily integrity sentenced to 405 months' imprisonment); *United States* v. *Gonzalez*, 533 F.3d 1057, 1060 (9th Cir. 2008) (police officer guilty of violating three women's right to bodily integrity sentenced to 30 years' imprisonment); *United States* v. *Volpe*, 224 F.3d 72, 75 (2d Cir. 2000) (police officer guilty of sexual abuse sentenced to 360 months' imprisonment).

Courts likewise impose lengthy sentences for civil-rights offenses not committed under color of law. See, *e.g.*, *United States* v. *Rogers*, 45 F.3d 1141,

1142 (7th Cir. 1995) (defendant who led racially-motivated attack on a neighbors' home sentenced to 266 months' imprisonment); *United States* v. *Allen*, 341 F.3d 870, 876 (9th Cir. 2003) (members of skinhead group that intimidated minorities to prevent them from using park sentenced to terms ranging up to 180 months' imprisonment for violating 18 U.S.C. 241 & 245(b)(2)(B)).

In addition, aggravated-assault cases can produce stiff sentences even when not racially motivated or committed under color of law. See, *e.g.*, *United States* v. *Williams*, 520 F.3d 414, 419 (5th Cir. 2008) (defendant convicted of assaulting a federal officer sentenced to 150 months' imprisonment); *United States* v. *Bogan*, 267 F.3d 614, 618 (7th Cir. 2001) (defendants who assaulted a federal officer sentenced to 120 and 125 months' imprisonment).

Viewed in this context, defendants' sentences – which range from 188 to 208 months' imprisonment – are far from disproportionate. Bartlett and his co-conspirators, acting under color of law, terrorized the very people they were sworn to protect. They did untold damage to their community, and severely tarnished the reputation of the MPD. Moreover, the brutality of their assault on Jude is truly shocking. As Bartlett's trial counsel conceded at sentencing: "These men * * * did the unthinkable. They became a mob. And had a mob mentality. And * * * not one of them said stop it." (R.241:30).

Thus, Bartlett's sentence is appropriate. While it is somewhat longer than those imposed for aggravated assaults not racially motivated or committed under color of law, it is significantly lower than those imposed on other police officers

who engaged in egregious conduct. And it is comparable to sentences imposed for some civil-rights violations not committed under color of law. Bartlett's claim of unwarranted disparity therefore fails even under this method of analysis.

CONCLUSION

This Court should affirm the judgments below.

Respectfully submitted,

LORETTA KING
Acting Assistant Attorney General

_____
JESSICA DUNSAY SILVER
DIRK C. PHILLIPS
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-4876

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Wordperfect 12.0. It contains no more than 28,683 words of proportionally spaced text, and therefore complies with the expanded word limit sought in the "Motion of Appellee United States For Leave To File Oversized Brief," which is filed together with this brief. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, which has been sent to the Court by first-class mail on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

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DIRK C. PHILLIPS
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2009, two paper copies and one electronic copy in CD format of the foregoing "Brief For The United States As Appellee" were served by first-class mail on the following counsel of record:

T. Christopher Kelly
Kelly, Habermehl & Bushaw
145 West Wilson Street
Madison, WI 53703

Brian Kinstler
Michael F. Hart
Kohler & Hart
Suite 1212
735 North Water Street
Milwaukee, WI 53202

Thomas L. Shriner, Jr.
David W. Simon
Katherine M. Longley
Rajnath P. Laud
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202

_____
DIRK C. PHILLIPS
Attorney