Nos. 08-6504, 08-6506, 09-5094, 09-5095

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant

v.

WESLEY LANHAM & SHAWN FREEMAN,

Appellants/Cross-Appellees

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

BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose the appellants'/cross-appellees' request for oral argument.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendants Wesley Lanham and Shawn Freeman on December 10, 2008. (Final Judgment, R. 120; Final Judgment R. 122).[1] Lanham and Freeman filed timely notices of appeal. The United States filed a timely

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[1] "R." refers to the district court record. The first number after "R." is the document number in the district court number. "Tr." refers to the trial transcript. "S.Tr." refers to the sentencing transcript. "Lanham Br. __" and "Freeman Br.__" indicates the page number of each appellant's opening brief. Where obvious "Br. __" is simply used. "GX" refers to the government's trial exhibits. "Apx." refers to the appendix.

notice of cross-appeal of the sentences. This Court's jurisdiction arises under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by rejecting defendants' motions to strike two jurors for cause, and granting a government motion to strike one juror for cause.

2. Whether the district court abused its discretion by prohibiting the defendants from asking questions about government witness Shawn Sydnor's possible sentence.

3. Whether the sufficiency of the evidence supported the conspiracy convictions of both defendants.

4. Whether the sufficiency of the evidence supported the 18 U.S.C. 242 convictions of both defendants.

5. Whether the sufficiency of the evidence supported the 18 U.S.C. 1519 convictions of both defendants.

6. Whether the district court erred by allowing the jury to determine whether the crime included aggravated sexual abuse.

7. Whether the district court committed clear error by declining to find a lesser offense role for Shawn Freeman.

8. Whether the district court abused its discretion in finding no violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

9. Whether the district court erred by refusing to calculate the defendants' sentences under the 2008 Sentencing Guidelines because of *Ex Post Facto* Clause concerns.

10. Whether the district court legally erred when it declined to apply the sentence enhancement to Wesley Lanham for an aggravated role in the crime as a leader or organizer.

STATEMENT OF THE CASE

On January 24, 2008, a grand jury returned a seven-count indictment against Shawn Sydnor, Wesley Lanham, and Shawn Freeman, alleging conspiracy to violate civil rights under color of law, aiding and abetting each other under color of law to violate civil rights, and obstruction of justice. R. 1, Indictment. These counts stemmed from the rape and beating of an 18-year old pretrial detainee by inmates. At the time of the offense, Syndor, Lanham, and Freeman were correctional officers at the Grant County Detention Center (Detention Center) in Williamstown, Kentucky.[2]

Count 1 charged that, on or about February 14, 2003, Lanham and Freeman

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[2] Prior to trial, Sydnor pled guilty to one count of conspiracy to commit an offense against the United States in violation of 18 U.S.C. 371 and one count of deprivation of civil rights under color of law in violation of 18 U.S.C. 242. R. 89, Sydnor's Rearraignment Tr. He testified for the government.

willfully conspired with one another, inmates, and other persons to injure, oppress, threaten and intimidate pretrial detainee Joshua Sester by denying his right not to be deprived of liberty without due process of the law in violation of 18 U.S.C. 241. R. 1, Indictment, p. 2. Count 1 also alleged that the acts committed in furtherance of the conspiracy included aggravated sexual assault. *Ibid.* Count 2 charged that, on or about February 14, 2003, Lanham and Freeman, acting under color of law and while aiding and abetting each other and others, locked Sester into Detention Center Cell 101 and thereby willfully deprived Sester of his right not to be deprived of liberty without due process of law in violation of 18 U.S.C. 242 and 2. *Id*. at 5. Count 2 further charged that they acted with deliberate indifference to a substantial risk that inmates in that cell would physically assault and otherwise harm Sester and that the offense resulted in bodily injury to Sester. *Id.* at 5. Count 5[3] charged that, on or about February 14, 2003, Lanham, aided and abetted by another, knowingly falsified an official report concerning the placement of Sester into Cell 101 with the intent to impede, obstruct, and influence the investigation and proper administration of that matter in violation of 18 U.S.C. 1519 and 2. *Id.* at 6a-6b.[4] Count 6 charged that, on or about February 14, 2003, Freeman knowingly falsified an official report concerning the placement of Sester

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[3] Counts 3, 4, and 7 related to Sydnor. R. 1, Indictment, pp. 5-7.

[4] The indictment is mispaginated with an unpaginated page appearing between 6 and 7. It is described as 6b and page 6 as 6a.

into Cell 101 with the intent to impede, obstruct, and influence the investigation and proper administration of that matter in violation of 18 U.S.C. 1519. *Id.* at 7.

On August 14, 2008, the jury returned guilty verdicts on all counts against both defendants. R. 78, Verdict Form; R. 79, Verdict Form. On December 8, 2008, the district court sentenced Lanham to 180 months imprisonment and Freeman to 168 months imprisonment. R. 143, Lanham S.Tr., p. 21; R. 120, Lanham Final Judgment; R. 142, Freeman S.Tr., p. 23; R. 122, Freeman Final Judgment.

STATEMENT OF FACTS

1. Detention Center Policies And Procedures

At trial, testimony established that, as a matter of policy and practice, the Detention Center's corrections officers were required to protect an inmate if the inmate was in danger of being harmed, R. 91, Tr., p. 30 (Sydnor); R. 92, Tr., p. 108 (Guthrie); R. 86, Tr., p. 111 (Powell); R. 93, Tr., p. 28 (Cook),[5] and that corrections officer could not put an inmate in a cell if he or she knew the inmate was likely to be physically harmed in the cell, R. 92, Tr., p. 110 (Guthrie). New correctional officers learned this when they first started working at the Detention Center. R. 92, Tr., p. 110 (Guthrie).

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[5] Tr. Vol. 1-A is filed as R. 90; Tr. Vol. 1-B is filed as R. 85; Tr. Vol. 1-C is filed as R. 91; Tr. Vol. 2-A is filed as R. 92; Tr. Vol. 2-B is filed as R. 86; Tr. Vol. 3-A is filed as R. 93; Tr. Vol. 3-B is filed as R. 87. Citations in the brief will be the record number.

Policy also prohibited corrections officers from allowing or inciting one inmate to harm or scare another inmate. R. 91, Tr., p. 30, 63-64 (Sydnor); R. 92, Tr., p. 109 (Guthrie); R. 86, Tr., p. 111 (Powell); R. 93, Tr., p. 29 (Cook). Corrections officers had no authority to punish arrestees or pretrial detainees, R. 91, Tr., p. 30 (Sydnor); R. 92, Tr., p. 109 (Guthrie); R. 86, Tr., p. 111 (Powell); R. 93, Tr., pp. 28-29 (Cook), and Detention Center policy prohibited an officer from scaring an inmate, R. 91, Tr., p. 63 (Sydnor); R. 92, Tr., pp. 109, 131 (Guthrie). Several corrections officers testified that officers could not do something wrong or illegal simply because a supervisor ordered it. R. 92, Tr., p. 93 (Sydnor); R. 86, Tr., p. 111 (Powell); R. 93, Tr., p. 35 (Cook).

Wesley Lanham, who worked at the Detention Center from 2001-2003, R. 93, Tr., p. 80, testified that corrections officers were not allowed to punish inmates for crimes, R. 87, Tr., p. 9, that there was no legitimate purpose for scaring an inmate, *id.* at 11, and that there were superiors' orders that he would not follow, R. 93, Tr., p. 154. Lanham agreed that telling an inmate to "fuck with" another inmate would not be consistent with a duty to protect the inmate. R. 87, Tr., p. 13. Shawn Freeman stated that, as a corrections officer, he was responsible for the safety of all inmates in all areas of the Detention Center, and that he had a duty to remove a child molester from a cell if that molester was going to be hurt by other inmates. *Id.* at 67-68. Freeman further admitted that, as a law enforcement

officer, he had a greater duty to protect those in his care than the ordinary person might have. *Id.* at 78-79.

The Detention Center is divided into several different sections, including: 1) a booking area with several detox or holding cells to house pretrial detainees; 2) the Main Hallway, 26 Hallway, and the Old Part of the Detention Center, each of which houses general population prisoners; and 3) Class D, an unrestricted or low-security area of the facility. R. 81, GX 1-A, Apx. 29; R. 91, Tr., pp. 22, 25-28 (Sydnor).

Testimony established that after an individual was arrested, the Detention Center's standard operation procedure was that the individual was processed and then held in a detox cell to await pretrial services. R. 91, Tr., pp. 30-31 (Sydnor); R. 92, Tr., pp. 59 (Sydnor), 108 (Guthrie); R. 86, Tr., p. 112 (Powell); R. 93, Tr., p. 60 (Cook). All corrections officers were aware of this policy. R. 92, Tr., p. 109 (Guthrie). The Chief Jailer had established a verbal policy that traffic offenders, such as the victim Joshua Sester, were not to be placed in the general prisoner population. *Id.* at 48 (Sydnor). Shawn Sydnor testified that he knew of no other instance in which a pretrial detainee or arrestee was placed into general population to scare him. *Id.* at 84. Deputy Jailer Wendy Guthrie[6] testified there was no reason to place someone in 26 Hallway who had not yet seen pretrial services. *Id.*

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[6] At the time of the incident Wendy Guthrie was known as Wendy Smith. R. 92, Tr., pp. 11-12 (Sydnor).

at 136. Even inmate Bobby Wright testified that he had never seen anybody placed in the general population for a traffic violation. R. 86, Tr., p. 81. Lanham told FBI Agent Glenn Van Airsdale that Sester would normally have been placed in a detox cell. R. 93, Tr., p. 19 (Van Airsdale).

2. The Initial Beating And Sexual Assault

On February 14, 2003, defendants Lanham and Freeman were working the third shift as corrections officers at the Grant County, Kentucky, Detention Center. R. 91, Tr., p. 47 (Sydnor). Sergeant Shawn Sydnor and deputy jailers Jack Powell, Mark Coleman, Wendy Guthrie, and Lula Garrison were also working the third shift that began at 11 p.m. on February 13, 2008 and ended at 7 a.m. on February 14, 2003. *Ibid.*; R. 86, Tr., p. 15 (Garrison); R. 92, Tr., p. 140 (Guthrie). Lanham and Freeman were assigned to the Class D section of the Detention Center. R. 91, Tr., p. 53 (Sydnor). Sydnor was the supervisor that night. *Id.* at 29. In the early morning of February 14, 2003, Joshua Sester, then eighteen years-old, was arrested for a traffic violation and brought to the Detention Center by Sheriff's Deputy Scott Allen. R. 91, Tr., pp. 49-51 (Sydnor). Sester had been speeding and was arrested for eluding police. R. 86, Tr., p. 31 (J. Sester). Deputy Allen told Sydnor that Sester had almost hit an off-duty officer with his (Sester's) car. R. 91, Tr., pp. 50-51 (Sydnor). This upset Sydnor because the off-duty officer was a friend. *Id*. at 51.

Sester was effeminate in appearance with highlighted hair, a bright shirt, and heart-shaped patterns on his undershorts. R. 92, Tr., pp. 125-126 (Guthrie); R. 86, Tr. p. 118 (Powell). He was five feet ten inches tall and weighed about 115-125 pounds. *Id*. at 30 (J. Sester), 116 (Powell). Sydnor described Sester as a "[s]cared little kid" and "[s]issy looking." R. 91, Tr., p. 51. When Sester arrived, Sydnor called Guthrie, Lanham and Freeman to come to booking to look at Sester's hair. R. 92, Tr., pp. 123-124, 126 (Guthrie). Sydnor testified that he specifically called Lanham because they were "making fun of [Sester], his demeanor, his hair." R. 91, Tr., p. 53 (Sydnor).

During booking, Sydnor, Lanham, and Freeman taunted and laughed at Sester. R. 91, Tr., p. 54 (Sydnor); R. 92, Tr., p. 127 (Guthrie). The officers told Sester that he looked "like a girl" and a "sissy," and they made fun of his highlighted hair and boxer shorts. R. 91, Tr., p. 54 (Sydnor); R. 86, Tr., pp. 117, 156 (Powell). Sydnor told Sester how "cute" he was and that he would make a "good girlfriend" for the inmates. R. 91, Tr., p. 55 (Sydnor); R. 92, Tr., p. 127 (Guthrie). Sester was visibly shaken by this comment, R. 91, Tr., p. 55 (Sydnor), and began crying and shaking, R. 92, Tr., pp. 126-127 (Guthrie). Lanham and Freeman heard all the comments made to Sester and did nothing to stop the taunting. *Id.* at 128. Sester was booked at 1:05 a.m. R. 86, Tr., p. 115 (Powell).

Sydnor told Lanham and Freeman that Sester "needed to be scared." R. 91,

Tr., p. 55 (Sydnor); R. 92, Tr., p. 131 (Guthrie). Sydnor asked them to find him a cell. R. 91, Tr., p. 55 (Sydnor); R. 92, Tr., p. 131 (Wright). Lanham said that he "knew a guy down in 26 Hall" in Cell 101, inmate Bobby Wright. R. 91, Tr., pp. 57-58 (Sydnor); R. 92, Tr., p. 71 (Sydnor). Lanham knew Wright from Wright's time in Class D, R. 91, Tr., p. 58 (Sydnor), though Wright had been sent back to the general inmate population in 26 Hallway for using marijuana, R. 86, Tr., p. 65 (Wright). Freeman was standing directly next to Lanham during this conversation, heard it all, and did nothing to stop the plan. R. 91, Tr., pp. 57-58 (Sydnor).

The inmates housed in 26 Hallway, Main Hallway, and the Old Part of the Detention Center included those convicted of misdemeanors and felonies. R. 91, Tr., p. 56. In fact, 26 Hallway was known commonly as the "hallway from hell." *Id.* at 43; R. 93, Tr., pp. 29, 47-48 (Cook). Detention Center Nurse Sandy Cook described 26 Hallway as a "catchall" for gang members, and that the inmates there were "almost * * * animalistic." *Id.* at 29. Sydnor testified that he was aware of instances of inmates expressing concern about being sexually assaulted, sexual predatory behavior was something to which he was alert, and that 26 Hallway had more incidents than other areas. R. 91, Tr., p. 43. The Detention Center staff, including Lanham and Freeman, were well aware of 26 Hallway's violent reputation. R. 92, Tr., pp. 113-114 (Guthrie).

Cell 101 housed felony-convicted prisoners, and there were 12-14 inmates

in the cell that night. R. 91, Tr., p. 59 (Sydnor). Among the prisoners was Victor Zipp, who was known as the ringleader of the cell. *Ibid.* Zipp was a dangerous, loud, and intimidating inmate with a mohawk haircut and tattoos, and tried to control anyone smaller than he. *Ibid.*; R. 86, Tr., p. 71 (Wright). Zipp was often naked, and guards frequently had to tell him to dress. R. 91, Tr., p. 59 (Sydnor). Lanham and Freeman both had worked in 26 Hall prior to February 14, 2003, when Zipp was housed there. *Id.* at 60.

Earlier that shift, Deputy Freeman helped remove a child molester from Cell 102 in 26 Hallway. R. 87, Tr., pp. 66, 81 (Freeman). Inmates had beaten up the child molester, and because of this, the inmates in 26 Hallway were riled up and celebrating. R. 86, Tr., pp. 72-73 (Wright). Inmate Bobby Wright testified that the inmates "were looking for anything to go down again." *Id.* at 73. The cells in 26 Hallway are in a circular pod, and inmates can communicate between the cells with each other through the doors. *Id.* at 68; R. 81, GX 1-A, Apx. 29; R. 81, GX 37, Apx. 33.

After Lanham volunteered that he knew an inmate in Cell 101, he and Freeman left booking and proceeded to 26 Hallway. R. 92, Tr., pp. 132-133 (Guthrie). After they left, deputy Wendy Guthrie told Sydnor: "[P]lease don't put [Sester] down there, somebody is going to beat him up." *Id.* at 133. Sydnor told her that it was none of her business and that he wore the sergeant's stripes. *Ibid.*

Lanham and Freeman proceeded to Cell 101. R. 86, Tr., pp. 73-74 (Wright). Inmate Wright was told that the officers were looking for him. *Id.* at 74. He went to the door to speak to Lanham and Freeman, with three or four other inmates around the door as well. *Id.* at 75. Lanham and Freeman were both standing just outside the door while they spoke to Wright. *Id.* at 75, 100, 106. Lanham and Freeman told Wright they were going to be bringing Sester down to Cell 101, and Lanham told Wright they wanted him to "fuck with" Sester. *Id.* at 75. Freeman shook his head up and down as Lanham spoke. *Ibid.* Freeman admitted shaking his head. R. 87, Tr., p. 73. The other inmates standing close to the door reacted with celebration. R. 86, Tr., p. 76. Neither Lanham nor Freeman told the inmates to avoid hurting Sester. *Id.* at 77. Wright said the inmates began behaving in ways he had never seen before immediately after the guards told the inmates to "fuck" with Sester. *Id.* at 106.

Lanham and Freeman returned to the booking area, and Lanham told Sydnor that he had spoken to Wright and that everything would be "taken care of." R. 91, Tr., p. 62 (Sydnor). Sydnor and Jack Powell then escorted Sester to Cell 101 in 26 Hallway. *Id.* at 64. Sester was crying. R. 92, Tr., p. 138 (Guthrie). Sydnor testified that the inmates were "hollering" and being "rowdy and noisy." *Id.* at 5 (Sydnor); R. 86, Tr., p. 121 (Powell). Sester overheard one inmate call out, "Oh, it's Valentine's Day, bring him here. He'd make a good girlfriend." *Id.* at 37; see

also R. 92, Tr., p. 5 (Sydnor). Powell heard an inmate describe Sester as "cute." R. 86, Tr., p. 121.

Based on these comments, Powell was concerned that Sester could be raped. R. 86, Tr., p. 122. There were three or four inmates at the door waiting when Sester arrived, R. 86, Tr., p. 80 (Wright); see also R. 92, Tr., p. 6 (Sydnor), and, as he entered the cell, Sester observed ten or more in total, *id.* at 38. Some were "hooting and hollering," *ibid.*, and some said things like, "He's so pretty, bring him in here. We've got a nice spot for him," *ibid.* Sester said he heard one of the guards say, "Here you go, boys. I got some fresh meat for you," and a guard pushed Sester into the cell and closed the door. *Id.* at 38-39.

An inmate then grabbed Sester around the arm and led him over to a bed. R. 86, Tr., p. 39 (J. Sester). Inmates played with his hair, saying, "Oh, it's so pretty. I love blond highlights. You look just like a girl." *Id.* at 39 (J. Sester); see also *id.* at 81 (Wright). Sester tried to pull away, but inmates sat him at a table and started playing with his hair again. *Id.* at 40 (J. Sester), 80 (Wright). Two inmates sat beside him and started pulling on his fingers and telling him this was how to break someone's finger. *Id.* at 40. Sester attempted to pull his fingers away, but the inmates started pulling his fingers even more. *Ibid.* As Sester was trying to pull away, one inmate came up from behind and grabbed him around the neck. *Ibid.* Several inmates picked him up, started stripping his clothes off, and began

slapping him with their prison issue flip-flops. *Id.* at 40-41. Sester called out for help numerous times, but no one responded. *Id.* at 41. The inmates then dropped Sester on his back and took him into the cell's shower area. *Id.* at 41 (J. Sester), 81 (Wright).

There, the inmates threw him against the wall in the corner and turned on scalding hot water. R. 86, Tr., p. 42 (J. Sester). An inmate pulled Sester's arm behind his back and started beating his head against the wall. *Ibid.* Sester felt a strong pain in his buttocks and believed he was being anally raped. *Ibid.* Eventually, Sester got out of the shower and tried to run towards the door, but he fell on the floor. *Ibid.* Zipp came out of the shower area naked. *Id.* at 82 (Wright). Some inmates picked Sester back up and started pressing his buttocks against the cell's window. *Id.* at 42 (J. Sester).

Inmates again began slapping Sester, R. 86, Tr., p. 43 (J. Sester); see also *id.* at 82 (Wright), and told him that he was going to be their "girl," *id.* at 82. Sester again called for help, and the inmates took him to the table and told him to be quiet while a guard walked by, and told him that they would kill him if he said a word. *Id.* at 43.

Zipp then came up and told Sester that he had two choices: "Either get fucked in the ass or suck my dick." R. 86, Tr., p. 44 (J. Sester). Sester told him that he did not want to do either and said no several times. *Ibid.* An inmate then

came up behind Sester, punched him in the head and forced him to open his mouth. *Ibid.* Zipp grabbed Sester by the hair and forced his penis into Sester's mouth. *Id.* at 44 (J. Sester), 83 (Wright). Sester, who said that he "would rather die than suck somebody's penis," bit down as hard as he could and Zipp stopped. *Id.* at 44. An inmate then hit him in the head again. *Id.* at 45. After that, he was left alone. *Ibid.*

The guards left Sester in Cell 101 all night and never checked on him. R. 92, Tr., p. 8 (Sydnor). In the morning, Sester was brought to pretrial services. R. 86, Tr., pp. 45-46 (J. Sester). Sester saw the Detention Center's nurse, Sandy Cook. Cook testified that Sester told her that he "had been traumatized * * * raped and * * * abused all night long." R. 93, Tr., p. 32.

Around 10:30 or 11:00 a.m., Sester learned that he would be released from the jail, and David Sester, his father, picked him up. R. 86, Tr., p. 49 (J. Sester); R. 91, Tr., p. 7 (D. Sester). As they left in David Sester's truck, Joshua told him that the jailers had placed him in a cell with other inmates and the inmates had raped him. R. 91, Tr., pp. 8-9 (D. Sester); R. 86, Tr., p. 49 (J. Sester). Sester testified that it was degrading and embarrassing to tell his father what had happened. *Ibid.*

A day or two later Sester's father brought him to St. Luke's Hospital. R. 91, Tr., p. 13-14; R. 86, Tr., p. 50. Sester told nurse Jill Harrison that he had been

sexually assaulted at the jail. R. 86, Tr., pp. 23-24 (Harrison). Harrison stated that Sester had abrasions inside his mouth on both the left and right, bruising on his left buttocks, an abrasion on his right shoulder, a scratch on his left cheek, and abrasions on his left lower chin and lower left leg. *Id.* at 28. Harrison testified that Sester's injuries were consistent with a sexual assault. *Id.* at 29.

Subsequent to the events of February 14, 2003, Lanham admitted that he spoke to Bobby Wright that night. R. 93, Tr., pp. 10-11 (Van Airsdale); R. 81, GX 5, Apx. 31. Lanham admitted that the officers intended to scare Sester and that he spoke to Wright about this, though he claimed it simply was to scare him from coming back to jail. R. 93, Tr., p. 93 (Lanham). He admitted that he assumed the plan was for Sester to be housed in Cell 101. *Id.* at 135. He admitted that he knew that the guards had no control over what happened to Sester after Sester was placed into Cell 101. *Id.* at 13-14.

Several witnesses testified that the general population cells were not a safe place for someone without prison experience, and Sester in particular. R. 91, Tr., p. 64 (Sydnor); R. 86, Tr., pp. 70 (Wright), 120 (Powell); R. 93, Tr., p. 30 (Cook). Sydnor testified that Sester did not appear to be someone who could protect himself from inmates in the general population cells. R. 92, Tr., p. 6. Sydnor stated that, based on Sester's reaction and the behavior of the inmates, it was not appropriate to leave Sester in Cell 101 because he could be harmed. *Id.* at 7.

Deputy Wendy Guthrie stated that she had no doubt that, if Sester were placed in Cell 101, "he would get beat up." *Id.* at 133. Sandy Cook testified that she did not believe Sester would have been safe in 26 Hallway because of its gang members and that it was undoubtedly inappropriate to house him there. R. 93, Tr., pp. 34-35. Inmate Bobby Wright testified that Lanham was aware of the violent felons being housed in the prison. R. 86, Tr., p. 104.

Sester testified that he thinks about what happened every minute, and that it has affected him in ways that he could not even imagine. R. 86, Tr., p. 51. He testified that as a result of the beating and rape he had to drop out of school and has not been able to keep a job. *Id.* at 51-52.

3. Filing Of False Reports

During the shift beginning the night of February 14, 2003, Sydnor and the other officers learned that Sester had been raped and beaten in the cell. R. 92, Tr., p. 16 (Sydnor). In response, Sydnor fabricated a story that they had needed to move Sester to the general population because the detox cells, where he should have remained, needed to be decontaminated. R. 91, Tr., p. 57 (Sydnor). Sydnor had told Lanham and Freeman nothing about the detox cells the previous shift, *ibid.*, and Sester was the only prisoner moved out of the detox cells that night, R. 92, Tr., p. 15-16 (Sydnor); R. 86, Tr., p. 126 (Powell). Another inmate in the same detox cell was not moved on February 14, 2003. R. 92, Tr., p. 15-16; R. 86, Tr., p.

126.

Sydnor and Powell then signed a false statement that stated that they put Sester in Cell 101 because they "were in the process of decontaminating the detox area." R. 81, GX 6, Apx. 32; R. 86, Tr., p. 127 (Powell). Powell later testified that he never decontaminated a detox cell nor saw such decontamination that night. R. 86, Tr., p. 128.

Sydnor also told both Lanham and Freeman that they needed to get their stories straight about the previous shift and "to be on the same page," because they all "were in a lot of trouble." R. 92, Tr., pp. 17 (Sydnor), 141 (Guthrie). In response, Lanham wrote and signed a false statement that the detox cells needed to be emptied on the morning of February 14, 2003, in order to clean them. *Id.* at 23 (Sydnor); R. 81, GX 5, Apx. 31. Lanham further wrote, falsely, that he went to 26 Hallway only to speak to Bobby Wright about Wright being reclassified. R. 81, GX 5, Apx. 31. Lanham also falsely stated that at the end of his shift, he asked Sydnor and Wright about Sester and they told him that Sester was fine. R. 81, GX 5, Apx. 31.

Freeman wrote a false statement that said he and Lanham left the booking area to return to Class D, and that they passed through 26 Hallway on the way back to do "a secure check for Sgt. Sydnor." R. 81, GX 4, Apx. 30. He wrote, again falsely, that Lanham spoke to Wright, and he spoke to some prisoners in

Cells 98 and 99, and that they then returned to Class D. R. 81, GX 4, Apx. 30. Sydnor also told Guthrie to write a false statement, but she refused. R. 92, Tr., pp. 141-143 (Guthrie).

4. Sentencing

The Probation Office prepared a Presentence Investigation Report (PSR) for each defendant. Lanham's PSR, based on the 2002 Sentencing Guidelines, recommended an offense level of 39 with a criminal history category of one, yielding a guideline sentencing range of 262 to 327 months. R. 135, PSR, ¶¶ 40, 69. Freeman's PSR, also based on the 2002 Sentencing Guidelines, recommended an offense level of 37 with a criminal history category of one, yielding a guideline sentencing range of 210 to 262 months. R. 137, PSR, ¶¶ 40, 71.

The United States and the defendants objected to the PSRs.[7] The United States argued that the more onerous 2008 Sentencing Guidelines applied. The 2008 Guidelines established a base offense level of 30, as opposed to the base offense level of 27 of the 2002 Guidelines. The government also argued that a four-level upward adjustment for Lanham's role as an organizer or leader should apply pursuant to U.S.S.G. § 3B1.1(a). The government objected to the two-point downward adjustment for Freeman pursuant to U.S.S.G. § 3B1.2(b). See R. 135, PSR, Gov. Obj. Attachment, pp. 1-3; R. 137, PSR, Gov. Obj. Attachment, pp. 1-3.

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[7] The government objected to the Probation Office but did not submit a sentencing memorandum. These objections were attached to each PSR.

Lanham and Freeman objected to the use of the 2008 Guidelines, arguing that the 2002 Guidelines should apply. R. 108, Lanham Sent. Memo., pp. 3-5; R. 111, Freeman Sent. Memo., pp. 10-11. Lanham also argued that a leadership enhancement under U.S.S.G. § 3B1.1(a) should not apply. R. 108, Lanham Sent. Memo., p. 5. Both Lanham and Freeman objected to the enhancement pursuant to U.S.S.G. § 3C1.1 for obstruction of justice. R. 108, Lanham Sent. Memo., p. 2; R. 111, Freeman Sent. Memo., p. 8-9. Both defendants argued that a two-level increase for physical restraint pursuant to U.S.S.G. § 3A1.3 constituted double-counting, because a two-level increase already applied because the victim was held in custody of a correctional facility. R. 108, Lanham Sent. Memo., p. 3; R. 111, Freeman Sent. Memo., pp. 9-10.

The sentencing hearing was held on December 8, 2008. The United States agreed with the defendants that the two-level increase for physical restraint constituted double-counting. R. 143, Lanham S.Tr., pp. 8-9; R. 142, Freeman S.Tr., p. 5. The district court agreed. R. 143, Lanham S.Tr., pp. 9-10; R. 142, Freeman S.Tr., p. 8.

The district court rejected the government's request for an upward enhancement for Lanham's leadership role, R. 143, Lanham S.Tr., pp. 10-11, and refused to apply the 2008 Guidelines. While it "tend[ed] to agree" with the government's legal argument, the district court felt itself bound by the Sixth Circuit law and what it perceived to be the Supreme Court's lack of clarity on the

issue. *Id.* at 12. The district court also rejected Lanham's argument that the obstruction of justice enhancement should not apply. *Id.* at 13.

The district court then calculated Lanham's total offense level as 37, because Lanham's criminal history category was one, the Sentencing Guidelines advised a range of 210 to 262 months. R. 143, Lanham S.Tr., pp. 13-14. The court stated that Lanham had not accepted responsibility. *Id.* at 19. Nevertheless, the court stated the guidelines range was "very onerous," and stated that a downward variance was "appropriate in light of the defendant's lack of criminal history." *Id.* at 20. Departing downward 30 months, the court sentenced Lanham to 180 months. *Id.* at 21.

For the same reasons, the court refused to apply the 2008 Sentencing Guidelines to Freeman. R. 142, Freeman S.Tr., pp. 7-8. The court agreed with the government that Freeman was not entitled to a downward adjustment for a substantially less culpable role in the offense and rejected Freeman's argument that the obstruction of justice enhancement should not apply. *Id.* at 9-10.

The district court then calculated an adjusted offense level of 37 for Freeman, and because Freeman also had a criminal history category of one, the Guidelines suggested a sentencing range of 210 to 262 months. R. 142, Freeman S.Tr., pp. 10-11. While the court noted the "terrible" nature of the crime, *id.* at 22; see also *id.* at 20-21, it stated that the defendant and others could be deterred by "a sentence that is below the guideline range," *id.* at 23. Stating that Freeman's

involvement was less than Lanham's, the court sentenced Freeman to 168 months. *Id.* at 23.[8]

SUMMARY OF ARGUMENT

This Court should affirm the defendants' convictions. The record easily supports the convictions, and defendants' other arguments fail. This Court should remand for resentencing because the district court committed legal errors at sentencing.

1. The court did not abuse its discretion when it rejected the defendants' motions to strike two jurors for cause and when it granted a government motion to strike another juror for cause. Even assuming an abuse of discretion, the defendants were not entitled to a specific jury composition but an impartial jury. As the defendants admit, they removed the two jurors they objected to through peremptory challenges; there is no allegation or evidence the final jury was biased in any way. The court did not abuse its discretion in limiting questions concerning government witness Shawn Sydnor's potential sentence. The court was correct in wanting to avoid alerting the jury to the potential sentences the defendants faced, and the jury had sufficient bases from which to judge Sydnor's potential biases

[8] After sentencing, Lanham and Freeman filed motions to stay their surrender to prison officials. In denying Lanham's motion, the district court stated: "[T]he Court believes that if any error occurred during the sentencing process, it related to the substantial downward variance given to the Defendant from his guideline range." R. 129, Memorandum and Order Denying Lanham's Motion for Bond Pending Appeal, p. 3.

and motives.

2. Regarding the evidence, there was more than sufficient evidence to support Lanham's and Freeman's convictions of conspiracy. Ample evidence demonstrated that each actively solicited inmates to punish and harm Sester and subsequently covered up the conspiracy. In addition, there was sufficient evidence to support Lanham's and Freeman's convictions under 18 U.S.C. 242. The evidence demonstrated that each was aware of the objective risk Sester faced in Cell 101, and that each was also subjectively aware of that risk. Each testified to his duty to protect inmates from harm. Similarly, there was sufficient evidence to support Lanham's and Freeman's convictions under 18 U.S.C. 1519. The evidence easily demonstrated that both defendants' reports contained material falsehoods.

3. There was no error at trial. The district court properly submitted the question of whether aggravated sexual abuse had occurred to the jury. The defendants were charged under 18 U.S.C. 241 of a conspiracy that included acts of aggravated sexual abuse, which lead to an enhanced penalty under the statute. Under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the jury was required to find that the aggravated sexual abuse occurred beyond a reasonable doubt. Contrary to defendants' arguments, the federal aggravated sexual abuse statute's jurisdictional requirements did not apply. Rather, the jurisdictional requirements of 18 U.S.C. 241 applied. And the district court did not abuse its discretion in finding no

violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The facts clearly supported the conclusion that the government was not in possession of the allegedly exculpatory information. Furthermore, the district court correctly determined that the alleged information was not exculpatory and, even if admitted, would not have changed the outcome of the trial.

4. Regarding sentencing, the court correctly rejected the minor role reduction for Freeman because he was not substantially less culpable than the other members of the conspiracy.

However, other errors were made during sentencing. First, the court erred when it refused to use the 2008 Sentencing Guidelines. Because the Sentencing Guidelines are no longer mandatory and binding, the *Ex Post Facto* Clause does not prohibit employing the current guidelines at sentencing even when they provide a more onerous guideline range. Second, the district court legally erred when it declined to apply the leader or organizer enhancement pursuant to U.S.S.G. § 3B1.1(a) to defendant Lanham. The district court's sole reason for declining to apply the enhancement was because Lanham did not originate the idea of punishing Sester. The enhancement's application, however, does not turn on whether a defendant originated the idea to punish the victim. The district court's reason for declining to apply the enhancement was legal error.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANTS' CHALLENGES FOR CAUSE TO TWO JURORS AND GRANTING THE GOVERNMENT'S MOTION FOR CAUSE TO STRIKE ANOTHER JUROR

A. Standard Of Review

This Court has stated that the "task of empaneling an impartial jury is left to the sound discretion of the district court," *United States* v. *Guzman*, 450 F.3d 627, 629 (6th Cir. 2006), cert. denied, 549 U.S. 1185 (2007), and reviews "a district court's voir dire of the jury venire for abuse of that discretion." *Ibid.* "Only in the case of manifest error will" this Court "overturn a finding of juror impartiality." *Ibid.* (citing *Mu'Min* v. *Virginia*, 500 U.S. 415, 428 (1991)). A district court's determination "regarding the credibility of jurors' assurances" receives "substantial deference on appeal." *United States* v. *Corrado*, 304 F.3d 593, 604 (6th Cir. 2002), cert. denied, 537 U.S. 1238 (2003); see also *Wainwright* v. *Witt*, 469 U.S. 412, 425-426 (1985).

B. Applicable Law

The Sixth Amendment "guarantees an accused the right to be tried 'by an impartial jury.'" *Guzman*, 450 F.3d at 629 (quoting U.S. Const. Amend. VI). "When a juror's impartiality is at issue, the relevant question is 'did a juror swear that he could set aside any opinion he might hold and decide the case on the

evidence, and should the juror's protestation of impartiality have been believed.'" *Dennis* v. *Mitchell*, 354 F.3d 511, 520 (6th Cir. 2003) (quoting *Patton* v. *Yount*, 467 U.S. 1025, 1036 (1984)), cert. denied, 541 U.S. 1068 (2004); see also *United States* v. *Angel*, 355 F.3d 462, 470 (6th Cir. 2004). This Court has noted that even a "juror's express doubt as to her own impartiality on *voir dire* does not necessarily entail a finding of actual bias." *Hughes* v. *United States*, 258 F.3d 453, 458 (6th Cir. 2001).

C. The District Court Did Not Abuse Its Discretion By Declining To Strike The Two Jurors For Cause

Lanham and Freeman argue that Juror 56's answers during voir dire demonstrated that he could not judge their case impartially and that the district court should have dismissed him for cause. Lanham Br. 22; Freeman Br. 18. A full reading of the voir dire transcript demonstrates that the district court did not abuse its discretion in denying the request to strike Juror 56.

Juror 56 stated that he had read about the case in the newspaper and formed an opinion about it. R. 90, Tr., p. 22. The district court and counsel asked the juror a series of questions. Initially, it seemed as if the juror could not lay aside his preconceived notions: "I haven't completely made up my mind, but based on what I've read, it's pretty made up." *Id.* at 24; see also *id.* at 25.

Later answers showed that the Juror 56 was able to swear impartiality. Government counsel asked whether he could "form an opinion just based on what

you hear during this case." R. 90, Tr., p. 26. Juror 56 said, "Yes, I can put it aside,"and that, "I would do my best effort to try as best I can to put all that [I know] aside and just consider the facts. So *I think I can do that*." *Id.* at 26-27 (emphasis added). Juror 56 also stated that while he could not say he was "totally neutral" at that moment, he could "certainly try" because he understood "how important this is for everybody involved." *Id.* at 27.

The district court also told Juror 56 that at the end of voir dire it would ask generally whether jurors could be impartial and wanted Juror 56 to tell the court if he felt he could not "be fair and impartial." R. 90, Tr., p. 25. The juror stated that he understood. *Ibid.*

Both defendants also argue that the district court abused its discretion by declining to strike Juror 143 for cause. Again, they give only one portion of Juror 143's answers. Juror 143 admitted to having read parts of a news article about the case. R. 90, Tr., p. 38. He stated that he had an opinion of the case based on the material, but further asserted: "I do believe I could make my judgment here based on what's presented." *Ibid.* Juror 143 stated that he could "compartmentalize" the knowledge from the article, stated that he would do his "darndest to do that," and said, "*I think I'm capable of doing that*." *Id.* at 39 (emphasis added).

Government counsel asked whether Juror 143 could put aside what he had read and "come into it fresh and listen only to what you hear in this trial." R. 90, Tr., p. 41. Juror 143 stated, "I think I can do that." *Ibid.* Lanham's counsel asked,

"[I]s there a possibility that despite your attempt to be impartial that that bell has already been rung?" *Id.* at 41-42. The juror answered, "I don't think so. I don't think so. But it's kind of an unanswerable question, that's the best judgement I have at this point. I think I can." *Id.* at 42. Freeman's counsel asked whether "either side in this case [would] have to meet a burden to change your opinion." *Ibid.* The juror believed he could "start all over" with a blank slate. *Ibid.*

The district court informed Juror 143 that, at the end of voir dire, the court would ask whether jurors had "formed opinions" that they could not put out of their minds and that he wanted Juror 143 to inform the court if he could not be impartial. R. 90, Tr., p. 40. The juror agreed. *Ibid.* At the end of voir dire, the district court asked the whole jury panel about any potential biases and neither Juror 56 or 143 expressed concern. *Id.* at 94. When defendants' counsel asked to excuse Jurors 56 and 143 for cause, the district court denied these requests. *Id.* at 120-121, 125-126.

Given the full transcript of Juror 56's and Juror 143's answers, and that neither expressed concern when the district court asked its general question at the conclusion of voir dire about bias, this Court should find that the district court did not abuse its ample discretion in refusing to strike these two jurors for cause. Each juror believed he could judge the case fairly and pledged to do so. At the end of voir dire, neither expressed any hesitation concerning bias.

Even if one grants some ambivalence on the part of the two jurors, this

Court has upheld a similar district court conclusion, presenting a far more serious possibility of bias, as not being an abuse of discretion. See *United States* v. *Pennell*, 737 F.2d 521, 534 (6th Cir. 1984) (no abuse of discretion where court kept jury empaneled where five jurors received threatening phone calls during trial and one juror expressed concerns about whether she could render an objective decision based solely on the evidence).

D. The District Court Did Not Abuse Its Discretion By Striking Juror 88 For Cause

Freeman argues that the court improperly granted the government's request to strike Juror 88 for cause. Br. 21-22. The record shows that the district court did not abuse its discretion in granting the government's request to strike Juror 88 for cause.

Juror 88 told the district court that she had worked with Freeman's attorney, Randy Blankenship, at Blankenship's former law firm for 15 years. R. 90, Tr., p. 55. She stated that she had worked with Mr. Blankenship on "many occasions," *ibid.*, had a good relationship with him, and would be "sympathetic" to him, *id.* at 56. When the court asked whether she could "set aside" her personal sympathies and "render a verdict based on the evidence," she answered that she would "absolutely try." *Ibid.* The district court then asked if she could "do more than try," and she answered, "Yes, sir." *Ibid.*

The government moved to strike Juror 88 for cause, arguing that because

she had worked with Blankenship for 15 years, she likely "quite rightly * * * likes him very much and would be sympathetic toward his cause here." R. 90, Tr., p. 124. Despite Freeman's opposition, the court granted the motion, stating, "The thing that concerns me is the length of the employment, a long-term relationship, and so I will sustain the request that she be stricken for cause." *Id.* at 124-125.

The district court's determination certainly was not an abuse of discretion. While Freeman argues that this shows that the district court imposed a higher burden on the defense than the prosecution for motions to strike for cause (Br. 22), this fails to account for the wholly different situations of Jurors 56 and 143 as opposed to Juror 88. The district court was justifiably concerned about the long-term and personal nature of Juror 88's relationship to defense counsel. Indeed, in a case Freeman cites, *Wolfe* v. *Brigano*, 232 F.3d 499, 502 (6th Cir. 2000), this Court found the "close and ongoing" relationships of jurors to the victim's family to be grounds for reversal. The district court did not abuse its discretion.

E. Even Assuming An Abuse Of Discretion, The Jurors Were Removed By The Defendants' Peremptory Challenges And, Thus, There Was No Constitutional Harm

Even assuming that the district court abused its discretion by failing to strike Jurors 56 and 143 for cause and for striking Juror 88, Lanham and Freeman have failed to demonstrate any harm whatsoever. As defendants admit, see Lanham Br. 25; Freeman Br. 19, Jurors 56 and 143 were excluded from the final jury composition by Lanham and Freeman's peremptory challenges. Lanham and

Freeman have no grounds upon which to attack the jury that was impaneled.

The Supreme Court has held that where a defendant uses a peremptory challenge to "cure" a district court's failure to excuse a juror for cause and the defendant is "subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 307 (2000); see also *McQueen* v. *Scroggy*, 99 F.3d 1302, 1321 (6th Cir. 1996) ("It is insufficient simply to claim that, had there been another peremptory available, a different juror would have been excluded, and the result might have been a more favorable jury for [the defendant].") (citing *Ross* v. *Oklahoma*, 487 U.S. 81 (1988)), overruled on other grounds, *In re Abdur'Rahman*, 392 F.3d 174, 182 (6th Cir. 2004). Lanham and Freeman fail to allege that the final jury was biased, and there is no such evidence.

The case upon which both Lanham and Freeman rely, *Wolfe* v. *Brigano*, is totally inapposite. There, the impaneled jury included four biased jurors whom the trial court refused to excuse for cause. *Wolfe*, 232 F.3d at 500. The defendant had used his four peremptory challenges to exclude three jurors he had not challenged for cause and one of five jurors he challenged for cause – leaving four challenged jurors on the final jury. This Court stated that the "[f]ailure to remove biased jurors taint[ed] the entire trial." *Id.* at 503. Here, in contrast, the allegedly biased jurors *were* removed through peremptory challenges.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LIMITING CROSS-EXAMINATION CONCERNING SYDNOR'S POTENTIAL PUNISHMENT

A. Standard Of Review

Because, as both Lanham and Freeman admit, Lanham Br. 11; Freeman Br. 23, neither defendant objected to the district court's limitation on cross-examination, this Court reviews for plain error. *United States* v. *Baker*, 458 F.3d 513, 519 (6th Cir. 2006); *United States* v. *Hayes*, 218 F.3d 615, 621-622 (6th Cir. 2000).

B. Applicable Law

"The Confrontation Clause of the Sixth Amendment guarantees a defendant an opportunity to impeach the credibility of a witness against him because impeachment is fundamental to effective cross-examination." *United States* v. *Holden*, 557 F.3d 698, 704 (6th Cir. 2009) (citing *Davis* v. *Alaska*, 415 U.S. 308, 315-318, (1974)). Trial courts "retain great discretion to impose reasonable limits on the cross-examination of witnesses based on concerns such as harassment, prejudice, confusion of the issues, the witness's safety, and marginal relevancy." *United States* v. *Davis*, 430 F.3d 345, 360-361 (6th Cir. 2005) (quoting *Norris* v. *Schotten*, 146 F.3d 314, 329 (6th Cir.) (1998)); see also *United States* v. *Beverly*, 369 F.3d 516, 535 (6th Cir.), cert. denied, 543 U.S. 910 (2004). In determining whether a district court abused its wide discretion in limiting cross-examination,

this Court "must decide 'whether [, despite the limitation of cross-examination,] the jury was otherwise in possession of sufficient information ... to make a 'discriminating appraisal' of a witness' motives and bias.'" *United States* v. *Kone*, 307 F.3d 430, 436-437 (6th Cir. 2002) (quoting *Stevens* v. *Bordenkircher*, 746 F.2d 342, 347 (6th Cir. 1984)).

C. The District Court Did Not Abuse Its Discretion When It Limited Cross-Examination Of Sydnor

Lanham (Br. 11) and Freeman (Br. 23) argue that the district court improperly limited cross-examination of one of the government's key witnesses, Shawn Sydnor. They argue that the district court erred in prohibiting them from "explor[ing] Sydnor's bias and motive for testifying." Freeman Br. 23.

The district court placed a reasonable and typical limit on the cross-examination of Sydnor. It told defense counsel that they could not ask questions about the specific sentence length Sydnor hoped to receive in exchange for cooperating with the government. The district court stated that, "the parties would be able to certainly ask questions about the defendant entering a plea of guilty in exchange for hoping to receive a lesser punishment"and that "if it goes much beyond that, it may become objectionable." R. 90, Tr., pp. 7-8. What this reasonable limitation did do was prevent the jury from knowing about the specific length of Sydnor's potential sentence or, perhaps more importantly, the defendants' potential sentences. R. 90, Tr., pp. 7-8; R. 86, Tr., p. 60.

Contrary to the defendants' claims, this was the only time the district court warned them about asking Sydnor questions about his potential sentence. Both Lanham and Freeman quote the district's admonition about questions concerning "limits in terms of the potential penalties." Lanham Br. 12 (quoting R. 86, Tr., p. 60); Freeman Br. 24 (same). What each fails to state is that this warning came long *after* both defendants had finished questioning Sydnor and in response to Lanham's counsel's question concerning another potential government witness. Lanham's counsel asked whether he could ask that potential witness, one of the prisoners who had been convicted on state charges for beating Sester, about that prisoner's conviction. R. 86, Tr., p. 59. The district court stated that he could ask that question and that the limiting order had to do with *potential* sentences to be imposed by the district court on Sydnor, Lanham, and Freeman. *Id.* at 59-60. This comment could have had no effect on the defendants' questioning of Sydnor.

Defendants contend that their counsels limited their questioning of Sydnor based on the Court's order. Nothing, however, stopped counsel from probing into Sydnor's potential biases, his hopes for a considerable reduction in sentence, his dismissed charges, or the timing of his plea agreement. Lanham's counsel elicited the fact that Sydnor pled guilty only days before trial and was cooperating with the United States. R. 92, Tr., p. 41. Counsel asked whether Sydnor entered into the plea agreement because he "hope[d] to have consideration on [his] sentencing." *Ibid.* Freeman's counsel asked Sydnor asked why Sydnor was now testifying that

Freeman was present when Sydnor and Lanham were discussing the conspiracy. *Id.* at 66. He asked Sydnor if he had "conveniently" remembered this now that he had just entered into a plea agreement. *Ibid.* He then asked, "So you're trying to better your situation, are you not?" Sydnor responded, "I'm going by the guidelines of my plea agreement." *Ibid.* That counsel did not ask more was simply a tactical decision on their part, not a limitation imposed by the district court.

In addition, the jury was properly instructed by the district court to consider Sydnor's testimony with caution and care. R. 94, Tr., p. 104. Lanham and Freeman's counsel argued in closing that Sydnor had strong motivation to lie to gain a reduced sentence. *Id.* at 29, 49. The jury was well aware of Sydnor's potential biases and motives in testifying, and the defendants could have probed even further into those biases and motives.

Other courts of appeals have upheld similar limitations on cross-examination. In *United States* v. *Cropp*, 127 F.3d 354 (4th Cir. 1997), cert. denied, 522 U.S. 1098 (1998), the district court "ruled that the defense could not ask about the specific penalties that the cooperators would have received absent cooperation, or about the specific penalties they hoped to receive due to their cooperation." *Id.* at 358. The defense was allowed to "ask witnesses whether they had signed plea agreements, whether they faced a 'severe penalty' prior to cooperating, and whether they expected to receive a lesser sentence as a result of

the cooperation, but the court did not allow questions about the specific penalties at stake." *Ibid.* The Fourth Circuit upheld the limitation, upholding "the district court's concern that the jury might 'nullify' its verdict if it knew the extreme penalties faced by the [defendants]." *Ibid.*; see also *United States* v. *Arocho*, 305 F.3d 627, 636 (7th Cir. 2002) (upholding limitation on questions concerning the specific sentences and sentencing guidelines the cooperators faced because the defendants "were able to elicit sufficient information to allow the jury to assess" the cooperators' "credibility, motives and bias"); *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995) (upholding limitation on question about the number of years cooperator would have faced on dismissed charge where cooperator was asked "repeatedly whether he had received any benefit for his testimony"); *Brown* v. *Powell*, 975 F.2d 1, 5 (1st Cir. 1992) (upholding prohibition on questions about penalty cooperator had avoided through plea because jury "was clearly given sufficient information from which it could conclude that * * * the accomplice * * * had a substantial motivation to testify against petitioner and lie").

Both Lanham and Freeman cite *United States* v. *Chandler*, 326 F.3d 210 (2003), where the Third Circuit held that the district court's limits on questioning two cooperators about the sentence reduction one received and the reduction the other hoped to receive was an abuse of discretion and not harmless error. That decision is unpersuasive and its holding was made over a vigorous dissent. More

importantly, because there are conflicting authorities on this question, simply means that, even if the district court abused its discretion in this case (which we deny), it could not have committed plain error. *United States* v. *Williams*, 53 F.3d 769, 772 (6th Cir. 1995) (a "circuit split preclude[d] a finding of plain error"). Accordingly, Lanham and Freeman's arguments fail.

III

THERE WAS SUFFICIENT EVIDENCE TO CONVICT LANHAM AND FREEMAN ON THE CONSPIRACY COUNT

A. Standard Of Review

In reviewing a sufficiency of the evidence claim, this Court asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime." *United States* v. *Jones*, 102 F.3d 804, 807 (6th Cir. 1996). The "defendant claiming insufficiency of the evidence bears a very heavy burden." *United States* v. *Fekete*, 535 F.3d 471, 476 (6th Cir. 2008) (quoting *United States* v. *Abboud*, 438 F.3d 554, 589 (6th Cir. 2006)). "If we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, then the conviction must be upheld." *Ibid.* This Court gives the government "the benefit of all reasonable inferences' drawn from the evidence, and courts must 'refrain from independently judging the weight of the evidence." *Ibid.* (quoting *United States* v. *Suarez*, 263 F.3d 468, 476 (6th Cir. 2001)). "[A]ll credibility issues are

to be resolved in favor of the jury's verdict." *Ibid.*

B. Applicable Law

18 U.S.C. 241 makes it a crime when "two or more persons conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." 18 U.S.C. 241. It provides for enhanced penalties if the conspiracy's "acts include kidnapping or * * * aggravated sexual abuse." 18 U.S.C. 241. Here, the indictment charged Lanham and Freeman with conspiring to injure Sester and depriving him of his rights not to be deprived of liberty without due process. R. 1, Indictment, p. 2. The indictment further charged that the conspiracy included sexual acts. *Ibid.* "To obtain a conviction for conspiracy to violate civil rights under § 241," the government was required to prove that the defendants "knowingly agreed with another person to injure" Joshua Sester "in the exercise of a right guaranteed under the Constitution." *United States* v. *Epley*, 52 F.3d 571, 575-576 (6th Cir. 1995). The government also needed to prove beyond a reasonable doubt that each had the "[s]pecific intent to deprive another of civil rights." *Id.* at 576; see also R. 82, Jury Instructions, p. 16.

C. There Was Ample Evidence From Which The Jury Could Find Lanham Guilty Beyond A Reasonable Doubt

Lanham argues that there was insufficient evidence to convict him of the

conspiracy. Br. 27. He argues that the evidence at trial showed that Lanham did not want Sester harmed and that there "was no evidence presented for the jury to conclude that Lanham knew the conspiracy's main purpose was to harm Sester." Br. 27-28. He further argues that the evidence was insufficient to show that Sester's sexual assault was reasonably foreseeable to Lanham. Br. 29.

There was ample evidence that Lanham knew that that purpose of the conspiracy was to punish and harm Sester, and that he actively pursued that harm. See pp. 9-12, *supra*. The evidence established that Lanham joined Syndor in mocking Sester about his alleged effeminate and slight appearance. See p. 9, *supra*. Evidence showed that Lanham was present when Sydnor told Sester he would make a "good girlfriend." See p. 9, *supra*. When Sydnor stated that they needed to teach Sester a lesson, Lanham quickly *volunteered* that he knew a prisoner in Cell 101. See p. 10, *supra*. The evidence showed that Lanham then proceeded to Cell 101 and talked to Bobby Wright, within earshot of other inmates, and explained that the guards would be bringing a new prisoner down and that they wanted the prisoners to "fuck with" him. See p. 12, *supra*. Evidence established that the inmates standing near Wright cheered at this news when Lanham was present. See p. 12, *supra.* Lanham knew of 26 Hallway's and Zipp's notorious reputations. See pp. 10-11, *supra*. Numerous witnesses, including officers and one inmate, testified as to the risk of placing someone like Sester in the general prison population. See pp. 5-7, 16-17, *supra*.

Further, there was ample evidence that pretrial detainees were housed in the detox cells not with the general population. See pp. 7-8, *supra*. Lanham said Sester should have been in a detox cell and admitted that he asked Wright to teach Sester a lesson. See pp. 8, 16, *supra.* From this, a rational factfinder could easily infer that the reason for placing Sester in the general population – an action that Lanham facilitated – was to have him beaten and abused, and Lanham knew Sester likely would be so harmed there. Numerous witnesses, including Lanham himself, testified that teaching a prisoner a lesson or punishing him was totally improper. See pp. 5-6, *supra*. Finally, the evidence established that Lanham worked to cover-up his actions after the fact as well. See p. 18, *supra*.[9]

"[A]n agreement may be inferred from a variety of circumstances, such as, 'sharing a common motive, presence in a situation where one could assume participants would not allow bystanders, repeated acts, mutual knowledge with joint action, and the giving out of misinformation to cover up [the illegal activity].'" *United States* v. *Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000) (quoting *United States* v. *Davis*, 810 F.2d 474, 477 (5th Cir. 1987)). This evidence amply established the conspiracy and Lanham's entry into it.

That Lanham (Br. 28) was not present when Sydnor actually put Sester into

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[9] It was enough that Lanham conspired to "punish" Sester, which is not a legitimate penological purpose under the Fourteenth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). The extent of the physical harm inflicted shows how serious the offense was.

Cell 101 is immaterial. A conspirator "need not have personally performed the deed for which he is being held liable. A conspirator can be held criminally liable for the actions of his co-conspirators committed during and in furtherance of the conspiracy." *United States* v. *Gresser*, 935 F.2d 96, 101 (6th Cir. 1991).

Lanham's argument (Br. 29-30) that it was not reasonably foreseeable that Sester might be raped in furtherance of the conspiracy also is unavailing. Evidence established that Sester was slight and effeminate in appearance, had highlighted hair, and was wearing boxer shorts with heart-shaped designs. See p. 9, *supra*. Sydnor told Sester that he would make a "good girlfriend" for the prisoners. See p. 9, *supra*. The evidence established that Lanham told Wright within earshot of other prisoners to "fuck with" Sester, and the inmates cheered at this statement. See p. 12, *supra.* Lanham admitted that if a jailer were to say this to a prisoner, it would be dangerous. See p. 6, *supra.* Further, the evidence established that Zipp was known to be a dangerous inmate who walked around naked in the cell and that Lanham had worked in 26 Hallway when Zipp was in Cell 101. See pp. 10-11, *supra.* Jack Powell testified that when he and Sydnor brought Sester to Cell 101, the prisoners' comments made him concerned that Sester might be raped. See p. 13, *supra.* Sydnor was alert to sexual predatory behavior, especially in 26 Hallway. See p. 10, *supra*. Numerous witnesses testified to the danger of putting someone as inexperienced with prison as Sester

into the general population, see pp. 16-17, *supra*,[10] and Lanham was an experienced officer, see p. 6, *supra*. Taken together, and in the light most favorable to the jury's verdict, this evidence easily establishes that Sester's rape was a reasonably foreseeable consequence of the conspiracy.

D. There Was Ample Evidence From Which The Jury Could Find Freeman Guilty Beyond A Reasonable Doubt

Freeman argues that there was insufficient evidence to prove him guilty of conspiracy to violate Sester's civil rights. He argues that the only evidence of his entering the conspiracy consists of his: 1) presence in the booking area while Sydnor and Lanham discussed teaching Sester a lesson; 2) joining in the taunting of Sester; 3) walking down 26 Hallway with Lanham; and 4) presence and nodding of his head at Cell 101. Br. 32. He argues that he merely knew about the conspiracy and possibly acquiesced. Br. 33, 35. He also contends that the nod of his head is a "summary of the evidence" of his entering the conspiracy. Br. 37.

Freeman's rendition of the facts is significantly misleading. Freeman not only isolates the facts in the record and attempts to examine them individually rather than as a whole, he also fails to describe all the evidence of his participation in the conspiracy. Contrary to Freeman's claim, the evidence was more than simply that he nodded his head. While it is true that as a matter of law mere knowledge, acquiescence, or approval of a crime is not enough to establish a

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[10] Contrary to Lanham's and Freeman's claims, Cook did not testify that she had no use for a rape kit. R. 93, Tr., p. 43 (Cook).

conspiracy, see, *e.g.*, *United States* v. *Heater*, 63 F.3d 311, 324 (4th Cir. 1995), the government proved much more than Freeman's simple knowledge or acquiescence.

Freeman taunted Sester, joined with Lanham in taking action to solicit inmates to harm Sester, failed to check on Sester throughout the five hours he was in Cell 101, and then joined in the cover-up after the rape and beating. See pp. 9-12, 15, 18-19, *supra.* Sydnor testified that he told both Lanham and Freeman of his plan to scare Sester, and that Freeman did not object to the plan. See p. 10, *supra.* Corrections Officer Wendy Guthrie testified that Freeman was present during the discussion of the plan to scare Sester. See p. 10, *supra.* Significantly, after Lanham suggested soliciting inmate Bobby Wright in Cell 101 to harm Sester, Freeman went with Lanham to the cell, a fact from which the jury easily could infer that he joined the conspiracy to harm Sester. See p. 12, *supra.* "Although mere presence at the crime scene is insufficient to show participation, a defendant's participation in the conspiracy's common purpose and plan may be inferred from the defendant's actions and reactions to the circumstances." *United States* v. *Salgado*, 250 F.3d 438, 447 (6th Cir.), cert. denied, 534 U.S. 936 (2001).

There is more. Inmate Bobby Wright testified that Lanham and Freeman came to the door of Cell 101 and spoke with him. See p. 12, *supra.* Wright testified that while Lanham told Wright that they wanted Wright to "fuck with" Sester, Freeman was standing at the door "agreeing with Lanham, shaking his

head yes." R. 86, Tr., p. 76. Freeman also failed to protect or assist Sester after learning of the plan; he left Sester in the cell for five hours while knowing of the plan and of the danger Sester was in. See p. 15, *supra.* As Freeman himself admitted, see pp. 6-7, *supra*, he had a duty to protect inmates in all areas of the jail; his failure to do so could surely help convince a reasonable jury that he was acting in furtherance of the conspiracy. Finally, Freeman's false reporting after the incident further supports the conclusion that he agreed to enter the conspiracy. This evidence is more than sufficient to establish Freeman's participation in the conspiracy.

IV

THERE WAS SUFFICIENT EVIDENCE TO CONVICT LANHAM AND FREEMAN OF VIOLATING 18 U.S.C. 242

A. Standard Of Review

See p. 37, *supra*.

B. Applicable Law

18 U.S.C. 242 makes it a crime for someone "under color of any law" to "willfully subject[] any person * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 18 U.S.C. 242. If "bodily injury results from the acts" giving rise to the 242 violation, the defendant "shall be fined under this title or imprisoned not more than ten years, or both." 18 U.S.C. 242. The jury was instructed, that to convict

Lanham and Freeman of Count 2, the government needed to prove, beyond a reasonable doubt:

> (A) First, that the defendant deprived Joshua Sester of a right secured by the Constitution or laws of the United States by committing one or more of the acts charged in the Indictment;
>
> (B) Second, that the defendant acted willfully;
>
> (C) Third, that the defendant acted under color of law; and
>
> (D) Fourth, that Joshua Sester sustained bodily injury as a result of the Defendant's conduct.

R. 82, Jury Instructions, p. 26. The defendants were charged as aiders and abettors. R. 1, Indictment, p. 5.

C. There Was Ample Evidence For The Jury To Find Lanham Guilty Beyond A Reasonable Doubt

Lanham argues that there was insufficient evidence to convict him of violating Sester's rights under color of law. Lanham argues that there was insufficient evidence that he had 1) specific intent to deprive Sester of his right not to be deprived of liberty without due process of law (Br. 30) and 2) "actual knowledge of a substantial risk that Sester would be assaulted by inmates in cell 101 and disregarded that risk by failing to take reasonable measures to eliminate the risk," Br. 30-31.

On the first point, the discussion of the evidence supporting the conspiracy convictions, see pp. 38-42, *supra*, demonstrates that there was ample evidence

supporting the jury's decision that Lanham had the specific intent to deprive Sester of his constitutional right not to be deprived of liberty without due process of law. On the second point, the Supreme Court and this Court have recognized that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Farmer* v. *Brennan*, 511 U.S. 825, 833 (1994) (citation omitted); see also *Leary* v. *Livingston County*, 528 F.3d 438, 442 (6th Cir. 2008). Prison officials are "not free to let the state of nature take its course [in a prison]," and "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objectiv[e].'" *Farmer*, 511 U.S. at 833 (citation omitted). This deliberate indifference standard has both an objective and subjective component. A prison official can be found guilty where "the official knows of and disregards an excessive risk to inmate health or safety" and "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Ford* v. *County of Grand Traverse*, 535 F.3d 483, 494-495 (6th Cir. 2008) (quoting *Farmer*, 511 U.S. at 837). Punishment of a pretrial detainee is not a legitimate penological purpose under the Fourteenth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979).

Lanham's argument that there was not sufficient evidence establishing that he had this subjective knowledge of risk of serious harm to Sester is wrong. Far from showing that Sester faced a "mere possibility" of harm (Br. 31 (quoting *Cook* v. *Sheriff of Monroe County*, 402 F.3d 1092 (11th Cir. 2005))) the evidence

showed that Lanham *solicited* that harm and was well aware of the probability Sester *would* be harmed. See pp. 9-12, *supra*; see also pp. 38-42, *supra.* Lanham told Wright, with other prisoners listening, to "fuck with" Sester and heard the excited reactions of those prisoners to this command. See p. 12, *supra*. Clearly, a rational juror easily could conclude that he knew his comments to Wright had worked.

The record is also replete with the objective risk of harm someone like Sester faced if he were to be placed in the general prison population. See pp. 16-17, *supra*. 26 Hallway was commonly known as the "hallway from hell." See pp. 10-11, *supra*. Lanham was aware of 26 Hallway's and Zipp's reputation. See pp. 10-11, *supra*. This evidence easily supports the jury's finding that Lanham was well aware, both objectively and subjectively, of the substantial risk of harm Sester faced on February 14, 2003. See *Dominguez* v. *Correctional Med. Servs.*, 555 F.3d 543, 550 (6th Cir. 2009) (subjective component may be shown through "inference from circumstantial evidence," and "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious") (quoting *Terrance* v. *Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 843 (6th Cir. 2002)).

D. There Was Ample Evidence For The Jury To Find Freeman Guilty Beyond A Reasonable Doubt

Freeman argues that there was insufficient evidence establishing with

"sufficient clarity" the constitutional right at issue in Count 2. Br. 40. Freeman argues that this case presents a novel factual and legal situation that has no analogue in caselaw. Br. 41.

As explained, p. 46, *supra*, the Supreme Court has recognized that prison officials are "not free to let the state of nature take its course," and "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objectiv[e].'" *Farmer*, 511 U.S. at 833. The evidence clearly showed that, not only did Freeman let nature take its course, he actively took steps to allow inmates to punish and harm Sester. See pp. 10-12, *supra*. The evidence clearly supports the conclusion that Freeman was aware of the substantial risk of harm to Sester in Cell 101, and of his responsibilities given that risk. See pp. 6-7, 10-11, 16-17, *supra*; see also pp. 42-44, *supra*. The evidence showed that Freeman covered up the crime after the fact, further suggesting that he knew exactly what his actions did. See pp. 18-19, *supra*. There was also specific testimony concerning Sester and the risk of harm to him were he placed in the general prison population. See pp. 16-17, *supra*. This evidence further supports the jury's conclusion that Freeman was well aware of the risk Sester faced on February 14, 2003. Freeman admitted that his duty as a corrections officer was to keep inmates free from harm. See pp. 6-7, *supra*.

Freeman is also mistaken that no "decisions have imposed civil or criminal liability for pretrial punishment under facts even distantly similar" to those here.

Br. 43. In *Leary*, this Court examined a similar claim in the context of a 42 U.S.C. 1983 action. Leary, an inmate who had been charged with raping a nine year-old girl, was beaten up by other inmates shortly after being placed in a cell with other prisoners. Leary alleged that the correctional officer told two inmates that Leary had raped a nine year-old girl, 528 F.3d at 442, and claimed that the officer told him that, once the other inmates found out about him, he would not be protected by anyone at the jail, *ibid.* Another correctional officer told Leary to keep his mouth shut concerning the charges against him. *Ibid.* This Court held that the correctional officer's alleged actions had violated a clearly established constitutional right. This Court held that "the harm facing Leary was 'sufficiently serious,'" and the first correctional officer's words – about how no officer would be able protect Leary if the other prisoners learned of his charges – confirmed that the officer was subjectively aware of the risk of harm to Leary. *Ibid*. (quoting *Farmer*, 511 U.S. at 834).

Freeman's actions were, if anything, more egregious than those in *Leary*. He took *affirmative* steps to put Sester in harm's way. Freeman's contention that there is no caselaw on point in this or other circuits is meritless.[11]

Freeman's argument also mischaracterizes the facts. He attempts to reduce the case against him to his "talking to an inmate." Br. 43. As explained, however, Freeman's actions involved much more than simply talking to an inmate. It is also

[11] Freeman cites cases totally inapposite to that here. Br. 40-41.

not true that "Sester would have been placed in Cell 101 irrespective of Freeman's action." Br. 45. The whole point of the deliberate indifference theory was that Freeman knew and could have put an end to the tragic sequence of events that led to Sester's rape, or could have at least tried to so. All Freeman had to do was exercise his simple duty – a duty of which he was well aware – to protect Sester. He took no such action. There was sufficient evidence upon which to convict Freeman of Count 2.

V

THERE WAS SUFFICIENT EVIDENCE TO CONVICT LANHAM AND FREEMAN OF FALSIFYING RECORDS IN VIOLATION OF 18 U.S.C. 1519

A. Standard Of Review

See p. 37, *supra*.

B. Applicable Law

18 U.S.C. 1519 reads in full:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. 1519; see also R. 82, Jury Instructions, pp. 35, 37.

C. There Was Sufficient Evidence That Lanham Knowingly Falsified His Incident Report

Lanham argues that his incident report was not false because Sydnor testified that the detox cells were in fact contaminated that night. Further, he argues that there is a difference between a false statement and an omission, and claims his report simply omitted information, rather than affirmatively made false statements. Lanham Br. 32.

Sydnor testified that the detox cells "had an odor coming from them" that night. R. 92, Tr., p. 15; see also *id.* at 49. However, he further testified that this "by itself" would not "be a justification for moving Sester," and, significantly, stated that the other person in the same detox cell was not moved that night. *Id.* at 15-16. Most significantly, he stated that Sester was *not* moved into general population because his cell needed to be cleaned, but rather to punish him, and that he did *not* tell anyone that night that Sester was being moved to clean the cell. *Id.* at 15.

This testimony directly contradicted Lanham's written report. Far from omitting anything, Lanham affirmatively and falsely stated that Sydnor "stated that he was going to start emptying our detox to get them cleaned." R. 81, GX 5, Apx. 31. Lanham's written report contained two other false statements. First, he stated that he went down 26 Hallway to speak to Wright about Wright's being reclassified. Second, he stated that after he spoke to Wright, he went back to Class

D. The evidence, rather, showed Lanham went down Hallway 26 to tell Wright to "fuck with" Sester, and after telling Wright that, Lanham returned to the booking area. See pp. 10-12, *supra*. Lanham testified that he had asked Wright to talk to Sester about Sester's staying out of prison, not as his report stated about Wright's reclassification. See p. 16, *supra*. Thus, as Lanham himself admitted on cross-examination, his report was "inaccurate." R. 87, Tr., p. 19.

There is, therefore, no doubt that Lanham's statements in his report were false and, far from Lanham's contention, they were not omissions.[12] Nor is Lanham correct in claiming that the government argued that all Lanham did was omit things from his report. Br. 31-32. In closing, the government argued that "the defendants both purposely lied in their reports." R. 94, Tr., p. 22.

D. There Was Sufficient Evidence That Freeman Knowingly Falsified His Incident Report

Freeman argues that there was insufficient evidence establishing that he knowingly falsified his report concerning the February 14, 2003 incident. Like

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[12] Even if the government's theory were premised on Lanham's material omissions, this would still meet the element of false entry under the statute. Courts have found that material omissions constitute false entries in the context of other statutes. See, *e.g.*, *United States* v. *Ely*, 142 F.3d 1113, 1119 (9th Cir. 1997) (stating that "[e]very circuit to interpret either 18 U.S.C. § 1005 or § 1006 [both of which, like Section 1519, use the "false entry" language] has determined that material omissions are false statements for the purposes of the statutes"); *United States* v. *McCord*, 33 F.3d 1434, 1448 (5th Cir. 1994); *United States* v. *Jackson*, 621 F.2d 216, 219 (11th Cir. 1980).

Lanham, he also raises the canard that the government's evidence at best established an omission of facts rather than an affirmative lie.

Freeman wrote in his report that when he and Lanham left booking "en route back to Class D [they] went to 26 Hall [and] did a secure check for Sgt. Sydnor." R. 81, GX 4, Apx. 30. He wrote that they spoke to some prisoners in 26 Hallway and then "returned to Class D." *Ibid.* The evidence at trial established that this short statement contained several lies. First, Lanham and Freeman did not leave booking to return to Class D. The evidence overwhelming established that they left booking to solicit Bobby Wright and the prisoners in Cell 101 into their conspiracy to punish Joshua Sester. See pp. 10-12, *supra*. Second, it was false to say that Lanham and Freeman proceeded down 26 Hallway in order to perform a "secure check" of the hallway. See pp. 10-12, *supra*. Third, the evidence established that Lanham and Freeman returned to booking after talking with Wright, rather than going immediately to Class D, as Freeman claimed in his written report. See p. 12, *supra*. Freeman's argument cannot prevail. Far from simply omitting facts, sufficient evidence easily supports the jury's verdict that Freeman affirmatively lied and created a false report. See also p. 52 n.12, *supra*.

E. The Federal Investigation Did Not Need To Be Ongoing To Convict Lanham

Lanham also argues that there "was no evidence presented that a federal investigation was occurring or about to occur at the time the reports were written."

Br. 32. He continues, "[A]t the time the reports were written, Lanham was not acting with the intent to obstruct the investigation of a matter within the jurisdiction of any department or agency of the United States." Br. 32.

Lanham's argument disregards the plain language of the statute. Nothing in the statute requires that a federal investigation be ongoing at the time the false statement is made. Rather, the statute requires that the statement be made to impede an "investigation or proper administration of *any* matter *within*" the United States' jurisdiction or "in relation to or contemplation of any such matter or case." 18 U.S.C. 1519 (emphasis added). The language clearly refers to a factual question: Whether the false statement relates to a matter within the United States' jurisdiction. Here, there is no dispute that this matter – the conspiracy to harm Sester – was within the jurisdiction of the United States.

Indeed, Section 1519 is analogous to a previous version of 18 U.S.C. § 1001, which, penalized, inter alia, knowingly and willfully making materially false statements "in any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1001 (1984). See Addendum. The Supreme Court characterized the statutory requirement, that the false statement relate to a matter within federal agency jurisdiction, as a purely "jurisdictional requirement," and further held that Section 1001 "unambiguously dispenses with any requirement that the Government * * * prove that those statements were made with actual knowledge of federal agency jurisdiction." *United States* v. *Yermian*, 468 U.S. 63,

69-70 (1984).

Because 18 U.S.C. 1519 was enacted as part of the Sarbanes-Oxley Act only in 2002, the government has found no published circuit cases that address this question directly. Pub. L. No. 107-204, 116 Stat. 745 (2002). The Eleventh Circuit has simply stated in passing that Section 1519 "criminalizes the conduct of an individual who (1) knowingly (2) makes a false entry in a record or document (3) with intent to impede or influence a federal investigation." *United States* v. *Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). The Third Circuit has stated that the "plain language of the statute requires the defendant to have destroyed evidence 'knowingly' and with the 'intent' to impede an investigation or case" without referring to any knowledge of the federal nature of that investigation or case or that the investigation had already begun. *United States* v. *Lessner*, 498 F.3d 185, 196 (3d Cir. 2007), cert. denied, 128 S. Ct. 1677 (2008).

In contrast, several district courts have discussed 18 U.S.C. 1519's proper interpretation. In *United States* v. *Jho*, the court rejected the defendant's argument that there needed to be a "pending 'investigation' before liability" could attach. 465 F. Supp. 2d 618, 635 (E.D.Tex. 2006), rev'd on other grounds, 534 F.3d 398 (5th Cir. 2008). The court in *Jho* stated that "Congress apparently included the terms 'investigation or proper administration of any matter' to distinguish § 1519 from other obstruction of justice statutes. Limiting the reach of § 1519 to 'investigations' ignores Congress' intent that the statute apply to obstructive

conduct which relates to 'the proper administration of any matter.'" *Ibid.* The court concluded, "All that is required is proof that [the defendant] knowingly made false entries in a document * * * with the intent to impede, obstruct, or influence the proper administration of any matter within the jurisdiction of the United States Coast Guard." *Id.* at 636. The court stated that the *mens rea* requirement of 1519 was that it "require[d] that the defendant act *knowingly* with the *intent* to obstruct justice." *Id.* at 637 n.9. The "knowingly" did not refer to an ongoing federal investigation.

The District of Connecticut has stated that "[i]n comparison to other obstruction statutes, § 1519 by its terms does not require the defendant to be aware of a federal proceeding or *even that a proceeding be pending*." *United States* v. *Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 329 (D. Conn. 2007) (emphasis added); see also *United States* v. *Atlantic States Cast Iron Pipe Co.*, 2009 WL 792046, at *82 n.102 (D.N.J. March 23, 2009).

While in our view the statutory language is clear, if this Court finds it lacks clarity, the Court can look to Section 1519's legislative history. See *United States* v. *Parrett*, 530 F.3d 422, 429 (6th Cir. 2008). This legislative history shows that the statute was written to reach the very sort of obstructive conduct at issue in this case. The Senate Report describing 1519 stated in relevant part:

> Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the

> investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States, or such acts done either in relation to or in contemplation of such a matter or investigation. This statute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter. * * * Destroying or falsifying documents to obstruct any of these types of matters or investigations, *which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute*."

S. Rep. No. 146, 107th Cong., 2d Sess. 14-15 (2002) (emphasis added). The chief drafter of the statute, Senator Patrick Leahy, echoed a similar reading. See 148 Cong. Rec. S7418 (daily ed. July 26, 2002) (stating that Section 1519 "could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is, as a factual matter, within the jurisdiction of any federal agency"); see also Dana S. Hill, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, *18 U.S.C. § 1519*, 89 Cornell L. Rev. 1519, 1564 (2004) (quoting letter from Senator Leahy in which he states that Section 1519 "requires only proof of the defendant's intent to obstruct, impede, or influence and *not any link to the defendant's knowledge about the nature of the government's jurisdiction*") (emphasis added). This legislative history makes clear that Lanham's reading of the statute is unavailing.

VI

THE DISTRICT COURT DID NOT ERR WHEN IT SUBMITTED TO THE JURY THE QUESTION WHETHER ACTS IN FURTHERANCE OF THE CONSPIRACY INCLUDED AGGRAVATED SEXUAL ASSAULT

A. Standard Of Review

As initial matter, neither defendant objected to this instruction on these grounds during trial. See R. 88, Jury Instructions Conference, pp. 14-15 (Freeman's counsel objected to foreseeability language in aggravated sexual abuse instruction). Rather, both Lanham and Freeman first raised this argument in their motions for new trials. See R. 95, Mot. for New Trial; R. 97, Mot. for New Trial. Typically, a failure to object to jury instructions on the grounds raised on appeal results in plain error review. See, *e.g.*, *United States* v. *Hughes*, 505 F.3d 578, 597 (6th Cir. 2007); *United States* v. *Collins*, 78 F.3d 1021, 1034 (6th Cir. 1996); *United States* v. *Pierce*, 62 F.3d 818, 831 (6th Cir. 1995).

Freeman argues (Br. 48) that the question presented is one of "subject matter jurisdiction" which can be raised at any time and is reviewed *de novo*. See, e.g., *United States* v. *Bahhur*, 200 F.3d 917, 922 (6th Cir. 2000). While the government submits, *infra*, that there is no jurisdictional question at issue because the defendants were not charged under 18 U.S.C. 2241, the defendants' arguments fail under either a plain error standard or a *de novo* review.

B. Applicable Law

Lanham and Freeman were charged under 18 U.S.C. 241 with conspiring to

violate Sester's civil rights. R. 1, Indictment, p. 2. The indictment charged that the acts in furtherance of the conspiracy included aggravated sexual abuse. *Ibid.* 18 U.S.C. 241 establishes a 10-year maximum sentence for those convicted of the statute, and includes an increased penalty of "any term of years or for life," if the conspiracy included acts of "aggravated sexual abuse" or attempted aggravated sexual abuse. Because the question of whether an act of aggravated sexual abuse occurred is a fact that "increases the penalty" for the violation of 18 U.S.C. 241 "beyond the prescribed statutory maximum," the question was required to be "submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). The district court properly submitted the question of whether aggravated sexual abuse occurred to the jury and used the definition of aggravated sexual abuse found in federal law in 18 U.S.C. 2241 (1998). At the time of the crime, 18 U.S.C. 2241 (1998), stated that "[w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act" by force or threat shall be punished as set forth therein. See also pp. 38, 44-45, *supra* (discussing 18 U.S.C. 241 and 242).

C. The District Court Properly Submitted The Issue Of Aggravated Sexual Abuse To The Jury

Lanham and Freeman do not argue that the district court misarticulated the elements of that crime. Rather, they argue that to be found guilty of a 241

conspiracy that involved aggravated sexual abuse, the government needed to meet an additional jurisdictional element not present in 241, but present in 18 U.S.C. 2241. Both argue correctly that in 2003, the federal crime of aggravated sexual abuse (18 U.S.C. 2241) required that the abuse occurred within the special maritime and territorial jurisdiction of the United States or in a federal prison. Because it was not proven at trial that the Grant County Detention Center was within the special maritime jurisdiction or that it was a federal prison in 2003, they argue that it was error to have submitted the question whether the aggravated sexual abuse occurred to the jury. Lanham Br. 21; Freeman Br. 48-49.

The defendants' argument makes no legal sense. Neither defendant was charged under 18 U.S.C. 2241. Both defendants were charged with conspiring to violate civil rights under 18 U.S.C. 241. The United States has jurisdiction to enforce 18 U.S.C. 241 anywhere in the United States against anyone whose conduct meets the elements of that statute. See, *e.g.*, *United States* v. *Price*, 383 U.S. 787, 805 (1966) ("We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it.").

To enhance a sentence under 18 U.S.C. 241's aggravated sexual assault clause or under 18 U.S.C. 242's similar clause, a district court must give some content to the term "aggravated sexual assault." One way district courts do this is

by referencing the elements of sexual assault found in 18 U.S.C. 2241, simply to define what entails a sexual assault. See, *e.g.*, *United States* v. *Holly*, 488 F.3d 1298, 1301 (10th Cir. 2007) ("Because aggravated sexual abuse is not defined in § 242, the statute necessarily requires reference to 18 U.S.C. § 2241, the federal aggravated sexual abuse statute."), cert. denied, 128 S. Ct. 1870 (2008). The defendants cite no case in which a court has found that to convict a defendant of conspiracy to violate civil rights that includes an act of aggravated sexual abuse, one must meet 18 U.S.C. 2241's *jurisdictional* component. Indeed, such a reading effectively would nullify Section 241's language concerning aggravated sexual abuse.

The Second Circuit has held directly that Section 2241's jurisdictional component is not a bar to employing its elements in a Section 242 prosecution. The court rejected as "baseless" the defendant's argument that the victims "had no federally protected right to be free from aggravated sexual abuse when such abuse did not satisfy the jurisdictional requirements of federal statutory sexual abuse crimes." *United States* v. *Giordano*, 442 F.3d 30, 47 (2d Cir. 2006), cert. denied, 549 U.S. 1213 (2007).

Because both 18 U.S.C. 241 and 242 allow for enhanced sentences where the underlying violation includes acts of "kidnapping" but do not define kidnapping, the manner in which courts handle that penalty enhancement is also illustrative for the question before this Court. For example, in *United States* v.

Guidry, 456 F.3d 493 (5th Cir. 2006), cert. denied, 549 U.S. 1139 (2007), the defendant argued that Section 242's reference to kidnapping required that the court employ the definition of kidnapping in the federal kidnapping statute, 18 U.S.C. 1201, which included an interstate nexus. Because the defendant had not taken the victim across state lines, the defendant argued that "his conduct did not meet the elements of kidnapping for purposes of [18 U.S.C. 242]." *Guidr*y, 456 F.3d at 510. The Fifth Circuit rejected his argument:

> If Guidry were charged with violating the federal kidnapping statute when he took [the victim] to an isolated spot in order to sexually assault her, for the purpose of federal jurisdiction he indeed would have had to transport [her] out of the state. But here, Guidry was charged with violating [the victim's] civil rights by kidnapping her. Federal jurisdiction exists without interstate abduction because his action constituted a violation of [the victim's] constitutional rights. In the absence of § 242 requiring "kidnapping" to comport with the elements of the federal kidnapping statute, the generic, contemporary meaning of kidnapping statute suffices.

Id. at 510-511. The same logic applies in this case.[13]

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[13] Courts of appeals also have routinely rejected this jurisdictional argument in the Guidelines context. See, *e.g.*, *United States* v. *Pipkins*, 378 F.3d 1281, 1300 n.15 (11th Cir. 2004) (holding that the "criminal sexual abuse guideline applies without regard to the jurisdictional requirements of 18 U.S.C. § 2241, where the underlying relevant conduct is present"); *United States* v. *Dolloph*, 75 F.3d 35, 39-40 (1st Cir. 1996) (same); *United States* v. *Pollard*, 986 F.2d 44, 46-47 (3d. Cir. 1993) (same).

VII

THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR IN DECLINING TO APPLY § 3B1.2(b) TO FREEMAN'S SENTENCE

A. Standard Of Review

This Court reviews "district court's denial of a mitigating role adjustment to a defendant's offense level for clear error." *United States* v. *Salgado*, 250 F.3d 438, 458 (6th Cir.), cert. denied, 534 U.S. 936 (2001); *United States* v. *Searan*, 259 F.3d 434, 447 (6th Cir. 2001). "The culpability determination is 'heavily dependent upon the facts.'" *Ibid.* (quoting U.S.S.G. § 3B1.2). "To be clearly erroneous, * * * a decision must strike [this Court] as more than just maybe or probably wrong; it must ... strike [the Court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *United States* v. *Perry*, 908 F.2d 56, 58 (6th Cir. 1990) (citation omitted).

B. Applicable Law

U.S.S.G. § 3B1.2(b) directs courts to reduce a defendant's offense level by two levels where that defendant "was a minor participant in any criminal activity." This Court has held that "[t]he 'minor participant' reduction is available only to a party who is 'less culpable than most other participants' and 'substantially less culpable than the average participant.'" *United States* v. *Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993) (quoting U.S.S.G. § 3B1.2, comment. (n.3) & (backg'd.)). This Court has held that a "defendant does not become a minor participant simply

because others planned a scheme and made all the arrangements for its accomplishment. * * * Although [a] defendant may be less culpable than some of his coconspirators, this does not require a finding that he was *substantially* less culpable than the others." *United States* v. *Miller*, 56 F.3d 719, 720 (6th Cir. 1995) (citation omitted).

C. The District Court's Finding Was Not Clearly Erroneous

At Freeman's sentencing, the district court rejected the minor role reduction for the following reasons:

> In this particular case, while [Freeman] may be somewhat minimally less culpable than Mr. Lanham, the Court does not believe that he would fit within the definition of substantially less culpable than the average participant. While he did not have as much of a speaking role, his activities, first his knowledge of what was going on and his participation in the agreement of the defendants was substantial. He added weight to Mr. Lanham's statements and, as indicated during trial, he indicated agreement with the activities that were being requested by Mr. Lanham. And under those circumstances, the Court believes it would be improper to reduce his role as a minor or minimal participant.

R. 142, Freeman S.Tr., p. 9. Freeman argues that the district court erred in making this finding. Br. 51. He states that all he did was tease Sester and nod his head, and that "Sester's assault, even under the Government's theory, would have occurred, irrespective of Freeman's conduct." Br. 51.

As an initial matter, Freeman's rendition of the facts has but a tenuous attachment to the evidence. The whole point of the deliberate indifference theory

is that, but for Freeman's deliberate indifference, he could have prevented Sester's horrendous assault, rape, and beating. While it is true that Freeman did not rape or assault Sester nor placed Sester in the cell, Freeman, along with Lanham, solicited Bobby Wright and the prisoners in Cell 101 into the conspiracy to punish Sester. At any point during the time between Sester's arrival and his placement in the cell or while Sester was in the cell, Freeman could have attempted to put a stop to the events. Not only was he deliberately indifferent to Sester's plight, he actively joined in putting Sester at substantial risk of harm. After the rape, Freeman was an active participant in the cover-up of the crime. Freeman was not substantially less culpable than the other participants in the conspiracy. The district court's determination was well-grounded. The district court did not commit any error, let alone clear error.

VIII

THE DISTRICT COURT PROPERLY DENIED FREEMAN'S *BRADY* MOTION AS THE EVIDENCE ALLEGEDLY WITHHELD WAS NOT KNOWN TO THE GOVERNMENT BEFORE TRIAL AND IT WAS NOT EXCULPATORY

A. Standard Of Review

This Court reviews "the district court's decision to deny a motion for new trial on the basis of newly discovered evidence or * * * violations [of *Brady* v. *Maryland*, 373 U.S. 83 (1963)] under an abuse of discretion standard." *United States* v. *White*, 492 F.3d 380, 408 (6th Cir. 2007) (citing *United States* v. *Frost*,

125 F.3d 346, 382 (6th Cir. 1997)); *United States* v. *Jones*, 399 F.3d 640, 647 (6th Cir. 2005). A district court abuses this "discretion when it relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law." *White*, 492 F.3d 408 (citing *United States* v. *Heavrin*, 330 F.3d 723, 727 (6th Cir. 2003)).

B. Applicable Law

Under *Brady* the government is required "to disclose exculpatory and impeachment evidence that is 'material either to guilt or to punishment.'" *Doan* v. *Carter*, 548 F.3d 449, 459 (6th Cir. 2008) (quoting *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999)). "A *Brady* violation includes three elements: (1) the evidence 'must be favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the 'evidence must have been suppressed by the State, either willfully or inadvertently'; and (3) 'prejudice must have ensued.'" *Ibid.* (quoting *Strickler*, 527 U.S. at 281-282). Evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 459 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). Such a "reasonable probability of a different result is ... shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Ibid.* (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995)) (internal quotation marks omitted). In its materiality review, this Court "considers the cumulative effect of the undisclosed evidence, not each item

in isolation." *Id.* at 459-460. If "there is a reasonable probability that ... the result of the proceeding would have been different an error cannot 'subsequently be found harmless under *Brecht*.'" *Id.* at 460 (quoting *Kyles*, 514 U.S. at 436).

The government's *Brady* obligations obviously do not extend to "information that it does not possess or of which it is unaware." *United States* v. *Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir. 1985). "Where the prosecutor had no actual or constructive possession of information, there can be no *Brady* violation for failure to disclose it." *Hollman* v. *Wilson*, 158 F.3d 177, 180 (3d Cir. 1998).

C. The District Court Did Not Abuse Its Discretion In Denying A New Trial Under Brady

1. The District Court Correctly Found That The Government Was Unaware Of The Allegedly Exculpatory Evidence

Freeman asserts that the government "did not disclose to the defense that [William] Chandler had told them that the video depicted Shawn Freeman at a cell other than Cell 101." Br. 53. He further alleges that the "FBI was aware of this information and failed to disclose it. Plainly, the evidence was suppressed." Br. 57. He argues that Chandler's would testify that Freeman walked to a different cell in 26 Hallway. Br. 52.

The district court found "that the government did not have the information in its possession that the defendants would attempt to assert that it had." R. 131, *Brady* Hearing Tr., p. 66. It found that there was no "information that was

suppressed, intentionally or otherwise." *Ibid.* Freeman points to nothing in the record to upset the district court's finding that the government did not have knowledge of Chandler's allegedly exculpatory testimony concerning the videotape.

The record overwhelming supports this finding. Chandler testified that he was "pretty confident" that he had told the FBI that on the destroyed videotape from February 14, 2003, he had seen Lanham walking toward Cell 101 and Freeman walking in the opposite direction toward a different cell when the two of them reached 26 Hallway. R. 131, *Brady* Hearing Tr., pp. 9-10. Chandler's testimony lacked credibility. On cross-examination at the *Brady* hearing, Chandler admitted that in at least one of his prior statements under oath he had lied. *Id.* at 21. He admitted that he signed an affidavit containing information not within his personal knowledge, and agreed that every single statement he had signed containing information outside his personal knowledge was designed to benefit Freeman and Lanham. *Id.* at 28, 30-31.

The record also included Chandler's prior inconsistent statements concerning what he had seen on the videotape. In response to whether he had seen Lanham at Cell 101, Chandler testified under oath in a civil deposition that on the videotape, "all you could see is [Lanham and Freeman] walking down the hall," and that "you really can't see" anything beyond walking down the hall. R. 106, Govt. Resp. to Freeman Mot. New Trial, Exh. 1, Chandler Depo., p. 99. Chandler

also testified to the grand jury that while he had seen Sydnor and Powell walking "down the hall," he could not "really see the door very well." *Id.*, Exh. 2, Chandler G.J. Test., p. 36.

FBI Special Agents Glenn Van Airsdale and Mary Trotman testified that Chandler never told them about seeing Freeman and Lanham walking in opposite directions. R. 131, *Brady* Hearing Tr., pp. 51-52, 60. Van Airsdale stated that the question of Lanham and Freeman's involvement was significant at the time, *id.* at 56, and that Chandler never told him what Chandler claimed at the hearing to have told the FBI, *id.* at 51-52. Trotman testified that Chandler never told them that he had seen Freeman on the videotape. *Id.* at 60. Given this evidence and Freeman's failure to argue anything from the record, this Court should hold that the district court correctly found that the government was not in possession of the allegedly exculpatory information.

2. The District Court Did Not Err In Finding Chandler's New Testimony Not To Be Favorable To Freeman

Even assuming the government did possess Chandler's testimony concerning Lanham and Freeman walking in different directions in 26 Hallway and that the testimony was true, the district court did not abuse its discretion in finding that this "evidence was not favorable" to Freeman. R. 131, *Brady* Hearing Tr., p. 66. The district court found that Chandler's testimony did not "go to the issue of everything that happened in the hallway." *Id.* at 65.

The record supports this finding. Chandler testified that he did not observe the videotape for the entire time Freeman and Lanham were in 26 Hallway. R. 131, *Brady* Hearing Tr., p. 39. Chandler did not see Freeman make any head gestures even though Freeman testified he had made these gestures. *Id.* at 40; Cf. R. 87, Tr., p. 73 (Freeman). This indicates that Chandler did not see the whole tape. His proposed testimony did not even contradict Wright's testimony that Freeman and Lanham were both at Cell 101, but simply indicates that at one point Freeman was standing at a different cell. The district court did not abuse its discretion in finding that this testimony was not favorable to Freeman.

3. The Suppressed Evidence Would Not Have Changed The Outcome Of Trial

Even assuming that the testimony was favorable to Freeman, it would not have changed the outcome of the trial.

First, Chandler's testimony was demonstrably inconsistent with other statements Chandler made, and, therefore, Chandler's testimony would have been subject to damaging impeachment on cross-examination at trial. Second, Chandler's testimony furthers a theory that was not central to Freeman's guilt, and which the jury rejected. Freeman's claim to have been standing a few feet behind Lanham, rather than right beside him, was not crucial to an adjudication of Freeman's guilt. Freeman was convicted, among other things, of a *conspiracy* to violate Joshua Sester's civil rights. The government was not required to prove

that Freeman participated in every aspect of the conspiracy, but only that he was part of an *agreement* to violate Joshua Sester's rights. As explained, pp. 42-44, *supra*, there was ample evidence in this record that Freeman was part of this agreement.

Freeman also misconstrues the import of Bobby Wright's testimony. Wright testified that Freeman was with Lanham when Lanham informed Cell 101 that he wanted the inmates there to "fuck with" Joshua Sester. Wright also testified that Freeman nodded his head in agreement with Lanham's statements to this effect. As the jury was informed through testimony and tangible evidence, the area surrounding the cells in 26 Hallway is a circular pod, see p. 11, *supra*, and that inmates inside the cells in the pod can easily see and hear people across the pod. Most importantly, Freeman himself corroborated Bobby Wright's testimony that he shook his head in an effort to communicate with an inmate housed inside Cell 101. See p. 12, *supra*. Of course, Freeman claims that Wright misinterpreted the meaning of his nod. However, that issue is clearly one for the jury to resolve. If Freeman corroborates Wright's testimony about the communicative nodding of his head, which Freeman claims occurred while he was standing at Cell 98 or 99, then there is no meaningful dispute for Chandler's testimony to settle.[14] The

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[14] Notably, Chandler testified that he saw Freeman go to *Cell 96*. R. 131, *Brady* Hearing Tr., p. 27. This statement actually contradicts Mr. Freeman's trial testimony, in which he stated that he was talking to inmates in Cells 98 and 99. R. 87, Tr., p. 53.

addition of Chandler's testimony on a matter that is immaterial to the key question at issue plainly would not have affected the jury's verdict.

CROSS-APPEAL

IX

THE DISTRICT COURT ERRED BY REFUSING TO APPLY THE 2008 SENTENCING GUIDELINES BECAUSE OF *EX POST FACTO* CONCERNS

A. Standard Of Review

Post-*United States* v. *Booker*, 543 U.S. 220 (2005), this Court has held that a "sentence will be found procedurally unreasonable when the district court failed to accurately calculate the sentencing recommendation of the United States Sentencing Guidelines." *United States* v. *Anderson*, 526 F.3d 319, 323 (6th Cir. 2008) (citing *United States* v. *Hazelwood*, 398 F.3d 792, 800-801 (6th Cir. 2005) & *Gall* v. *United States*, 128 S. Ct. 586, 596 (2007)). "Generally a remand will be warranted when the district court committed an error in computing the Guidelines' recommended sentencing range." *Id.* at 323-324. While remand "will not be required" when the Court is convinced that "any such error did not affect the district court's selection of the sentence imposed," *id.* at 324 (citing *Hazelwood*, 398 F.3d at 801), this Court has stated that "it may be that an incorrect Guidelines calculation * * * can rarely, if ever, be found harmless," *id.* at 330 (citing *Gall*, 128 S. Ct. at 597).

"*Ex post facto* challenges present questions of law" reviewed *de novo*. *United States* v. *VanHoose*, 437 F.3d 497, 500 (6th Cir.), cert. denied, 549 U.S.

917 (2006).

B. The District Court Should Have Applied The 2008 Guidelines

The district court erred as a matter of law when it applied the 2002 Guidelines instead of the 2008 Guidelines because of *Ex Post Facto* Clause concerns. Under the Sentencing Guidelines, the district court is to apply the version of the Guidelines in effect at the time of sentencing unless it "determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause." U.S.S.G. § 1B1.11(b)(1). In that case, it "shall use the Guidelines manual in effect on the date that the offense of conviction was committed." *Ibid.*

In this case, the offense was committed in 2003 when the 2002 Guidelines were in effect. The 2008 Guidelines, in effect at the time of sentencing, establish a higher base offense level for the offense of Criminal Sexual Abuse, Section 2A3.1 (30 as opposed to 27 under the 2002 Guidelines). At sentencing, the United States argued that using the current advisory guidelines, which established a more onerous offense level than those in effect on the date of the crime, did not violate the *Ex Post Facto* Clause under the new post-*Booker* advisory guidelines regime. The district court stated that it "tend[ed] to agree * * * with the legal argument * * * made" concerning the *Ex Post Facto* Clause, but believed itself bound by Sixth Circuit precedent to impose the 2002 Guidelines. R. 143, Lanham S.Tr., p. 12.

The *Ex Post Facto* Clause, U.S. Const. Art. I, § 9, Cl. 3, "bars application of

a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" *Johnson* v. *United States*, 529 U.S. 694, 699 (2000) (quoting *Calder* v. *Bull*, 3 U.S. 386, 390 (1798)). In *Miller* v. *Florida*, 482 U.S. 423 (1987), the Supreme Court interpreted the *Ex Post Facto* Clause to bar the retroactive application of a revised version of state sentencing guidelines that increased a defendant's presumptive sentencing range. When the federal Sentencing Guidelines were considered mandatory, the courts of appeals, including this Court, uniformly applied the holding in *Miller* to the Guidelines. See, *e.g.*, *United States* v. *Kussmaul*, 987 F.2d 345, 351-352 (6th Cir. 1993); *United States* v. *Armstead*, 114 F.3d 504, 510 (5th Cir. 1997); *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994).

But the *Ex Post Facto* Clause no longer applies under the new sentencing regime. Under *Booker*, the Guidelines are neither mandatory nor binding on the sentencing court, and the Supreme Court's recent decisions explaining the role of the Guidelines in post-*Booker* sentencing have made clear that the Guidelines have a far different role than the government and most courts of appeals previously believed.

The Guidelines are just one of a number of factors a court must consider in imposing a reasonable sentence. *Kimbrough* v. *United States*, 128 S. Ct. 558, 564 (2007). A court is not entitled to rely solely upon the Guidelines range, but "must consider the § 3553(a) factors in exercising [its] independent judgment about what

sentence to impose." *United States* v. *Cruz* 461 F.3d 752, 754 (6th Cir. 2006); see also *Rita* v. *United States*, 551 U.S. 338, 351 (2007). In *Rita*, the Supreme Court held that, although a court of appeals may presume that a within-Guidelines sentence is reasonable, that presumption is optional. *Rita*, 551 U.S. at 341, 347, 354. The Supreme Court further held that any presumption does not have "independent legal effect, but simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the [Sentencing] Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Rita*, 551 U.S. at 350-351. And the Supreme Court held that the presumption of reasonableness is only "an appellate court presumption" and may not be applied by a sentencing court. *Id.* at 351.

Moreover, "a sentence outside the Guidelines carries no presumption of unreasonableness," *Irizarry* v. *United States*, 128 S. Ct. 2198, 2202 (2008), and a court may vary from the Guidelines whenever it determines the Guidelines unreasonable in light of the Section 3553 factors. *Kimbrough*, 128 S. Ct. at 570, 576. In *Irizarry*, the Supreme Court explained that, after *Booker*, defendants no longer have "[a]ny expectation subject to due process protection" that they will receive a sentence within the Guidelines range. 128 S. Ct. at 2202. Thus, the Guidelines constitute advice, not the sort of legally binding rules that establish a "high hurdle that must be cleared before discretion can be exercised" to impose a

different sentence prohibited by *Miller*. 482 U.S. at 435.

The *Ex Post Facto* Clause applies to laws that *bind* a court. Clearly, it would extremely problematic were a court to apply more onerous legally binding law to a crime committed under a legally binding, more lenient sentencing regime. However, based on post-*Booker* changes in the sentencing scheme, the Guidelines are no longer legally binding and therefore no longer implicate the clause.

The Seventh Circuit has held so explicitly. In *United States* v. *Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), cert. denied, 127 S. Ct. 3055 (2007), the court held that post-*Booker* changes in the law established that the *Ex Post Facto* Clause does not apply to application of new Sentencing Guidelines. "We conclude that the ex post facto clause should apply only to laws and regulations that bind rather than advise, a principle well established with reference to parole guidelines whose retroactive application is challenged under the ex post facto clause". *Ibid*. See also *United States* v. *Rodarte-Vasquez*, 488 F.3d 316, 324-25 (5th Cir. 2007) (Jones, C.J., concurring) (agreeing with the *DeMaree* analysis); but see *United States* v. *Turner*, 2008 WL 5101309, at *4 (D.C. Cir. Dec. 5, 2008) (*Ex Post Facto* Clause still applies to use of advisory Guidelines); *United States* v. *Carter*, 490 F.3d 641, 643 (8th Cir. 2007).

The conclusion that the Guidelines no longer implicate the *Ex Post Facto* Clause is all the more evident given that in reaching its sentencing determination, a sentencing court may (even if not required to do so) reasonably take into

consideration that more recent versions of the Sentencing Guidelines express the current view of the seriousness of the offense and would result in a higher advisory sentencing range. See *Demaree*, 459 F.3d at 795.

Also, as Lanham conceded in the district court, this Court has not squarely addressed this question; it has, though, offered *dicta* strongly supporting the government's position. In *United States* v. *Barton*, 455 F.3d 649, 652 (6th Cir.), cert. denied, 549 U.S. 1087 (2006), this Court addressed whether retroactively applying *Booker,* in a manner that adversely affected the defendant, violated the Due Process Clause. This Court stated:

> When the Guidelines were mandatory, defendants faced the very real prospect of enhanced sentences caused by changes in the Guidelines or changes in the interpretation of Guidelines that occurred after they had committed their crimes. Now that the Guidelines are advisory, the Guidelines calculation provides no such guarantee of an increased sentence, which means that the Guidelines are no longer akin to statutes in their authoritativeness. As such, the Ex Post Facto Clause itself *is* not implicated.

Barton, 455 F.3d at 655 n.4 (emphasis added).

In *United States* v. *Duane*, 533 F.3d 441, 446 (2008), this Court stated that *Barton* had not conclusively resolved the issue: "Although we recognize that some language from * * * *Barton* * * * could be read to suggest that a change to the Guidelines does not raise an *ex post facto* concern, we decline to read *Barton* as announcing such a broad rule." Instead, the Court merely "assume[d] *arguendo*

that a retroactive change to the Guidelines *could* implicate the *Ex Post Facto* Clause." *Ibid.* (emphasis added). Thus, although this Court has not conclusively resolved this issue, its thorough analysis in *Barton* clearly supports the conclusion the government argues here. And, in our view, Supreme Court precedent compels the conclusion that the *Ex Post Facto* Clause is not implicated by applying the more onerous 2008 Guidelines here. This Court should now hold that no *Ex Post Facto* concerns prohibit the application of the 2008 Guidelines in this case.

C. This Error Was Not Harmless

Had the district court applied the 2008 Guidelines, Lanham's advisory guideline range would have been 292 to 365 months, instead of the 210 to 262 months it was under the 2002 Guidelines. The 180 month sentence the district court imposed is substantially lower than the 2000 Guideline range. Similarly, under the 2008 Guidelines, Freeman's adjusted offense level would have been 292 to 365 months. His sentence of 168 months is considerably lower than that range. With respect to both defendants the sentence imposed was procedurally unreasonable and the error certainly was not harmless. This Court should remand for resentencing under the 2008 Guidelines.

The district court's post-trial order denying Lanham's Motion for Bond Pending Appeal further suggests that this error was not harmless. The district court stated that "if any error occurred during the sentencing process, it related to the substantial downward variance given to the Defendant from his guideline

range." R. 129, Memorandum and Order Denying Lanham's Motion for Bond Pending Appeal, p. 3. If the district court had been starting from a higher advisory guideline range, even if it had decided to reduce the sentences somewhat, it very likely would have imposed higher sentences to each defendant. Resentencing therefore is appropriate.

X

THE DISTRICT COURT'S REFUSAL TO APPLY THE "LEADER OR ORGANIZER" ENHANCEMENT TO LANHAM'S GUIDELINE CALCULATION WAS LEGAL ERROR

A. Standard Of Review

The standard of review this Court applies to "a district court's imposition of an enhancement under § 3B1.1(a) is 'subject to some debate.'" *United States* v. *Walls*, 546 F.3d 728, 734 (6th Cir. 2008) (quoting *United States* v. *McDaniel*, 398 F.3d 540, 551 n.10 (6th Cir. 2005)). It is an open question whether a *de novo* standard applies to the legal question involved in a Section 3B1.1 application. *Ibid.* As explained, *infra*, the district court's refusal to apply the leadership enhancement was premised on a clear legal error, and under either a *de novo* or a more deferential standard this Court should vacate the district court's determination.

B. Applicable Law

When a "defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the offense level is

increased four levels. U.S.S.G. § 3B1.1(a). A "participant" is defined under the application notes of the Guidelines to be "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, comment. (n.1). The application notes further state that to "qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." Sentencing Guidelines § 3B1.1, comment. (n.2). In other words, "to impose a § 3B1.1(a) enhancement, a court must find that the defendant 'exerted control over at least one individual within a criminal organization.'" *Walls*, 546 F.3d at 735 (citation omitted). The notes list a number of "[f]actors the court should consider," including: "the exercise of decision making authority, the nature of participation in the commission of the offense, *the recruitment of accomplices*, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1, comment. (n.4) (emphasis added). The notes also state that "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." *Ibid.*; see also *Walls*, 546 F.3d at 734-735.

C. The District Court Legally Erred In Refusing To Apply The Leadership Enhancement

The district court stated on several occasions that it was "a close question"

as to whether to apply the enhancement, R. 143, Lanham S.Tr., pp. 10, 13, and recognized the effect of Lanham's exhortation of the inmates to violence, *id.* at 11-12, 19. The only explicit reason the district court gave for declining to impose the enhancement, however, was the statement that "[u]nder the facts of this particular case, it would not appear that the *initial idea* for the punishment of the victim was Mr. Lanham's idea." *Id.* at 10 (emphasis added).

This was legal error. A number of courts have concluded that the fact that a defendant did not originate the idea of a criminal enterprise is not a legal basis for declining to apply the enhancement. For instance, the Ninth Circuit has recently stated that the "organizer/leader role determination under § 3B1.1(a) does not hinge on the issue of which co-conspirator first conceives of the idea to commit the offense." *United States* v. *Ingham*, 486 F.3d 1068, 1077 (9th Cir.), cert. denied, 128 S. Ct. 403 (2007); see also *United States* v. *Ivory*, 11 F.3d 1411, 1414 (7th Cir. 1993) (a "defendant need not be *the* creator of the criminal scheme or enterprise * * * in order to be an organizer or leader"); *United States* v. *DeRiggi*, 72 F.3d 7, 8 (2d Cir. 1995) (while defendant "may not have been the scheme's inventor or originator, he was clearly one of its leaders"). While this Court has not spoken on the question of origination, it has held the "key issue" in deciding whether to apply the leader/organizer enhancement is a defendant's "relative responsibility." *United States* v. *Henley*, 360 F.3d 509, 517 (6th Cir. 2004). This is also the clear implication of the application notes guidance that more than one

person can qualify as a leader or organizer. U.S.S.G. § 3B1.1, comment. (n.4).

The district court's sole explicit reason for declining to apply the enhancement was not a sufficient legal basis upon which to decline to apply this upward adjustment. The harm caused by this legal error is all the more evident given two other factors. First, the district court found application of the leadership enhancement to be a close question. Second, the district court made numerous factual findings that supported the application of the enhancement. The district court recognized that "Mr. Lanham chose the particular cell, Cell 101" and that Lanham directed the inmate in the cell on what he was to do (*i.e.*, an organizer of one of the participants). R. 143, Lanham S.Tr., pp. 11-12 ("[T]he Court believes that the stronger language was given as to what the persons inside the cell were to do, the manner in which they were to handle the victim."). The district court also stated that Lanham "laid the groundwork for what was to follow in Cell 101 by his conversations with" Bobby Wright. *Id.* at 19. But for the district court's *legally* erroneous belief that Lanham had to originate the conspiracy to be considered a leader or organizer, its factual findings clearly supported the application of this enhancement. Had this enhancement been applied Lanham would have faced a higher Guideline range.[15] This legal error was not harmless and this Court should

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[15] Under the 2002 Guidelines Lanham's adjusted offense level, with the leadership enhancement, would have been a 41 yielding a guideline ranges of 324-405 months. U.S.S.G. § 5A (2002). Under the 2008 Guidelines, Lanham's adjusted offense level, with the leadership enhancement, would have been 44 (43

(continued...)

remand for resentencing.

[15](...continued)
being the highest possible), yielding a guideline range of life. U.S.S.G. § 5A & comment. (n.2) (2008).

CONCLUSION

The Court should affirm the defendants' convictions and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect X4 and contains 20,985 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

In addition, I hereby certify that I have signed the original of the foregoing document and will retain the original signed document for a period not less than the maximum allowable time to complete the appellate process.

/s/ Conor B. Dugan
CONOR B. DUGAN
Attorney

June 3, 2009

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Docket Number	Document Description
1	Indictment
78	Lanham Jury Verdict Form
79	Freeman Jury Verdict Form
81	Exhibit and Witness List
82	Jury Instructions
86	Transcript Vol. 2b, 8/12/08
87	Transcript Vol. 3b, 8/13/08
88	Jury Instructions Conference, 8/13/08
89	Transcript of Arraignment of Syndor, 8/8/08
90	Transcript Vol. I-A, 8/11/08
91	Transcript Vol. 1-C, 8/11/08
92	Transcript Vol. 2-A, 8/12/08
93	Transcript Vol. III-A, 8/13/08
94	Transcript of Proceedings Vol IV, 8/14/08
95	Motion for New Trial
97	First Motion for Acquittal, Motion for New Trial
106	Response in Opposition by USA to Freeman's Motion for New Trial
108	Lanham Sentencing Memorandum
111	Freeman Sentencing Memorandum
120	Lanham Final Judgment

122	Freeman Final Judgment
129	Memorandum Opinion and Order
131	Transcript of Proceedings (Brandy Hearing), 12/8/08
135	Lanham Presentence Report
137	Freeman Presentence Report
142	Freeman Sentencing Transcript, 12/8/08
143	Lanham Sentencing Transcript, 12/8/08

UNITED STATES CODE

1982 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES, IN FORCE
ON JANUARY 14, 1983

Prepared and published under authority of Title 2, U.S. Code, Section 285b
by the Office of the Law Revision Counsel of the House of Representatives

VOLUME SEVEN

TITLE 17—COPYRIGHTS
TO
TITLE 19—CUSTOMS DUTIES

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1983

AMENDMENTS

1982—Pub. L. 97-398, § 3, Dec. 31, 1982, 96 Stat. 2010, added item 1028.

1974—Pub. L. 93-406, title I, § 111(a)(2)(B)(iii), Sept. 2, 1974, 88 Stat. 852, substituted "Employee Retirement Income Security Act of 1974" for "Welfare and Pension Plans Disclosure Act" in item 1027.

1967—Pub. L. 90-19, § 24(e)(1), (2), May 25, 1967, 81 Stat. 28, included "Department of Housing and Urban Development" in item 1010 and substituted the same for "Public Housing Administration" in item 1012, respectively.

1962—Pub. L. 87-420, § 17(d), Mar. 20, 1962, 76 Stat. 42, added item 1027.

1951—Act Oct. 31, 1951, ch. 655, § 25, 65 Stat. 720, substituted, in item 1012, "Public Housing Administration" for "United States Housing Authority".

1949—Act May 24, 1949, ch. 139, §§ 18, 19, 63 Stat. 92, corrected spelling of "1016. Acknowledgment etc.", and substituted "officers" for "offices" in "1019. Certificates by consular officers."

CROSS REFERENCES

Alien registration, fraud and false statements, see section 1306 of Title 8, Aliens and Nationality.

Carriers' reports to Interstate Commerce Commission, false entries, see section 11909 of Title 49, Transportation.

China Trade, false or fraudulent statements prohibited, see section 158 of Title 15, Commerce and Trade.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 7 section 12a; title 15 sections 78o, 80b-3; title 29 section 1031.

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 749.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 80 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

Section 80 of title 18, U.S.C., 1940 ed., was divided into two parts.

The provision relating to false claims was incorporated in section 287 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "or any corporation in which the United States of America is a stockholder" in said section 80 were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

In addition to minor changes of phraseology, the maximum term of imprisonment was changed from 10 to 5 years to be consistent with comparable sections. (See reviser's note under section 287 of this title.)

SHORT TITLE OF 1982 AMENDMENT

Section 1 of Pub. L. 97-398 provided: "That this Act [enacting sections 1028 and 1738 of this title and amending section 3001 of Title 39, Postal Service] may be cited as the 'False Identification Crime Control Act of 1982'."

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

CROSS REFERENCES

Conspiracy to defraud Government in regard to false claims, see section 286 of this title.

Conspiracy to defraud United States, see section 371 of this title.

Education, section as applicable to National Defense Education Program, see section 581 of Title 20, Education.

False claims for pensions, see section 289 of this title.

False claims for postal losses, see section 288 of this title.

False entry or certificate by revenue officer or agent, see section 7214 of Title 26, Internal Revenue Code.

Falsification of postal returns to increase compensation, see section 1712 of this title.

Fraudulent claims, generally see section 287 of this title.

National Science Foundation scholarships or fellowships, applicability of section to loyalty affidavits, see section 1874 of Title 42, The Public Health and Welfare.

Passports, false statements in application, see section 1542 of this title.

Patent declaration in lieu of oath; warning in document of punishment for willful false statements and the like under this section, see section 25 of Title 35, Patents.

Public buildings, section as applicable to statements by contractors, see section 276c of Title 40, Public Buildings, Property, and Works.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title; title 7 section 136h; title 12 section 1457; title 15 section 3413; title 19 section 2515; title 20 section 581; title 22 sections 1623, 3622; title 35 section 25; title 40 section 276c; title 42 sections 1874, 2000b-3, 2000c-6, 3426, 3795a; title 43 sections 1212, 1812.

UNITED STATES CODE

1982 EDITION

SUPPLEMENT I

CONTAINING THE GENERAL AND PERMANENT LAWS OF THE UNITED STATES, ENACTED DURING THE 98TH CONGRESS, FIRST SESSION

Prepared and published under authority of Title 2, U.S. Code, Section 285b, by the Office of the Law Revision Counsel of the House of Representatives

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VOLUME ONE

TITLE 1—GENERAL PROVISIONS

TO

TITLE 41—PUBLIC CONTRACTS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1984

$10,000 or imprisoned not more than ten years, or both.

(b) Whoever, with knowledge that such Treasury check or bond or security of the United States is stolen or bears a falsely made or forged endorsement or signature buys, sells, exchanges, receives, delivers, retains, or conceals any such Treasury check or bond or security of the United States that in fact is stolen or bears a forged or falsely made endorsement or signature shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(c) If the face value of the Treasury check or bond or security of the United States or the aggregate face value, if more than one Treasury check or bond or security of the United States, does not exceed $500, in any of the above-mentioned offenses, the penalty shall be a fine of not more than $1,000 or imprisonment for not more than one year, or both.

(Added Pub. L. 98-151, § 115(a), Nov. 14, 1983, 97 Stat. 976.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3056 of this title.

CHAPTER 31—EMBEZZLEMENT AND THEFT

CROSS REFERENCES

Merchant seamen, punishment for embezzlement of ship's stores or cargo, see section 11501 of Title 46, Shipping.

Vessel's owner, limitation of liability for embezzlement of merchandise, see section 183 et seq. of Title 46, Appendix.

CHAPTER 45—FOREIGN RELATIONS

§ 965. Verified statements as prerequisite to vessel's departure

REFERENCES IN TEXT

Sections 91 and 94 of Title 46, referred to in text, have been transferred to Title 46, Appendix, Shipping.

Section 92 of Title 46, referred to in subsec. (a), was repealed by Pub. L. 87-826, § 3, Oct. 15, 1962, 76 Stat. 953.

CHAPTER 47—FRAUD AND FALSE STATEMENTS

§ 1001. Statements or entries generally

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title; title 7 sections 136h, 511r; title 12 section 1457; title 15 section 3413; title 19 section 2515; title 22 sections 1623, 3622; title 35 section 25; title 40 section 276c; title 42 sections 1874, 2000b-3, 2000c-6, 3426, 3795a; title 43 sections 1212, 1812; title 49 App. section 1607a.

CHAPTER 51—HOMICIDE

§ 1114. Protection of officers and employees of the United States

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the secret service [1] or of the Drug Enforcement Administration, any officer or member of the United States Capitol Police, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any civilian official or employee of the Army Corps of Engineers assigned to perform investigations, inspections, law or regulatory enforcement functions, or field-level real estate functions, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare, the Consumer Product Safety Commission, Interstate Commerce Commission, the Department of Commerce, or of the Department of Labor or of the Department of the Interior or of the Department of Agriculture assigned to perform investigative, inspection, or law enforcement functions, or any officer or employee of the Federal Communications Commission performing investigative, inspection, or law enforcement functions, or any officer or employee of the Veterans' Administration assigned to perform investigative or law enforcement functions, while engaged in the performance of his official duties, or on account of the performance of his official duties, any attorney, liquidator, examiner, claim agent, or other employee of the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the Comptroller of the Currency, the Federal Home Loan Bank Board, the Board of Governors of the Federal Reserve System, any Federal Reserve bank, or the National Credit Union Administration engaged in or on account of the performance of his official duties, or any

[1] So in original. Probably should be "Secret Service".

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT with the Clerk of the Court using the CM/ECF system, this the 3rd day of June, 2009.

The following will be served by the CM/ECF System upon: Randy J. Blankenship, Candace Crouse, and Martin Stanley Pinales.

I also certify that on June 3, 2009, a copy of the foregoing will be served by First Class Mail on the following:

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