No. 00-2976

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ROOSEVELT FRANKLIN, JR.,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

BILL LANN LEE
Assistant Attorney General

DENNIS J. DIMSEY
SETH M. GALANTER
Attorneys
Department of Justice
P. O. Box 66078
Washington, D.C. 20035-6078
(202) 307-9994

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES

STATUTES (continued): **PAGE**

REGULATIONS:

SENTENCING GUIDELINES:

SENTENCING GUIDELINES (continued): **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2976

UNITED STATES OF AMERICA,

Appellee

v.

ROOSEVELT FRANKLIN, JR.,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

SUMMARY OF THE CASE

Defendant-appellant pled guilty to willfully violating the Eighth Amendment right of an inmate in his custody by assaulting him, in violation of 18 U.S.C. 242. As part of the plea agreement, the parties stipulated that the United States would not urge the court to rely on several enhancements under the Sentencing Guidelines that would have otherwise increased defendant's offense level (U.S. Add. 4). The district court granted defendant a further reduction for acceptance of responsibility, despite finding his testimony at sentencing "at some variance" with his plea (Tr. 67), and then sentenced defendant to 18 months' imprisonment, the minimum

sentence permissible under the Sentencing Guidelines. Defendant now appeals the district court's decision not to depart downward.

The general legal standards applicable to this appeal are well-established. The United States does not believe oral argument would assist the Court in resolving defendant's fact-specific arguments.

STATEMENT OF SUBJECT MATTER JURISDICTION

This action was instituted by the filing of an indictment in the United States District Court for the Eastern District of Arkansas charging defendant with a violation of 18 U.S.C. 242. The district court had jurisdiction of the case pursuant to 18 U.S.C. 3231.

STATEMENT OF APPELLATE JURISDICTION

This appeal is from a criminal sentence imposed on July 31, 2000 (as amended *nunc pro tunc* on August 21, 2000). Defendant filed a timely notice of appeal on August 8, 2000. In the view of the United States, this Court does not have jurisdiction over this appeal, but if it did, it would be pursuant to 18 U.S.C. 3742(a).

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review the district court's decision not to depart from the prescribed Sentencing Guidelines range when the district court declined to depart downward "considering the totality of the circumstances" based "on the evidence that I have heard," thereby evidencing an exercise of its unreviewable discretion.

United States v. *Payne*, 81 F.3d 759 (8th Cir. 1996)
United States v. *Robinson*, 20 F.3d 320 (8th Cir. 1994)
United States v. *Bieri*, 21 F.3d 811 (8th Cir.), cert. denied, 513 U.S. 878 (1994)

2. Whether the district court erred in not departing below the prescribed Sentencing Guidelines range on the basis of "aberrant behavior" when the defendant took a prisoner in his custody to a secluded location and attempted to start a fight with him, willfully assaulted the prisoner when that provocation failed, took him to another room and slammed him into a fire extinguisher, and attempted to conceal the assaults by ordering his subordinates to omit information from their reports.

United States v. *Allery*, 175 F.3d 610 (8th Cir. 1999)
United States v. *Wind*, 128 F.3d 1276 (8th Cir. 1997)

3. Whether the district court erred in not departing below the prescribed Sentencing Guidelines range on the basis of "minor degree of injury," when the Guideline at issue already takes the degree of injury into account.

United States v. *Allery*, 175 F.3d 610 (8th Cir. 1999)
United States v. *Wind*, 128 F.3d 1276 (8th Cir. 1997)
United States v. *Wong*, 127 F.3d 725 (8th Cir. 1997)
United States v. *Beltran*, 122 F.3d 1156 (8th Cir. 1997)

STATEMENT OF THE CASE

A. Procedural history

On January 4, 2000, an indictment was filed charging defendant Franklin and one of his subordinates with violating 18 U.S.C. 242 by striking a prisoner, causing bodily injury, in willful violation of the Eighth Amendment to the Constitution (U.S. Add. 1-2).[1] On April 18, 2000, defendant entered into an agreement with the United States to plead guilty to the indictment (U.S. Add. 3-8), which was accepted by the court on that same day (U.S. Add. 12). On July 24, 2000, at defendant's sentencing hearing, the district court sentenced defendant to 18 months' imprisonment to be followed by two years' supervised release (Tr. 97). On September 25, 2000, the district court granted defendant bail pending appeal.

B. Facts[2]

Defendant was a Corrections Captain and night shift supervisor of prison guards at the Grimes/McPherson Correctional Unit in the State of Arkansas (PSR 1 ¶ 6). John Ponder, an inmate, had filed a request seeking a transfer to another

---

[1] "U.S. Add." refers to the Addendum attached to this brief. "PSR" refers to the Presentence Investigation Report. "Tr." refers to the transcript of the July 24, 2000, sentencing hearing. "Br." refers to the opening Brief for Appellant. "Def. Add." refers to the addendum attached to the Brief for Appellant.

[2] These facts are drawn from the government's description of the offense at the plea hearing (U.S. Add. 10-11), which defendant agreed with (U.S. Add. 12); the Presentence Investigation Report's factual description (PSR 1-2), which was not objected to by defendant (PSR 11), and which was adopted by the district court (Def. Add. 7); and the testimony taken at the sentencing hearing consistent with these other sources (Tr. 20-63). Defendant does not identify (Br. 4-5) the source of his "facts," which are contrary in some respects to the facts outlined in the text of this brief.

portion of the facility (Tr. 41). In the early morning hours of May 28, 1998, defendant ordered Ponder brought to his office, and had the two officers who had brought him in (Larry Clark and Shane Rogers) remove his handcuffs (PSR 1 ¶ 7; Tr. 21, 26, 41). Defendant began to berate the inmate regarding his attitude toward correctional staff earlier in the evening and denied the inmate's request (PSR 1 ¶ 7; Tr. 41). The inmate became upset and began cursing, causing defendant to order him put back in handcuffs and removed from his office (Tr. 41). Defendant followed inmate Ponder out and ordered that he should be taken to the empty gymnasium (PSR 1 ¶ 8; Tr. 21, 27, 42), an action he acknowledged was not "proper procedure" (Tr. 40). Defendant's "purpose in directing the inmate be transported to the gymnasium was for the purpose of provoking a fight" (PSR 2 ¶ 10).

In the gymnasium, Defendant had the two officers release Ponder from the handcuffs (Tr. 21, 27, 43). Defendant admitted that "I did taunt the inmate and I was trying to get the inmate to fight me" (Tr. 44; see also Tr. 54 ("I did try to intimidate the inmate into fighting me, which he refused to do")). The inmate said he "wouldn't hit anyone" (Tr. 28, 30). When Ponder refused to fight, one of defendant's subordinates, Larry Clark, "jumped in" and started hitting Ponder (Tr. 28-29). Defendant, a 6' 2", 220 pound man (Tr. 59), then intervened and "punched, and kicked inmate Ponder" (PSR 2 ¶ 8), who weighed only 120 pounds (Tr. 30), for "a minute or two" (Tr. 29). Defendant explained that "it was a brief fight because the inmate wouldn't fight me anyway" (Tr. 45).

After the incident in the gymnasium, at defendant's direction, the officers again handcuffed Ponder and took him back to defendant's office, where defendant again taunted the inmate and then pushed him against the wall, causing him to strike his head on a fire extinguisher (U.S. Add. 11; PSR 2 ¶¶ 8, 10). Ponder's injuries included scratches, scrapes, bruises, and a big semi-circular shaped gash on the side of his head (U.S. Add. 11; PSR 2 ¶ 8). Defendant instructed his subordinates to falsify their reports to omit mention of the incident in the gymnasium and falsified his own report (PSR 2 ¶ 9; Tr. 23).

C. Sentencing

1. The plea agreement between defendant and the United States contained a number of stipulations regarding sentencing, all of which were accepted by the probation officer in the Presentence Investigation Report (PSR). The relevant United States Sentencing Guidelines (U.S.S.G.) provision for violations of 18 U.S.C. 242 is Section 2H1.1. As the parties stipulated (U.S. Add. 3), the base offense level under Section 2H1.1(a) was 12 because the offense involved two or more participants. Again as the parties stipulated (U.S. Add. 4), six levels were added pursuant to Section 2H1.1(b) because defendant acted under color of law. The probation officer ultimately agreed with the parties' stipulation (U.S. Add. 4) that defendant should receive a three-level reduction for acceptance of responsibility (PSR 2-3 ¶ 11).[3] The PSR also recommended (over the objection of

[3] The first draft of the PSR had recommended that defendant not receive a

(continued...)

defendant (PSR 11)) a two-level enhancement under Section 3A1.3 because Ponder was physically restrained by defendant during the course of the offense (PSR 2 ¶ 11, 12). With the enhancement, the PSR found that defendant's Offense Level was 17, and his Criminal History Category I, yielding a Sentencing Guidelines range of 24 to 30 months (PSR 10).

The PSR also stated (PSR 2 ¶ 11) that several other sentencing enhancements would have been applied but for the stipulations of the parties. First, the PSR found that defendant served as a supervisor in the criminal activity and would be subject to a two-level enhancement under U.S.S.G. § 3B1.1(c). Second, the PSR found that the victim appeared to meet the criteria for a vulnerable victim, subjecting defendant to another two-level enhancement under U.S.S.G. § 3A1.1(b)(1), but again deferred to the parties' stipulation. Finally, the PSR stated that defendant's order to the officers under his control to refrain from including information regarding the assault in their reports would constitute an obstruction of the administration of justice under U.S.S.G. § 3C1.1, subjecting defendant to yet another two-level enhancement but for a stipulation. These enhancements would have increased the Offense Level to 23, yielding a Sentencing Guidelines range of 46 to 57 months. Defendant objected to the discussion of the potential

---

[3](...continued)
reduction for acceptance of responsibility based on his interview with the probation officer. On a second interview, arranged with the assistance of the United States, defendant made statements sufficient for the probation officer to amend her recommendation (Tr. 8, 66-67).

enhancement for obstruction, but not to the discussion regarding supervisory or vulnerable victim enhancements (PSR 11).

2. On July 24, 2000, at defendant's sentencing hearing, the court first considered the two-level enhancement for restraint of victim recommended in the PSR. The court found that "although the facts as I understand them might have justified such an enhancement," it was not going to enhance on that basis "in light of the stipulation in the plea agreement that the government would not seek that two-level enhancement for the vulnerable victim, and [counsel for the United States] has graciously conceded that that stipulation covered that point" (Tr. 9).[4]

The court otherwise concurred with the PSR's recommendations. It found that "because you served as a supervisor, you're subject to a two level enhancement for role as defined in guideline section 3B1.1(c), but there was a stipulation again that you would not receive an enhancement for that" (Tr. 11). "[A]gain, by stipulation" (Tr. 11), the court declined to enhance for obstruction of administration of justice and vulnerable victim. And, after hearing defendant's testimony, the district court decided to grant defendant a three-level reduction for acceptance of responsibility, despite his testimony being "at some variance at least as to his culpability" with his plea (Tr. 67). As determined by the court,

---

[4] In our view, the record is ambiguous as to whether the United States in fact conceded this point. The plea agreement itself is clear that the stipulation covered only "the 2-level enhancement for Vulnerable Victim, pursuant to U.S.S.G. § 3A1.1(b)" (U.S. Add. 4), and did not include a two-level enhancement for "Restraint of Victim" under U.S.S.G. § 3A1.3.

defendant's Offense Level was 15, and his Criminal History Category I, yielding a Sentencing Guidelines range of 18 to 24 months.

The court then addressed defendant's request, opposed by the United States, to depart below the Guidelines range. Defendant argued that departure was warranted because (Tr. 68) "when examined in the totality" the following factors put this case "outside the heartland": the minor degree of injury (Tr. 68-71), victim misconduct (Tr. 71-72), prison conditions (Tr. 72-73), aberrant behavior (Tr. 73-76), and charitable or public service (Tr. 76-77). In reviewing the request, the court explained "if circumstances exist which were not adequately taken into consideration by the sentencing commission, then I'm entitled to apply those to the range and make a downward departure, but unless there are those circumstances present, then I have no choice but to choose a sentence within the guideline range and impose it" (Tr. 94).

The court first focused on the degree of injury. It found that in pleading guilty to the offense, defendant had conceded the existence of bodily injury (Tr. 94-95). It further recognized that the Guideline provision for violations of civil rights was intentionally designed to set a minimum Offense Level regardless of the extent of the injury (Tr. 95). "[C]onfronted with that" at "the very beginning," the court then went on "to consider the other factors," including "aberrant behavior" (Tr. 95-96). The court recognized that "even though the [*United States* v. *Kalb*, 105 F.3d 426 (8th Cir. 1997)] case has relaxed the rule since *Koon*, [defendant's conduct] has to be something more than just out of character" (Tr. 96). The court explained

that "[w]hat concerns me here" was defendant's crime was not "just an out of control act very briefly and simultaneously, but rather this was something that had to have some planning on the front end and the back end, and although I would like to apply that circumstance to your case, I just don't think it's justified by the evidence that I have heard" (Tr. 96). The court then expressed skepticism regarding defendant's claim of victim misconduct, explaining that the inmate's conduct was not unusual, was something defendant had "learned to deal with," and that "this person was not a threat to you because of his size and your superior size and ability to defend yourself" (Tr. 96).

The court concluded that "even considering the totality of the circumstances" and "even though * * * I do think it's harsh in your case," the court denied the motion to depart downward and "sentence[d him] in what I think is the appropriate guideline range" (Tr. 96-97). Noting that it had "given [him] the benefit of every other consideration here like acceptance of responsibility and the government has given [him] the benefit of some stipulations as well," the court sentenced defendant to 18 months' imprisonment to be followed by two years' supervised release (Tr. 97), the bottom of the applicable Guidelines' range.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over the district court's decision not to depart downward. The district court was aware of the appropriate law and believed it had the authority to depart downward, but found this was not an appropriate case in

which to do so. Such decisions implicate the court's discretionary authority and are unreviewable on appeal.

In any event, no downward departure would have been appropriate in this case. Defendant's actions and the circumstances of this case land squarely within the conduct contemplated by 18 U.S.C. 242 and the United States Sentencing Guidelines Commission when it adopted Section 2H1.1. Defendant admitted assaulting an inmate in his custody, willfully violating his Eighth Amendment right to be free from cruel and unusual punishment. Defendant's actions were precisely the kind of substitution of personal punishment for valid law enforcement procedures that constitutes the "heartland" of excessive force cases under the Guidelines.

Neither of the grounds relied on by defendant takes this case out of the "heartland." This Court's established precedent regarding "aberrant behavior" makes clear that defendant's absence of criminal history and general good character cannot be a basis for downward departure. This case law also makes clear that the defendant's substantial planning and post-assault cover up make him ineligible for downward departure. Similarly, because the relevant Guideline already accounts for the degree of bodily injury, there is no basis to depart on this ground. Moreover, the structure of the Guideline reflects the additional harm, apart from bodily injury, caused by deprivations of civil rights by two or more persons acting under color of state law.

ARGUMENT

I

THIS COURT HAS NO JURISDICTION TO REVIEW THE DISTRICT COURT'S DECISION NOT TO DEPART BELOW THE GUIDELINES RANGE

This Court has "no jurisdiction" to review a district court's decision not to depart downward "unless the Court was unaware of its authority to depart downward and declined to do so for that reason." *United States* v. *Shepard*, 207 F.3d 455, 457 (8th Cir. 2000). The critical question, then, is whether the district court denied the departure because in general it did not think it had the authority to depart or because it recognized that it had the authority to depart but did not think these circumstances warranted departure. It is not enough, as defendant contends (Br. 7), that the district court expressed a desire to depart. That a district court "fervently wanted to exercise that authority [to depart downward], but could not find a valid reason to do so" does not convert an unreviewable discretionary decision to a reviewable question of law. *United States* v. *Robinson*, 20 F.3d 320, 323-324 (8th Cir. 1994).

This Court has developed some helpful rules-of-thumb in making the determination. First, it has made clear that when a district court describes its reasoning using terms such as "under the facts of this case" or "under the circumstances," it is signaling an exercise of discretion. The phrase "under the facts of this case" does "not demonstrate a belief on [the district judge's] part that he was barred as a matter of law from departing from the sentencing guidelines,"

but should be understood "as an acknowledgment that a downward departure was not justified." *United States* v. *Bieri*, 21 F.3d 811, 818 (8th Cir.), cert. denied, 518 U.S. 878 (1994); accord *United States* v. *Field*, 110 F.3d 587, 591-592 (8th Cir. 1997). *Bieri* also noted that the phrase "under the circumstances" has a "sufficiently similar" import. *Id*. at 818 (citing *United States* v. *Dutcher*, 8 F.3d 11, 12 (8th Cir. 1993)); see also *United States* v. *Vidrickson*, 998 F.2d 601, 603 (8th Cir. 1993) (same); *United States* v. *Payne*, 81 F.3d 759, 765 (8th Cir. 1996) ("under all of the circumstances in this case"); *United States* v. *Hawkins*, 102 F.3d 973, 976 (8th Cir. 1996), cert. denied, 520 U.S. 1179 (1997) ("on the basis of what I've heard"). The court in this case, in explaining its decision, used the phrases "by the evidence that I heard" and "considering the totality of the circumstances" (a phrase encompassing defendant's claims of aberrant behavior and minor injury), that likewise suggest a case-specific exercise of discretion, rather than a legal judgment as to its power to depart.

It is sometimes difficult to determine whether the district court was aware of its authority. But this is not one of those cases. In denying the motion to depart downward, the court explained (Tr. 96) that it had reviewed *Koon* v. *United States*, 518 U.S. 81 (1996), as well as this Court's post-*Koon* decision, *United States* v. *Kalb*, 105 F.3d 426 (1997). Finding that these cases had "relaxed the rule" of earlier cases regarding when a departure was appropriate, the court nonetheless stated that "I just don't think [a departure is] justified by the evidence that I have heard" (Tr. 96). In *United States* v. *Saelee*, 123 F.3d 1024, 1026 (8th Cir. 1997),

this Court held that a district court's invocation of *Koon* for the proposition that "the court may always depart if the circumstances warrant" was sufficient to show that "the district court understood its authority to depart downward, but declined to do so in the circumstances," thus making "its decision not to exercise that authority * * * unreviewable." Indeed, in *United States* v. *Hawkins*, 59 F.3d 723, 732 (8th Cir. 1995), vacated on other grounds, 516 U.S. 1168 (1996), this Court held the district court's awareness of its authority to depart downward was evidenced by the fact that the district court denied such a motion after the United States, in opposing the motion, cited the relevant authority.

Defendant suggests there are parts of the district court's explanation that indicate that the court might have thought it did not have the authority to depart downward. For example, it described the sentence as "harsh" (Tr. 97), which could suggest that the court believed it did not have the power to reduce it. But this Court in *Dutcher*, 8 F.3d at 12 & n.4, held that a district court's description of its sentence as "excessive" was not sufficient to support an inference that the district court believed that it lacked authority to depart to below the applicable guideline range. See also *United States* v. *West*, 942 F.2d 528, 532 (8th Cir. 1991) (statement that sentence was "a little heavy" not sufficient); *United States* v. *Nguyen*, 1 F.3d 972, 974-975 (10th Cir. 1993) (district court's statement about "harsh and unfair" Guideline's range was not sufficient). Similarly, the district court in this case implied that it was concerned that granting the downward departure would result in reversal on appeal (Tr. 97). But in the converse situation, this Court held in *Bieri*,

21 F.3d at 817-818, that a court's statement that the defendant could appeal its refusal to depart did not make the decision appealable. See also *United States* v. *Castillo*, 140 F.3d 874, 887-889 (10th Cir. 1998).

The language in the district court's discussion relied on by defendant is not enough to sustain his burden to show that this Court has jurisdiction over the refusal to depart downward. In *Payne*, 81 F.3d at 765, for example, the district court had said "even if I were inclined to [depart], I am not certain that I have the actual authority to." This court held that this language was not sufficient to establish appellate jurisdiction. "The overall context of the judge's statements * * * indicated that he was aware of his authority to depart, but chose not to do so based on the merits of [defendant's] request, concluding that departure was inappropriate based on 'all the information' before him." *Ibid.*

This is consistent with the position taken by other courts of appeals. The Second Circuit, for example, does "not require that district judges by robotic incantations state 'for the record' or otherwise that they are aware of this or that arguable authority to depart but that they have consciously elected not to exercise it." *United States* v. *Brown*, 98 F.3d 690, 694 (2d Cir. 1996). Instead, it applies a "strong presumption that a district judge is aware of the assertedly relevant grounds for departure," which can be "overcome only in the rare situation where the record provides a reviewing court with clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority." *Ibid.*; see also *United States* v. *Larkins*, 83 F.3d 162, 168 (7th Cir. 1996) ("We presume that the district court

knew that it had authority to depart downward and simply exercised its discretion not to do so. Defendant bears the burden of convincing us otherwise."); *United States* v. *Rodriguez*, 30 F.3d 1318, 1319 (10th Cir. 1994) ("unless the judge's language unambiguously states that the judge does not believe that he has authority to downward depart, we will not review his decision").

The district court in this case cited the appropriate cases and then determined "even considering the totality of the circumstances," that "I just don't think [a downward departure is] justified by the evidence that I have heard" (Tr. 96-97). As this reflects an exercise of the court's unreviewable discretion, the appeal must be dismissed.

II

EVEN IF THIS COURT HAS JURISDICTION, THE DISTRICT COURT DID NOT ERR IN REFUSING TO DEPART DOWNWARD

In any event, the district court did not commit error in declining to depart downward. In the district court, defendant proffered five grounds for downward departure (Tr. 68-77). On appeal, defendant continues to press only two: aberrant behavior and degree of injury. Neither is an appropriate basis for departure in this case.

District courts can depart downward from the applicable Guidelines range when they find a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines." U.S.S.G. § 5K2.0 (quoting 18 U.S.C. § 3553(b)). Each Guideline

carves out a heartland-set of typical cases embodying the conduct that the Guideline describes. See *Koon* v. *United States*, 518 U.S. 81, 94-96 (1996). "[D]eparture is appropriate 'only in the extraordinary case – the case that falls outside the heartland for the offense of the conviction.'" *United States* v. *Wind*, 128 F.3d 1276, 1277 (8th Cir. 1997).

A. *Defendant Was Not Entitled To A Downward Departure For "Aberrant Behavior"*

1. Defendant contends (Br. 8-16) that he is eligible for a downward departure because his assault of an inmate was "aberrant behavior." It is true that this was defendant's first criminal conviction. But the Guidelines take this into account by assessing the lowest criminal history score possible. Because this is already accounted for by the Guidelines, this Court has "squarely held that the lack of prior criminal history can never furnish the basis for a downward departure." *United States* v. *Allery*, 175 F.3d 610, 614 (8th Cir. 1999); see also *Koon*, 518 U.S. at 111 (cannot depart downward based on "low likelihood of recidivism" because the "Commission took that factor into account in formulating the criminal history category"). Nor does lack of prior criminal conduct take a person out of the "heartland" of offenders because "[t]here is, we can hope, nothing atypical about obeying the law." *Allery*, 175 F.3d at 614; see also *Wind*, 128 F.3d at 1278 ("the defendant's lack of a criminal history cannot remove a case from the heartland").

2. Apart from the lack of criminal history, defendant suggests (Br. 8-11) that he is eligible for a departure because the willful assault was out of character for

him. Defendant appears to concede that he would not be eligible for a downward departure on the basis of "aberrant behavior" based on the "very strict" (Br. 10) standard articulated by this Court prior to *Koon*. See *United States* v. *Weise*, 89 F.3d 502, 507 (8th Cir. 1996) (requiring a "spontaneous and seemingly thoughtless [act]"); *United States* v. *Jenkins*, 78 F.3d 1283, 1291 (8th Cir.1996) (same); *United States* v. *Garlich*, 951 F.2d 161, 164 (8th Cir. 1991) (same). Indeed, the district court found that defendant's crime was not "just an out of control act very briefly and simultaneously, but rather this was something that had to have some planning on the front end and the back end" (Tr. 96; see also Tr. 54 (defendant testifies that "I'm not going to say I was out of control. I was aware what was going on")).

While *Koon* did not discuss "aberrant behavior," defendant suggests (Br. 10-11) that this Court in *United States* v. *Kalb*, 105 F.3d 426 (8th Cir. 1997), relied on *Koon* to reject this pre-existing Eighth Circuit rule. But *Kalb* must be read in light of this Court's even more recent decisions in *Allery* and *Wind*. *Allery* involved a district court that granted a downward departure to a defendant who had raped a woman while she was sleeping. The district court departed downward based on a number of grounds, including "aberrant behavior." This Court remanded, holding that the district court had abused its discretion "in finding [defendant's] acts were aberrant in the sense that our cases have defined them." 175 F.3d at 614. It explained that "our cases defined aberrant behavior as a 'spontaneous and seemingly thoughtless act,'" and that defendant could not fall within these cases because his actions "must of necessity have involved an amount of planning," thus

making it "wholly inconsistent with spontaneity." *Ibid*. (some internal quotation marks omitted); see also *Wind*, 128 F.3d at 1278 (rejecting claim that "lack of a criminal record and otherwise exemplary lifestyle" were sufficient to justify departure on the basis that criminal behavior was "aberrant"). The district court in this case properly applied this holding by finding (Tr. 96) that pre- and post-assault conduct negated the spontaneity necessary for "aberrant behavior."

The Court then addressed *Kalb*, which it concluded was not a case about the aberrant behavior of the defendant, but about aberrant means of violating the statute. The Court explained that *Kalb* "indicates that the aberrancy of *offense conduct* can be evaluated in light of the extent to which that *conduct* deviated from *that* typical of those who commit the relevant offense." *Ibid*. (emphases added). *Allery* held that this type of aberration looks at "the atypicality of [defendant's] behavior when compared to the behavior that occurs in heartland cases." *Ibid*. And defendant does not contend that a prison guard assaulting an inmate is not in the "heartland" of Section 242 violations.

Thus, after *Allery*, a claim of aberrant behavior in this Circuit clearly requires a "spontaneous and seemingly thoughtless act." The Fifth Circuit has reached the same result on facts similar to this case. In *United States* v. *Winter*s, 105 F.3d 200 (5th Cir. 1997), the court reversed a district court's downward departure for aberrant behavior against a prison guard who had beat a prisoner and then attempted to persuade a fellow guard who had witnessed the incident to testify that nothing had happened. The court explained defendant's "subsequent efforts to

conceal his wrongdoing remove his actions from consideration as a single act of aberrant behavior." *Id*. at 207. The court went on to explain that a downward departure relying on positive employment history, while a disfavored ground in most instances, would be truly incongruous when the defendant is punished for a violation of Section 242. "[I]n regard to crimes committed under color of law, it would be inconsistent with the theory and structure of the Guidelines to use these factors in aid of classifying a course of criminal conduct as a single aberrant act." *Id*. at 208. This is because even after *Koon*, "[t]he theory of the Guidelines punishes criminal acts committed under color of law precisely because the Commission considered criminal acts committed by government agents to require a firmer response in order to prevent them." *Id*. at 207.

3. Defendant also relies (Br. 12-16) on Amendment 603 to the Sentencing Guidelines that added § 5K2.20 to the Guidelines effective November 1, 2000 (three months after defendant was sentenced), which for the first time expressly identifies "aberrant behavior" as a grounds for departure and articulates the appropriate standards to apply. But the Commission did not designate this amendment as one that would apply retroactively. See U.S.S.G. § 1B1.10(c); 65 Fed. Reg. 50,035 (2000) (designating three other amendments proposed at same time for retroactive application). This Court has consistently held that absent such a designation, a defendant is not entitled to rely on subsequent amendments to the Guidelines even if they become effective while the case is on appeal. See *United States* v. *Williams*, 905 F.2d 217, 218 (8th Cir. 1990), cert. denied, 498 U.S. 1030

(1991); *United States* v. *Green*, 902 F.2d 1311, 1313-1314 (8th Cir.), cert. denied, 498 U.S. 943 (1990); *United States* v. *Russell*, 913 F.2d 1288, 1292 (8th Cir. 1990), cert. denied, 500 U.S. 906 (1991). Nor did the Commission describe this amendment as "clarifying" some existing provision, which might permit its use in interpreting the existing Guidelines. See *United States* v. *Diaz-Diaz*, 135 F.3d 572, 581 (8th Cir. 1998). Instead, the Commission explained that it was "creat[ing] a new policy statement and accompanying commentary" that "does not adopt *in toto* either the majority or minority circuit view on this issue." 65 Fed. Reg. 26,880, 26,900 (2000).

In any event, defendant would not be eligible under the new Guideline. One of the requirements of the new provision is that the criminal act was "committed without significant planning." U.S.S.G. § 5K2.20 App. Note 1. Defendant relies (Br. 14-15) on his own testimony at the sentencing hearing to assert that he elected to move the inmate from his office to the gymnasium simply to talk, and that after he beat the inmate in the gymnasium, the inmate was taken to the medical office for treatment. But the district court "adopt[ed] the factual findings" in the Presentence Investigation Report (Def. Add. 7), which found defendant's "purpose in directing the inmate be transported to the gymnasium was for the purpose of provoking a fight" (PSR 2 ¶ 10), and that after beating him in the gymnasium, the inmate was brought back to defendant's office where defendant "again assaulted the inmate by pushing Mr. Ponder into a fire extinguisher secured to a wall of the office" (PSR 2 ¶ 8; see also U.S. Add. 10-12) (defendant at plea hearing agreed

with government's description of his involvement, which included second assault in office)), before instructing his subordinates to falsify their reports to omit mention of the incident in the gymnasium and then falsifying his own report (PSR 2 ¶ 9).

While the term "significant planning" is not defined in the Guidelines, the Guidelines define the term "more than minimal planning" to mean "more planning than is typical for commission of the offense in a simple form," and provides as one example "luring the victim to a specific location" to commit an assault. U.S.S.G. § 1B1.1 App. Note 1(f). Here, defendant did more than "lure" his victim. He used his authority to bring his victim to him in the early morning hours and then shuttle him back and forth between venues of his choosing: first to the empty gymnasium, where he had hoped to start a fight with the inmate, but ended up just beating him, and then back to his office, where he slammed the inmate's head against the wall. On each occasion, defendant instructed his subordinates to remove the inmate's handcuffs in order to make it more likely that the inmate would respond to defendant's verbal taunts with violence justifying the beating, further evidencing the predetermined result of these encounters. These were not random meetings between a prisoner and guard–they were incidents planned and structured by defendant to further his purpose of beating this inmate. In addition, the Guidelines explain that "more than minimal planning" also exists "if significant affirmative steps were taken to conceal the offense." U.S.S.G. § 1B1.1 App. Note 1(f). Defendant's filing his own false report of the incident and ordering his

subordinates to do the same fit squarely within this provision. For these reasons, defendant would not be eligible for departure under the amended Guidelines, even if they were applicable.

B. *Defendant Was Not Entitled To A Downward Departure For "Insignificant Injury"*

Defendant also contends (Br. 17-21) that the court could have departed because the Guidelines did not take into account the degree of injury defendant inflicted on the inmate. That argument is based on an incorrect reading of the Guidelines, which already account for the degree of injury in assessing the punishment under U.S.S.G. § 2H1.1.

First, in order to be convicted of a felony under 18 U.S.C. 242, a defendant's willful deprivation of constitutional rights must result in "bodily injury," while cases not involving bodily injury are only misdemeanors. So the statute itself has already excluded the least physically injurious cases from any sentence over 12 months, leaving to the Guidelines the finer gradations between degrees of bodily injury.

The Guidelines define three levels of "bodily injury." Ordinary "bodily injury" means "any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." U.S.S.G. § 1B1.1 App. Note 1(b). "Serious bodily injury" means "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery,

hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1 App. Note 1(j). And "permanent or life-threatening bodily injury" means "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent." U.S.S.G. § 1B1.1 App. Note 1(h). There is no dispute in this case that defendant inflicted "bodily injury" on the inmate, including scratches, scrapes, bruises, and a big semi-circular shaped gash on the side of his head (U.S. Add. 11; PSR 2 ¶ 8).

Defendant's contention that the Guidelines do not account for the degree of bodily injury for Section 242 violations is wrong. The relevant Guideline provides that the "[b]ase offense level" for a Section 242 violation must be, at a minimum, 12 levels "if the offense involved two or more participants." U.S.S.G. § 2H1.1(a)(2). However, if the offense level for "any underlying offense" is greater, then it will be used instead. U.S.S.G. § 2H1.1(a)(1). In this case, the "underlying offense" was assault. For purposes of this case, it is sufficient to note that the Guidelines recognize two types of assault: aggravated assault, and minor assault.[5] All assaults involving "serious bodily injury" are treated as "aggravated assaults." See U.S.S.G. § 2A2.2 App. Note 1. Even without serious bodily injury, an assault is treated as an "aggravated assault" if it involves a dangerous weapon

[5] Two other types of assault – assault with intent to murder, U.S.S.G. § 2A2.1, and assault of a governmental officer, U.S.S.G. § 2A2.4 – are not relevant given the defendant's state of mind and the identity of the victim.

with intent to do bodily harm or an intent to commit another felony. *Ibid*. In any such aggravated assault case, the degree of bodily injury (ordinary, "serious," or "permanent or life-threatening") affects the offense level. U.S.S.G. § 2A2.2(b)(3). Any assault that is not an aggravated assault is deemed a "minor assault." U.S.S.G. § 2A2.3 App. Note 1.

If defendant had inflicted more significant bodily injury on the inmate, it would have been reflected in the offense level. If defendant had inflicted "serious bodily injury" on the inmate, then the offense level would have been 19 (base offense of 15 for aggravated assault, U.S.S.G. § 2A2.2(a), plus four levels for the serious bodily injury, U.S.S.G. § 2A2.2(b)(3)(B)); if he had inflicted "permanent or life-threatening bodily injury" then the offense level would have been 21, U.S.S.G. § 2A2.2(a) & (b)(3)(C). Because either would have been greater than the 12-level minimum prescribed by the Guidelines for Section 242 violations committed by more than one person, it would have become the base offense level for defendant's sentence under U.S.S.G. § 2H1.1(a). But because defendant inflicted only "bodily injury," and did not meet any of the other criteria for "aggravated assault," the "minor assault" guideline was applicable, which did not exceed the 12-level minimum of the Section 242 guideline. Thus, the Guidelines incorporated by U.S.S.G. § 2H1.1(a) provide that a defendant whose assault inflicts serious or

permanent bodily injury will be subject to a higher offense level than one whose assault does not.[6] Defendant acknowledged this below (Tr. 69).

There is nothing to suggest that this case falls outside the heartland of "minor assaults" involving two or more participants acting under color of law to violate individual rights. See *United States* v. *Wong*, 127 F.3d 725, 728-729 (8th Cir. 1997) (when "the applicable Guidelines for each defendant had already taken into account the absence of weapons or violence," district court abused discretion in granting departure when "[t]here is nothing in the record to suggest that the absence of weapons or violence makes this case exceptional or extraordinary, when compared with other cases in which there was no use of weapons or violence"). This case is unlike *United States* v. *Allery*, 175 F.3d 610 (1999), in which this Court held that a district court did not abuse its discretion in departing downward in a sexual abuse case in which the defendant used a minimal amount of force because the victim was asleep. In that case, the Court did not depart simply because the degree of force was atypical, but because the degree of force reduced the psychological injury suffered by the victim, see *id*. at 612-613, a combination of factors not taken into account by the relevant Guideline.

---

[6] Defendant's comparison (Br. 20) of the injuries he inflicted to those described in *United States* v. *Harrison*, 671 F.2d 1159 (8th Cir.), cert. denied, 459 U.S. 847 (1982), is inapposite. If the defendant in *Harrison* had been sentenced under the current Guidelines, it appears from the opinion's description of the extent of the injuries and the need for hospitalization that they would constitute "significant bodily injury," which, as we explain in the text, would require the imposition of a base offense level 7 levels higher than defendant received in this case.

This case is analogous to *United States* v. *Beltran*, 122 F.3d 1156, 1159-1160 (8th Cir. 1997), in which this Court reversed a downward departure based on the low purity of drugs sold because the Commission had "explicitly considered the purity of methamphetamine when formulating" the Guidelines, and *Wind*, 128 F.3d at 1278, in which this Court held that a district court abused its discretion to depart downward based on the number of items of child pornography possessed by the defendant because the amount of pornography was expressly accounted for by the relevant Guideline. Because the degree of injury is a factor taken into account by the Section 242 Guideline itself, it also should not constitute a basis for departing downward in this case. Defendant "is not entitled to a downward departure on the ground that he did not commit * * * a worse crime." *Ibid.*

Indeed, this case is more compelling than *Wong*, *Beltran*, and *Wind*, in that it is clear that the Sentencing Commission set a minimum offense level of 12 for Section 242 violations committed by more than one person because it believed that, regardless of the degree of bodily injury, the deprivation of civil rights was more serious than a simple assault, cf. *Koon*, 518 U.S. at 110 ("Public officials convicted of violating § 242 have done more than engage in serious criminal conduct; they have done so under color of the law they have sworn to uphold."); *Winter*s, 105 F.3d at 207, and that an offense committed by more than one person was deserving of more punishment, cf. *United States* v. *Barnes*, 1999 WL 641249, at *1 (D. Kan. June 21, 1999). Indeed, defendant admitted in the district court that the degree of

injury was a "fairly minor part of [his] argument" and "would not, standing alone, support a departure" (Tr. 71).

* * * * *

The district court stated that it had "given [defendant] the benefit of every other consideration here like acceptance of responsibility and the government has given [him] the benefit of some stipulations as well" (Tr. 97). There is no basis in law for a further departure for the willful violation of constitutional rights committed by defendant.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the sentence of the district court should be affirmed.

Respectfully submitted,

BILL LANN LEE
Assistant Attorney General

DENNIS J. DIMSEY
SETH M. GALANTER
Attorneys
Department of Justice
P. O. Box 66078
Washington, D.C. 20035-6078
(202) 307-9994

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2000, two copies of the foregoing Brief for the United States as Appellee and one 3 ½" disk containing the brief's text, scanned for viruses and determined to be virus free, were served by first-class mail, postage pre-paid, on the following counsel:

Jason D. Files
211 Spring Street
Little Rock, AR 72201

SETH M. GALANTER
Attorney
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 307-9994