ORAL ARGUMENT NOT REQUESTED
Nos. 07-4180, 07-4182, & 07-4283

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ERIC G. EGBERT, SHAUN A. WALKER,
& TRAVIS D. MASSEY,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR PLAINTIFF-APPELLEE

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LEGISLATION:

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STATEMENT OF JURISDICTION

The district court's jurisdiction over this prosecution under 18 U.S.C. 241, 18 U.S.C. 245(b)(2)(C), and 18 U.S.C. 2 was based on 18 U.S.C. 3231. Defendant Eric Egbert (Egbert) filed a notice of appeal on August 21, 2007, from a final judgment entered by the district court on August 16, 2007. Defendant Shaun Walker (Walker) filed a notice of appeal on August 22, 2007, from the district court's August 16, 2007, final judgment. Defendant Travis Massey (Massey) filed

a notice of appeal on December 18, 2007, from a final judgment entered by the district court on December 17, 2007. The jurisdiction of this Court is based on 28 U.S.C. 1291 and 18 U.S.C. 3742.

ISSUES PRESENTED

1. Whether the district court erred in computing Walker's and Egbert's base offense levels for their conspiracy convictions by including, as relevant conduct pursuant to U.S.S.G. § 1B1.3(a)(1)(B), the assault near the Port O'Call bar.

2. Whether the district court erred in applying the aggravated assault guideline, U.S.S.G. § 2A2.2, or applying a five-level enhancement to Walker's and Massey's sentences, pursuant to U.S.S.G. § 2A2.2(b)(3)(B), because the victim in the Port O'Call incident sustained serious bodily injury.

3. Whether the district court erred in adjusting Walker's and Massey's base offense levels by considering the Port O'Call incident for purposes of the multiple count adjustment provisions of the guidelines.

4. Whether the district court erred in applying a four-level enhancement to Walker's sentence, pursuant to U.S.S.G. § 3B1.1(a), for being an organizer or leader of criminal activity involving five or more participants.

5. Whether Walker's sentence is substantively reasonable.

STATEMENT OF THE CASE

On June 7, 2006, a grand jury sitting in the District of Utah returned an indictment charging Walker, Massey, and Egbert with violations of 18 U.S.C. 241, 18 U.S.C. 245(b)(2)(C), and 18 U.S.C. 2. R. 1.[1] Count One charged that between December 31, 2002, and March 15, 2003, Walker, Massey, and Egbert conspired to injure, oppress, threaten, and intimidate individuals in and around Salt Lake City, Utah, in the free exercise and enjoyment of their rights to full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation without intimidation, threat, or coercion because of race, color and national origin, in violation of 18 U.S.C. 241. R. 1 at 1-3.

Count One alleged that it was the plan and purpose of this conspiracy for the defendants and others to provoke and engage in arguments and fights in public settings with individuals they perceived to be "non-white," for the purpose of making such individuals afraid to appear in public and to live and work in and

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[1] Citations to "R. __" refer to the documents filed in the district court. Citations to "Tr. __" refer to the transcript of the trial. Citations to " __ Sen. Tr. __" refer to the transcripts of the sentencing hearings of the relevant defendant. The government's trial exhibits are cited as "GX __". Citations to "Egbert Br. __," "Walker Br. __," or "Massey Br. __," refer to pages in the appellants' opening briefs.

around Salt Lake City. R. 1 at 2. Count One identified three overt acts committed by defendants in furtherance of the conspiracy: intimidating and threatening individuals of minority racial and ethnic heritage in a bar in Salt Lake City; intimidating, threatening, and assaulting a Mexican-American male in that same bar; and intimidating, threatening, and assaulting a Native-American male outside another bar on a separate occasion. R. 1 at 2-3.

Count Two charged that Walker, Massey, and Egbert willfully injured, intimidated, and interfered with a Mexican-American male, because of his national origin and because he was and had been enjoying employment by a private employer, in violation of 18 U.S.C. 245(b)(2)(C) and 18 U.S.C. 2. Count Two charged that this offense resulted in bodily injury to the Mexican-American male. R. 1 at 4.

Trial was held from April 17-20, 2007, before the Honorable Dee Benson. On April 20, 2007, the jury returned a verdict finding all three defendants guilty on both counts. R. 107.

At sentencing hearings on August 13, 2007, the district court sentenced Egbert to 42 months in prison and Walker to 87 months of imprisonment. Egbert Sen. Tr. 21-22; Walker Sen. Tr. 44-45. The court entered final judgments as to Egbert and Walker on August 16, 2007. R. 137 (Egbert), R. 135 (Walker).

Massey was sentenced on December 14, 2007, to 57 months in prison. R. 206 at 55, 71. Judgment as to Massey was entered on December 17, 2007. R. 187.

STATEMENT OF THE FACTS

1. Count One - The Conspiracy

Walker and Massey were leaders of the Salt Lake City unit of the National Alliance, a white supremacist group, during the period at issue in this case, *i.e.*, December 2002 to March 2003. Tr. 265, 267. Egbert was a member of the National Alliance during that period. Tr. 281.

The Salt Lake City unit of the National Alliance had both a non-violent public side and a militant element that was not formally acknowledged. Tr. 274, 360, 551-552. The group sought to maintain a public image of being "clean cut and well-spoken and polite." Tr. 274. The more militant members, however, including Walker, Massey, Egbert, Keith Cotter (Cotter), and Brad Callahan (Callahan), frequently discussed a racial holy war (RAHOWA) as part of the white power movement. Tr. 273-276. The ultimate goal of RAHOWA was to have an open, racial holy war to throw the "non-whites" out of the country, overthrow the government, and install a government run by white people. Tr. 277.[2] The group

[2] The evidence showed that the National Alliance was founded in the 1970's by William Pierce, who wrote a novel, called *The Turner Diaries*, about

(continued...)

used the word "non-whites" as a blanket term to refer to anyone who was not a white person of European descent, as well as to Jewish people of European descent. Tr. 258-259. Walker and Massey encouraged the members to read and distribute to others a book about setting up a communications network among units of the National Alliance to fight a racial holy war. Tr. 280-281.

In addition to the "bigger picture" of a racial holy war in the future, Walker, Massey, Egbert, Cotter, and Callahan discussed targeting non-whites for violence on a local level to raise awareness that "skinheads and white people are out there" and that this country belongs to white people. Tr. 273-276, 278, 285-289, 293-294. One of the main purposes of assaulting non-whites in public and semi-public places in the Salt Lake City area was to instill a sense of fear in the non-white community and to be sure "that word gets around within their circles * * * to keep [non-whites] from using" public places. Tr. 289, 293, 295-296. Beating up non-whites was also considered a recruitment tool for the white supremacist movement. Tr. 286, 289.

During these discussions about using violence against non-whites, Walker played music from his large collection of "anti-government, anti-non-white, pro-

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[2](...continued)
fighting a racial holy war against the government's suppression of white people. See *National Alliance* v. *United States*, 710 F.2d 868, 873 (D.C. Cir. 1983).

white, * * * militant skinhead music," that is produced and distributed by the National Alliance's record label, Resistance Records. Tr. 281-284. The music advocated targeting non-whites for violence, and the defendants expressed agreement with that message in the music. Tr. 284-285.

Prior to December 31, 2002, the defendants specifically discussed using violence against non-whites in the Salt Lake City area. Tr. 286-288. Walker, Massey, Callahan, and Egbert all participated in those discussions. Tr. 273-274, 276. Cotter stated that he had conversations with Egbert about using violence against non-whites in the Salt Lake City area between late 2002 and March 2003. Tr. 290, 294. He stated that much of the discussion with Egbert about the bigger picture of a racial holy war was "just talk," but that when they talked about actions to be taken on a local level, the discussions were more specific, *i.e.*, that "this is our mission; this is what we should try to do." Tr. 294. The group did not discuss specific locations and times for using violence against non-whites in public places; rather, the understanding among Walker, Massey, Egbert, Cotter, and Callahan was that "[i]f the opportunity presents itself, then you go ahead and act on it." Tr. 288-289, 293-295.

2. The Assault At O'Shucks

On December 31, 2002, the defendants and other members of the National Alliance were celebrating New Year's Eve by having drinks in a bar in downtown Salt Lake City called the O'Shucks Bar and Grill (O'Shucks). Tr. 298-299.[3] A restaurant called Ahh Sushi, which is under the same ownership, also operates on the premises. Tr. 57. The two establishments, which are located in a basement, share a kitchen that prepares food for patrons, but each employs its own staff. Tr. 58, 60.

On the night of December 31, 2002, James Ballesteros was the head bar tender at O'Shucks. Tr. 53. Ballesteros has a mixed racial background. Tr. 80-81. Another bartender, Matt Sawyer, was also working that night. Tr. 70. Paul Velos was the sushi chef at Ahh Sushi, and Ben McGregor was one of the servers. Tr. 70.

Cotter had been out "barhopping" with Massey, and the two men met up with Walker, Egbert, and a few other National Alliance members at O'Shucks between 10 and 11 p.m. Tr. 298-300. Walker had brought along stickers with a National Alliance message to distribute during the First Night celebration in

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[3] Because O'Shucks is classified as a private club under Utah law, it is permitted to serve its members hard liquor, as well as beer. Tr. 51, 56. Anyone can obtain a temporary membership by paying a fee at the door. Tr. 57.

downtown Salt Lake City, and group members started handing them out in the bar and applying them to the walls and the bar. Tr. 203, 302. Walker designated Cotter and Egbert to give out the stickers because they were the newest members of the National Alliance. Tr. 303. The sticker stated:

> Stop immigration. Non-whites are turning America into a third world slum. They come for welfare or to take our jobs. They bring crime. They are messy, disruptive, noisy and multiply rapidly. Let's send them home now. National Alliance, an organization of whites who are not afraid to speak up for their race.

GX 1. The stickers listed postal and email addresses for the National Alliance and invited recipients to send $2 to get a catalog and membership information. Tr. 79.

Many of the customers in O'Shucks were offended by the stickers, and the atmosphere was becoming tense. Tr. 204. One of the regular customers, Kathryn Jencks, engaged in conversation with a man sitting next to her at the bar. Tr. 573. He asked Jencks, who has red hair, whether she was Irish. Tr. 83, 573. Jencks told the man she was a "Polish Jew." Tr. 573. The man bought Jencks a drink and toasted to the Irish, and Jencks offered a toast to Polish Jews. Tr. 573. When she did so, the man sitting next to the one with whom Jencks was toasting punched him and asked, "[W]hat the fuck are you doing toasting to a Polish Jew?" Tr. 574; see also Tr. 204-205.

Jencks was "shocked" at that response and left the bar area to sit at a table with two friends, Zoey Grey and Trevor Taylor. Tr. 574. Jencks then went back to the bar to talk to Ballesteros and Ben McGregor, her boyfriend at the time, to make them aware of what was going on, because she was concerned that the situation would escalate. Tr. 575-576. While Jencks was gone, the man who punched the man who had toasted with Jencks at the bar came by the table and started talking to Grey and Taylor about Jews and people of color and saying that white people were the right people. Tr. 577. Cotter identified the man who made these remarks as Egbert. Tr. 304.

Cotter testified that he and Egbert had approached Grey and Taylor because they thought Grey and Taylor, who were bald, were skinheads. Tr. 304-305. When Grey and Taylor told Egbert to leave because they did not agree with his beliefs, Egbert stated that "two million more" Jews should die and that people of color were dirty and should not be here. Tr. 577. Egbert walked away but returned with stickers and started to pass them out. Tr. 578. He bought drinks for Grey and Taylor and handed them stickers, but they told him that the stickers were disgusting and refused to accept the drinks. Tr. 580. Egbert told Jencks to "die, you fucking Jew bitch, two million more." Tr. 582.

Ballesteros asked to see one of the stickers, and Cotter handed him one. Tr. 306. Ballesteros read it and said that he was not white, so Cotter probably would not like him. Tr. 306. Cotter asked Ballesteros where he was from, and Ballesteros said that he was an American, but part of his heritage was related to Mexico. Tr. 80-81. Cotter called Ballesteros a "dirty Mexican," "dirty spick," and "nigger" multiple times and told him to leave this country and go back where he came from. Tr. 81.

Ballesteros told Cotter to stop handing out the stickers. Tr. 306. Cotter, who was "irritated," informed Walker and Massey that the bartender had ordered him to stop distributing stickers. Walker was angry because a non-white told them to stop handing out the stickers. Tr. 306-308. Walker and Massey asked Cotter if he could get the bartender outside so that they could beat him up. Tr. 308, 447. Walker and Massey used ethnic slurs against Ballesteros. Tr. 308-309.

Cotter testified that he waited until about ten minutes before midnight and then started an argument with Ballesteros, who told the group to leave. Tr. 307, 310. Ballesteros said that he had already asked the group nicely several times to leave, but when they did not, he told them that he could call the police. Tr. 87. Ballesteros came out from behind the bar to escort the group out, and Cotter started running toward the door so that Ballesteros would follow him and not go

back behind the bar. Tr. 88, 310. Ballesteros testified that he was trying to create a buffer between the group and the patrons in the bar who were not happy with what the group had been doing. Tr. 87-88. At that point, Ballesteros did not feel he was in any danger. Tr. 89.

Cotter testified that Ballesteros gave him a little push, and Cotter punched Ballesteros, grabbed him around the neck, and dragged him out the door of the bar into a small foyer at the foot of the stairs leading up to the street. Tr. 89, 311. Ballesteros was struggling, and Cotter "rabbit-punched" him in the side of his head. Tr. 312. Egbert, Walker, and Massey were in the foyer area punching and kicking Ballesteros in the midsection and the legs. Tr. 312, 314. Ballesteros was not striking back at any of the men in the group. Tr. 313. All of the men in the group were shouting racial slurs at Ballesteros. Tr. 92, 314. Ballesteros testified that the assault, which was a group effort, was "extremely violent," and he was punched repeatedly in the head, face, ribs, and stomach and kicked in his legs. Tr. 92. He stated that the man who was holding him told him he was not allowed to talk to a member of a higher race. Tr. 92. The men were calling him "nigger, dirty spick, dirty Mexican," and they told him to leave the country and go back where he came from because he did not belong here. Tr. 93-94.

One of the group members was holding the door to the bar shut so that the bar patrons could not get out to the foyer to assist Ballesteros. Tr. 90, 162-163, 209-210, 226-227. After about 30 seconds, Ballesteros broke loose from Cotter's hold, and some of the bar patrons came through the door and pulled Ballesteros back into O'Shucks. Tr. 315. The group, who knew that the police had been called and were on their way, left at that point. Tr. 315-316.

Later that night, members of the group, including Callahan, met back at Walker's house. Tr. 316. Egbert asked if they had seen him punch "that motherfucker." Tr. 313, 448. Callahan testified that Egbert said that he had gotten a "couple shots" on the bartender, that Walker "said he got a couple boots on the guy," and that Massey "said he got a couple of shots on the guy as well." Tr. 477-484. Cotter told Callahan in the presence of all three defendants that the beating of Ballesteros was racially motivated. Tr. 381-382.

3. The Assault Near The Port O'Call Bar

On the evening of March 14, 2003, Cotter, Egbert, Walker and Massey went out drinking together and ended up at Area 51, a bar and dance club. Tr. 316-317. Near closing time at Area 51, Cotter and Massey met two female nurses and accompanied them to another bar, the Galley, that stayed open past 1 a.m. and

served food and non-alcoholic beverages, leaving Walker and Egbert behind. Tr. 316-318.[4]

At the Galley, the two nurses began talking in sign language to a group at another table that included two white men and a man perceived by Cotter and Massey to be a Native American because of his "dark reddish-brown skin" and "long straight black hair." Tr. 319-320. Massey told Cotter that he was "pissed off with the Indian" and wanted to "kick this white murderer's ass." Tr. 321-322. In previous conversations with Cotter, Massey had said that he had a "special place in his heart for hate for Indians because * * * the media portrayed them as being great noble warriors, but we took two continents from them without breaking a sweat." Tr. 321-322. The man had not done anything to provoke Cotter or Massey. Tr. 322. Massey suggested that they invite all three men for a party, but once they were outside, they would "basically whip [the Indian's] ass." Tr. 322.

The plan to get the other men outside was carried out, and the group walked to the corner of 4th South and West Temple Streets, near a bar named the Port O'Call. Tr. 323-324. As they turned the corner, Massey started an argument with

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[4] Subsequently, the bar was renamed the Anchors Aweigh, and some witnesses used that name during the trial to refer to it. See Tr. 318, 461, 492.

one of the white men, and Cotter started hitting the other white man, knocked him down, and kicked him. Tr. 326. When Cotter turned around, he saw that Massey had "squared up with the Indian guy." Tr. 327. As Massey and the Native American man moved into the intersection, the Native American man put his arms around Massey's waist, and Massey called out to Cotter for help. Tr. 327. Cotter grabbed the Native American man around his midsection, lifted him, and threw him to the ground. Tr. 327. The man landed on his head, and Cotter hit him with his elbow and punched him in the side of the head. Tr. 327-328. Massey stood by and yelled, "Punch him." Tr. 328. The assault lasted a couple of minutes until the Native American man stopped moving and appeared to be unconscious. Tr. 328. Cotter thought he had broken the man's cheekbone. Tr. 328.

Valerie Hodge, who had also been in the Galley and had seen Cotter and Massey playing pool there, left the bar at about the same time they did and witnessed the assault on the Native American man from her car. Tr. 461-465. She testified that one of the two white men shoved the dark-skinned man, punched him a few times, and then threw him to the ground. The dark-skinned man hit his head on the street. Tr. 468. The other white man was standing on the side yelling and was not trying to pull his friend away to stop the assault. Tr. 468, 470. In addition, the second white man kicked the dark-skinned man while he was on the

ground. Tr. 468. She stated that the fight lasted a minute or two, and when it was over, the two white men left the dark-skinned man on the ground unconscious, bleeding from his head, and severely injured. Tr. 469. She thought perhaps he might have been dead. Tr. 469.

The two nurses had fled down the street, and Cotter and Massey ran to catch up to them. Tr. 329. The nurses gave Cotter and Massey a ride back to Walker's house, where Cotter was planning to spend the night. Tr. 329. After Cotter and Massey left, one of the Native American man's friends stayed with him until the other came with a car and took him away. Tr. 469.

The following morning, Massey and Cotter told Walker what they had done, stating that they had "wrecked out on a wagon burner." Tr. 331. They told Walker they had decided to assault the man because he was an Indian. Tr. 331. Walker said that it was a "good job." Tr. 331. Cotter and Massey then went to Egbert's house and told him that they had assaulted an Indian, and Egbert laughed. Tr. 331-332. Callahan was also present at Egbert's when Cotter talked about the assault. Tr. 331.

4. Facts Relevant To Sentencing

a. Egbert

The June 25, 2007, Presentence Report (PSR), based on the 2006 edition of the Sentencing Guidelines, calculated Egbert's total offense level at 17. PSR ¶ 39.[5] Given his criminal history category of II, the advisory guidelines sentence range was 27 to 33 months. PSR ¶ 70.

After Egbert argued that the offense level was improperly computed, the probation office issued an addendum to the PSR clarifying that the overt act in the conspiracy count involving a second victim (the Port O'Call incident) was treated as if contained in a separate count of conviction, pursuant to Application Note 1 of U.S.S.G. § 2H1.1. Initial Addendum to Egbert PSR 1. This resulted in a two-level increase in the base offense level, pursuant to U.S.S.G. § 3D1.4. The probation office submitted to the district court Egbert's argument that a downward departure of two levels should be granted, pursuant to U.S.S.G. § 3B1.2(b), because of his minor role in the offenses. Initial Addendum to Egbert PSR 1-2. Egbert objected to the two-level increase in his base offense level that resulted from holding him responsible for the Port O'Call incident. R. 120; 2nd Addendum to Egbert PSR 2.

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[5] The guideline for violations of 18 U.S.C. 241 and 18 U.S.C. 245(b) is U.S.S.G. § 2H1.1.

The United States argued that (1) U.S.S.G. § 2H1.1(a)(1) required a cross-reference to the guideline for aggravated assault, U.S.S.G. § 2A2.2, as the underlying conduct for the offenses of conviction, and (2) the conduct involved warranted a two-level adjustment for more than minimal planning, U.S.S.G. § 2A2.2(b)(1); a five-level adjustment for inflicting serious bodily injury, U.S.S.G. § 2A2.2(b)(3)(B); and a two-level victim-related adjustment for physical restraint of the victim, pursuant to U.S.S.G. § 3A1.3. R. 118 at 2-5.

The probation office issued a second addendum stating that the PSR did not apply the aggravated assault guideline because the victim in the Port O'Call incident was never identified and the extent of injury was never formally determined. 2nd Addendum to Egbert PSR 2.

At the August 13, 2007, sentencing hearing, the district court found by a preponderance of the evidence that it was reasonably foreseeable, and within the scope of the conspiracy of which the jury convicted Egbert, that his co-conspirators might assault another individual based on his race or ethnic origin and that such an assault might result in serious bodily injury, as occurred in the Port O'Call incident. Egbert Sen. Tr. 23. The court applied the aggravated assault guideline as underlying conduct for the conspiracy and added a five-level adjustment for serious bodily injury, which it found "by * * * far more than a

preponderance of the evidence," based upon the "independent corroboration of the serious physical plight that Mr. Cotter and Mr. Massey left that Native American in." Egbert Sen. Tr. 24. The court added two levels for restraint of the victims, declined to add points for more than minimal planning or for grouping of multiple counts, and decreased the offense level by three levels for Egbert's "minimal" participation in the Port O'Call incident. Egbert Sen. Tr. 24; see U.S.S.G. § 3B1.2 (mitigating role).[6]

From an advisory guideline sentence range of 41 to 51 months, based on an adjusted offense level of 21, the district court sentenced Egbert to 42 months, which it characterized as a "relatively light sentence." Egbert Sen. Tr. 24-25. The court stated that, even without the guidelines, it would have sentenced Egbert to three or four years of imprisonment because of the "ugly area" of racially based attacks on individuals that the co-conspirators "chose to be involved in." Egbert Sen. Tr. 25. The court also stated that it would pronounce the same sentence after consideration of the factors in 18 U.S.C. 3553(a). Egbert Sen. Tr. 25-26.

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[6] The guideline advises a 4 level decrease if participation is "minimal," U.S.S.G. § 3B1.2(a), a 2 level decrease if participation is "minor," U.S.S.G. § 3 B1.2(b), and a 3 level decrease "[i]n cases falling between (a) and (b)."

b. Walker

The June 25, 2007, PSR calculated Walker's total offense level at 17. Walker PSR ¶ 41. Given his criminal history category of I, the guidelines advisory sentence range was 24 to 30 months. PSR ¶ 63; see U.S.S.G. § 5A (Sentencing Table).

Walker joined Egbert's objections to the calculation of his base offense level. R. 121. The probation office issued an addendum to the PSR clarifying, as it did with Egbert, that the overt act in the conspiracy count involving the Port O' Call victim was treated as if contained in a separate count of conviction, pursuant to Application Note 1 of U.S.S.G. § 2H1.1, resulting in a two-level increase in the base offense level, pursuant to U.S.S.G. § 3D1.4. Initial Addendum to Walker PSR 1-2. Walker also joined Egbert's objections to the Initial Addendum. R. 121 at 1-2; 2nd Addendum to Walker PSR 2-3. In addition, Walker argued that his sentence should be reduced to 18 months based upon the circumstances of the case and the factors provided in 18 U.S.C. 3553. R. 121 at 2-5.

As it had with regard to Egbert, the government argued that the guideline for aggravated assault should be applied and that adjustments should be made for more than minimal planning (two levels), inflicting serious bodily injury (five levels), and restraint of victim (two levels). R. 118 at 2-5. In addition, the

government argued that a four-level aggravating role adjustment should be added for Walker as an organizer or leader of a criminal activity that involved five or more participants, pursuant to U.S.S.G. § 3B1.1(a). R. 118 at 5-9.

In a second addendum to Walker's PSR, the probation office declined to revise the PSR to cross-reference the aggravated assault guideline, for the same reasons as noted in the second addendum to Egbert's PSR. 2nd Addendum to Walker PSR 1-2. The probation office agreed with the government that an increase in Walker's offense level "may be warranted based upon the defendant's leadership position and organizing capacity" in the local National Alliance chapter and subsequent ascent to a national leadership role just prior to the commission of the assaults in this case. 2nd Addendum to Walker PSR 2. With that revision, the PSR calculated Walker's total offense level as 21, producing an advisory guidelines sentencing range of 37 to 46 months. 2d Addendum to Walker PSR 2.

At the August 13, 2007, sentencing hearing, the district court cross-referenced the aggravated assault guideline as the underlying conduct based on its finding, by a preponderance of the evidence, that the Port O'Call incident was related to the agreement reached by the conspirators "to target non-white individuals in the Salt Lake City area for violent acts against them." Walker Sen. Tr. 39-40. The court added five levels to the base offense level for the serious

bodily injury that occurred in the Port O'Call incident. Walker Sen. Tr. 40. The court also added three levels based on the fact that the assaults were committed because of the perceived racial and national origin of both victims, see U.S.S.G. § 3A1.1(a), which is "one of the ugliest things that we encounter and want to try somehow to eliminate." Walker Sen. Tr. 40-41.

In addition, the court increased Walker's offense level by four because it found "by a preponderance of the facts that he was involved as a leader or organizer or both of this criminal * * * conspiracy." Walker Sen. Tr. 41. The court concluded "that Mr. Walker was the man in charge" of this conspiracy "to beat up non-whites in the Salt Lake City area." *Ibid*. The court also added two levels for physical restraint of the victims and one level for grouping based on multiple counts of conviction, but did not agree with the government that the offenses involved more than minimal planning. Walker Sen. Tr. 42-43. The recalculation resulted in a total offense level of 29, resulting in an advisory guideline sentencing range of 87 to 108 months. Walker Sen. Tr. 44. The court sentenced Walker to 87 months of imprisonment, followed by 36 months of supervised release. Walker Sen. Tr. 44-45.

The court stated that if it were to sentence Walker using only the factors set forth in 18 U.S.C. 3553(a), it "would reach the same [sentence] and find it

completely reasonable," "necessary to reflect the seriousness of this offense," needed "to afford adequate deterrence to criminal conduct in the future for others who may be inclined toward viewpoints that are not illegal, but actions that are," and "to protect the public from further crimes of the defendant." Walker Sen. Tr. 47-49. Finally, the court said that under the circumstances of this case, it "could have considered a higher sentence for the ugliness of the conduct." Walker Sen. Tr. 49.

c. Massey

The PSR calculated Massey's total offense level at 19. Massey PSR ¶ 42. With a criminal history category of I, the advisory sentencing guidelines range was 30 to 37 months. Massey PSR ¶ 64.

Although Massey did not file any objections by the date specified in the PSR, the probation office issued an addendum to the PSR to include the clarifications it had made to Egbert's and Walker's PSRs as to the method of grouping applied pursuant to Application Note 1 to U.S.S.G. § 2H1.1, comment. (n.1); and U.S.S.G. § 3D1.4. Initial Addendum to Massey PSR.

The government objected to Massey's PSR for the same reasons as it had to the PSR for Walker, *i.e.*, failure to apply the aggravated assault guideline as the underlying conduct for the conspiracy count and omission of (1) a two-level

increase of more than minimal planning, (2) a five-level increase for infliction of serious bodily injury, (3) a two-level increase for restraint of victim, and (4) a four-level increase for aggravating role in the offenses. R. 118; 2nd Addendum to Massey PSR 1. As it had in its response to the government's objections to the Walker PSR, the probation office declined to cross-reference the aggravated assault guideline, although it agreed that if the court were to do so, an increase for bodily injury (but not serious bodily injury) would be appropriate. 2nd Addendum to Massey PSR 2. It also declined to increase the offense level for more than minimal planning and restraint of victims. 2d Addendum to Massey PSR 2.

The probation office did conclude, however, that an increase in the offense level "may be warranted based upon [Massey's] leadership position" in the local National Alliance chapter. 2nd Addendum to Massey PSR 2. Based on its view that Massey "did not hold sway to the same extent as Mr. Walker," the second addendum revised the PSR to include a two-level adjustment for aggravating role in the offenses, pursuant to U.S.S.G. § 3B1.1(c). 2nd Addendum to Massey PSR 2. As a result of these revisions, the PSR calculated Massey's total offense level at 19, providing an advisory sentencing guideline range of 30-37 months. 2nd Addendum to Massey PSR 2.

After employing new counsel, Massey filed his response to the revised PSR and to the government's position concerning sentencing factors. R. 162. He objected to the two-level increase in the revised PSR for his role in the offense, and to the findings made by the district court in sentencing Walker and Egbert. R. 162 at 1-2; see also R. 162 at 5-7. He argued against the government's position that the aggravated assault guideline should be applied and that five levels should be added to the base offense level for infliction of serious bodily injury in connection with the Port O'Call incident. R. 162 at 2-5. Finally, he argued that the court should take into account, pursuant to 18 U.S.C. 3553(a), the disparity in sentencing between himself and Cotter. R. 162 at 8.

Massey was sentenced on December 14, 2007. The court found that the aggravated assault guideline was appropriately applied and "that there was sufficient evidence presented at trial * * * primarily coming from [Valerie] Hodge and Mr. Cotter, indicating that the incident that happened outside of the Port O'Call included serious bodily injury," even though the victim could not be identified. R. 206 at 24-27, see also R. 206 at 50. The court also added three levels for the racially-motivated assaults and two levels for restraint of the victims. R. 206 at 53. The court found that an aggravating role for Massey was not proven by a preponderance of the evidence. R. 206 at 53-55. Based on these findings,

resulting in a total offense level of 24 and an advisory sentencing guideline range of 57 to 71 months, the court sentenced Massey to 57 months of imprisonment. R. 206 at 55, 71.

Applying the factors provided in 18 U.S.C. 3553(a), the court found that this sentence was "first and foremost" necessary to reflect the seriousness of the offense, where the object of the conspiracy was "to target people * * * because of their race, for actions against their person, for beating and for being singled out and attacked on that basis." R. 206 at 71. The court stated that even if it were not looking at the guidelines, a sentence in the five-year range for Massey would be warranted for these very serious offenses. R. 206 at 71. The court specifically found that the incident at the Port O'Call was "shocking and outrageous," and that the evidence, which the court characterized as "very strong," was "convincing beyond a reasonable doubt that Mr. Massey was right in the middle of it and involved." R. 206 at 71-72. Finally, the court stated that "a serious sentence needs to be imposed to deter others from starting down that path." R. 206 at 73.

SUMMARY OF ARGUMENT

None of the defendants in this case has challenged the validity of his conviction for conspiracy and for injuring, intimidating, and interfering with the

right of individuals to engage in federally protected activities based on their race or national origin. Rather, these appeals involve only sentencing issues.

A majority of the issues arise from the district court's decision to take the Port O'Call incident into account in calculating appellants' base offense levels. Walker and Egbert, who did not participate in that incident, object to having it included as relevant conduct as to them, pursuant to U.S.S.G. § 1B1.3(1)(B). All three appellants argue that it was error for the district court to apply the offense level for aggravated assault in computing their offense levels because of the Port O'Call incident and raising those levels by an additional five points because the victim of the Port O'Call incident sustained serious bodily injury.

1. The district court properly took into account the Port O'Call incident in computing Egbert's and Walker's base offense levels despite the fact that they did not participate in the incident because, under settled principles of conspiracy law, the court did not clearly err in finding that the incident was reasonably foreseeable to all members of the conspiracy to assault "non-whites" in the Salt Lake City area during the period covered by the indictment. *Pinkerton* v. *United States*, 328 U.S. 640, 647-648 (1946) (quoting *United States* v. *Kissel*, 218 U.S. 601, 608 (1910) (overt act committed by one conspirator "may be the act of all without any new agreement specifically directed to that act")).

2. The district court did not clearly err in finding that the offense level applicable to aggravated assault applied in computing appellants' base offense level, pursuant to U.S.S.G. § 2H1.1(a)(1) because the Port O'Call incident involved serious bodily injury, as demonstrated by the record evidence that the victim was rendered unconscious as a result of head injuries inflicted by Cotter and Massey. Unconsciousness qualifies as "serious bodily injury" because it involves impairment of the function of a mental faculty. *United States* v. *Dennison*, 937 F.2d 559, 562 (10th Cir. 1991), cert. denied, 502 U.S. 1037 (1992); *United States* v. *Tsosie*, Nos. 96-2084, 96-2085, 1997 WL 556283, at * 5 (10th Cir. Sept. 8, 1997). The fact that the evidence concerning the extent of the victim's injury came from testimony of Cotter and an eyewitness, rather than from the victim himself or a medical provider, should not prevent the district court from finding serious bodily injury where, as here, the victim could not be located.

3. The district court properly applied guideline principles identified in the Presentence Reports in adding two additional levels to Walker's and Massey's base offense levels by considering conspiracy to commit the Port O' Call incident as a separate group for purposes of the multiple counts of conviction provisions of the guidelines. U.S.S.G. § 3D1.2. Because the Port O'Call incident involved a distinct act committed in accordance with the conspiracy and a different victim,

creation of a separate group for conspiracy to commit the Port O'Call incident was required by the U.S.S.G. §§ 1B1.1(d) and 3D1.2. See also U.S.S.G. § 2H1.1, comment. (n.1).

4. The district court did not err in applying a four-level enhancement to Walker's base offense level for being an organizer or leader of a criminal activity involving five or more participants. The district court did not clearly err in finding that there were five or more participants to the conspiracy or in finding that Walker used his leadership of the local National Alliance to orchestrate the conspiracy.

5. The district court did not abuse its discretion in constructing Walker's sentence. Walker's sentence was substantively reasonable because the district court properly applied the factors provided in 18 U.S.C. 3553(a). Walker's contention that his sentence was substantively unreasonable because of the disparity between it and the sentences of the other defendants is not ordinarily grounds for relief. *United States* v. *Davis*, 437 F.3d 989, 997 (10th Cir.), cert. denied, 547 U.S. 1122 (2006). Moreover, disparity is permissible where it is "explicable by the facts on the record," *United States* v. *Goddard*, 929 F.2d 546, 550 (10th Cir. 1991), such as the fact that Cotter cooperated with the government

and that Walker's longer sentence is based primarily on his aggravated role in the crimes.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR BY INCLUDING THE ASSAULT NEAR THE PORT O'CALL AS RELEVANT CONDUCT IN COMPUTING EGBERT'S AND WALKER'S BASE OFFENSE LEVELS

A. Standard Of Review

This Court reviews the sentencing court's application of the guidelines de novo and its findings of fact, including findings supporting a base offense level, for clear error. *United States* v. *Melton*, 131 F.3d 1400, 1403 (10th Cir. 1997); *United States* v. *Tagore*, 158 F.3d 1124, 1129 (10th Cir. 1998).

B. The District Court Did Not Err In Including The Assault Near The Port O'Call As Relevant Conduct In Computing Egbert's And Walker's Base Offense Levels

Where, as here, the offense of conviction involved two or more participants, the guideline for violations of 18 U.S.C. 241 and 18 U.S.C. 245 directs the district court to apply the greater of 12 or "the offense level from the offense guideline applicable to any underlying offense." U.S.S.G. § 2H1.1(a)(1). The application notes provide that the district court should apply the guideline from "the offense guideline applicable to any conduct established by the offense of conviction,"

U.S.S.G. § 2H1.1, comment. (n.1). In accordance with Section 1B1.3(a)(1)(A) of the guidelines, offense conduct is to be determined on the basis of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant * * * that occurred during the commission of the offense of conviction." In addition,"in the case of a jointly undertaken criminal activity, * * * all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction" should be taken into account. U.S.S.G. § 1B1.3(1)(B).

In this case, appellants were convicted of conspiracy to deprive individuals of their civil rights, and none of them has challenged his conviction for agreeing to assault "non-whites" in the Salt Lake City area between December 31, 2002 and March 15, 2003. Although only the assault at O'Shucks was charged as a separate count in the indictment, the record contained extensive evidence involving the assault near the Port O'Call that occurred in the course of the conspiracy. The district court found by a preponderance of the evidence that the assault near the Port O'Call was related to the agreement entered into by the defendants. Walker Sen. Tr. 39.

As the district court found (R. 206 at 24-25), and as we demonstrate below in Argument II, the assault near the Port O'Call was an aggravated assault because it was "a felonious assault that involved * * * serious bodily injury." U.S.S.G. § 2A2.2, comment. (n.1). Aggravated assault carries a minimum base offense level of 14. U.S.S.G. § 2A2.2. Since that base offense level is "greater" than the base offense level of 12 for a civil rights violation, U.S.S.G. § 2H1.1(a), the district court did not err in applying the aggravated assault guideline.

For purposes of sentencing Walker and Egbert, the district court was required by the guidelines to determine the scope of the criminal activity that they agreed to jointly undertake, and, in making that determination, the court was permitted to "consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." U.S.S.G. § 1B1.3, comment. (n.2). See *Tagore*, 158 F.3d at 1130.

Even though they did not participate directly in the Port O'Call incident, Walker and Egbert are criminally responsible, pursuant to U.S.S.G. § 1B1.3(a)(1)(B), for the reasonably foreseeable acts of conspirators Massey and Cotter committed in furtherance of the conspiracy. In sentencing Egbert, the district court found by a preponderance of the evidence that he "joined that conspiracy knowingly, and that it was a broader conspiracy, and that it involved

all of the behaviors of his coconspirators, and that it was reasonably foreseeable that his coconspirators may go out on an assault prank or mission or opportunity and beat somebody up really badly," and "[t]hat happened in the incident near the Port O'Call." Egbert Sen. Tr. 23. The district court made a similar finding as to Walker. Walker Sen. Tr. 39-40.

This Court has noted that "[t]he standard set forth in [§ 1B1.3 of] the Guidelines approximates the standard set forth in *Pinkerton* v. *United States*, 328 U.S. 640 (1946)." *United States* v. *Evans*, 970 F.2d 663, 678 n.20 (10th Cir. 1992), cert. denied, 507 U.S. 922 (1993). In *Pinkerton*, the Court stated that it is "settled that 'an overt act of one partner may be the act of all without any new agreement specifically directed to that act.'" *Id.* at 646-647 (quoting *United States* v. *Kissel*, 218 U.S. 601, 608 (1910)).

Egbert argues (Br. 24) that he did not have any prior knowledge of the assault by Cotter and Massey on the Native-American victim near the Port O'Call, and Walker argues (Br. 32) that he neither "counseled, commanded, induced, or caused this assault." But "*Pinkerton* does not require a co-conspirator to have actual knowledge of the underlying crime (here, the aggravated assault) in order to impose criminal liability." *United States* v. *Willis*, 102 F.3d 1078, 1083 (10th Cir. 1996), cert. denied, 521 U.S. 1122 (1997). Rather, a "co-conspirator has criminal

responsibility *unless* 'the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.'" *Willis*, 102 F.3d at 1083 (quoting *Pinkerton*, 328 U.S. at 647-648).

All defendants were convicted of a conspiracy, the plan and purpose of which was to engage in arguments and fights in public places with individuals who they perceived to be "non-white" in order to make such individuals fearful of frequenting public places and living and working in and around Salt Lake City. R.1 at 2. Neither Egbert nor Walker has challenged his conviction on the conspiracy count. Moreover, both Egbert (Br. 23) and Walker (Br. 35) agree that their participation in the O'Shucks assault is evidence that they entered into an agreement to harm non-whites and that they participated in a violent act in furtherance of that agreement. There is no basis for concluding that the conspiracy – charged in the indictment as continuing from December 2002 to in or about March 2003 – ended with the assault at O'Shucks. The record "contains no suggestion that the conspiracy was abandoned or otherwise terminated by some affirmative act, such as withdrawal" by any of the co-conspirators. *Willis*, 102

F.3d at 1083-1084; see also *United States* v. *Russell*, 963 F.2d 1320, 1322 (10th Cir.), cert. denied, 506 U.S. 898 (1992) ("A conspiracy, once instituted, continues to exist until it is abandoned, succeeds, or is otherwise terminated by some affirmative act, such as withdrawal by the defendant.").[7]

Moreover, the assault outside the Port O'Call followed the same pattern as the O'Shucks assault, ten weeks earlier. In both instances, members of the conspiracy encountered a non-white person in a public place, lured the victim outside and then jointly assaulted him.

Finally, although Egbert and Walker argue that Cotter and Massey were acting on their own, outside the purposes of the conspiracy, the fact that Cotter and Massey reported the Port O'Call incident ("wrecking out on a wagon-burner") to the rest of the group and that Walker pronounced it a "good job," Tr. 331,

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[7] *United States* v. *Melton*, 131 F.3d 1400 (10th Cir. 1997), does not support Egbert's argument that because the court found that he was a minor player in the overall conspiracy, he should not be found accountable for acts of other conspirators of which he had no prior knowledge. In *Melton*, the government "conceded that Mr. Melton's participation in the conspiracy terminated with his arrest and that Mr. Melton had absolutely no involvement with the [subsequent] reverse sting operation which was entirely set up and funded by the government with the cooperation of [another of his co-conspirators]." 131 F.3d at 1405. Thus, the court of appeals concluded that the acts of Melton's fellow conspirators "cannot be attributed to him following his arrest." *Ibid*. The court's mention of Melton's "minimal role" in the conspiracy related to whether it was reasonably foreseeable to Melton when he participated in the original conspiracy that the other conspirators would later agree to counterfeit $30 million. *Id*. at 1405-1406.

supports the court's finding that the Port O'Call incident was within the scope of the conspiracy that Egbert and Walker joined.[8]

Nor does *United States* v. *Willis*, 476 F.3d 1121 (10th Cir.), cert. denied, 127 S. Ct. 3025 (2007), on which Egbert relies (Br. 17), support his argument. Willis was convicted of aiding and abetting others to gain unauthorized access to a financial information services website, in violation of 18 U.S.C. 2(a), 18 U.S.C. 1030(a)(2)(C), and 18 U.S.C. 1030(c)(2)(B)(iii). The individual Willis aided to obtain unauthorized access used the information she obtained to engage in identity theft. Subsequently, the court of appeals concluded that, in the absence of findings about an agreement to engage in identity theft, using the restricted website information to engage in identity theft was not part of the "specific objective of the offense" for which Willis was convicted and thus was not relevant conduct under U.S.S.G. § 1B1.3(a)(1)(A). *Willis*, 476 F.3d at 1129.

Unlike Egbert, the defendant in *Willis* was not convicted of conspiracy, and the district court in that case had made no findings of the scope of any "jointly undertaken criminal activity" that would have permitted holding Willis accountable for "all reasonably foreseeable acts and omissions of *others* in

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[8] No one disavowed the incident as inappropriate conduct, and Walker and Egbert laughed when Cotter described what he and Massey had done. Tr. 331-332.

furtherance of [such] jointly undertaken criminal activity." U.S.S.G. § 1B1.3(1)(B) (emphasis added).

Neither are the facts in *United States* v. *Morales*, 108 F.3d 1213 (10th Cir. 1997) analogous to those of this case. In *Morales*, the government appealed the district court's refusal to sentence Morales to a ten-year minimum prison term that is mandatory where a defendant is convicted of a conspiracy to distribute a certain amount of drugs. This Court upheld the sentence because it found the district court did not commit clear error in determining that *no* quantity of drugs was reasonably foreseeable to Morales, who was "simply a money launderer." 108 F.3d at 1227. The Court relied in part on the fact that the government "d[id] not even allege Mr. Morales had any knowledge of the occurrence of a single drug transaction." *Ibid.*

Likewise, in *United States* v. *Chalarca*, 95 F.3d 239 (2d Cir. 1996), on which *Morales* relied, the court of appeals concluded that the district court did not commit clear error in finding that the defendant, who provided transportation for his cousin to the location of a drug transaction, was not directly involved in the drug transaction, had no knowledge of the cocaine trade or of the particular quantity of cocaine that could be purchased with the amount of money found in his

jeep, and should not be held responsible for an amount of cocaine that would mandate a five-year minimum sentence. 95 F.3d at 245-246.

By contrast, in this case the district court found that the Port O'Call incident *was* reasonably foreseeable to Walker and Egbert, and they have not carried their burden of showing that the district court committed clear error in so finding.

This Court can overturn the district court's finding that the Port O'Call assault was reasonably foreseeable to Walker and Egbert, as members of the conspiracy, only if it is clearly erroneous, *i.e.*, if it is "simply not plausible or permissible in light of the entire record." *United States* v. *Torres*, 53 F.3d 1129, 1144 (10th Cir.), cert. denied, 515 U.S. 1152 (1995). Although both Walker and Egbert rely on Callahan's testimony that Cotter assaulted the Native American because he and his companions were talking to a woman with whom Cotter hoped to have sex later in the evening (Walker Br. 37, Egbert Br. 24), that testimony does not make the district court's finding clearly erroneous. That is particularly true in light of the fact that Cotter testified that Massey wanted to focus on the Native-American man because of his hatred for "Indians," and the fact that the brunt of the assault was aimed at the Native-American man.[9] See discussion *supra* at 14-16.

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[9] Walker's attempt to distance himself from Cotter and from the events following the December 31, 2002, assault at O'Shucks (Walker Br. 37) is not

(continued...)

This assault and the serious injuries that resulted from repeated blows to the victim's head were entirely foreseeable consequences of the conspirators' agreement to assault non-whites in the Salt Lake City area to send a message that such persons were not welcome and to raise awareness of the white power movement advocated by the National Alliance.

II

THE DISTRICT COURT DID NOT ERR IN APPLYING THE AGGRAVATED ASSAULT GUIDELINE BASED ON THE VICTIM IN THE PORT O'CALL INCIDENT HAVING SUSTAINED SERIOUS BODILY INJURY

A. Standard Of Review

This Court reviews the sentencing court's application of the guidelines de novo and its findings of fact, including findings supporting a base offense level, for clear error. *United States* v. *Melton*, 131 F.3d 1400, 1403 (10th Cir. 1997); *United States* v. *Tagore*, 158 F.3d 1124, 1129 (10th Cir. 1998). A district court's determination regarding the significance of a bodily injury is a finding of fact

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[9](...continued)
supported by the record. Contrary to Walker's assertion (Br. 8) that Massey had taken over Walker's duties as "local unit coordinator in the December 2002 through March 2003 time frame," the record reflects that Walker did not leave the Salt Lake City area until after the Port O'Call incident. Tr. 266. Indeed, all three defendants and Cotter had been out drinking together on the night of the Port O'Call incident and spent the following day together "bar hopping" and attending the St. Patrick's Day parade. Tr. 317, 329-332.

subject to review for clear error. *United States* v. *Perkins*, 132 F.3d 1324, 1326 (10th Cir. 1997). In order for a factual finding to be found clearly erroneous, this Court "must be convinced that the sentencing court's finding is simply not plausible or permissible in light of the entire record on appeal, remembering that [it is] not free to substitute [its] judgment for that of the district court." *Torres*, 53 F.3d at 1144.

B. The District Court Did Not Commit Clear Error In Finding That The Victim In The Port O'Call Incident Sustained Serious Bodily Injury

The evidence at trial about the assault near the Port O'Call was that after Cotter threw the victim to the ground and struck him in the head and Massey kicked him, the victim lost consciousness. Cotter testified that he was "pretty sure [he had] broke[n the victim's] cheekbone." Tr. 328. Eyewitness Valerie Hodge corroborated Cotter's testimony. She testified that the victim was certainly unconscious, and she feared that he might even be dead, based on her observation of the victim as his companions dragged him from the street and placed him in a car. Tr. 469.

As the district court noted (R. 206 at 25), there is no case law requiring that a victim be identified in order to find that serious bodily injury occurred. The argument that eyewitness testimony is not sufficient to establish the degree of

injury for sentencing purposes would support the absurd result that if a victim were shot on board a ship, fell overboard, and was lost at sea, the government could not prove that the shooting resulted in death even in the face of the testimony of multiple eyewitnesses. Here, the fact that the victim did not report his injuries to the police should not prevent the district court from finding that those injuries were serious, in light of the fact that the court found Cotter's testimony about the Port O'Call incident was "consistent," "candid," and "believable" and was corroborated by eyewitness Valerie Hodge. R. 206 at 26. The testimony of Cotter and Hodge provided a sufficient basis for the court to find by a preponderance of the evidence that the victim was unconscious and seriously injured when Cotter and Massey left him in the street. R. 206 at 25-27; see also Egbert Sen. Tr. 24 (Native American victim left in a "serious physical plight"). In addition, Massey's PSR mentioned the statement of a second eyewitness to the Port O'Call incident who did not testify at trial, but who stated that the victim "was beaten severely, including being punched and kicked, and was rendered unconscious." Massey PSR ¶ 12; Walker PSR ¶ 12. Indeed, like Valerie Hodge, that witness feared that the victim might be dead. Walker PSR ¶ 12. Moreover, Massey told the probation office that he stopped Cotter from continuing the assault because it appeared that the victim was "seriously hurt." Massey PSR ¶

23. Walker's assertion (Br. 43) that the victim might have been "playing possum" to avoid further blows is belied by Hodge's testimony (Tr. 469) that the victim's companions dragged him out of the street and placed him in their car.

The definition of serious bodily injury in the application notes to U.S.S.G. § 1B1.1 includes "injury involving extreme physical pain or the protracted impairment of a function of a * * * mental faculty." An assault involving repeated blows to the head of a victim that causes him to lose consciousness clearly qualifies under that definition as an assault involving serious bodily injury. U.S.S.G. § 1B1.1, comment. (n.1(L)); *United States* v. *Thompson*, 60 F.3d 514, 518 (8th Cir. 1995) (brief hospitalization and impairment of mental faculties when victim knocked unconscious); *United States* v. *Dennison*, 937 F.2d 559, 562 (10th Cir. 1991), cert. denied, 502 U.S. 1037 (1992) (approving jury instruction defining serious bodily injury as involving unconsciousness in upholding conviction under 18 U.S.C. 113(f));[10] see also *United States* v. *Tsosie*, Nos. 96-2084, 96-2085, 1997 WL 556283, at *5 (10th Cir. Sept. 8, 1997) (victim testimony that he "blacked out"

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[10] In 1994, 18 U.S.C. 113(f) was redesignated as 18 U.S.C. 113(a)(6). Pub. L. No. 103-322, § 170201(c)(5), 108 Stat. 2042. The 1994 amendments also added a definition of "serious bodily injury," Pub. L. 103-322, § 170201(d), 108 Stat. 2043 (referencing the definition in 18 U.S.C. 1365, which was enacted by Pub. L. No. 98-127, § 2, 97 Stat. 831 (1983)). Congress stated that "[t]he definitions are self-explanatory." H.R. Rep. No. 93, 98th Cong., 1st Sess. 6.

after the assault met the "'unconsciousness' criterion") (Attachment 2). Where, as here, there is ample support in the record for the fact that the victim *was* unconscious, it should not matter whether that evidence comes from the victim or from eyewitnesses.

In interpreting the term "serious bodily injury," courts have held that it is not limited to injuries that are "life-threatening" or involve a substantial risk of death. *United States* v. *Christopher*, 956 F.2d 536, 540 (6th Cir. 1991), cert. denied, 505 U.S. 1207 (1992); *United States* v. *Johnson*, 637 F.2d 1224, 1246 (9th Cir. 1980); *United States* v. *Webster*, 620 F.2d 640, 642 (7th Cir. 1980) ("There is no indication that Congress in adopting such commonly used terms intended to include only the very highest degree of serious bodily injury."). Based on this record, the district court did not clearly err in finding serious bodily injury.

III

THE DISTRICT COURT DID NOT ERR IN ADJUSTING WALKER'S AND MASSEY'S OFFENSE LEVELS BY CONSIDERING CONSPIRACY TO COMMIT THE PORT O' CALL ASSAULT AS A SEPARATE GROUP, PURSUANT TO U.S.S.G. § 3D1.2

A. Standard Of Review

Whether counts should be grouped under U.S.S.G. § 3D1.2 is a legal issue subject to plenary review. *United States* v. *Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995).

B. The District Court Did Not Commit Plain Error In Considering The Port O'Call Incident For Purposes Of The Guidelines Grouping Provisions

Walker and Massey contend that the district court erred in considering the Port O'Call incident as offense conduct for purposes of the grouping provisions of the guidelines. Walker Br. 39-40; Massey Br. 22-23. The district court followed the recommendations of the PSR as to grouping (Walker PSR 11; Massey PSR 11-12). Because it is not clear that Massey objected to that portion of the PSR,[11] and Walker, who objected initially (Addendum to Walker PSR 1), stated during the sentencing hearing that he deferred to the probation office on the issue of multiple

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[11] In his response to the PSR and the government's position concerning sentencing factors, Massey objected only to the recommendation for a two level increase for his role in the offense. R. 162 at 1-2, 5-7. Nowhere did he argue that the court should not follow the PSR's recommendation concerning grouping.

counts and grouping (Walker Sen. Tr. 44), this Court reviews the district court's determination only for plain error, under which "the error must be particularly egregious, as well as obvious and substantial." *United States* v. *Gilkey*, 118 F.3d 702, 704 (10th Cir. 1997) (quoting *United States* v. *Ivy*, 83 F.2d 1266, 1295 (10th Cir.), cert. denied, 519 U.S. 901 (1996)). But the district court did not commit *any* error in applying the grouping provisions, let alone an egregious one.

The multiple counts provisions of the guidelines provide that "[a] primary consideration in this section is whether the offenses involve different victims." U.S.S.G. § 3D1.2, background. As the Application Notes state:

> A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. See § 1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the offense level based upon the substantive counts of which the defendant is convicted and *the various acts cited by the conspiracy count that would constitute behavior of a substantive nature.* Example: The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense (C). Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the *various acts cited by the conspiracy count that would constitute behavior of a substantive nature*, according to the rules in this section.

U.S.S.G. § 3D1.2, comment. (n.8) (emphasis added).

Pursuant to U.S.S.G. § 1B1.2(d), "a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." See also U.S.S.G. § 1B1.2, comment. (n.3) (provisions of Chapter 3, Part D (Multiple Counts) may apply even though there is only one count of conviction). In this case, Walker and Massey were convicted of conspiracy to commit civil rights violations (Count One) and willfully injuring Ballesteros because of his national origin and in order to intimidate him from participating in a federally protected activity (Count Two). Those two offenses are grouped together because they are closely related counts, *i.e.*, they involve "substantially the same harm," the same victim (Ballesteros), the same act or transaction. See U.S.S.G. § 3D 1.2(a).

The Port O'Call incident is an act "cited by the conspiracy count that would constitute behavior of a substantive nature," but involving a different victim and a different act or transaction. U.S.S.G. § 3D1.2, comment. (n.8). As in the example quoted above, for purposes of determining Walker's and Massey's offense levels,

the Port O'Call incident is treated as though they were convicted of conspiracy to commit that assault.[12]

The PSR properly followed the advisory guidelines by grouping the conspiracy count with substantive Count Two of the indictment involving victim Ballesteros and then creating a second group to account for the conspiracy to commit the assault near the Port O'Call. Massey PSR 10-12. Since it was equally, and arguably more, serious than the group involving the assault on Ballesteros, the second group is counted as one additional unit, adding one level to the base offense level. U.S.S.G. § 3D1.4(a). The district court thus did not err in adopting the PSR's calculations as to grouping.

IV

THE DISTRICT COURT DID NOT CLEARLY ERR IN APPLYING A FOUR-LEVEL ENHANCEMENT TO WALKER'S SENTENCE, PURSUANT TO U.S.S.G. § 3B1.1(a), FOR BEING AN ORGANIZER OR LEADER OF A CRIMINAL ACTIVITY INVOLVING FIVE OR MORE PARTICIPANTS

A. Standard Of Review

This Court reviews a district court's determination that a defendant was an organizer or leader of a criminal activity involving five or more persons for clear

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[12] This situation is also addressed by the Application Notes to the guideline governing the underlying offense, *i.e.*, § 2H1.1, comment. (n.1) (conduct set forth in the count of conviction constituting more than one underlying offense).

error. *United States* v. *Cruz Camacho*, 137 F.3d 1220, 1223-1224 (10th Cir. 1998). As this Court has stated, "[a] finding of fact is clearly erroneous if it is without factual support in the record or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made." *United States* v. *Clark*, 415 F.3d 1234, 1246 (10th Cir. 2005) (quoting *Tosco Corp.* v. *Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000)).

B. The District Court Did Not Clearly Err In Finding That Walker Was A Leader Or Organizer Of The Conspiracy

Section 3B1.1(a) of the Sentencing Guidelines provides for a four-level enhancement to a defendant's offense level where "the defendant was an organizer or leader of a criminal activity that involved five or more participants." U.S.S.G. § 3B1.1(a). Application Note 4 to § 3B1.1(a) provides that in determining whether a defendant exercised a leadership or organizational role, the court should consider such factors as the defendant's "exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, * * * 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). It is not necessary for each of these factors to be satisfied in order for Section 3B1.1 to apply. *United States* v.

Bernaugh, 969 F.2d 858, 863 (10th Cir. 1992). The district court's finding that Walker qualified as a leader or organizer under this standard is not clearly erroneous.

1. The District Court Did Not Commit Plain Error In Finding That The Criminal Activity Involved Five Or More Participants

Walker argues (Br. 48-51) that there were not five or more participants in the criminal activity. The PSR recommended adding four levels to Walker's sentence for his role in the offenses (Walker PSR ¶¶ 28, 34), and Walker did not argue to the district court that this adjustment should not be made because the offenses involved fewer than five participants. Thus, the district court's fact-finding on this issue was not triggered. *United States* v. *Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006), cert. denied, 127 S. Ct. 1338 (2007). Although Massey made this argument at his sentencing four months later (see Walker Br. 48 n.11), that fact should not enure to Walker's benefit in terms of the standard of review that should be applied to his sentence. Accordingly, as to Walker, this Court can review only for plain error the district court's finding that there were five participants. Fed. R. Crim. P. 52(b); *United States* v. *Romero*, 491 F.3d 1173, 1179 (10th Cir.), cert. denied, 128 S. Ct. 319 (2007).

The criminal activity for which Walker was convicted involved at least five participants: Walker, Massey, Egbert, Cotter, and Callahan. Walker argues that Callahan should not be counted as a participant because Callahan denied involvement in planning violent acts against minorities, and Callahan was not shown to have participated in either the assault on Ballesteros or the assault outside the Port O'Call bar. That argument fails to take into consideration that Cotter identified Callahan as a member of the conspiracy (Tr. 273-276; 316, 331), and Callahan admitted that he was present during discussions regarding the targeting of non-whites in the Salt Lake City area for violent attacks in public places. (Tr. 549-552). Callahan also admitted that he was present when those who participated in the two assaults discussed that they had committed the assaults based on the fact that the victims were non-whites (Tr. 476-482).[13] It was not necessary for Callahan to have been convicted of conspiracy in order to qualify as a participant for purposes of Section 3B1.1. U.S.S.G. § 3B1.1, comment. (n.1); *United States* v. *Lacey*, 86 F.3d 956, 968 (10th Cir.), cert. denied, 519 U.S. 944 (1996).

Contrary to Walker's argument (Br. 49-50), it was not necessary for the government to show that five persons participated in the assaults in order for the

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[13] Cotter also testified that he had provided evidence to the government that Callahan was involved in a separate incident of violence that was outside the time period charged in the indictment in this case (Tr. 420-421).

four-level enhancement to apply. It is sufficient that Callahan was shown to be a member of the conspiracy, and Cotter's testimony established that fact. Moreover, the fact that the district court stated, in declining to enhance Massey's sentence pursuant to Section 3B1.1, that it did not have "enough facts to show * * * that Mr. Massey was out managing five or more people" (Walker Br. 50) does not mean that the court could not find that there were five or more participants in the criminal activity for which Walker was convicted. Rather, this statement simply reflects the court's view of Massey's role in the conspiracy and the assaults. In light of Cotter's testimony, the district court did not commit any error, let alone plain error, in concluding that the criminal activity at issue here involved five or more participants.

2. The District Court Did Not Clearly Err In Finding That Walker Was An Organizer Or Leader Of The Criminal Activity

The leadership enhancement applied by the district court to Walker's sentence was not based solely on his leadership role in the National Alliance, but on the fact that he used his leadership position in the organization to launch the conspiracy involved in this case. Walker encouraged violence against non-whites at gatherings of the subgroup, including playing music that expressed messages not only of racial separatism but also of targeting non-whites for violence. Tr. 283-

284.[14] Because of Walker's leadership of the larger group, the members of the sub-group that agreed to use violence against non-whites in the Salt Lake City area continued to look to him for leadership.

The evidence showed that Cotter viewed Walker as being in charge. Walker supplied Cotter and Egbert with flyers and stickers containing racially inflammatory messages that they were told to distribute. Tr. 302-303. Walker asked Cotter to lure Ballesteros outside the bar so that they could beat him up because Walker was angry that the bartender, a non-white, had told Cotter not to hand out the stickers. Tr. 307-309, 447. Cotter carried out Walker's directive to isolate Ballesteros from his friends and colleagues so they could not come to his aid. Cotter and Massey followed Walker's strategy of isolating the victim when they invited the Native American man and his companions to leave the Galley bar. Thus, Walker's argument (Br. 53) that "there is no evidence that [he] directed anyone's specific actions, or planned and organized this assault more than any other participant," misstates the evidence. Walker was much more than "a mere

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[14] Contrary to Walker's argument (Br. 51), he was not punished for his ideological views, but rather for acting out on those views through violent acts against non-whites. The district court denied Walker's motion to strike testimony concerning the music, finding that the probative value of the violent message in the music that the group listened to, as showing the motivation for the assaults, outweighed any prejudice that might be caused. Tr. 334-336.

participant" (Br. 53). Moreover, Walker's contention (Br. 53) that he was "for the most part out of the picture" after the O'Shucks incident is contrary to Cotter's testimony that Walker did not leave the Salt Lake City area until after the Port O'Call incident. Tr. 266.

While the conspiracy may have been comparatively "loose" as conspiracies go (Walker Sen. Tr. 41), that does not mean it had no leadership. And although the individual assaults may have been "hatched pretty much on the fly" (Walker Sen. Tr. 43), Cotter learned from Walker how to execute them for maximum effectiveness and justifiably believed that the assaults on non-whites had Walker's imprimatur. In order to apply the four-point enhancement to Walker's sentence for his role in the offenses, "[t]he government does not have to prove that [the] defendant controlled five or more participants," but rather that "five persons participated in the criminal venture, and that [the] Defendant exercised leadership control over at least one person." *Cruz Camacho*, 137 F.3d at 1224. At the very least, Walker exercised leadership control over Cotter.

Accordingly, since there was support in the record for the district court's finding that a preponderance of the evidence demonstrated that Walker was a leader and organizer, *i.e.*, "the man in charge" (Walker Sen. Tr. 41), there was no clear error in applying the four-level enhancement.

V

WALKER'S SENTENCE IS SUBSTANTIVELY REASONABLE

A. Standard Of Review

This Court reviews the substantive reasonableness of a sentence using the deferential abuse of discretion standard. *United States* v. *Angel-Guzman*, 506 F.3d 1007, 1014-1015 (10th Cir. 2007).

B. The District Court Did Not Abuse Its Discretion In Sentencing Walker

The inquiry concerning whether a sentence is substantively reasonable "involves whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *United States* v. *Conlan*, 500 F.3d 1167, 1169 (10th Cir. 2007). A sentence that is within the correctly calculated guidelines range is presumed to be reasonable. *Rita* v. *United States*, 127 S. Ct. 2456, 2462 (2007); *United States* v. *McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007). In order to rebut that presumption, Walker must demonstrate that the sentence is unreasonable in light of the other sentencing factors listed in Section 3553(a). Because the abuse of discretion standard is deferential, Walker's burden is a "hefty" one. *United States* v. *Verdin-Garcia*, 516 F.3d 884, 898 (10th Cir. 2008).

The district court is not required to "march through § 3553(a)'s sentencing factors," nor "recite any magic words to show that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider." *Verdin-Garcia*, 516 F.3d at 898 (quoting *United States* v. *Rines*, 419 F.3d 1104, 1107 (10th Cir. 2005), cert. denied, 546 U.S. 1119 (2006)). This is especially true where the sentence falls within the guidelines range. *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1222 (10th Cir. 2006), cert. denied, 127 S. Ct. 3043 (2007).

Nonetheless, the district court here specifically discussed a number of the Section 3553(a) factors in explaining Walker's sentence. First, the court stated that "this sentence is necessary to reflect the seriousness of this offense" 18 U.S.C. 3553(a)(2)(A); Walker Sen. Tr. 48. In this regard, the court stressed the "ugliness" of the conduct and "the racist nature of * * * commit[ing] violent acts against people because of their ethnic background," which the court described as a "category of criminality that those people who venture into it need to be fairly warned * * * is viewed as extremely serious by the law [and] by society." Walker Sen. Tr. 40, 48.

The court also stated that this sentence was needed "to promote respect for the law," and to provide "just punishment for the offense." Walker Sen. Tr. 48; 18 U.S.C. 3553(a)(2)(A). Indeed, the court commented that it would have felt justified

in "consider[ing] a higher sentence for the ugliness of the conduct." Walker Sen. Tr. 49. The court also noted the "need to mete a sentence of this length to afford adequate deterrence to criminal conduct in the future for others who may be inclined toward viewpoints that are not illegal, but actions that are," and "to protect the public from further crimes of the defendant." Walker Sen. Tr. 48; see 18 U.S.C. 3553(a)(2)(B) & (C). See also R. 206 at 73 ("[A] serious sentence needs to be imposed to deter others from starting down that path.").

In response to counsel's argument that the sentence was unreasonable, the court summarized its reasoning by stating that, after having followed the guidelines, it had reached a sentence that "happily coincided" with "what this crime deserves by way of incarceration." Walker Sen. Tr. 47.

Walker's principal contention is that his sentence is substantively unreasonable because of the disparity between his sentence and those of his convicted co-conspirators. Br. 54-57. While a district court should consider, *inter alia*, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. 3553(a)(6), "the purpose of the guidelines is to 'eliminate unwarranted disparities [in sentencing] nationwide,' not to eliminate disparity between co-defendants." *United States* v. *Gallegos*, 129 F.3d 1140, 1143 (10th Cir. 1997) (quoting *United*

States v. *Garza*, 1 F.3d 1098, 1100 (10th Cir.), cert. denied, 510 U.S. 1018 (1993)). Therefore, the disparity between co-defendants' sentences is ordinarily not grounds for relief. *United States* v. *Davis*, 437 F.3d 989, 997 (10th Cir.), cert. denied, 547 U.S. 1122 (2006). In any event, disparate sentences are permissible "where the disparity is explicable by the facts on the record." *Garza*, 1 F.3d at 1101 (quoting *United States* v. *Goddard*, 929 F.2d 546, 550 (10th Cir. 1991)).

In the district court, Egbert and Walker were sentenced on the same day, so prior to his sentencing, the only disparity Walker raised was that the government sought a higher sentence against him than Cotter received. R. 121 (Position of Defendant [Walker] Regarding Sentencing Factors). Cotter's lower sentence in his own case resulted from his substantial cooperation with the government in the prosecution of this case. In contrast, Walker did not cooperate, proceeded to trial, and was convicted on both counts of the indictment. Cotter's cooperation justifies his lower sentence, *United States* v. *Contreras*, 108 F.3d 1255, 1272 (10th Cir. 1997), cert. denied, 522 U.S. 839 (1997), and therefore he and Walker are not similarly situated.

Now that Egbert and Massey have been sentenced, Walker argues here that his sentence is substantively unreasonable because he received a longer sentence than his co-conspirators (Br. 54-57). Walker's longer sentence is primarily based

on the fact that the district court found Walker was "the man in charge" of the conspiracy. Walker Sen. Tr. 41. The court did not find that Massey was a leader of the criminal activity, and it found that Egbert was a minor participant. Walker's adjusted offense level was 29, which resulted in an advisory guideline sentence range of 87 to 108 months, and the district court chose the lowest sentence of that range.

Accordingly, Walker has failed to rebut the presumption that his sentence was reasonable.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

The United States does not object to appellants' requests for oral argument.

CONCLUSION

For the foregoing reasons, this Court should affirm the sentences of all three appellants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 12 software, the brief contains 13,275 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the digital version of the foregoing is an exact copy of what has been submitted to the court in written form. I further certify that this digital submission has been scanned with the most recent version of Trend Micro Office Scan (version 8.0, dated 6/4/2008) and is virus-free.

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