No. 05-4098

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL J. BUDD,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

_____

PROOF BRIEF FOR THE UNITED STATES AS APPELLEE

_____

GREGORY A. WHITE
United States Attorney

WAN J. KIM
Assistant Attorney General

MARK L. GROSS
GREGORY B. FRIEL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-3876

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose Appellant's request for oral argument.

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STATEMENT OF JURISDICTION

Appellant's jurisdictional statement (Br. 1) is correct.[1]

STATEMENT OF THE ISSUES

1. Whether the district court plainly erred in instructing the jury at the first trial on the conspiracy charge in Count 1.

2. Whether the district court constructively amended Count 2 of the indictment at the second trial by instructing the jury on *Pinkerton* liability and conspiracy law.

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[1] "Br. __" refers to the page number of Appellant's opening brief; "GX __" and "DX __" identify by number the government's and defendant's trial exhibits, respectively.

3. Whether the district court constructively amended Count 3 of the indictment by instructing the jury using an Eighth Amendment standard.

4. Whether the district court plainly erred in instructing the jury on the Fourteenth Amendment standard applicable to uses of force against pretrial detainees.

5. Whether the evidence was sufficient to convict defendant on Count 4 for violating the due process rights of pretrial detainee Stephen Blazo.

6. Whether the evidence was sufficient to convict defendant on Count 3 for violating the Eighth Amendment rights of detainee Brandon Moore.

STATEMENT OF THE CASE

In October 2004, a federal grand jury returned a four-count indictment against Michael J. Budd, the second-highest-ranking official in the Mahoning County (Ohio) Sheriff's Department. (R. 1, Indictment, Apx. ___-___). Count 1 charged that Budd violated 18 U.S.C. 371 by conspiring with several Department employees to obstruct justice and deprive Tawhon Easterly, a pretrial detainee, of his constitutional right to be free from excessive force. (*Id.* at 3-6, Apx. ___-___).[2] Count 2 alleged that Budd and other Department employees, acting under color of law and aiding and abetting each other, violated 18 U.S.C. 242 by using and

[2] Count 1 alleged that Budd's co-conspirators included William DeLuca, Ronald Denson, Mark Dixon, Raymond Hull, Ronald Kaschak, John Rivera, and Ryan Strange. These seven individuals pleaded guilty to civil rights offenses. See *United States* v. *Hull, et al.*, No. 04-CR-381 (N.D. Ohio); *United States* v. *Kaschak*, No. 04-CR-167 (N.D. Ohio); see also Presentence Report at 3.

causing others to use excessive force against Easterly, resulting in his bodily injury. (*Id.* at 6-7, Apx. ___-___).[3] Counts 3 and 4 charged that Budd violated Section 242 by using excessive force against detainees Brandon Moore and Stephen Blazo, respectively, resulting in their bodily injury. (*Id.* at 7-8, Apx. ___).

Two trials took place. At the first trial, the jury found Budd guilty of conspiracy to obstruct justice, as charged in Count 1. (R. 79, Verdict Form at 1, Apx. ___). The jury deadlocked on Counts 2, 3, and 4, and on the portion of Count 1 that alleged a conspiracy to violate Easterly's rights. (*Id.* at 1, 3-5, Apx. ___, ___-___; R. 168, 3/1/05 Tr. 292-296, Apx. ___-___). The district court declared a mistrial on Counts 2, 3, and 4. (R. 168, 3/1/05 Tr. 293, Apx. ___). At Budd's retrial, the jury found him guilty on Counts 2, 3, and 4. (R. 140, Verdict Form, Apx. ___-___).[4]

The district court sentenced Budd to 97 months in prison and three years of supervised release and ordered him to pay a $12,500 fine and a $400 assessment. (R. 177, Judgment, Apx. ___-___).

STATEMENT OF FACTS

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[3] The other individuals named in Count 2 were DeLuca, Denson, Dixon, Hull, Kaschak, and Rivera. See footnote 2, *supra*.

[4] At the second trial, the district court redacted the indictment to delete the references to the conspiracy charge and renumbered Counts 2, 3 and 4 as Counts 1, 2 and 3. (R. 113, Order at 4, Apx. ___). This brief refers to the counts as they were numbered in the original indictment.

The evidence showed that Budd, the second-highest-ranking official in the Mahoning County Sheriff's Department, ordered his subordinates to beat a detainee without justification, conspired to cover up his role in that beating, and personally used excessive force against two other detainees. During these incidents, the detainees were restrained and did not resist officers, try to escape, physically threaten anyone, or do anything else to justify the use of force. See pp. 6-17, *infra*. The government's evidence included not only the testimony of the three victims, but also the accounts of eight law enforcement officers who confirmed that Budd engaged in the criminal conduct alleged in the indictment. (R. 171, 4/6/05 Tr. 294-389, Apx. ___-___; R. 172, 4/7/05 Tr. 455-565, Apx. ___-___; R. 173, 4/11/05 Tr. 570-678, Apx. ___-___; R. 131, Kashak Tr. 1-45, Apx. ___-___).[5]

1. Background

When Budd committed the offenses, he held the rank of major and was second-in-command of the Sheriff's Department. In that position, he had supervisory authority over the County Jail. (R. 174, 4/12/05 Tr. 854, 857, 897, Apx. ___, ___, ___). Budd had received extensive training in the use of force and had trained other law enforcement officers on the subject. (*Id.* at 777, Apx. ___; R. 91, 2/17/05 Tr. 18-19, 89, Apx. ___-___, ___). Budd testified that, based on his

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[5] Those officers were Sergeant William DeLuca, Sergeant Gary Wollett, Corporal Ronald Denson, and Deputies Raymond Hull, Ron Kashak, Sam Oliver, John Rivera, and Jeffrey Tinkey.

training and experience, he understood that it was wrong for a law enforcement officer to use excessive force against a detainee, and that it was impermissible to use excessive force against an inmate solely as punishment or retribution. (R. 174, 4/12/05 Tr. 835-836, Apx. ___-___). At the time of Budd's offenses, the policies of the Sheriff's Department prohibited officers from using excessive force to punish detainees or to physically retaliate against inmates who were verbally disrespectful. (R. 171, 4/6/05 Tr. 230, 234-235, Apx. ___, ___-___).

2. Offense Conduct

a. The Beatings Of Tawhon Easterly And The Cover-Up (Counts 1 and 2)

On December 28, 2001, Tawhon Easterly was a pre-trial detainee at the County Jail. (R. 171, 4/6/05 Tr. 215-216, 346, Apx. ___-___, ___). At around 3:10 p.m. that day, Easterly and other detainees got in a fight, during which Easterly punched a female deputy who tried to break up the skirmish. (*Id.* at 250-251, 276-277, 346-347, Apx. ___-___, ___-___, ___-___). Jail guards quickly brought the fight under control by spraying the detainees with mace and locking them in their cells. (*Id.* at 251-253, 256-257, 347, Apx. ___-___, ___-___, ___).

About 30 to 40 minutes later, on orders of Corporal Ronald Denson, guards removed Easterly from his cell, took him to an empty gymnasium, and beat him as punishment for hitting the female deputy. (R. 172, 4/7/05 Tr. 434-435, Apx. ___-___; R. 171, 4/6/05 Tr. 260, 304-306, 325-327, 350-352, 377-378, Apx. ___, ___-___, ___-___, ___-___, ___-___). At no time during the incident did Easterly

resist or threaten anyone or attempt to flee. (*Id.* at 303-306, 349, 351-353, Apx. ___-___, ___, ___-___). Denson and Deputy Raymond Hull, who witnessed the beating, testified that Easterly did nothing to justify the use of force. (*Id.* at 306, 382, Apx. ___, ___). After the beating, the guards returned Easterly to his cell. (*Id.* at 306, Apx. ___).

After learning that Easterly had hit a female deputy, Budd called Denson, one of his subordinates. The call took place about an hour after the guards had assaulted Easterly in the gym. (R. 172, 4/7/05 Tr. 420, Apx. ___; R. 174, 4/12/05 Tr. 849-850, Apx. ___-___). During that telephone conversation, Budd told Denson that Easterly "should have been put in the hospital" and demanded to know whether he had been "taken care of." (*Id.* at 417, 431, Apx. ___, ___; R. 171, 4/6/05 Tr. 384-385, Apx. ___-___). Although Denson explained to Budd that Easterly had already been "taken care of," Budd ordered Denson to have Sergeant William DeLuca assign some guards to "take care" of Easterly again and to take away his clothes. (R. 171, 4/6/05 Tr. 384-387, Apx. ___-___; R. 172, 4/7/05 Tr. 431-432, Apx. ___-___). Denson relayed Budd's order to DeLuca, telling him that Budd "was pissed off because this inmate wasn't in the hospital." (R. 172, 4/7/05 Tr. 466, Apx. ___).

Budd then called DeLuca. During this conversation, Budd was "yelling and screaming," "ranting and raving," and using profanity. (R. 172, 4/7/05 Tr. 462-463, 487, Apx. ___-___, ___). Budd demanded to know why Easterly "wasn't in

the hospital" and "why [the guards] didn't beat his ass." (*Id.* at 462-463, 487, Apx. ___-___, ___).

Denson and DeLuca testified that they had no doubt that Budd was ordering that Easterly receive a second beating severe enough to put him in the hospital. (R. 172, 4/7/05 Tr. 463-465, Apx. ___-___; R. 171, 4/6/05 Tr. 386, Apx. ___).

DeLuca relayed Budd's order to some of the deputies on duty. (R. 172, 4/7/05 Tr. 465, Apx. ___). Four deputies – Hull, John Rivera, Mark Dixon, and Ronald Kaschak – carried out the order. At around 5:30 p.m., more than two hours after Easterly had hit the female deputy and about an hour and a half after the first beating, the deputies removed Easterly from his cell and escorted him to an isolated hallway outside the range of surveillance cameras. (*Id.* at 499-505, 509-510, Apx. ___-___, ___-___; R. 171, 4/6/05 Tr. 271-272, 307-311, 354-356, Apx. ___-___, ___-___, ___-___). The deputies restrained Easterly's arms behind his back as they escorted him. (R. 171, 4/6/05 Tr. 266, 355, Apx. ___, ___).

After they reached the hallway, one of the deputies threw Easterly to the floor, and all four deputies jumped on top of him. (R. 172, 4/7/05 Tr. 505, Apx. ___; R. 171, 4/6/05 Tr. 310-312, 356; Apx. ___-___, ___). Easterly's face hit the floor, causing him pain. (R. 171, 4/6/05 Tr. 356, Apx. ___). The four deputies then punched, kicked, and kneed Easterly. (*Id.* at 312-314, 356-358, Apx. ___-___, ___-___; R. 172, 4/7/05 Tr. 505-507, Apx. ___-___). This attack lasted "quite a bit longer" than the beating that the guards had administered to Easterly in the gym. (R. 171, 4/6/05 Tr. 314, 358, Apx. ___, ___). During the entire incident,

Easterly did not resist, fight back, threaten anyone, or attempt to flee. (*Id.* at 266, 310, 312, 355, 357, Apx. ___, ___, ___, ___, ___; R. 172, 4/7/05 Tr. 503, 507, Apx. ___, ___). As Hull testified, Easterly did nothing during the incident to justify the beating. (R. 171, 4/6/05 Tr. 314, Apx. ___). The beating inflicted pain on Easterly and left him with scars and bruises. (*Id.* at 357, 359, Apx. ___, ___). Easterly later requested, but never received, medical attention. (*Id.* at 359, Apx. ___).

After the deputies finished beating Easterly, they stripped him naked, kicked him in the groin, and dragged him into a cell. (R. 172, 4/7/05 Tr. 508, Apx. ___; R. 171, 4/6/05 Tr. 315-316, 358-359, Apx. ___-___, ___-___). Hull then yelled a message for the other inmates to hear: "This is what happens when you hit a female deputy." (R. 172, 4/7/05 Tr. 508-509, Apx. ___-___).

None of the deputies who participated in the beating completed the use-of-force reports required by Sheriff's Department policies. (R. 69, 2/15/05 Tr. 32-33, Apx. ___-___; R. 172, 4/7/05 Tr. 509, Apx. ___; R. 171, 4/6/05 Tr. 317, 389, Apx. ___, ___). According to those policies, an officer must prepare such a report immediately after using force against a detainee. (R. 119, 2/14/05 Tr. 12-15, 21, Apx. ___-___, ___; GX 17 at 2, Apx. ___).

Nine months later, in September 2002, Deputy Kaschak admitted to officials in the Austintown Police Department that he had used excessive force on Easterly as a result of an order that Budd had relayed through Sergeant DeLuca. Kaschak made this admission while applying for a job with the Austintown police force. (R.

69, 2/15/05 Tr. 34-35, Apx. ___-___; R. 107, Durkin Tr. 4-8, Apx. ___-___). As a result, the Austintown police chief sent a letter to the Mahoning County Sheriff describing Kaschak's allegations against Budd. (R. 107, Durkin Tr. 8-9, Apx. ___-___). The Sheriff turned the letter over to Budd. (R. 91, Budd Tr. 99-100, Apx. ___-___; R. 119, Kosinski Tr. 138, Apx. ___; R. 174, 4/12/05 Tr. 893-894, Apx. ___-___).

Shortly thereafter, Budd summoned Kaschak to his office. (R. 69, Kaschak Tr. 34-35, Apx. ___-___). Budd was irate. Waving the letter in his hand and yelling at Kaschak, Budd demanded to know "[w]hat the fuck [Budd was] supposed to do now" that the incident was a matter of "public record." (*Id.* at 35, 54, Apx. ___, ___). Budd threatened to arrest Kaschak, and ordered him to write a report about the Easterly incident. (*Id.* at 35-37, Apx. ___-___). When Kaschak initially refused, Budd took away his gun and ID and told him he was being placed on administrative leave. (*Id.* at 37-38, Apx. ___-___).

Kaschak eventually relented and wrote a false report, in which he stated that the guards used force on Easterly only after Easterly resisted the officers. (R. 69, Kaschak Tr. 39-41, Apx. ___-___; GX 20, Apx. ___). In fact, Easterly never resisted the guards. (R. 69, Kaschak Tr. 40, Apx. ___). The report also failed to mention that Budd had ordered the beating of Easterly. (*Ibid.*). When Budd read Kashak's report, his demeanor immediately changed. He began joking with Kaschak and returned his gun and ID. (*Id.* at 41, Apx. ___).

At around the same time, Budd summoned Deputies Rivera and Hull to his office and ordered them to write reports about the Easterly incident. (R. 172, 4/7/05 Tr. 512-513, Apx. ___-___; R. 171, 4/6/05 Tr. 337-339, Apx. ___-___). Rivera and Hull submitted reports falsely asserting that the use of force was justified because Easterly had resisted the guards. (R. 172, 4/7/05 Tr. 515, Apx. ___; R. 171, 4/6/05 Tr. 338-339, 342-343, Apx. ___-___, ___-___; DX A & B, Apx. ___, ___).

Budd submitted the false reports prepared by Kaschak, Rivera, and Hull to the FBI in response to a federal grand jury subpoena. (R. 118, 2/16/05 Tr. 12, Apx. ___; R. 174, 4/12/05 Tr. 863, Apx. ___; R. 173, 4/11/05 Tr. 722, Apx. ___). But Budd never turned over to federal officials the incriminating letter from the Austintown Police Department, even though the subpoena requested all correspondence and other documents relating to any investigations into the use of force against Easterly. (R. 118, 2/16/05 Tr. 8, 12-13, Apx. ___, ___-___; GX 19, Subpoena, Apx. ___).

b. The Attacks On Detainee Brandon Moore (Count 3)

On October 23, 2002, Moore was a detainee in the custody of the Mahoning County Sheriff's Department and was at the County courthouse to attend his sentencing on state charges. (R. 173, 4/11/05 Tr. 628-629, Apx. ___-___; R. 171, 4/6/05 Tr. 216, Apx. ___). He was 16 years old at the time. (See R. 173, 4/11/05 Tr. 627, Apx. ___ (19 years old in 2005)). During the entire time Moore was at the courthouse that day, he wore leg shackles and handcuffs attached to a "belly chain"

wrapped around his waist. (R. 174, 4/12/05 Tr. 839, Apx. ___; R. 173, 4/11/05 Tr. 594-596, 629-630, 652-653, Apx. ___-___, ___-___, ___-___; R. 172, 4/7/05 Tr. 529-530, Apx. ___-___).

Budd was in charge of courthouse security on the day of Moore's sentencing. (R. 174, 4/12/05 Tr. 807, Apx. ___). At the conclusion of the sentencing hearing, Moore and two other detainees were taken to a conference room in the courthouse. Budd and other officers, including Deputies Sam Oliver and Jeffrey Tinkey, joined the detainees in the conference room. (R. 173, 4/11/05 Tr. 653, Apx. ___).

While in the room, Budd became upset about comments Moore made about his trial and sentencing. He ordered Moore to "sit the fuck down" and slammed him down into a chair. (R. 173, 4/11/05 Tr. 596-598, 608, 631-632, Apx. ___-___, ___, ___-___).

After ordering the removal of the other two detainees from the room, Budd grabbed Moore and slammed his head into a window with such force that Deputy Oliver initially thought the impact might have broken the glass. (R. 173, 4/11/05 Tr. 598-600, 633-634, 655-656, Apx. ___-___, ___-___, ___-___). Moore's face hit the blinds on the window. (*Id.* at 633-634, Apx. ___-___). The impact knocked the breath out of Moore, caused him pain, and scratched his face. (*Id.* at 599, 633-634, Apx. ___, ___-___). Budd then forcefully pushed Moore's head against the steel frame surrounding the window, leaving an indentation in his forehead. (*Id.* at 599-600, 616-617, Apx. ___-___, ___-___). As Budd did this, he

warned Moore: "You don't want to fucking mess with me." (*Id.* at 600, Apx. ___).

Budd then threw Moore to the floor face-first, knocking the breath out of him. (R. 173, 4/11/05 Tr. 634-635, 657-658, 667-668, Apx. ___-___, ___-___, ___-___).[6] As Moore lay passively on the floor wearing leg shackles and handcuffs, Budd stepped on Moore's back with both feet, placing his full body weight on the detainee. (R. 173, 4/11/05 Tr. 604-606, 635-638, 648-649, 658, 668, Apx. ___-___, ___-___, ___-___, ___, ___). Budd weighed about 250 pounds at the time. (See R. 105, 2/16/05 Tr. 102, Apx. ___; Presentence Report at 2 (listing Budd's weight as 235 pounds)). Moore had a bullet lodged in his back from a previous incident. (R. 173, 4/11/05 Tr. 636, Apx. ___). After Budd placed one of his feet on Moore's back, Moore told him about the bullet. Budd responded, "oh, yeah?" and then proceeded to place both of his feet on Moore's back. (*Id.* at 636, 646, Apx. ___, ___). Moore found it difficult to breathe while Budd was standing on his back. (*Id.* at 636-637, Apx. ___-___). Moore testified that after stepping off his back, Budd kicked him in the ribs, causing him further pain. (*Id.* at 637, Apx. ___). After he finished assaulting Moore, Budd ordered Tinkey to "'get this fucking piece of shit off' his courthouse floor." (*Id.* at 607, Apx. ___). When

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[6] Deputy Tinkey testified that he, not Budd, was the one who took Moore to the floor. (*Id.* at 602-604, Apx. ___-___). Deputy Oliver and Moore asserted that Budd threw Moore to the floor.

Moore arrived back at his cell, he asked for but was denied medical treatment for his injuries. (*Id.* at 638-639, Apx. ___-___).

Deputies Tinkey and Oliver testified that Budd's use of force against Moore was unjustified. (R. 173, 4/11/05 Tr. 601, 606-608, 656-657, 659-660, 669, Apx. ___, ___-___, ___-___, ___-___, ___). Both deputies explained that when Budd used force against Moore, the detainee was wearing handcuffs and leg shackles and was not resisting the officers, attempting to flee, or physically threatening anyone. (*Id.* at 597, 600-601, 604, 607, 625, 654-657, 659, 668, Apx. ___, ___-___, ___, ___, ___, ___-___, ___, ___).

c. The Attacks On Pretrial Detainee Stephen Blazo (Count 4)

In July 2000, Blazo was a pretrial detainee being held on burglary charges at the Mahoning County Jail. (R. 175, 4/13/05 Tr. 967, Apx. ___; R. 173, 4/11/05 Tr. 579-580, Apx. ___-___; R. 172, 4/7/05 Tr. 533, Apx. ___). Blazo was suspected of burglarizing a house belonging to an officer employed by the Sheriff's Department. (R. 172, 4/7/05 Tr. 533, Apx. ___).

Budd contacted Sergeant Gary Wollet, the detective assigned to investigate the burglary, and notified him that he (Budd) wanted to interview Blazo. (R. 172, 4/7/05 Tr. 533-534, Apx. ___-___; R. 174, 4/12/05 Tr. 824-825, Apx. ___-___). When Blazo was brought to Budd and Wollet for the interview, the detainee was wearing leg shackles and handcuffs. (R. 172, 4/7/05 Tr. 534-535, Apx. ___-___; R. 173, 4/11/05 Tr. 581-583, Apx. ___-___). Blazo remained in those restraints

during the entire incident. (See R. 173, 4/11/05 Tr. 586-587, 589, Apx. ___-___, ___).

As Budd was leading Blazo to the interrogation room, Budd rammed Blazo's head into at least two different doors and shoved his body into the walls of the hallway. (R. 173, 4/11/05 Tr. 583, 588-590, Apx. ___, ___-___). In addition, Budd yanked upward on Blazo's ear as he took him up the steps toward the interrogation room. (R. 172, 4/7/05 Tr. 536-539, Apx. ___-___).

Once inside the room, Budd used additional force against Blazo. When Blazo asked to see his lawyer, Budd shouted: "I'm your goddamn lawyer." (R. 173, 4/11/05 Tr. 585, Apx. ___). Budd then grabbed Blazo by the collar and forcefully rammed his head into the table, inflicting pain on the detainee. (*Id.* at 585, 591-592, Apx. ___, ___-___). Budd also grabbed Blazo and slammed him into window sills. (*Id.* at 585-586, 591, Apx. ___-___, ___). As Budd did this, he told Blazo: "You broke in my friend's house, and if I ever catch you in my neighborhood I'm going to kill you." (*Id.* at 586, Apx. ___). Before he left the conference room, Budd also rammed a 150-pound table into Blazo with such force that it pushed him backward, pinning him against the wall. (R. 172, 4/7/05 Tr. 540-543, Apx. ___-___). During the entire encounter with Budd, Blazo never resisted or threatened the officers and never disobeyed a command. (R. 172, 4/7/05 Tr. 542-544, Apx. ___-___; R. 173, 4/11/05 Tr. 584, 586, Apx. ___, ___).

The force used by Budd inflicted pain on Blazo and left him with lumps on his head and a large bruise on his arm. (R. 173, 4/11/05 Tr. 587, Apx. ___). Blazo

requested medical attention for his injuries when he returned to his cell, but his requests were denied. (*Ibid.*).

SUMMARY OF ARGUMENT

This Court should affirm Budd's conviction. Budd raises several meritless challenges to the jury instructions and the sufficiency of the evidence. Supreme Court or Sixth Circuit precedent forecloses each of his attacks on the jury instructions. As for the sufficiency of the evidence, Budd ignores crucial testimony from government witnesses that is more than adequate to support his conviction.

1. The district court did not plainly err in instructing the jury on Count 1 at the first trial. Although Count 1 alleged that Budd conspired to obstruct justice *and* deprive Easterly of his rights, the district court correctly instructed the jury that it could convict Budd if he conspired to do either one. That instruction, which is plainly correct under Supreme Court and Sixth Circuit precedent, did not constructively amend the indictment.

Nor did the district judge constructively amend the indictment by mentioning an "attempt" to corruptly persuade in instructing the jury on the elements of obstruction of justice under 18 U.S.C. 1512(b)(3), one of the objects of the conspiracy charged in Count 1. Because Budd was not charged with violating Section 1512(b)(3) itself, the "attempt" language did not modify the essential elements of the offense charged. At any rate, no constructive amendment occurred

because the attempt to corruptly persuade is a lesser-included-offense of corrupt persuasion.

2. The district court did not constructively amend Count 2 of the indictment by instructing the jury at the second trial on *Pinkerton* liability and conspiracy law. The jury instructions made clear that Budd could not be convicted on Count 2 simply for conspiring to violate pretrial detainee Tawhon Easterly's rights. The instructions allowed jurors to convict Budd only if they found that he violated 18 U.S.C. 242, the offense charged in Count 2. The absence of a conspiracy count at the second trial did not bar the judge from instructing the jury on the *Pinkerton* theory or conspiracy law because the facts relating to the conspiracy were relevant to whether Budd violated Section 242.

3. The district court did not constructively amend the indictment by using an Eighth Amendment standard in instructing the jury on Count 3. It is immaterial whether the indictment cited the Eighth or the Fourteenth Amendment because the factual allegation of Count 3 – use of excessive force against Moore – was identical to that on which Budd was convicted. At any rate, the "due process" language in the indictment was broad enough to encompass an Eighth Amendment standard. Because the Due Process Clause of the Fourteenth Amendment incorporates the Eighth Amendment's prohibition against cruel and usual punishment, a state actor's infringement of that Eighth Amendment protection is a violation of due process.

4. The district court did not plainly err in instructing the jury on the Fourteenth Amendment standard applicable to uses of force against pretrial detainees. The jury instruction incorporated the standard that the Supreme Court has endorsed for circumstances where, as here, the use of force against the pretrial detainee did not occur in situations involving a prison riot or other violent disturbance requiring split-second decisionmaking.

5. The evidence was sufficient to support Budd's conviction for violating pretrial detainee Stephen Blazo's due process rights. The Due Process Clause of the Fourteenth Amendment protects a pretrial detainee from the use of excessive force that amounts to punishment. The government's evidence included testimony that Budd slammed Blazo's head into a table and doors even though Blazo was in full restraints and was not resisting officers, theatening anyone, or doing anything else to justify the use of force. That evidence would allow a rational jury to find that the force Budd used was excessive and inflicted for the purpose of punishment.

6. The evidence was sufficient to support Budd's conviction on Count 3 for inflicting cruel and unusual punishment on detainee Moore. Budd contends that the evidence at the first trial was insufficient to identify him as the officer who used force against Moore. Budd's argument is meritless. Two deputies identified Budd at the first trial as the one who used excessive force against Moore.

The evidence was also sufficient to prove that Budd's use of force against Moore violated the Eighth Amendment. Government witnesses testified that Budd

(1) slammed Moore head-first into a window, (2) threw him face-first to the floor, (3) stood on his back with both feet despite being told that Moore had a bullet lodged in his back, and (4) kicked him in the ribs. When Budd inflicted this abuse on Moore, the detainee was wearing leg shackles, handcuffs, and a belly chain, and was not resisting the officers, physically threatening anyone, trying to escape, or doing anything else to justify the use of force. This evidence amply demonstrated that Budd's use of force was applied maliciously and sadistically to cause harm.

ARGUMENT

I

THE DISTRICT COURT DID NOT PLAINLY ERR IN INSTRUCTING THE JURY ON COUNT 1

Budd argues (Br. 34-41) that the jury instructions at the first trial constructively amended Count 1 of the indictment in two ways: (1) by advising the jury that it could convict Budd if he conspired *either* to obstruct justice *or* to deprive Tawhon Easterly of his rights; and (2) by referring to an "attempt[] to corruptly persuade" in explaining the elements required for a violation of 18 U.S.C. 1512(b)(3), one of the objects of the conspiracy charged in Count 1. Contrary to Budd's argument, neither portion of the instructions constructively amended the indictment. Budd has failed to demonstrate any error, much less plain error warranting reversal.

A. Standard Of Review

Budd did not object at trial to either portion of the jury instructions. (R. 102, Memo. Op. & Order at 4-5, 13, Apx. ___-___, ___; compare R. 42, US Requested Jury Instructions at 23, 38-40 (Nos. 15, 28-30), Apx. ___, ___-___ with R. 48, Defendant's Proposed Jury Instructions at 1, Apx. ___). Consequently, this Court will review the instructions only for plain error. See *United States* v. *Brown*, 332 F.3d 363, 371-372 (6th Cir. 2003).

B. The District Court Did Not Constructively Amend The Indictment By Instructing The Jury That Budd Could Be Found Guilty On Count 1 If He Conspired Either To Obstruct Justice Or To Deprive Easterly Of His Rights

1. Count 1 of the indictment alleged that Budd violated 18 U.S.C. 371 by conspiring with other officers (1) to deprive Easterly of his rights in violation of 18 U.S.C. 242 *and* (2) to obstruct justice in violation of 18 U.S.C. 1512(b)(3). (R. 1, Indictment at 3-4, Apx. ___-___). The district court instructed the jury that

> Even though the word "and" is used, the government is not required to prove both means or methods of violating this law which are alleged in the indictment. In order to return a guilty verdict, however, you must unanimously agree upon at least one of these means of violating this law; in other words, that either the defendant conspired to deprive an individual of civil rights or that the defendant conspired to obstruct justice.

(R. 164, 2/22/05 Tr. 174, Apx. ___).

During deliberations, jurors asked the court whether they could "declare a verdict on one part of Count 1 and still not reach a verdict on the other part." (R. 167, 2/25/05 Tr. 284, Apx. ___). In discussing the jury's question, defense counsel told the judge: "Obviously, if he's guilty on one, we would agree with the government that he would be guilty on the count." (*Id.* at 286, Apx. ___). After a

brief discussion, defense counsel and the prosecutors agreed with the court's decision to answer the jury's question with a simple "yes." (*Id.* at 286-287, Apx. ___-___). Budd is thus challenging on appeal an instruction to which his counsel consented in the district court.

2. The Fifth Amendment prohibits the constructive amendment of an indictment. *Brown*, 332 F.3d at 371. "A constructive amendment results when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States* v. *Martinez*, 430 F.3d 317, 338 (6th Cir. 2005), cert. denied, 126 S. Ct. 1603 (2006). No constructive amendment occurs unless the evidence or jury instructions "broaden[]" the charges in the indictment. *United States* v. *Miller,* 471 U.S. 130, 138-140 (1985).

This Court has "articulated a two-part test for finding a constructive amendment requiring reversal of a conviction: a variance between indictment and jury instructions, and prejudice to a substantial right of the defendant." *United States* v. *Suarez*, 263 F.3d 468, 478 (6th Cir. 2001), cert. denied, 535 U.S. 991 (2002). "The defendant has the burden of proving that the variance in question rose to the level of a constructive amendment." *United States* v. *Chilingirian*, 280 F.3d 704, 712 (6th Cir. 2002). Budd has not met this burden because the jury instructions did not alter the allegations of Count 2.

3. Budd's challenge to the instruction (Br. 34-38) is squarely foreclosed by Supreme Court and Sixth Circuit precedent. No constructive amendment occurs "when, although an indictment charges several acts in the conjunctive, the district court charges the jury in the disjunctive." *United States* v. *Hathaway*, 798 F.2d 902, 913 (6th Cir. 1986); accord *Miller,* 471 U.S. at 136 (an "indictment count that alleges in the conjunctive a number of means of committing a crime can support a conviction if any of the alleged means are proved") (citing *Crain* v. *United States*, 162 U.S. 625, 634-636 (1896)); *Griffin* v. *United States*, 502 U.S. 46, 48, 60 (1991) (applying the same rule in upholding a conviction where the trial judge "instructed the jury in a manner that would permit it to return a guilty verdict against petitioner * * * if it found her to have participated in *either one* of the two objects of the conspiracy").

This Circuit's pattern jury instructions incorporate this rule. Where, as here, an indictment alleges that a conspiracy has multiple object offenses, the pattern instructions authorize the following jury charge:

> The indictment accuses the defendants of conspiring to commit several federal crimes. The government does not have to prove that the defendants agreed to commit all these crimes. But the government must prove an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge.

Sixth Circuit Pattern Criminal Jury Instructions 3.02(5) (2005).

Budd contends (Br. 21, 34-38), however, that Count 1 of the indictment alleges "two separate and distinct conspiracies." That contention is irrelevant to the constructive amendment argument, as the district court explained in denying

Budd's post-trial motions. (R. 102, Memo. Op. & Order at 12-17, Apx. ___-___). Even if Count 1 were interpreted as alleging two distinct conspiracies, the jury instructions were consistent with the indictment because they allowed the jury to separately consider (1) whether Budd conspired to obstruct justice and (2) whether he conspired to deprive Easterly of his rights. (R. 164, 2/22/05 Tr. 174, Apx. ___; see also R. 79 Verdict Form at 1, Apx. ___).[7]

Finally, none of the cases on which Budd relies (see Br. 36-38) supports his position. Those cases stand for the proposition that a defendant may not be convicted of either a conspiracy or substantive offense "different and distinct" (Br. 36) from the one charged in the indictment. Budd's conviction does not violate that rule because conspiracy to obstruct justice was alleged in Count 1. At bottom, Budd's "complaint is not that the indictment failed to charge the offense for which he was convicted, but that the indictment charged more than was necessary." *Miller,* 471 U.S. at 140. But as the Supreme Court has held, "a conviction for a criminal plan narrower than, but fully included within, the plan set forth in the indictment" is not a constructive amendment. *Id.* at 138; see *id*. at 138-145.

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[7] The jury instructions and verdict form ensured juror unanimity on Count 1 and thus cured any duplicity problem that might otherwise exist if two distinct charges were combined into a single count. (R. 102, Memo. Op. & Order at 11-13, Apx. ___-___). See *United States* v. *Adesida*, 129 F.3d 846, 849 (6th Cir. 1997), cert. denied, 523 U.S. 1112 (1998).

C. The District Court Did Not Constructively Amend Count 1 By Including The "Attempt" Language In Explaining 18 U.S.C. 1512(b)(3)

In instructing the jury on Count 1, the district court explained that the indictment charged Budd with conspiracy to obstruct justice, but not with the underlying offense of obstructing justice. (R. 164, 2/22/05 Tr. 180, Apx. ___). The court further emphasized that jurors need not find that Budd committed the underlying offense in order to convict him of conspiracy. (*Ibid*.) The judge then gave the following instruction:

> The first object of the conspiracy alleged in the indictment is that defendant conspired with others to obstruct justice, in violation of 18, U.S.C., 1512(b)(3). * * *
>
> A violation of this statute involves two elements:
>
> First, that the defendant corruptly persuaded another person or persons, or *attempted to do so*, or directed misleading conduct toward that person or persons.
>
> * * * * *
>
> So that you can determine, not if defendant Budd committed the crime of obstruction of justice, but rather if he conspired to commit it, the first element of obstruction of justice is:
>
> 1. Engaging in misleading conduct toward another person; or
>
> 2. Corruptly persuading, or *attempting to corruptly persuade*, another person.

(R. 164, 2/22/05 Tr. 181-182, Apx. ___-___ (emphasis added)). The references to "attempt[]" in the jury instructions tracked the statutory language. See 18 U.S.C. 1512(b)(3) ("Whoever knowingly * * * corruptly persuades another person, *or attempts to do so*") (emphasis added).

Budd argues (Br. 38-41) that the "attempt" language in the jury instructions constructively amended the indictment because the word "attempt" does not appear in Count 1. His argument is meritless for two independent reasons.

First, the "attempt" language did not modify the essential elements of the conspiracy charged in Count 1. Jury instructions do not constructively amend an indictment unless they "so modify *essential elements of the offense charged* that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *Martinez*, 430 F.3d at 338 (emphasis added). The "attempt" language pertained only to the elements necessary to prove obstruction of justice under 18 U.S.C. 1512(b)(3), one of the objects of the conspiracy. The essential elements of conspiracy do not include the elements of the substantive offense that is the object of the conspiracy. "It is well-established that a conspirator need not successfully complete all of the elements of the underlying offense to be guilty of conspiracy." *United States* v. *Warshawsky*, 20 F.3d 204, 208 (6th Cir. 1994). Consequently, in a conspiracy count, "it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, * * * or to state such object with the detail which would be required in an indictment for committing the substantive offense." *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927); accord *United States* v. *Reynolds*, 762 F.2d 489, 494-495 (6th Cir. 1985).

Second, the jury instruction did not constructively amend Count 1 because an *attempt* to corruptly persuade is a lesser-included-offense of the crime of corrupt persuasion. No constructive amendment occurs when the jury convicts the defendant of a lesser-included-offense necessarily encompassed within the crime alleged in the indictment. *United States* v. *Solorio*, 337 F.3d 580, 590-591 (6th Cir.), cert. denied, 540 U.S. 1063 (2003). An attempt is a lesser-included-offense of the completed crime, *Costo* v. *United States*, 904 F.2d 344, 348, reh'g denied, 922 F.2d 302 (6th Cir. 1990), and thus a defendant charged with an offense may be convicted instead of an attempt to commit that offense. Fed. R. Crim. P. 31(c). Consequently, a judge may permissibly instruct the jury on an attempt theory even if the indictment does not mention attempt. *United States* v. *Shoffner*, 929 F.2d 702, 1991 WL 43922, at *2 (6th Cir. 1991).

II

THE DISTRICT COURT DID NOT CONSTRUCTIVELY AMEND COUNT 2 OF THE INDICTMENT BY INSTRUCTING THE JURY AT THE SECOND TRIAL ON *PINKERTON* LIABILITY AND CONSPIRACY LAW

Budd argues (Br. 23-31) that the district court constructively amended the indictment at the second trial by instructing the jury on conspiracy law and the theory of co-conspirator liability set forth in *Pinkerton* v. *United States*, 328 U.S. 640, 646-648 (1946). Under *Pinkerton*, "a defendant can be convicted for the criminal acts of a coconspirator so long as the crime was foreseeable and committed in furtherance of the conspiracy." *United States* v. *Wade*, 318 F.3d 698,

701 (6th Cir. 2003). Budd contends that the instructions were inappropriate because Count 1, the only count that charged Budd with conspiracy, was not before the jury at the second trial. Contrary to Budd's arguments, neither the *Pinkerton* instruction nor the related explanation of conspiracy law constructively amended the indictment.

A. Standard Of Review

This Court reviews *de novo* whether jury instructions constructively amended the indictment. *United States* v. *Prince*, 214 F.3d 740, 756 (6th Cir.), cert. denied, 531 U.S. 974 (2000). The Court must consider the jury charge "as a whole" and avoid viewing any portion of the instructions in isolation. *Id.* at 761.

B. Background

The original indictment contained four counts, two of which are relevant here. Count 1 charged Budd with violating 18 U.S.C. 371 by conspiring with other officers to (1) obstruct justice and (2) deprive Tawhon Easterly of his right to be free from excessive use of force. (R. 1, Indictment at 3-4, Apx. ___-___). Count 2 charged Budd with violating 18 U.S.C. 242 by using and causing others to use excessive force against Easterly. (*Id.* at 6-7, Apx. ___-___). At the first trial, the district court gave a *Pinkerton* instruction related to Count 2, without objection from Budd. (R. 164, 2/22/05 Tr. 193-195, Apx. ___-___; compare R. 48, Defendant's Proposed Jury Instructions at 1, Apx. ___ with R. 42, US Requested Jury Instructions at 58-59, Apx. ___-___).

The jury at the first trial convicted Budd on Count 1, finding him guilty of conspiring to obstruct justice. Jurors were unable to reach a verdict on the allegation in Count 1 that Budd conspired to deprive Easterly of his rights. In addition, the jury failed to reach a verdict on the other counts. See p. 3, *supra*.

The government retried Budd on Counts 2, 3 and 4. In light of the guilty verdict on Count 1 at the first trial, he was not retried on that conspiracy count.

In instructing the jury on Count 2 at the second trial, the district court included this explanation of *Pinkerton* liability:

> Count [2][8] of the indictment accuses the defendant of depriving Tawhon Easterly of his Constitutional right to be free from excessive force amounting to punishment. In addition to convincing you that defendant aided and abetted the commission of this crime, there is another way the government can prove the defendant guilty of this crime. It is based on the legal rule that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy and are within the reasonably foreseeable scope of the agreement.

(R. 175, 4/13/05 Tr. 977, Apx. ___). The court also instructed the jury "about the nature of a conspiracy and its basic elements" to help jurors decide whether the *Pinkerton* theory applied in Budd's case. (*Id.* at 979-984, Apx. ___-___).

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[8] This brief refers to the counts as they were numbered in the original indictment. See p. 4 n.4, *supra*.

C. No Constructive Amendment Occurred

No constructive amendment occurs unless the jury instructions "broaden the charges" of the indictment. *United States* v. *Smith*, 320 F.3d 647, 656 (6th Cir.), cert. denied, 538 U.S. 1023 (2003). Budd asserts (Br. 22, 29) that the jury instructions "broadened" the allegations of his indictment "by adding [a] conspiracy charge" to Count 2. He is mistaken.

The jury instructions, when viewed in their entirety, did not permit the jurors at the second trial to convict Budd on Count 2 simply for conspiring to violate Easterly's civil rights. Rather, "a reasonable juror would understand the *Pinkerton* charge to mean that the defendant could not be convicted under a vicarious liability theory unless all of the elements of [the substantive offense] had been proved." *United States* v. *Myers*, 102 F.3d 227, 238 (6th Cir. 1996), cert. denied, 520 U.S. 1223 (1997). The judge instructed the jury that in order for the *Pinkerton* theory to apply, the government must prove the following elements beyond a reasonable doubt:

> First, that the defendant was a member of a conspiracy to deprive Tawhon Easterly of his Constitutional right to be free from excessive force amounting to punishment.
>
> Second, that after he joined the conspiracy, and while he was still a member of it, one or more of the other members *committed every element of the crime charged in Count [2] of the indictment*.
>
> Third, that this crime was committed to help advance the conspiracy.
>
> And fourth, that this crime was within the reasonably foreseeable scope of the unlawful projects.

(R. 175, 4/13/05 Tr. 978, Apx. ___ (emphasis added)). This instruction – particularly the second element, which premised *Pinkerton* liability on a finding that at least one of the conspirators violated 18 U.S.C. 242 – communicated to the jury that conspiracy alone, without a substantive violation of Section 242, was insufficient for a conviction under Count 2. See *Myers*, 102 F.3d at 238 (rejecting challenge to instruction, which cautioned jurors that *Pinkerton* liability applied only if they found that "one or more of the other members committed the [substantive] crime alleged in Count 2").

Other portions of the court's instructions made clear to the jury that Budd could be convicted on Count 2 only if he violated 18 U.S.C. 242, either directly, as an aider and abettor, or under a *Pinkerton* theory. The court explained to the jury that Count 2 charged Budd with violating Section 242, and instructed jurors that

> To establish a violation of this statute the government must prove the following four elements beyond a reasonable doubt. First, that the defendant deprived a person of a right secured by the Constitution or laws of the United States; here, the right under the due process clause of the Constitution to be free from excessive force amounting to punishment * * *.
>
> Second, that the defendant acted willfully. Third, that the defendant acted under color of law. And fourth, that the deprivation resulted in bodily harm.

(R. 175, 4/13/05 Tr. 969, Apx. ___). Moreover, the district judge twice emphasized to the jury that "the defendant is only on trial for the particular crimes charged in the indictment." (*Id.* at 964, 1059, Apx. ___, ___). Because no conspiracy count was included in the redacted indictment at the second trial (see p.

4 n.4, *supra*), this instruction made clear that the jury could not convict Budd of conspiracy.

The absence of a conspiracy count at trial does not bar a judge from instructing the jury on conspiracy law. *United States* v. *Hoffa*, 349 F.2d 20, 41-42 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966). In *Hoffa*, all the defendants were indicted on substantive counts, but only one of them was charged with conspiracy. The conspiracy charge was severed before trial, and thus only the substantive counts were before the jury. *Id.* at 26 n.1, 41. Nonetheless, the trial judge instructed the jury on conspiracy law because it was relevant to whether out-of-court statements were admissible against the defendants. *Id.* at 41. On appeal, the defendants argued that the instruction was improper and prejudicial because no conspiracy count was before the jury. This Court disagreed, concluding that a "conspiracy may be shown as an evidentiary fact to prove participation in the substantive crime." *Ibid.*

Other courts of appeals have applied the same principle to the *Pinkerton* theory. For example, in *United States* v. *Chairez*, 33 F.3d 823 (7th Cir. 1994), the court held that the government could rely on a *Pinkerton* theory in prosecuting the defendant on a substantive count, even though the conspiracy charge had been dismissed before trial as part of a plea bargain. *Id.* at 824, 827. Indeed, several circuits have recognized that a trial court may give a *Pinkerton* instruction even where the defendant has never been indicted for conspiracy. See *United States* v. *Lopez*, 271 F.3d 472, 480-481 (3d Cir. 2001), cert. denied, 535 U.S. 908 (2002);

United States v. *Macey*, 8 F.3d 462, 468 (7th Cir. 1993); *United States* v. *Thirion*, 813 F.2d 146, 152 (8th Cir. 1987); *Pacelli* v. *United States*, 588 F.2d 360, 367 (2d Cir. 1978), cert. denied, 441 U.S. 908 (1979); *Pinkerton* v. *United States*, 151 F.2d 499, 500 (5th Cir. 1945), aff'd, 328 U.S. 640 (1946). But see *United States* v. *Nakai*, 413 F.3d 1019, 1023 (9th Cir.) ("It is error to use a *Pinkerton* instruction in a case in which the indictment does not allege a conspiracy."), cert. denied, 126 S. Ct. 593 (2005). A *Pinkerton* instruction is necessarily permissible where, as here, the defendant has been indicted for, and never acquitted of, conspiracy.

Contrary to Budd's assertion (Br. 28-29), this Court's decision in *United States* v. *Henning*, 286 F.3d 914 (6th Cir. 2002), provides no support for his argument. In *Henning*, the jury found the defendant guilty of conspiracy and five substantive charges after the district court gave a *Pinkerton* instruction. *Id.* at 918-919. The district court then granted the defendant's post-trial motion for judgment of acquittal on the conspiracy count, finding the evidence insufficient to prove conspiracy. *Id.* at 919. On appeal, this Court vacated his convictions on the substantive counts, concluding that the judgment of acquittal on the conspiracy count called into question the viability of the other convictions because jurors may inappropriately have relied on a co-conspirator liability theory, on which there had been an acquittal, in reaching a verdict on those substantive charges. *Id.* at 920-923.

Unlike the defendant in *Henning*, Budd was never acquitted of conspiracy. To the contrary, he was found guilty at the first trial of conspiring to obstruct

justice in relation to the Easterly beatings. Although the jury at the first trial could not agree whether Budd conspired to violate Easterly's rights, a hung jury is not the equivalent of an acquittal. See *Richardson* v. *United States*, 468 U.S. 317, 325 (1984). Moreover, in contrast to *Henning*, where the trial court acquitted the defendant in a post-verdict ruling, the district judge here *denied* Budd's motion for judgment of acquittal, finding the evidence sufficient to support a conviction on the conspiracy count. (Compare R. 162, 2/17/05 Tr. 91, 122, Apx. ___, ___, with R. 64, Motion for Judgment of Acquittal at 5-8, Apx. ___-___).

Budd's position, if adopted, would have the perverse effect of penalizing the government for obtaining a conviction on Count 1 at the first trial. If the jury at the first trial had failed to reach a verdict on Count 1, the government could have retried Budd on the conspiracy charge. Budd, who did not object to the *Pinkerton* instruction regarding Count 2 at the first trial, does not dispute that such an instruction would have been appropriate at the second trial had he been retried on all four counts of the indictment. The government's success in obtaining a conviction at the first trial should not preclude it from relying on the *Pinkerton* theory at the second trial.

III

THE DISTRICT COURT DID NOT CONSTRUCTIVELY AMEND THE INDICTMENT BY USING AN EIGHTH AMENDMENT STANDARD IN INSTRUCTING THE JURY ON COUNT 3

Count 3 of the indictment alleged that Budd violated 18 U.S.C. 242 by using excessive force on detainee Brandon Moore, thereby willfully depriving him of

"the right to Due Process of law under the Constitution, which includes the right to be free from excessive force amounting to punishment by one acting under color of law." (R. 1, Indictment at 7, Apx. ___). The court instructed the jury that it could convict Budd on Count 3 only if it found that the force used against Moore violated the Eighth Amendment. (R. 175, 4/13/05 Tr. 969-970, 972-974, Apx. ___-___, ___-___).

Budd contends (Br. 31-34) that the jury instruction constructively amended the indictment by referring to the Eighth, rather than the Fourteenth, Amendment. His argument lacks merit because the jury instruction did not alter the *factual* theory alleged in the indictment – *i.e.*, that Budd used excessive force against detainee Brandon Moore. Budd's argument is also meritless because the "due process" language in Count 3 is broad enough to encompass the Eighth Amendment standard on which the court instructed the jury.

A. Background

At the first trial, Budd argued that Count 3 should be analyzed under the Eighth Amendment, and urged the district court to give the jury an Eighth Amendment instruction. (R. 64, Motion for Judgment of Acquittal at 2-3, Apx. ___-___; R. 66, Defendant's Eighth Amendment Jury Instruction at 1-7, Apx. ___-___). He reasoned that since the use of force alleged in Count 3 occurred after Moore's sentencing on state criminal charges, the relevant test was the Eighth Amendment standard applicable to convicted prisoners, not the Fourteenth Amendment standard used for pretrial detainees. (R. 64, Motion for Judgment of

Acquittal at 2-3, Apx. ___-___). The United States disagreed, arguing that the Eighth Amendment did not apply because, when Budd attacked Moore, final judgment had not been entered in Moore's state criminal case and he had not been remanded to the custody of the officials charged with carrying out his sentence. (R. 162, 2/17/05 Tr. 93-94, Apx. ___-___). The district court agreed with Budd that the Eighth Amendment applied to Count 3 (*id.* at 90, 120-121, Apx. ___, ___-___), and instructed the jury at the first trial using that standard. (R. 164, 2/22/05 Tr. 186, 188-189, Apx. ___, ___-___).

After the first trial, Budd moved to dismiss Count 3 on the ground that it failed to charge an Eighth Amendment violation. (R. 103, Motion to Dismiss at 1-5, Apx. ___-___). He argued that proceeding to trial on Count 3 under an Eighth Amendment theory would constructively amend the indictment. (*Id.* at 2-5, Apx. ___-___). The district court denied the motion to dismiss, agreeing with Budd that the Eighth Amendment applied to Count 3 but rejecting his constructive amendment argument. (R. 114, Memo. Op. & Order at 1-4, Apx. ___-___).

B. Standard Of Review

Review is *de novo*. See p. 30, *supra*.

C. No Constructive Amendment Occurred

It has long been settled that a conviction may be sustained on the basis of a federal law other than that cited in the indictment. *United States* v. *Hutcheson*, 312 U.S. 219, 229 (1941); *United States* v. *Stone*, 954 F.2d 1187, 1191-1192 (6th Cir. 1992). This principle is reflected in the Federal Rules of Criminal Procedure,

which require that an indictment cite "the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated," Fed. R. Crim. P. 7(c)(1), but also provide that "[u]nless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction." Fed. R. Crim. P. 7(c)(3). Consistent with this principle, this Court has repeatedly upheld convictions where the evidence proved a violation of a law different from that cited in the indictment. See *United States* v. *Groff*, 643 F.2d 396, 400, 402 (6th Cir.), cert. denied, 454 U.S. 828 (1981); *United States* v. *West*, 562 F.2d 375, 378-379 (6th Cir. 1977), cert. denied, 435 U.S. 922 (1978); *United States* v. *Garner*, 529 F.2d 962, 966 (6th Cir.), cert. denied, 429 U.S. 850 (1976).

Consequently, whether the indictment cited the Fourteenth or the Eighth Amendment is irrelevant in assessing the validity of the jury instruction. Instead, what matters is that "the factual predicate of the indictment is identical to that of the conviction." *United States* v. *Daniels*, 281 F.3d 168, 179 (5th Cir.), cert. denied, 535 U.S. 1105 (2002). In *Daniels*, the indictment alleged that defendants violated 18 U.S.C. 242 by using excessive force against a detainee in violation of the Eighth Amendment. *Id.* at 173, 178. Defendants did not deny that the charged conduct would establish a Fourteenth Amendment violation but argued that their convictions should be overturned because the evidence was insufficient to prove an infringement of Eighth Amendment rights. *Id.* at 178-179. The Fifth Circuit disagreed, concluding that "there was no variance between the factual predicate

charged in the indictment and that developed at trial," and thus it was irrelevant whether the government framed the indictment in terms of the Eighth, rather than the Fourteenth, Amendment. *Id.* at 179.

As in *Daniels*, the factual predicate for Budd's conviction – use of excessive force against Moore – was the same as the factual allegations in the indictment. Count 3's allegation of "excessive force amounting to punishment" (R. 1, Indictment at 7, Apx. __) was consistent with the court's Eighth Amendment instruction. It is well-settled that excessive force against an inmate can constitute "punishment" violating the Eighth Amendment. See *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994) ("the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners"); *Hudson* v. *McMillian*, 503 U.S. 1, 4 (1992) ("the use of excessive physical force against a prisoner may constitute cruel and unusual punishment"); *Pelfrey* v. *Chambers*, 43 F.3d 1034, 1035-1037 (6th Cir.) (unprovoked use of excessive force against an inmate can qualify as prohibited "punishment" under the Eighth Amendment), cert. denied, 515 U.S. 1116 (1995).

The district court properly held that Budd was neither misled nor prejudiced by the indictment's failure to cite the Eighth Amendment. (R. 114, Mem. Op. & Order at 3-4, Apx. ___-___; R. 162, 2/17/05 Tr. 90-91, 95, 119, Apx. ___-___, ___, ___). As Budd conceded below, he had notice well in advance of the second trial that he had to defend himself against an alleged Eighth Amendment violation. (R. 173, 4/11/05 Tr. 745-746, Apx. ___-___). Indeed, it was Budd who convinced

the district judge at the first trial that the Eighth Amendment applied to the use of force against Moore. See pp. 38-39, *supra*.

More importantly, the jury instruction worked to Budd's advantage because the Eighth Amendment standard was more difficult for the government to meet than the one applicable to pretrial detainees under the Fourteenth Amendment. Budd conceded this point below, acknowledging that the jury instruction afforded him "greater protection" than he would have enjoyed under the alternative standard. (R. 103, Motion to Dismiss at 2, Apx. ___; R. 173, 4/11/05 Tr. 746, Apx. ___). Under these circumstances, Budd has failed to prove that the jury instruction resulted in a constructive amendment of the indictment. See *United States* v. *Williams*, 138 Fed. Appx. 743, 747 (6th Cir. 2005) (rejecting constructive amendment argument where the jury instruction used a more rigorous standard than that alleged in the indictment), cert. denied, 126 S. Ct. 1442 (2006).

Budd incorrectly asserts (Br. 33), however, that a constructive amendment occurs even if the jury instruction is more favorable to the defendant than the standard alleged in the indictment. He bases his argument on a misreading of *United States* v. *Combs*, 369 F.3d 925 (6th Cir. 2004), and *Lucas* v. *O'Dea*, 179 F.3d 412 (6th Cir. 1999). In those cases, the jury charges had the effect of *easing* – not increasing – the government's burden. In *Combs*, the indictment alleged that the defendant possessed a firearm "in furtherance of a drug trafficking crime," 369 F.3d at 930, but the jury instruction allowed a conviction if the defendant's firearm possession was "during and in relation to" a drug trafficking offense. *Id.* at 935.

Because the "in furtherance of" standard in the indictment was more difficult to satisfy than the "during and in relation to" standard set forth in the jury charge, *id.* at 933, the instructions had the effect of easing the government's burden. See *Williams*, 138 Fed. Appx. at 747 (explaining that the jury instruction in *Combs* "allowed conviction for an 'in furtherance of' crime using the less rigorous 'during and in relation to' standard"). In *Lucas*, the jury instructions also eased the prosecutor's burden. There, the indictment alleged that the defendant intentionally murdered the victim by shooting him dead with a pistol, but the instructions told the jury that it was immaterial whether the defendant fired the shot that killed the victim. *Lucas*, 179 F.3d at 415, 417.[9]

Thus, in contrast to *Combs* and *Lucas*, any difference between the jury instructions and the language of Budd's indictment worked to *his*, not the government's, advantage. Consequently, the alleged variance did not prejudice Budd's "substantial right[s]" and, hence, did not rise to the level of a constructive amendment requiring reversal. *United States* v. *Suarez*, 263 F.3d 468, 478 (6th Cir. 2001), cert. denied, 535 U.S. 991 (2002).

At any rate, no constructive amendment occurred here because the "due process" language in Count 3 is broad enough to encompass the Eighth Amendment standard on which the court instructed the jury. A state actor's

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[9] *Combs* and *Lucas* are also distinguishable because, in each case, the instructions allowed the jury to convict the defendant on a *factual* theory different from that alleged in the indictment. In Budd's case, the jury instructions did not alter the factual predicate of Count 3 – the use of excessive force against Moore.

infringement of Eighth Amendment rights is a violation of due process. "[T]he Due Process Clause of the Fourteenth Amendment incorporates the Eighth Amendment's guarantee against cruel and unusual punishment." *United States* v. *Georgia*, 126 S. Ct. 877, 881 (2006) (citing *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 463 (1947)); accord *Wilson* v. *Seiter*, 501 U.S. 294, 296-297 (1991). Consequently, a claim alleging "actual violations of the Eighth Amendment by state agents," is the equivalent of an allegation that they engaged in "conduct that independently violated the provisions of § 1 of the Fourteenth Amendment." *Georgia*, 126 S. Ct. at 880-881.

Other courts of appeals have properly recognized that no constructive amendment occurs when an indictment charges a "due process" violation and the the jury instructions refer to a provision of the Bill of Rights applicable to state actors through the Due Process Clause of the Fourteenth Amendment. See *United States* v. *Johnstone*, 107 F.3d 200, 207 n.6 (3d Cir. 1997); *United States* v. *Reese*, 2 F.3d 870, 890-891 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994). In *Johnstone* and *Reese*, the indictments charged the defendants with violating 18 U.S.C. 242 by using excessive force that deprived their victims of "due process" rights. In each case, the trial judge instructed the jury that a Fourth Amendment standard governed the excessive force allegation. The defendants in both cases argued that the jury instructions constructively amended the indictment by referring to the Fourth, rather than the Fourteenth, Amendment. The Third and Ninth Circuits disagreed, concluding that the indictments' reference to "due

process of law" was "sufficient to charge a violation of the Fourth Amendment as made applicable to the states through the Fourteenth Amendment due process clause." *Johnstone*, 107 F.3d at 207 n.6; accord *Reese*, 2 F.3d at 891.

The same logic applies here. The "due process" language in Budd's indictment was sufficient to charge an Eighth Amendment violation. Consequently, no constructive amendment occurred.

IV

THE DISTRICT COURT DID NOT PLAINLY ERR IN INSTRUCTING THE JURY ON THE FOURTEENTH AMENDMENT STANDARD APPLICABLE TO USES OF FORCE AGAINST PRETRIAL DETAINEES

Budd contends (Br. 23, 41-49) that the district court should have instructed the jury that use of force violates the Fourteenth Amendment only if it "shocks the conscience." He further suggests (Br. 48-49) that the court should have instructed the jury that force "shocks the conscience" only if "employed 'maliciously and sadistically for the very purpose of causing harm' rather than 'in a good faith effort to maintain or restore discipline.'" His argument is meritless. The court's instruction, which incorporated the Fourteenth Amendment standard endorsed by the Supreme Court, was not an abuse of discretion, much less plain error.

A. Standard Of Review

If a defendant fails to preserve an objection to a jury instruction, the Court will review the instruction only for plain error. *United States* v. *McGee*, 173 F.3d 952, 957 (6th Cir.), cert. denied, 528 U.S. 859 (1999). The plain-error standard

applies here. The proposed instruction that Budd submitted to the district court omitted the "malicious and sadistic" language that he now advocates on appeal. (See R. 48, Defendant's Proposed Jury Instructions at 1-17, Apx. ___-___). Although Budd's proposed instruction included the "shocks the conscience" language (*id.* at 4-5, Apx. ___-___; see R. 130, Defendant's Proposed Jury Instructions at 1, Apx. ___), he forfeited the issue by failing to renew his objection, with sufficient specificity, after the district court finished instructing the jury.

A party "who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). Even if the district court previously rejected the defendant's proposed jury instruction, the defense generally is required to renew its objection *after* the jury has been instructed. *United States* v. *Johnson*, 62 F.3d 849, 850 (6th Cir. 1995); *United States* v. *Sturman*, 951 F.2d 1466, 1475-1476 (6th Cir. 1991), cert. denied, 504 U.S. 985 (1992); *United States* v. *Williams*, 75 Fed. Appx. 480, 485 (6th Cir. 2003). The only exception to this requirement is "when it is plainly apparent from the discussion between the parties and the judge that the judge was aware of a party's dissatisfaction with the instruction, as read to the jury, and the specific basis for that claimed error or omission." *Woodbridge* v. *Dahlberg*, 954 F.2d 1231, 1237 (6th Cir. 1992) (interpreting civil analogue to Criminal Rule 30(d)).

It is not "plainly apparent" (*ibid.*) that the district court understood, when it instructed the jury, that Budd still objected to the Fourteenth Amendment

instruction. The following comments by defense counsel at the charge conference suggested that Budd might be abandoning his opposition to the instruction:

> I submitted last night what was basically our old instructions on the Fourteenth Amendment and the Eighth, and I would ask the Court to just recognize that that's still my objections there.
>
> And the one more specifically, *as I see the Fourteenth Amendment I'm getting more comfortable with it*, but the Eighth Amendment one I believe has this subjective stuff that's missing from that instruction, and I would invite the Court to relook at that one.

(R. 173, 4/11/05 Tr. 764, Apx. ___ (emphasis added)).

In light of these comments, Budd had an obligation to clarify his position by explaining the specific grounds for his objection *after* the court gave the Fourteenth Amendment instruction. He failed to do so. After instructing the jury on the Fourteenth Amendment, the court asked the parties whether they had objections that they had not already raised. (R. 175, 4/13/05 Tr. 987, Apx. ___). Defense counsel replied: "No, Your Honor. The defense stands by all the objections they put in." (*Ibid.*). This statement, which did not mention the "shocks the conscience" instruction, was not sufficiently specific to satisfy Rule 30(d). See *Sturman*, 951 F.2d at 1475-1476. In *Sturman*, the defendants had requested a "multiple conspiracy" instruction but the trial court failed to include that instruction in the jury charge. When the court had concluded its instructions, the defendants raised a general objection "to the failure with respect to any of the jury instructions that have not been included," but did not specifically mention the "multiple conspiracy" issue. *Id.* at 1475. This Court found such a general

objection insufficient to satisfy the requirements of Rule 30(d). *Id.* at 1475-1476. Because Budd's post-charge objection was similarly inadequate, plain error is the standard of review.

B. The District Court's Fourteenth Amendment Instruction Properly Incorporated The Standards Endorsed By The Supreme Court

The district court's instruction incorporated the standards that the Supreme Court adopted in *Graham* v. *Connor*, 490 U.S. 386 (1989), and *Bell* v. *Wolfish*, 441 U.S. 520 (1979), for determining whether mistreatment of a pretrial detainee violates the Fourteenth Amendment. Consequently, the instruction was not an abuse of discretion, much less plain error.

"It is clear * * * that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, 490 U.S. at 395 n.10 (citing *Bell*, 441 U.S. at 535-539)). To determine whether the use of force violated a pretrial detainee's due process rights, a court must decide whether the force was "imposed for the purpose of punishment or whether it [was] but an incident of some other legitimate government purpose." *Bell*, 441 U.S. at 538. If the use of force "is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539. Conversely, if the use of force "is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees."

Ibid. "Retribution and deterrence are not legitimate nonpunitive governmental objectives." *Id.* at 539 n.20.

As illustrated by the excerpts quoted below, the district court's Fourteenth Amendment instruction tracked the language of *Graham* and *Bell* almost verbatim:

> [T]he due process clause of the United States Constitution protects a pretrial detainee from the use of excessive force that amounts to punishment.
>
> You must decide if Defendant Budd used or caused to be used excessive force which amounted to punishment, or whether the force imposed was but an incident of some legitimate government purpose.
>
> * * * * *
>
> If the exercise of force during pretrial detention is reasonably related to a legitimate governmental objective, and the amount of force is not excessive in relation to that objective, then there is no Constitutional deprivation.
>
> * * * * *
>
> Law enforcement officers may not use force against pretrial detainees as a means of retaliation, retribution, or deterrence. * * *
>
> Simply put, while law enforcement officers may discipline detainees in furtherance of legitimate law enforcement purposes, they may not use force to inflict punishment.
>
> If you find that Defendant Budd used or caused to be used force which was not necessary for any legitimate law enforcement purpose, but rather was for the purpose of punishing, retaliating, or taking revenge against Tawhon Easterly or Steven Blazo, then this element of the offense is satisfied with respect to the count under consideration.

(R. 175, 4/13/05 Tr. 970-972, Apx. ___-___).

Contrary to Budd's argument (Br. 47), the jury instruction did not conflict with *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998). In *Lewis*, the Supreme Court reiterated its long-standing position that the Due Process Clause protects against abuse of executive power that "shocks the conscience." *Id.* at 846-847. *Lewis*, however, did not overrule *Graham* or *Bell*. Consequently, the standard articulated in *Graham* and *Bell* continues to define whether excessive force against a pretrial detainee violates the Fourteenth Amendment. See *Phelps* v. *Coy*, 286 F.3d 295, 300 (6th Cir. 2002) (post-*Lewis* decision quoting *Graham* for the proposition that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment"), cert. denied, 537 U.S. 1104 (2003).

Lewis did not prescribe a single, across-the-board standard for assessing whether conduct is conscience-shocking. Instead, the Court emphasized that what shocks the conscience will vary depending on the context. *Id.* at 850-851. In some contexts, such as a high-speed police chase or a prison riot, a law enforcement officer's conduct shocks the conscience only if done maliciously and sadistically to cause harm. See *Lewis*, 523 U.S. at 853-854. On the other hand, a different standard – deliberate indifference – is used to determine whether the denial of medical care to a pretrial detainee is conscience-shocking for constitutional purposes. *Lewis*, 523 U.S. at 850-853; *Ewolski* v. *City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002).

This Court's post-*Lewis* decisions have made clear that the malicious-and-sadistic standard applies under the Fourteenth Amendment if the misconduct involves "reflexive actions" occurring during "a rapidly evolving, fluid, and dangerous predicament which precludes the luxury of calm and reflective pre-response deliberation." *Darrah* v. *City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001) (quoting *Claybrook* v. *Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000)). The malicious-and-sadistic standard is inappropriate where "the circumstances allowed the state actors time to fully consider the potential consequences of their conduct." *Ewolski*, 287 F.3d at 510; see *id.* at 511-513.

Although *Lewis* did not specify the appropriate test for determining whether use of force against pretrial detainees is conscience-shocking, the Court emphasized that the "circumstances of normal pretrial custody" are "markedly different" from high-speed police chases. *Lewis*, 523 U.S. at 851. In contrast to high-speed chases, this Court has stated that "custodial settings" typically "provide the opportunity for reflection and unhurried judgments." *Ewolski*, 287 F.3d at 511 n.5.

The malicious-and-sadistic standard is inappropriate here because the assaults of pretrial detainees Easterly and Blazo did not occur in situations involving "split-second decision making." *Ewolski*, 287 F.3d at 511. Budd ordered the beating of Easterly to punish him for hitting a female deputy during a fight earlier in the day. Budd issued his order approximately an hour and a half after guards had broken up the fight, restored order and locked Easterly and the

other detainees in their cells. See pp. 6-7, *supra*. This lapse of time afforded Budd ample opportunity for calm reflection. Nor did Budd confront a situation requiring split-second decisionmaking when he assaulted Blazo. When Budd attacked him, Blazo was wearing leg shackles and handcuffs and was not resisting, threatening anyone, or doing anything else to justify the use of force. Under these circumstances, the malicious-and-sadistic standard does not apply and thus the district court's instruction was proper.

Applying the malicious-and-sadistic standard under these circumstances also would inappropriately erase the distinction between the Eighth Amendment standard applicable to convicted prisoners and the Fourteenth Amendment standard used for pretrial detainees. The malicious-and-sadistic standard that Budd advocates (Br. 48-49) is identical to the one courts apply in Eighth Amendment cases involving use of force against convicted prisoners. See *Hudson* v. *McMillian*, 503 U.S. 1, 6-7 (1992). In the context of excessive force, however, this Court has "declined to apply the Eighth Amendment standard in the case of an incarcerated pretrial detainee." *Phelps*, 286 F.3d at 301 (citing *Gantt* v. *Akron Corr. Facility*, 73 F.3d 361, 1996 WL 6530, at *2 (6th Cir. 1996)). Moreover, Budd's argument conflicts with his assertions on appeal and in the district court that the Eighth Amendment standard is more onerous than the one used for pretrial detainees under the Fourteenth Amendment. (Br. 31-34; R. 173 4/11/05 Tr. 746, Apx. ___).

Finally, Budd incorrectly asserts (Br. 23) that the jury instruction adopted a Fourth, rather than a Fourteenth, Amendment standard. This Court's decision in *Phelps* refutes that contention. There, the Court drew a distinction between the standards used to analyze excessive force claims under the Fourth, Eighth, and Fourteenth Amendments, and explained that the Fourteenth Amendment "protects a pretrial detainee from the use of excessive force that amounts to punishment," 286 F.3d at 299-300 – precisely the standard used by the district court in its jury instruction.

V

THE EVIDENCE WAS SUFFICIENT TO PROVE THAT BUDD'S USE OF FORCE AGAINST PRETRIAL DETAINEE STEPHEN BLAZO VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Budd argues (Br. 49-51) that the district court erred in denying his motion for judgment of acquittal on Count 4. He contends that the evidence was insufficient to support his conviction on that count because the amount of force used against Blazo did not violate the Fourteenth Amendment. Budd's argument is meritless. He ignores the most damaging testimony about his use of force against Blazo – evidence that is more than sufficient to establish a Fourteenth Amendment violation.

A. Standard Of Review

This Court reviews *de novo* the denial of a motion for judgment of acquittal. *United States* v. *Meyer*, 359 F.3d 820, 826 (6th Cir.), cert. denied, 543 U.S. 906

(2004). The Court must determine "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ibid.* A defendant challenging the sufficiency of the evidence bears a "very heavy burden." *United States* v. *Chavis*, 296 F.3d 450, 455 (6th Cir. 2002).

B. The Evidence Was Sufficient To Allow A Rational Jury To Find Budd Guilty Of Violating Blazo's Fourteenth Amendment Rights

As previously explained, the Due Process Clause of the Fourteenth Amendment "protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham* v. *Connor*, 490 U.S. 386, 395 n.10 (1989). If the use of force "is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees." *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979). The evidence in this case was more than sufficient to demonstrate that Budd used excessive force against Blazo for the purpose of punishing him.

The argument section of Budd's brief (Br. 49-51) ignores the most serious allegations about his treatment of Blazo. In his argument, he fails to mention the trial testimony that Budd (1) slammed Blazo's head into a table, causing him pain; (2) rammed Blazo's head into doors at least twice; (3) slammed Blazo into window sills; and (4) shoved Blazo into walls several times while escorting him to an interrogation room. See pp. 15-17, *supra*. Thus, contrary to the misleading

impression left by Budd's brief, the government's evidence established that Budd's use of force against Blazo was far more serious than merely "pulling on his ear" or "shoving a table into him." Br. 49. The argument section of Budd's brief also neglects to mention that Blazo was wearing handcuffs and leg shackles during the entire incident and that the government's witnesses testified that Blazo never resisted or threatened officers or disobeyed a command during his encounter with Budd. See pp. 15-17, *supra*.

This evidence was sufficient to prove that the force used against Blazo was excessive. Slamming a pretrial detainee's head into doors and a table and ramming his body into walls and window sills is plainly excessive where, as here, the detainee is fully restrained with leg shackles and handcuffs and is neither resisting, trying to escape, nor threatening anyone. Cf. *McDowell* v. *Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988) (concluding, in a Fourth Amendment case, that the "need for the application of force" was "nonexistent" where victim was handcuffed and not trying to escape or hurt anyone).

Moreover, the evidence was sufficient to allow the jury to infer that the excessive force had a punitive purpose. The type of force used against Blazo serves no legitimate governmental purpose where, as here, the detainee is compliant, non-threatening, and doing nothing else to justify the use of force. See *Phelps* v. *Coy*, 286 F.3d 295, 301-302 (6th Cir. 2002) ("there was simply no governmental interest in continuing to beat [the victim] after he had been neutralized, nor could a reasonable officer have thought there was"), cert. denied,

537 U.S. 1104 (2003). And because the use of force served no legitimate purpose, the jury could rationally infer that it was intended to punish Blazo. See *Bell*, 441 U.S. at 539. The testimony that defendant angrily accused Blazo of burglarizing the home of Budd's friend bolstered the inference that the force had a punitive purpose.

Finally, Budd's reliance (Br. 50) on *Riley* v. *Dorton*, 115 F.3d 1159 (4th Cir.) (en banc), cert. denied, 522 U.S. 1030 (1997), is misplaced. The force in *Riley* involved a slap across the face, the insertion of a pen a quarter-inch into the detainee's nose, and uncomfortable handcuffing. *Id.* at 1161. The use of force against Blazo – particularly the slamming of his head into hard objects – was much more extreme and posed a far greater risk of injury than the alleged misconduct in *Riley*. This physical abuse of Blazo was excessive force amounting to punishment, precisely what the Due Process Clause forbids.

VI

THE EVIDENCE WAS SUFFICIENT TO CONVICT BUDD ON COUNT 3

Budd argues (Br. 51-57) that he is entitled to a judgment of acquittal because the evidence was insufficient to support his conviction on Count 3. Specifically, he asserts (1) that Brandon Moore failed to identify Budd as the officer who used force against him (Br. 54-57) and (2) that the amount of force used against Moore did not violate the Eighth Amendment (Br. 51-54). In fact, the evidence was more

than sufficient to identify Budd as the perpetrator and to prove that his use of force against Moore was cruel and unusual punishment under the Eighth Amendment.

A. Standard Of Review

This Court reviews the evidence in the light most favorable to the prosecution to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See p. 56, *supra*.

B. The Evidence Was Sufficient To Identify Budd As The Officer Who Used Excessive Force Against Moore

Budd argues that the district court should have granted a judgment of acquittal at the first trial because Moore never identified Budd at that trial as the officer who used force against him. Budd's claim is meritless because Deputies Tinkey and Oliver identified Budd at the first trial as the one who used excessive force against Moore. (R. 105, 2/16/05 Tr. 67-70, 73-75, 87-89, 92, 116-121, 123, 129-130, Apx. ___-___, ___-___, ___-___, ___, ___-___, ___, ___-___).

C. The Evidence Was Sufficient To Allow A Rational Jury To Find That The Use Of Force Against Moore Violated The Eighth Amendment

The "unnecessary and wanton infliction of pain" constitutes "cruel and unusual punishment forbidden by the Eighth Amendment." *Hudson* v. *McMillian*, 503 U.S. 1, 5 (1992) (citation omitted). In excessive force cases involving convicted prisoners, the key inquiry under the Eighth Amendment is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 6-7. Although *de minimis* uses of physical force will not violate the Eighth Amendment unless they involve the type of force that is "repugnant to the conscience of mankind," force need not produce "serious injury" to constitute cruel and unusual punishment. *Id.* at 4, 9-10.

Budd ignores critical portions of the government's evidence against him – evidence that is more than sufficient to prove that he inflicted force "maliciously and sadistically to cause harm" to Moore. *Id.* at 6-7. Budd fails to mention the *undisputed* fact that Moore was physically restrained during the entire incident with leg shackles, handcuffs, and a belly chain. See p. 12, *supra*. Budd also neglects to mention that both deputies who witnessed the encounter testified that Moore did nothing to justify the force that Budd used against him. See p. 15, *supra*. In addition, Budd ignores testimony by government witnesses that Moore did not resist the officers, physically threaten anyone, try to escape, or fight back even when attacked by Budd. See p. 15, *supra*. This evidence belies Budd's assertion (Br. 52-54) that he reasonably believed he had to use force to keep Moore under control.

In addition, Budd downplays or simply ignores critical evidence about the severity of the force he inflicted on Moore. Government witnesses testified that Budd

- slammed Moore head-first into a window, knocking the breath out of him, causing him pain, and scratching his face;
- forcefully pressed Moore's head against a steel window frame, leaving an indentation in his forehead;
- threw Moore face-first to the floor, knocking the breath out of him;

- stood on Moore's back with both feet, placing his full body weight of about 250 pounds on the detainee, despite being told that Moore had a bullet lodged in his back; and
- kicked Moore in the ribs, causing him further pain.

See pp. 12-15, *supra*. This evidence amply supports a finding that Budd acted maliciously and sadistically to harm Moore.

Finally, contrary to Budd's suggestion (Br. 53), the force he inflicted on Moore cannot plausibly be characterized as *de minimis*. Budd's conduct bears no resemblance to the situation in *DeWalt* v. *Carter*, 224 F.3d 607 (7th Cir. 2000) (see Br. 53), which involved a "single and isolated" shove, "unaccompanied by further uses of force." *Id.* at 620. Budd's multiple uses of force against Moore were far more egregious than the single shove in *DeWalt*, and amply support the jury's finding of an Eighth Amendment violation.

CONCLUSION

The Court should affirm defendant's conviction.

Respectfully submitted,

GREGORY A. WHITE
United States Attorney

WAN J. KIM
Assistant Attorney General

_____
MARK L. GROSS
GREGORY B. FRIEL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-3876

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2006, a copy of the foregoing PROOF BRIEF FOR THE UNITED STATES AS APPELLEE was served by Federal Express, overnight delivery, on

Sebastian Rucci, Esq.
3058 Chardonnay Lane
Poland, OH 44514
(330) 707-1182
(counsel for Michael J. Budd)

I also certify that on the same date, a copy of the same proof brief was served by first-class mail, postage prepaid, on

Martin Yavorcik, Esq.
44 Federal Plaza, Suite 201
Youngstown, OH 44503
(330) 744-7300
(co-counsel for Michael J. Budd)

I further certify that, on the same date, the United States' proof brief was sent by first-class mail, postage prepaid, to the Clerk of the United States Court of Appeals for the Sixth Circuit.

GREGORY B. FRIEL
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 12 and contains 13,584 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____
GREGORY B. FRIEL
Attorney

July 13, 2006

APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

Appellee, per Sixth Circuit Rule 28(d) & 30(b), hereby designates, in addition to Appellant's designations,[1] the following portions of the record for inclusion in the Joint Appendix:

Description of Entry	**Date Filed**	**Record Number**
Excerpt from Trial Transcript 2/15/05 (Testimony of Witnesses Ron Kaschak, Tawhon Easterly and Ronald Denson) Pages 31-42, and 53-55	2/22/05	69
Excerpt from Trial Transcript 2/17/05 (Testimony of Michael J. Budd and Aurea Montero) Pages 17-20, 88-90, and 98-101	3/8/05	91
Excerpt from Trial Transcript 2/16/05 (Testimony of Mark J. Durkin)	4/1/05	107
Excerpt from Trial Transcript 2/16/05 (Testimony of Peter Proch) Pages 7-9 and 11-14	4/3/05	118

[1] When the Appellant's appendix designation lists a document without specifying page numbers for that document, the United States assumes that Appellant intends to include the entire document in the appendix.

APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

Description of Entry	Date Filed	Record Number
Government Trial Exhibit 17	Admitted on 4/11/05	N/A
Government Trial Exhibit 19 (Subpoena)	Admitted on 4/11/05	N/A
Government Trial Exhibit 20	Admitted on 4/11/05	N/A
Defendant Exhibit A	Admitted on 4/11/05	N/A
Defendant Exhibit B	Admitted on 4/11/05	N/A