ORAL ARGUMENT IS REQUESTED

Nos. 03-2011, 03-2012, 03-2019, 03-2036

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant

v.

WILLIAM FULLER, MATIAS SERRATA, JR., and KENDALL LIPSCOMB,

Defendants-Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE WILLIAM P. JOHNSON

BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

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SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from judgments of conviction and sentence under federal law. The district court had jurisdiction pursuant to 18 U.S.C. 3231. It sentenced defendants on November 13, 2002, and entered judgments on December 31, 2002. (R. 221,222,223).[1] Defendants Matias Serrata and William Fuller filed notices of

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[1] "R." refers to the record entry number on the district court docket sheet. "F.Br." refers to defendant William Fuller's brief. "L.Br." refers to defendant Kendall Lipscomb's brief. "S.Br." refers to defendant Matias Serrata Jr.'s brief. "Tr." followed by a number refers to a page of the trial transcript. "11/6/02 Tr." and "11/13/02 Tr." followed by a number refer to the transcripts of the sentencing hearings held November 6 and 13, 2002. "Govt. Ex." followed by a number refers

(continued...)

appeal on January 3, 2003, (R.225,226), and defendant Kendall Lipscomb filed a notice on January 9, 2003. (R. 227). The United States filed a notice of cross-appeal on January 30, 2003. (R. 240). This Court has jurisdiction over these appeals pursuant to 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE CASE

On May 17, 2001, a federal grand jury in the District of New Mexico returned a five-count indictment charging correctional officers William Fuller, Gary Butler, Kendall Lipscomb, and Matias Serrata, Jr., with criminal offenses arising out of an assault (and subsequent cover-up thereof) on inmate Eric Duran at the Lea County Correctional Facility (LCCF) in Hobbs, New Mexico. (R. 1). Count One charged Fuller and Butler with violating 18 U.S.C. 242 for willfully using excessive force against Duran by repeatedly kicking him in the head as he lay on the floor with his hands cuffed behind his back, causing him bodily injury and depriving him of his constitutionally-protected right to be free from cruel and unusual punishment. Count Two charged Serrata with violating 18 U.S.C. 242 for failing to intervene in the assault on Duran. Count Three charged Fuller and Butler with violating 18 U.S.C. 241 for conspiring to file false criminal charges against Duran. Counts Four and Five charged all four defendants with violating 18 U.S.C.

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[1](...continued)
to an exhibit admitted at trial. "Add." followed by a letter refers to a document in the addendum attached to the end of this brief.

371 (conspiracy) and 18 U.S.C. 1512(b)(3) (obstruction of justice) by concocting a false story, filing false reports, and giving false statements to cover up the assault.

On April 12, 2002, the jury returned guilty verdicts against all defendants on all counts. (R. 142,147).[2] The defendants then filed motions for a new trial and judgments of acquittal, (R. 162,161,166), which were denied on June 4 and 11, and September 24, 2002. (R. 170,172,193). The court sentenced Fuller to 78 months' imprisonment, Serrata to 51 months, and Lipscomb to 24 months. (R. 221-223). These appeals followed.

STATEMENT OF FACTS[3]

On December 21, 1998, Lieutenant William Fuller and Correctional Officer Gary Butler repeatedly kicked inmate Eric Duran in the head as Duran lay face-down on the floor with his hands cuffed behind his back in a hallway at LCCF. Lieutenant Matias Serrata, Jr., who had both the authority and the opportunity to stop the unjustified assault, stood several feet away and watched without intervening. After the incident, Fuller and Butler conspired to press false criminal charges against Duran. Meanwhile, Fuller, Butler, Serrata, and Correctional

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[2] In August 2001, Butler entered into a plea agreement in which he pled guilty to Counts One and Four and agreed to testify on behalf of the government at defendants' trial.

[3] In evaluating the facts presented at trial, a court of appeals must view all the evidence, and draw all reasonable inferences, in the light most favorable to the government. See *United States* v. *Avery*, 295 F.3d 1158, 1177 (10th Cir. 2002).

Officer Kendall Lipscomb all conspired to cover up the unjustified beating by falsifying reports and making false statements to law enforcement officials.

The evidence at trial showed that the incident began when inmate Duran refused to sit in his assigned seat in the dining hall at lunchtime. (Tr. 66-67,269-270). Duran engaged Lipscomb and another officer in a verbal altercation and was ordered to return to his cell. (Tr. 17-19,54,71,72,271-272). Rather than obeying the officers' instructions, Duran exited the dining hall from one door and then immediately returned through an adjacent door, at which point the officers escorted him back into the hallway. (Tr. 72). When Duran exited the dining hall the second time, Lieutenants Fuller and Serrata -- both ranking officers -- were in the hallway waiting for him. (Tr. 107,272). Fuller cursed at Duran, got "up in Duran's face," and said that "he was going to kick the shit out of [Duran]." (Tr. 106,273,529). Serrata and Butler, followed by Fuller and several other officers, then escorted Duran to the nearby isolated "P-15 hallway." (Tr. 106-107,216; Gov't Ex. 1).

Numerous correctional officers, a civilian prison employee, and Duran all testified about the ensuing events. Once in the P-15 hallway, Fuller ordered Duran to place his hands on the wall, and Duran obeyed. (Tr. 108,275-276,567-568). As several officers -- two with dogs -- entered the hallway, Fuller continued to threaten Duran, put a fist to his face, and said, "we're all going to fuck him up." (Tr. 25-26,74,111,113,277-279,567,599). Fuller demanded that Duran place his hands behind his back to be cuffed. (Tr. 109,113,116,277). Duran, who had both hands on the wall and who had not been physically aggressive, allowed Fuller to

cuff his left wrist. (Tr. 29,113-114,117,279,282,297,531,543). However, convinced that he was about to be beaten and spotting an officer in the hallway with a video camera, Duran explained that he would not "cuff up" the rest of the way until the video camera was turned on. (Tr. 25,109-110,113-114,116-117,211,274,277-281,306,326,530,569,599,603). A canine sergeant in the hallway stepped forward and calmly reassured Duran that if he submitted to handcuffing, he would be taken to lockdown without being harmed. (Tr. 116,281-282). The sergeant, Albert Hernandez, was called as a defense witness and confirmed the testimony of the other eyewitnesses who had stated that Duran was not belligerent or physically aggressive with the officers. (Tr. 835).

Trusting the sergeant, Duran submitted to having Fuller cuff his right hand. (Tr. 117-118,282-283). However, as Duran's right hand came off the wall, Fuller and Butler, who weighed 300 and 220 pounds respectively, threw the much smaller inmate (who was 5'7"-5'8" and 160-165 pounds) to the ground, face-first, breaking one of his teeth. (Tr. 118-119,147-148,283). Within four to five seconds, Duran was on the floor, face down, with his hands cuffed behind his back. (Tr. 120,283-284,547).

Several witnesses described the ensuing assault. As Duran lay handcuffed on the ground, "completely defenseless," (Tr. 374), and surrounded by at least eight officers, Fuller, who was wearing black boots, "stomped" on Duran's forehead. (Tr. 23-25,29,121,124,127,213,286-287,374,534,543-544,548,570,572-573,603-605; 860 (defense witness)). Butler, who also was wearing boots, kicked Duran

"very hard" in the face and head. (Tr. 25,124,286,570,575). Butler and Fuller, standing on opposite sides of Duran, then alternated kicks, each kicking Duran four or five times in the head. (Tr. 124-125,211,214,548, 571,584-585,603-604). With each kick, Duran's head would "flop" from side to side. (Tr. 42,125,571). During the assault, which lasted approximately 40-45 seconds, Serrata stood within arm's reach, watched, but did not say or do anything to stop the assault. (Tr. 27,29,115-116,125-126,213,574,577,602,605,649). Defendant Serrata took the stand at trial and admitted that it was his "role as supervisor in charge of the use of force to give the order to terminate the use of force." (Tr. 1024).

Several witnesses said that when the assault ended, Fuller noticed multiple officers and civilian employees looking through large windows in the adjacent hallway. (Tr. 20,155-156,209,216-217,224,566-567,573-574,598,606). Fuller, looking angry and "like he was busted," gestured at the eyewitnesses to move away, and yelled for them to "turn the fuck around." (Tr. 217,224,573-574,606-607).

Meanwhile, Butler and another guard pulled the handcuffed Duran, whose face was very red, swollen, and puffy, and who appeared "dazed" and lifeless, (Tr. 221,575), to his feet and guided him to the prison medical unit. (Tr. 127,287-288,297,575,610). The physician observed that Duran was groggy, had black marks on his scalp, and had abrasions on his head, collarbone, back, behind his right ear, and under his left eye. (Tr. 233-235,240). The doctor also noticed that Duran's left eye had a sluggish reaction to light, and determined that Duran had

suffered a concussion. (Tr. 235).

Fifteen or twenty minutes later, the physician reexamined Duran, who by that time had passed out and could not be roused. (Tr. 235). Concerned that Duran might have intracranial bleeding, the doctor ordered him transported by ambulance to Lea County Medical Center. (Tr. 236). From Lea County Medical Center, Duran was sent to Albuquerque by ambulance for additional medical care. (Tr. 332-336,346). When Duran's condition worsened in transit, the ambulance diverted to a hospital in Roswell, where a helicopter picked up Duran and transported him the rest of the way to Albuquerque. (Tr. 339-340). Ultimately, Duran recovered from his injuries.

After the assault, Fuller recognized that he and his co-defendants would have to explain both their excessive use of force and Duran's injuries. (Tr. 34,548,572,604,770-772). Fuller thus ordered Butler to punch himself in the face so that they could take a photograph of the resulting injury and use the picture as evidence to bolster a false charge that Duran had assaulted Butler. (Tr. 129-130). Butler complied and allowed his "injury" to be photographed. (Tr. 81,90-91,95,129-131,351,381-382,521-524). Fuller and Butler then drove to the Hobbs Police Department and pressed false criminal charges against Duran. (Tr. 131-132,381-382).

On the way to the station, Butler and Fuller rehearsed the false story they planned to tell the police. (Tr. 134-137). As agreed, Butler told police that Duran had picked a fight, hit Butler, resisted, had to be taken to the ground two times, and

injured his head on a windowsill and the floor when he tried to bite Butler and was pushed away. (Tr. 135-136). Fuller also told the police that Duran hit Butler. (Tr. 146). Based on these statements, the Hobbs Police Department filed criminal assault charges against Duran, which were later dismissed. (Tr. 296,387-389; Gov't Ex. 17).

Several correctional officers testified that when Butler and Fuller returned to LCCF, they met in the conference room with Serrata, Lipscomb, and four other officers who had been in the P-15 hallway during the assault. (Tr. 137-138). Before leaving for the police department earlier in the afternoon, Fuller had instructed the other officers to go to the conference room and await his return before writing their reports of the incident. (Tr. 10-11,133,420-422,451-452,610). Once he returned, Fuller instructed the other officers to file false statements justifying the use of force and the injuries. (Tr. 138-140,144,154,173,612-615,645). He also told the officers to leave him out of their reports because Warden Erasmo Bravo disapproved of supervisors using force, (Tr. 139,771-772,1073-1074), and to claim that Duran resisted, fought, and punched Butler. (Tr. 612-617,657).

Following Fuller's instructions, the officers agreed to claim falsely that Fuller was not in the hallway, and that Duran challenged them to a fight, cursed, resisted, struggled, jerked away, had to be taken to the floor twice, hit Butler in the face, and injured his head when he fell and hit a windowsill. (Tr. 141-145,349-352,371-372,612-620,623,829). Serrata "added a little bit here and there," and

each officer discussed and wrote an account consistent with the false story. (Tr. 616). Defense witnesses Albert Hernandez and Rickie Cagle confirmed that Fuller and Serrata directed them to file false reports. (Tr. 829-832,836,841,860-861,864-865).

Fuller included many false assertions in his own use of force statement. (Tr. 146; Gov't Ex. 9). He falsely claimed, for example, that he was not in the P-15 hallway during the assault, but was watching through a window as Duran hit Butler with his closed fist. (*Ibid.*). He also wrote, untruthfully, that "Duran was resisting and struggling with Officer Butler and Lieutenant Serrata, then bounced off all the walls." (*Ibid.*).

Lipscomb similarly reported falsely that he was not in the hallway during the assault. (Tr. 149-150). And Serrata falsely claimed that he, rather than Fuller, cuffed one of Duran's wrists and twice took Duran to the floor, and that Duran struggled, attempted to bite Butler, and struck his head on a windowsill. (Tr. 150-152). Warden Bravo, a defense witness, testified that Fuller later admitted that he failed to report everything that happened, and that Fuller made "reference to putting his foot around the inmate's head." (Tr. 877-878). Bravo further admitted on cross-examination that he had conducted an initial investigation into the incident and concluded that Serrata had lied both in his report and during the investigation when he denied that excessive force was used against Duran. (Tr. 898-899).

The morning after the assault, Warden Bravo met with the officers and instructed them to re-write their reports, stating that he knew Fuller had been in the

hallway and that their reports were inaccurate. (Tr. 157,628-629). The officers met again, and Fuller suggested they write basically the same reports, except to state that Fuller entered the hallway at the end of the assault and placed his foot on Duran's head to control him. (Tr. 157-159).

Within a couple of weeks, the New Mexico State Police launched a criminal investigation into the attack. (Tr. 396). After being told that a complaint had been filed about their excessive use of force, the defendants repeated their false stories and provided false documents to the police. (Tr. 399-400; Gov't Exs. 18,18a,19,19a,20,20a).[4] As an example, each defendant told police that Duran struck Butler in the face. (Ex. 18a at 3; Ex. 19a at 5; Ex. 20a at 3).

Defendants' trial commenced on April 2, 2002. Uncontroverted evidence was introduced during the proceedings showing that, prior to becoming correctional officers, defendants all attended training academies where they received expert instruction on the lawful use of force against inmates. (Tr. 404-422,441-452,479-504). The government and the defense witnesses agreed that correctional officers are trained that they may use only the minimum amount of force necessary to control a situation, that *no* force is allowed once an inmate is restrained and handcuffed, and that force is never permissible when an inmate is merely verbally abusive, or as punishment or discipline. (Tr. 409,411-413,450,493,496,498; 713,717 (defense witness); 971-972 (defense witness)).

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[4] Exhibits 18, 19, and 20 are audio tapes of defendants' interviews. Exhibits 18a, 19a, and 20a are the transcripts of the audio tapes.

These witnesses also stated that correctional officers are taught that, even when force is justified, the head and neck are "no strike" zones because there is a high risk of permanent injury or death from blows to those areas. (Tr. 419-420,497; 703,718 (defense witness); 972-975 (defense witness)). Witnesses further explained that defendants were instructed that the deliberate use of excessive force violates an inmate's federal rights, and that federal law enforcement officials can investigate claims of excessive force, resulting in federal civil or criminal lawsuits. (Tr. 413,447-448,487-489; 714 (defense witness)).

At the end of the ten-day trial, the jury returned verdicts of guilty on every count. (R. 142,147). During the sentencing hearing, defendants sought downward departures on five separate bases: aberrant behavior; victim misconduct; coercion and duress; susceptibility to abuse in prison; and the sentencing disparity between the cooperators who pled guilty and the defendants who went to trial. (11/6/02 Tr. 90,106,108,113-114,134; Add. D). The district court denied these requests and specifically found that defendants "did not reach the requirements set forth in the guidelines" for such departures. (11/13/02 Tr. 58; Add. E).[5]

The court nevertheless expressed its disagreement with the guideline sentences and *sua sponte* granted each defendant a five-level downward departure

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[5] Defendants do not, nor could they, appeal the district court's denial of their motions for downward departure.

pursuant to U.S.S.G. 5K2.0. (11/13/02 Tr. 58,61,68,79; Add. E).[6] The court predicated its ruling on an argument that defendants had never advanced -- either in their pleadings or at the two-day sentencing hearing -- as bases for a downward departure. In particular, the court cited the aggregation of: defendants' family ties; the financial burden that incarceration would have on defendants' families; defendants' absence of prior arrests; defendants' exhibition of leadership skills; letters of community support; defendants' public service; and defendants' educational and employment history. (11/13/02 Tr. 60-61,66-68,78-80; Add. E). Taking these downward departures into account, the court sentenced Fuller to 78 months' imprisonment, Serrata to 51 months, and Lipscomb to 24 months. (R. 221-223).

SUMMARY OF ARGUMENT

1. *Sufficiency Of The Evidence.* The challenges by Serrata and Lipscomb to the sufficiency of the evidence are meritless as the trial record overwhelmingly

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[6] Prior to making this downward departure determination, the district court had correctly calculated defendants' criminal history categories and total offense levels. Specifically, Fuller was adjudged to fall within Criminal History Category I with a total offense level of 33, giving him a guideline sentence of 135-168 months. (11/6/02 Tr. 79-80; Add. D). Serrata was deemed to be within Criminal History Category I and have a total offense level of 29, thus giving him a guideline sentence of 87-108 months. (11/6/02 Tr. 85; Add. D). Finally, Lipscomb was determined to fall within Criminal History Category II and have a total offense level of 21, giving him a guideline sentence of 41-51 months. (11/6/02 Tr. 83; Add. D).

supports their convictions. The testimony of at least four eyewitnesses established that Serrata violated 18 U.S.C. 242 when he stood by, doing nothing, and watched as Fuller and Butler repeatedly kicked Duran in the head. In failing to intervene in this assault, despite having the clear ability and opportunity to do so, Serrata willfully deprived Duran of his constitutional right to be free from cruel and unusual punishment. Similarly, the convictions of all three defendants for obstruction of justice and conspiracy to obstruct justice must be sustained because the evidence unequivocally demonstrates that the defendants agreed to engage in, and did in fact engage in, misleading conduct to prevent the communication of accurate information to all law enforcement officers, including federal officers, about a crime they knew was a federal offense and thus was likely to be investigated by federal officials.

2. *Evidentiary Rulings.* The district court did not abuse its discretion in limiting cross-examination and excluding extrinsic evidence regarding certain underlying details of the victim's criminal convictions. Fuller and Serrata sought to use – and did use – the details of Duran's past crimes solely for the impermissible purpose of trying to prove that Duran had a propensity for resisting arrest. After Duran admitted to his prior arrests and convictions, and answered numerous questions about the underlying facts, the district court properly excluded additional details of Duran's criminal history as irrelevant, not probative of Duran's intent, and inadmissible under Fed. R. Evid. 403. The excluded testimony was not habit evidence, and the court's ruling did not affect the outcome of the trial because

the evidence was cumulative and the government's evidence was overwhelming.

3. *Jury Instructions*. The district court properly instructed the jury. The instruction regarding the requisite intent for a violation of 18 U.S.C. 1512(b)(3) did not mislead the jury and was not plain error. Nor did the district court err in refusing to give an accomplice charge as to an eyewitness whose testimony was corroborated by several other witnesses.

4. *Calculation Of Sentencing Guidelines*. At sentencing, the district court correctly calculated the sentencing guidelines by using the aggravated assault guideline to determine the defendants' appropriate Sentencing Guideline range. The guideline governing 18 U.S.C. 242 directs the court to use the base offense level for the underlying offense which, in this case, was an aggravated assault because the violence committed against Duran was a felonious assault involving the use of a dangerous weapon.

5. *Cross Appeal -- Unwarranted Downward Departure*. The district court unlawfully departed downward from the applicable Sentencing Guideline range by relying on prohibited factors and other considerations that are reserved for "extraordinary" circumstances which are in no way present in the case at bar. The district court inappropriately sought to circumvent the Guideline's dictates based on its own disagreement with the requirements therein.

ARGUMENT

I. THE EVIDENCE OVERWHELMINGLY SUPPORTS DEFENDANTS' CONVICTIONS

Defendants contend that the evidence is insufficient to support their convictions.[7] (S.Br. 26-31; L.Br. 15-19). A jury verdict must be sustained if, "after viewing the evidence in the light most favorable to the prosecutor, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Woodlee*, 136 F.3d 1399, 1405 (10th Cir.), cert. denied, 525 U.S. 842 (1998). In reviewing the record, this Court must draw all reasonable inferences and "resolve any conflicts in the evidence in favor of the government." *United States* v. *Williamson*, 53 F.3d 1500, 1516 (10th Cir.), cert. denied, 516 U.S. 882 (1995).

"It is left to the jury to weigh conflicting evidence and to consider the credibility of witnesses." *United States* v. *Oliver*, 278 F.3d 1035, 1043 (10th Cir. 2001) (internal quotations and citations omitted). This Court must "accept the jury's resolution of the evidence as long as it is within the bounds of reason." *Messer* v. *Roberts*, 74 F.3d 1009, 1013 (10th Cir. 1996). Accordingly, reversal of a conviction for insufficiency of the evidence is permissible only if "no reasonable

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[7] Because each of the defendants specifically incorporates the arguments presented in their co-defendants' briefs, (F.Br. 12; L.Br. 26-27; S.Br. 2 n.1), we assume, whenever factually and legally appropriate, that a claim raised by one defendant applies to all three. Accordingly, we refer to a claim raised by a defendant as "defendants' claim," followed by a citation to the specific brief(s) in which it is presented.

juror could have reached the disputed verdict." *United States* v. *Whitney*, 229 F.3d 1296, 1300-1301 (10th Cir. 2000).

A. *Ample Evidence Supports Serrata's Conviction For A Violation Of 18 U.S.C. 242*

Serrata argues that the evidence is insufficient to establish that he violated 18 U.S.C. 242 because the testimony about his misconduct is inconsistent. (S.Br. 28). His argument lacks both factual and legal merit. Overwhelming and consistent testimony established that Serrata witnessed an unjustified assault, had the opportunity and ability to intervene, and failed to do so. Even if he were correct, however, in characterizing the evidence as inconsistent, his argument would fail because the resolution of any and all factual inconsistencies rests within the sole province of the jury. See *Oliver*, 278 F.3d at 1043. In this case, the jury resolved any inconsistency by rejecting the defendants' versions of events in favor of the contrary evidence presented by the prosecution.

Section 242 makes it a criminal offense for a person acting under color of law willfully to deprive a person of a right protected by the Constitution or laws of the United States. The Supreme Court has recognized that an inmate has an Eighth Amendment right to be free from cruel and unusual punishment, and that a correctional officer has a concomitant constitutional duty to protect an inmate from such harm. *Hudson* v. *McMillian*, 503 U.S. 1, 5 (1992). As a result, a law enforcement officer violates Section 242 when he observes the use of unjustified force against a person in his custody, has the opportunity to intervene, and wilfully

chooses not to do so. *United States* v. *Reese*, 2 F.3d 870, 887-888 (9th Cir. 1993); accord *Mick* v. *Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1999) (applying same principle in 42 U.S.C. 1983 suit); *Estate of Davis* v. *Delo*, 115 F.3d 1388 (8th Cir. 1997) (same).[8]

The jury's verdict here must be sustained because the evidence clearly demonstrates that Serrata, an LCCF lieutenant, had both the authority and the opportunity to stop the assault against Duran. Notwithstanding this duty, he stood by and did nothing as he watched Fuller and Butler kick Duran eight to ten times in the head. Four eyewitnesses testified that as Duran was lying defenseless on the floor with his hands cuffed behind his back, Serrata stood within arm's reach and simply gazed at the unlawful attack. See Tr. 27 (Officer Cary Escobedo said Serrata was "facing the kick[ing] * * * looking right at it" and took no action); Tr. 125-126 (Officer Gary Butler said Serrata was "within arm[']s reach of Lieutenant Fuller," "looking right at [me]" and "just st[ood] there" as Butler and Fuller kicked Duran); Tr. 577 (Officer Heather Surratt said Serrata was "four feet" from Duran looking "[a]t the [kicking] incident that was happening"); Tr. 602,604-605 (similar testimony of Officer Robert Kersey, Jr.). Serrata also displayed his guilty conscience when he falsified his reports and statements and asked other officers to lie about the incident.

But even if the government had not adduced this plethora of consistent

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[8] The phrase "under color of law" has the same meaning in 42 U.S.C. 1983 as it does in 18 U.S.C. 242. *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966).

evidence regarding Serrata's guilt, he would not be entitled to a reversal of his conviction based on other conflicting testimony. This Court has repeatedly explained that its "function as a court of review * * * prevents [it] from re-weighing the testimony and coming to a conclusion at odds with the one reached by the jurors.'" *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1018 (10th Cir.), cert. denied, 537 U.S. 1063 (2002). As long as there is evidence to support the jury verdict, minor inconsistencies in the testimony are not a basis for setting it aside. In this case, the jury heard, and clearly rejected, Serrata's incredible claims that he did not know that Duran was being kicked or otherwise abused and that he "didn't see" the attack. (Tr. 995,1017,1028,1051). Indeed, even witnesses called by the defense testified that Serrata told them to "lie." Tr. 836 (Hernandez); Tr. 860 (Cagle). The jury obviously chose to believe the consistent statements of numerous eyewitnesses rather than Serrata' self-serving denials and, as discussed previously, had ample evidence on which to base such a conclusion.

B. *The Evidence Is Sufficient To Sustain Defendants' Convictions For Conspiracy To Obstruct Justice And Obstruction Of Justice*

Defendants argue (L.Br. 15-19) that the evidence is insufficient as to the counts charging conspiracy to obstruct justice (18 U.S.C. 371) and obstruction of justice (18 U.S.C. 1512(b)(3)) because the government failed to establish that the defendants had the requisite intent. In particular, defendants contend that to the extent they misled prison authorities, their intent was merely to prevent retaliation and adverse employment action, not preclude the transmission of any information

to federal authorities. Their arguments are unpersuasive.

1. Section 1512(b)(3) renders it unlawful to intimidate, threaten, or corruptly persuade (or attempt to intimidate, threaten, or corruptly persuade) "another person" with the "intent to * * * hinder, delay or prevent the communication to a law enforcement officer * * * of the United States information relating to the commission or possible commission of a federal offense." This provision is designed to protect "the integrity of potential federal investigations by ensuring that transfers of information to federal law enforcement * * * relating to the possible commission of federal offenses [are] truthful and unimpeded." *United States* v. *Perry,* 335 F.3d 316, 321 (4th Cir. 2003) (citation omitted).

Defendants here labor under the fundamental misconception that the government was required to prove that they *specifically intended* to interfere with communications to a *federal* law enforcement officer. Section 1512, by its explicit terms, mandates no such proof. See 18 U.S.C. 1512(g)(2) ("In a prosecution under this section, no state of mind need be proved with respect to the circumstance * * * that the * * * law enforcement officer is an officer or employee of the Federal Government."). Under the plain language of the statute, it is immaterial that a defendant may have intended to prevent communications only with local, rather than federal, law enforcement. *Perry*, 335 F.3d at 321; *United States* v. *Baldyga,* 233 F.3d 674, 680-681 (1st Cir.), cert. denied, 534 U.S. 871 (2001); *United States* v. *Applewhaite,* 195 F.3d 679, 687 (3d Cir. 1999); *United States* v. *Emery*, 186 F.3d 921, 925 (8th Cir. 1999); *United States* v. *Diaz,* 176 F.3d 52, 90-91 (2d Cir.),

cert. denied, 528 U.S. 875 (1999); *United States* v. *Veal,* 153 F.3d 1233, 1253 (11th Cir. 1998). The evidence, in fact, may be sufficient to sustain a conviction under Section 1512(b)(3) even if the defendant had no knowledge that the witnesses he intimidated (or otherwise corruptly persuaded) had contemplated communicating with a federal official at any point. The only thing the statute mandates is that the defendant "had the intent to influence an investigation that *happened to be federal*." *Baldyga*, 233 F.3d at 680-681 (emphasis added); *Applewhaite*, 195 F.3d at 687.[9] As the Eleventh Circuit observed, "it would be ironic if congressional intent to ensure the integrity of investigations into possible federal crimes could be defeated simply by a defendant's ignorance, feigned or real, about the federal character of the crime." *Veal*, 153 F.3d at 1252.

It is critical as well that the term "another person" in Section 1512(b)(2) is unrestricted. This term thus necessarily includes state law enforcement officers who served as the "conduit for relaying false and misleading information imparted to them by [a defendant] to federal authorities." *Ibid.* at 1253. In other words, there is no requirement that the defendant have specifically sought to interfere with

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[9] Consistent with these principles, this Court has held that a defendant violates Section 1512(b)(3) when he threatens another individual with the intent of making him "think twice" before going to any law enforcement officer -- federal or otherwise -- and giving information about a potential federal offense. See *United States* v. *Dunning,* 929 F.2d 579, 581 (10th Cir. 1991) (affirming conviction under 18 U.S.C. 1512(b)(3) for witness tampering where defendant, who had committed bank and mail fraud with her mother, told three people at a meeting that if "anyone else" provides information that "could cause [my] mother to go to jail," they "will not be on the face of this earth any longer").

communications *between a witness and a federal officer*. Rather, all that is required for a violation of Section 1512(b)(3) is "the possibility or likelihood that [defendants'] false and misleading information would be transferred to federal authorities irrespective of the governmental authority represented by the initial investigation." *Ibid.* at 1251-52 (emphasis omitted).[10]

Defendants similarly miss the mark in alternatively arguing that their focus was not on influencing a federal investigation, but merely on preserving their jobs and preventing retaliation by prison officials. Not surprisingly, a defendant may be found to have intended to prevent communication with federal officials within the meaning of Section 1512 when he acts with multiple motives. See *Emery*, 186 F.3d at 925 (evidence is sufficient when "at least some part of defendant's motive in killing * * * victim was to halt" the disclosure of information); *United States* v.

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[10] Defendants rely heavily on *United States* v. *Causey*, 185 F.3d 407 (5th Cir. 1999), in support of their insufficient evidence theory. The Fifth Circuit there adopted a confusing and, the government respectfully submits, legally erroneous interpretation of Section 1512(b)(3) requiring "proof that the officers with whom the defendant believed the victim might communicate *would in fact be federal officers*." *Ibid.* at 422 (emphasis in original) (quoting *United States* v. *Bell*, 113 F.3d 1345, 1349 (3d Cir. 1997)). Imposing such a burden on the prosecution ignores the plain language of Section 1512(g)(2) and is inconsistent with the well-reasoned decisions of the various circuits cited in the text above. Ultimately, however, *Causey* affords the defendants no refuge in this appeal. Indeed, the district court in this case instructed the jury pursuant to the overly demanding standard set forth in *Causey*, see R. 145, Instr. 8D (government must prove that "defendant believed that the witness -- toward whom the defendant engaged in misconduct -- might communicate with federal authorities"), and the evidence at trial easily satisfied that standard.

Jefferson, 149 F.3d 444, 446 (6th Cir.) ("jury need not find that defendant's sole motivation * * * was to prevent him from communicating to law enforcement authorities"), cert. denied, 525 U.S. 989 (1998); *United States* v. *Bell*, 113 F.3d 1345, 1349 (3d Cir.) (same), cert. denied, 522 U.S. 984 (1997). And inasmuch as defendants' alleged motive of preserving their jobs is entirely consistent with an effort to prevent *all* law enforcement officers -- including federal officials -- from learning that defendants committed a crime, even this claimed rationale in no way demonstrates that they lacked the requisite intent for conviction.

2. The evidence presented at trial is clearly adequate to support defendants' convictions for obstruction of justice and conspiracy to obstruct justice because it demonstrated overwhelmingly that defendants agreed to engage in, and did in fact engage in, misleading conduct to prevent the communication of accurate information to *all* law enforcement officers, including federal officials, about a crime they knew was a federal offense and thus likely to be investigated by federal officials.

The government introduced evidence establishing that, within hours of the assault on Duran, defendants met to fill out the paperwork and reports required whenever there is a prison incident involving the use of force. (Tr. 610-612). During the meeting, defendants fabricated a story and agreed to submit false reports. (Tr. 613-614,616-618,877-878). The next morning, defendants met and again agreed to adhere to their false account. As a result, defendants provided their false story each time law enforcement officials, including prison officials, (Tr. 157-

159), local police (Tr. 135-137), and state police (Govt. Exs. 18,18a,19,19a, 20,20a), interviewed them.

The evidence further shows that defendants knew their false reports related to a potential federal crime (*i.e.*, the use of constitutionally excessive force against Duran) and thus would likely be provided to federal officials. During their initial meeting after the attack, Fuller told defendants and other correctional officers that it was necessary to falsify reports in order to cover-up the "excessive use of force." (Tr. 139). Each of the defendants had been trained that the use of excessive force constitutes a federal offense that can be investigated and prosecuted by federal officials, or become the subject of a civil suit in federal court. (Tr. 414-415,447-448,488-490,713). And prior to providing a statement to the New Mexico State Police, each defendant was told that a complaint had been filed regarding the excessive use of force. (Tr. 399-400; Exs. 18,18a,19,19a,20,20a). In short, the evidence demonstrates conclusively that defendants knew that their conduct could constitute a federal offense, that a complaint had been filed and was likely to be investigated by federal officials, and that their false reports and statements might be provided to federal officials. The record thus fully supports the jury's verdicts on the obstruction of justice and conspiracy to obstruct justice counts of conviction. See *United States* v. *Cobb,* 905 F.2d 784, 790 (4th Cir. 1990) (violation of 1512(b)(3) sustained where local police officers used excessive force against arrestee and filed false affidavit), cert. denied, 498 U.S. 1049 (1991).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING CROSS-EXAMINATION AND EXCLUDING EXTRINSIC EVIDENCE REGARDING CERTAIN UNDERLYING DETAILS OF THE VICTIM'S CRIMINAL CONVICTIONS

Defendants next argue that their convictions should be reversed because the district court (i) limited cross-examination of Duran regarding the details of his conviction for aggravated assault on a police officer, and (ii) refused to allow a police officer, Sergeant Frank Smith, to testify about the details of Duran's misdemeanor juvenile adjudication for resisting arrest. (F.Br. 14-30; L.Br. 24-25). Defendants contend that the underlying details of Duran's convictions somehow show not only that Duran provoked the use of force during the LCCF incident, but that the degree of force employed was necessary and that the issue of Duran's intent is relevant to this case. (F.Br. 23,26). Defendants' claims have no merit. The district court allowed the defense far more latitude than was required, or even permitted, by the Federal Rules of Evidence.[11] The only testimony excluded was

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[11] On the morning of jury selection, Fuller's trial counsel moved for permission to cross-examine Duran about the details of his juvenile adjudication and adult misdemeanor conviction for resisting arrest. She argued that the inquiry was proper pursuant to Rule 404(b) to establish Duran's intent and "pattern of resisting being handcuffed." (Tr. 15,13-14). The district court granted defense counsel's request. (Tr. 15-16,260-261,265).

Duran testified about the details of his convictions for resisting arrest, including the fact that, as an adult, he fought several officers when he resisted arrest and, as a juvenile, he fled in a car to get away from the police. (Tr. 300-305). The district court finally cut off the cross-examination when the government objected after Fuller's counsel asked Duran her *thirtieth* question about his criminal

(continued...)

indisputably inadmissible and offered exclusively for an impermissible purpose.

A district court has broad discretion in determining the admissibility of evidence. *United States* v. *Talamante*, 981 F.2d 1153, 1155 (10th Cir. 1992), cert. denied, 507 U.S. 1041 (1993). This Court will not disturb a trial court's decision to exclude evidence or limit cross-examination unless it "'ha[s] a definite and firm conviction that the (trial) court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *Ibid.* In this case, the court

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[11](...continued)
history. The district court responded, "We don't need to go into quite that much detail." (Tr. 305).

After the government rested, Fuller's counsel sought to introduce extrinsic evidence as to the details of Duran's convictions for resisting arrest. (Tr. 662). The district court, citing Rules 404 and 608, explained that the evidence was inadmissible because Duran had acknowledged all of his convictions during cross-examination. Noting that Duran had already been "extensively" cross-examined about his criminal history, the judge noted, "This isn't a trial on Eric Duran." (Tr. 664,662). Shortly thereafter, Fuller's counsel renewed her request and proffered that she would call Sgt. Smith to testify that, when arrested as a juvenile in 1994, Duran said, "It will take at least five officers to get me to do anything." (Tr. 686,302-303). Sgt. Smith also purportedly would have testified that, during that juvenile incident, "it did take four officers to restrain and cuff [Duran] and they needed to take him to the floor." (Tr. 686,688). The district court denied defendant's request. (Tr. 689). Subsequently, the court requested further argument on the admissibility of Sgt. Smith's testimony, but again refused to allow him to testify, reasoning that the testimony was inadmissible because Rule 609(d) expressly precludes impeachment by juvenile convictions, (Tr. 912), and that the circumstances of Duran's juvenile adjudication were irrelevant, "too remote" to be probative of Duran's intent during the charged incident, not proper 404(b) evidence, and unnecessarily confusing to the jury. (Tr. 919-921).

could not possibly have abused its discretion by limiting evidence that was purely cumulative of other evidence, which already had been admitted improperly and which was being used for an impermissible purpose.

A. *The District Court Allowed The Defendants To Introduce Far More Evidence Of Duran's Criminal History Than Was Permitted By The Rules Of Evidence*

Rule 609, governing impeachment of a witness with evidence of prior criminal convictions, generally permits either party to impeach a witness's credibility by presenting evidence of that witness's prior conviction for a crime of dishonesty or a felony within the past ten years. The rule presumes that juvenile adjudications and misdemeanors not involving dishonesty will be excluded. Fed. R. Evid. 609(a) and (d). Additionally, Rule 404(b), which governs the admission of evidence relating to a witness's prior bad acts, prohibits the introduction of the same evidence if it is offered "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Admission of prior convictions and prior bad conduct, like admission of any other type of evidence, is also subject to the standard evidentiary balancing test, which directs the court to exclude even relevant and otherwise admissible evidence if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues * * * delay * * * or needless presentation of cumulative evidence." Fed. R. Evid. 403.

Thus, to the extent that any evidence of the victim's criminal history was admissible in this case, it was only for the purpose of impeaching Duran's

credibility. Pursuant to Rule 609, the jury should only have heard evidence of his prior felonies and any misdemeanors involving dishonesty. Moreover, while it was not necessarily inappropriate to allow defendants to probe the general nature of Duran's relevant prior felony conviction, it was wholly improper to permit them to go beyond the "essential facts" of that previous offense. See *United States* v. *Howell*, 285 F.3d 1263, 1267-1269 (10th Cir. 2002) (where prior conviction of witness is admissible only for impeachment purposes, examination is generally limited to the nature of the underlying crime, the time and place of conviction, and the punishment).

In this case, the district court improperly admitted evidence of the victim's misdemeanor juvenile adjudication, and improperly permitted the defense to explore in extraordinary detail the surrounding circumstances of the victim's past offenses and arrests. Additionally, the court repeatedly allowed the defense to use this criminal history evidence, in violation of Rule 404(b), for the impermissible purpose of implying that the victim had a propensity to resist arrest and acted in conformity therewith on December 21, 1998.

But having gone far beyond the limits of the Federal Rules of Evidence, and having admitted extensive evidence that should have been excluded, the court clearly did not abuse its discretion by finally drawing the line and excluding inappropriate cross-examination and inadmissible extrinsic evidence being offered for an impermissible purpose.

B. *Fuller And Serrata Used Duran's Criminal History Exclusively For An Impermissible Purpose*

The district court permitted defense counsel to ask Duran twenty-nine consecutive questions about his criminal history, eliciting testimony that Duran had repeatedly defied, struggled with, and disobeyed law enforcement officers, repeatedly resisted arrest, and required the police to use force to detain him. (Tr. 302-305). Fuller and Serrata then used the details of Duran's criminal history, in violation of Rule 404(b), *solely* for the impermissible purpose of attempting to persuade the jury that Duran acted in conformity with his criminal character during the charged incident. See *Hynes* v. *Coughlin*, 79 F.3d 285, 292 (2d Cir. 1996) (court abused its discretion in admitting inmate's disciplinary record in a case in which correctional officers were accused of using excessive force, because defense counsel relied on the record during closing argument to show inmate's "assaultive character"). This Court has repeatedly held that a defendant cannot introduce the details of a victim's past crimes or misconduct to create the inference that the victim acted in a manner consistent with prior conduct. *United States* v. *Yazzie*, 188 F.3d 1178, 1191-1192 (10th Cir. 1999); *United States* v. *Bautista,* 145 F.3d 1140, 1152 (10th Cir. 1998); *Talamante*, 981 F.2d at 1155-1156.

Despite the Federal Rules of Evidence and controlling precedent, Fuller and Serrata used the details of Duran's "other crimes" *exclusively* to try to convince the jury that Duran, consistent with his prior criminal actions, initiated, resisted, and fought during the assault. Indeed, during closing argument, each of the three times

that Fuller's counsel mentioned Duran's criminal history, she asked the jury to infer that Duran, in conformity with his criminal character, resisted and struggled with defendants and other correctional officers. She argued:

> Eric Duran refused to be handcuffed because that's what he does. * * * He had been resisting authority since he was kid. He resisted authority on that day, beginning in the chow hall.
>
> He started a disturbance in those chow halls, he resisted authority, he resisted arrest, and now he wants to play the poor victim.
>
> Also, what is Eric Duran doing in the penitentiary in the first place? Aggravated assault on a peace officer, that sounds a little like resisting arrest. * * * [Duran] disrespects policemen, and he disrespects authority. Why was December 21st any different? Why should you believe him now?

(Tr. 1212-1214).[12] Similarly, Serrata's counsel sought to convince the jury that Duran's conduct on the day in question was consistent with his criminal character of resisting authority. Referring to his co-counsel's remarks, Serrata's attorney in summation argued:

> As you heard during the course of this trial, this was a reasonable exercise of force used to calm down a disruptive, rowdy inmate *who has a history of doing as* [Fuller's counsel] indicated to you, *of defying authority. And that's exactly what he did* when he told [the officer who took his food away at the LCCF on the day of the underlying incident], and excuse the phrase, but "F you."

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[12] Even on appeal, although Fuller concedes that character evidence is inadmissible "to show Duran's propensity for resisting," F.Br. 23 n.3, he and Lipscomb maintain that the details of Duran's criminal history are admissible to establish that Duran acted in conformity with his criminal character during the assault. See F.Br. 21 (details of Duran's criminal history are "strong[ly] probative of * * * Duran's pattern of refusing to be handcuffed without a take-down"); see also F.Br. 23,27; L.Br. 24,25.

(Tr. 1234) (emphasis added). Because the record reflects that Fuller and Serrata repeatedly used the circumstances of Duran's convictions solely for the impermissible purpose of establishing Duran's criminal character and alleged propensity for resistance, the district court's refusal to admit additional evidence regarding the underlying circumstances relating to certain offenses and arrests clearly was not an abuse of discretion.

C. *Duran's Intent Was Irrelevant To Any Material Issue And, In Any Event, Was Not In Dispute*

In order for evidence of a witness's prior crimes to be admissible under Rule 404(b), it must be: (i) offered for a proper purpose (*i.e.*, not to show propensity); (ii) relevant; and (iii) sufficiently probative to outweigh the dangers of unfair prejudice. *Huddleston v. United States*, 485 U.S. 681, 691-692 (1988); *United States* v. *Lazcano-Villalobos*, 175 F.3d 838, 846 (10th Cir. 1999). To be relevant, evidence must have the "tendency to make the existence of a[] fact that *is of consequence to the determination of the action* more probable or less probable." Fed. R. Evid. 401 (emphasis added). Thus, "other crimes" evidence is inadmissible if offered to establish a fact that is not material to an issue for the jury, or "not a genuinely contested issue" in the case. *United States* v. *Soundingsides*, 820 F.2d 1232, 1237 (10th Cir. 1987).

"Other crimes" evidence offered to explain a victim's motive or intent is generally inadmissible in a trial in which a law enforcement officer is accused of using excessive force. The pivotal issue in such cases is whether the *defendant*

willfully used unjustified force, irrespective of what the *victim* may have been thinking. See, *e.g.*, *Palmquist* v. *Selvik*, 111 F.3d 1332, 1337-1341 (7th Cir. 1997) (evidence that decedent intended to "provoke the police to kill him" and "wanted to be shot by the police" properly excluded in a lawsuit in which the victim's family alleged that police used excessive force in killing him; at issue were *defendant's* intent and actions, "not the *victim's* reasons") (emphasis in original); *Hynes* v. *Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996) (court erred in admitting inmate's disciplinary record since inmate's state of mind was irrelevant as to whether correctional officer used excessive force); *Senra* v. *Cunningham*, 9 F.3d 168, 172 (1st Cir. 1993) (evidence that victim had previously been convicted of drunk driving, offered to explain victim's motivation for leaving the scene, improper because victim's intent was irrelevant to whether police used excessive force).

In the case at bar, Duran's state of mind had no bearing on whether Fuller and Serrata were guilty of violating 18 U.S.C. 242. Indeed, the indictment and the jury's guilty verdict were predicated on the actions of Fuller and Serrata *after* Duran was under control. The government's witnesses and the defendants' own expert agreed that a correctional officer is not entitled to use *any force* once an inmate is under control. (Tr. 409,496,498,717,971-972). As a result, regardless of Duran's state of mind, the jury could find Fuller and Serrata guilty if it concluded that Fuller repeatedly kicked Duran in the head as he lay face down on the floor with his hands cuffed behind his back while Serrata stood by, watched, and did

nothing.[13]

Moreover, even if Duran's intent had been relevant and his prior criminal conduct probative of his intent, the district court did not err in limiting cross-examination and excluding Sgt. Smith's testimony because Duran's state of mind during the charged incident was not in dispute. See *Soundingsides,* 820 F.2d at 1237 (error to admit evidence of prior bad acts to prove intent where intent was not genuinely contested); *Senra,* 9 F.3d at 172 (error to admit prior conviction to explain victim's motive for leaving the scene because it "was irrelevant * * * to any disputed issue in the case"). Here, all parties agree that Duran initially resisted being handcuffed, (S.Br. 30), and Duran himself admitted it. (Tr. 306).

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[13] Contrary to Fuller's claim, Duran's intent was not "central to Fuller's defense." (F.Br. 21). At trial, Fuller claimed that he never kicked Duran, did not use force once Duran was restrained, and did nothing that constituted an excessive use of force. (Tr. 763,821). Because the question of Fuller's guilt ultimately turned on whether the jury believed Fuller or the government's witnesses as to what actually occurred, evidence pertaining to Duran's intent, particularly before he was under control, had no bearing on any material issues the jury had to decide. See *Hynes,* 79 F.3d at 291. Cf. *Schulz* v. *Long,* 44 F.3d 643, 649 (8th Cir. 1995) (evidence offered to explain police officers' "actions prior to moment of seizure [was] irrelevant" as to whether they willfully used unreasonable force during the seizure).

No contrary result is dictated by *Perrin* v. *Anderson,* 784 F.2d 1040 (10th Cir. 1986). In *Perrin*, this Court held that a victim's past incidents of violence and aggressiveness toward police were relevant in a 42 U.S.C. 1983 civil rights action alleging that police used excessive force when they shot and killed the victim. *Ibid.* at 1044-45. In *Perrin*, however, the incidents were relevant because, unlike here, defendants argued self-defense.

D. The District Court Did Not Abuse Its Discretion In Concluding That Evidence As To The Details Of Duran's Criminal History Was Not Probative of Duran's Intent

Although Duran's intent was, as discussed above, both irrelevant and undisputed, the details of his prior convictions were not probative of his intent in any event. The circumstances relating to his misdemeanor juvenile adjudication, at the age of *sixteen*, (Tr. 267,302-303), for having fled from police to avoid arrest bear little similarity to the circumstances relating to his refusal, years later as an *adult*, to submit to handcuffing by prison officials who had threatened to abuse him. Contrary to Fuller's claim, (F.Br. 16,20-21), Duran did testify about the details of his juvenile adjudication, explaining that, as a juvenile, he fled because he was "trying to get away." (Tr. 306). By contrast, he testified that he refused to be handcuffed by defendants during the incident at LCCF because he thought he was going to be beaten and "feared for [his] life." (Tr. 280,326). The Federal Rules of Evidence bar admission of juvenile adjudications of a witness other than the accused unless "the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." Fed. R. Evid. 609(d). Duran's own testimony establishes that his juvenile adjudication was far too attenuated from the conduct at issue here to be of any significant probative value.

In the same vein, the district court did not abuse its discretion in refusing to allow Fuller's counsel to cross-examine Duran about the details of his conviction for aggravated assault. The burden of establishing the admissibility of "other crimes" evidence is on its proponent, and there is nothing in the record to suggest

that this criminal episode is probative of Duran's intent during the charged incident. Because defendants neither made a proffer as to the circumstances of that conviction nor argued its factual similarity to Duran's conduct prior to the assault, the district court properly limited cross-examination. See *United States* v. *Lahue*, 261 F.3d 993, 1015 (10th Cir. 2001) (court did not abuse its discretion in refusing to admit proposed testimony that defendants failed to describe in specificity in proffer).

E. *The District Court Did Not Abuse Its Discretion By Limiting Evidence Pursuant To Rule 403*

Fuller incorrectly suggests (F.Br. 20) that the district court did not rely on Rule 403 in refusing to allow trial counsel to question Duran about his conviction for aggravated assault on a police officer. In fact, immediately before Duran testified, the district court explained that in deciding the extent to which Duran could be cross-examined about his criminal history, it was "strik[ing] [a] balance * * * on not being unduly prejudicial to the government * * * as far as things that the jury shouldn't consider versus the defendants' rights of cross-examination and impeachment and being able to * * * portray Mr. Duran * * * [as] they wish[ed]." (Tr. 259-260). In addition, the district court restricted cross-examination only after allowing defense counsel to ask Duran twenty-nine questions about his criminal history. (Tr. 305). Thus, the court clearly balanced the probative value of further testimony against the danger of unfair prejudice and the waste of time that would result from further inquiry, as required by Rule 403. See *Lazcano-Villalobos*, 175

F.3d at 845-846 (upholding district court's implicit 403 ruling based on the circumstances of the case). Further, because defendants do not even argue that the district court improperly relied on Rule 403 in excluding Sgt. Smith from testifying about the details of Duran's juvenile adjudication, its ruling cannot be deemed erroneous.

F. *Duran's Alleged Pattern Of Resisting Being Handcuffed Was Not Admissible As Habit Evidence*

For the first time on appeal, defendants argue that Duran's "pattern of refusing to be handcuffed without a use of force" was admissible, pursuant to Fed. R. Evid. 406, as evidence of a "habit." (F.Br. 28-30). Because this claim was not addressed by the district court, it is subject to review only for plain error. See *United States* v. *Wilson*, 107 F.3d 774, 782 (10th Cir. 1997) (evidentiary rulings to which no objections were lodged in district court are reviewed for plain error).

The defendants' Rule 406 argument constitutes an untenable attempt to circumvent restrictions on character evidence by repackaging it as habit evidence. See *Yazzie*, 188 F.3d at 1190 (because habit evidence is particularly "potent" and "may offer a backdoor to proving character," its admission is "highly discretionary and potentially troublesome"). Although Rule 406 permits the use of habit evidence "to prove that the conduct of the person * * * on a particular occasion was in conformity with the habit," action only qualifies as a habit when it "describes one's regular response to a repeated specific situation." Fed. R. Evid. 406 Advisory Note. A "habit" involves conduct that is "semi-automatic" and is done

with "invariable regularity." *Ibid.* Evidence of prior assaults, particularly when offered as proof of a subsequent assault, does not fall into such a category. *Ibid.*

Here, there is no evidence that Duran's alleged "pattern of resisting being handcuffed" constitutes a habit. Three instances of resistance, spread over a lifetime, cannot possibly qualify as the type of "reflex behavior," *Perrin v. Anderson,* 784 F.2d 1040, 1046 (10th Cir. 1986), or "semi-automatic reaction," *Yazzie*, 188 F.3d at 1190, contemplated by the rule. See *Camfield* v. *City of Oklahoma,* 248 F.3d 1214, 1232 (10th Cir. 2000) (five instances of police entering a video rental store and announcing the seizure of child pornography failed to establish a habit on the part of police); *Yazzie*, 188 F.3d at 1190 (mere fact that victim routinely instigated fights did not qualify as habit evidence because behavior did not involve a "semi-automatic reaction").

This Court's ruling in *Perrin* does not dictate a contrary result. In *Perrin*, the estate of an individual who had been fatally shot by two highway patrol officers brought suit under 42 U.S.C. 1983 alleging a violation of the decedent's constitutional rights. As part of their substantive defense, the defendants introduced, over the plaintiff's objection, evidence from four police officers that the decedent had a habit of reacting violently to law enforcement. *Ibid.* at 1043-44. The trial court admitted this testimony under Rule 406, and this Court affirmed. *Ibid.* at 1045-46. In underscoring the narrowness of its holding, this Court emphasized that the decedent's habit of resisting police officers was "rather extraordinary." *Ibid.* at 1046. The Court pointed out that the defendants had

proffered numerous other incidents of resistance in addition to those actually admitted, while the plaintiff had been unable to produce *any* evidence of interactions in which he had *not* reacted with violence. *Ibid.*

The instant action is readily distinguishable from *Perrin*. There has been no suggestion here that Duran "invariably" reacted to correctional officers with violence. To the contrary, the evidence demonstrated that even in the incident culminating in his assault, Duran acted non-violently towards the officers. It is thus impossible to claim that Duran had a habit of reflexively fighting with correctional officers. Accordingly, the district court did not commit plain error by failing to admit this evidence under Rule 406.[14]

III. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY

Defendants further contend that the district court committed reversible error in instructing the jury. (L.Br. 19-25). Their arguments are wholly without

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[14] Even if the district court did err in limiting cross-examination and excluding evidence regarding additional details of Duran's criminal history, these rulings were harmless because they could not have affected the outcome of the trial. See *United States* v. *Talamante*, 981 F.2d 1153, 1157 (10th. Cir. 1992), cert. denied, 507 U.S. 1041 (1993). Defendants thoroughly cross-examined Duran about his criminal history, and any further details of Duran's prior convictions would have been merely cumulative. Moreover, because the government's evidence was overwhelming -- including four eyewitnesses who testified that Fuller repeatedly kicked Duran in the head as Duran lay defenseless on the floor with his face down and his hands cuffed behind his back -- additional evidence relating to Duran's past criminal history clearly would not have affected the jury's verdicts. Additionally, because Lipscomb was not even charged with an offense relating to his conduct during the assault, the evidentiary rulings had no possible effect on the jury's verdict with respect to him.

foundation.

This Court reviews instructions "as a whole to determine whether the jury may have been misled," *United States* v. *Magelby,* 241 F.3d 1306, 1310 (10th Cir. 2001), and has repeatedly admonished that "a single sentence is not to be lifted out of context and considered separate and apart from the remainder" of the charge. *United States* v. *Caro,* 965 F.2d 1548, 1555 (10th Cir. 1992). The Court focuses not on "whether the charge was faultless in every particular[,] but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine th[o]se issues." *United States* v. *Roberts*, 185 F.3d 1125, 1139 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000). The trial court's judgment must be upheld "in the absence of substantial doubt that the jury was fairly guided." *United States* v. *Fabiano*, 169 F.3d 1299, 1303 (10th Cir. 1999).

A. *The District Court Did Not Commit Plain Error When It Instructed The Jury Regarding A Violation Of 18 U.S.C. 1512(b)(3)*

For the first time on appeal, defendants argue (L.Br. 19-21) that the district court "vitiated the * * * requirement" that the government prove, in order to establish a violation of Section 1512(b)(3), that defendants "believed prison authorities or the New Mexico State Police might communicate with federal authorities." When a defendant fails to object to an instruction at trial, it is reviewed on appeal for plain error. *United States* v. *Cavely*, 318 F.3d 987, 999 (10th Cir. 2003). "Under a plain error review, reversal is only warranted if there is: (i) an error; (ii) that is plain or obvious; (iii) that affects substantial rights; and (iv)

that seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Ibid.*

In fact, the instructions in this case were legally correct and clearly stated that in order to convict, the jury needed to determine, beyond a reasonable doubt, that the defendants knew or believed that the witness toward whom they engaged in obstructive conduct might communicate with federal authorities. (R. 145, Instr. 8D). The instructions further directed that the jury consider a variety of factors in determining whether the government has met its burden in establishing the requisite intent. Despite the court's instruction on this point, defendants lift two sentences of the court's lengthy instruction out of context, read them back-to-back even though they do not appear together, and interpret them "separate and apart" from the remaining charges, all in an effort to imply that the court's reference to allowable inferences limited the jury's discretion. See *Caro,* 965 F.2d at 1555; *United States* v. *Abbadessa,* 470 F.2d 1333, 1338 (10th Cir. 1972). This approach distorts the plain meaning of the instructions and ignores the impact of the court's charge as whole.

The two sentences to which defendants object direct the jury with respect to the third and fourth elements of the Section 1512 charge. The court first instructed the jury that in order to convict, the jury must find that the offense in question was actually a federal offense, and that the defendant believed the witness toward whom he engaged in obstructive conduct might communicate with federal authorities. The court then specified, in keeping with the case law, that the jury

may conclude, based on "the fact that the [underlying] offense was federal in nature," that the defendants believed the misinformation they provided "might [be] communicate[d] with federal authorities." (R. 145, Instr. 8D). The court also instructed the jury that the defendant's intent with respect to this count "*may be inferred* from the fact that the offense was federal in nature." *Ibid.* (emphasis added).

The court's discussion of permissible inferences neither changed the burden of proof nor altered the substantive elements of the offense. See *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1017-18 (10th Cir. 2002) (instruction that jury, in evaluating offense's intent requirement, may infer that defendant intended the natural and probable consequences of his acts, does not shift the burden of proof or alter any elements of the offense). To the contrary, the instructions accurately state the law. Indeed, there is nothing improper about instructing a jury that it "may consider the fact that the offense is a federal offense in determining [a defendant's intent, and specifically] whether [the defendant believed] there might be communication with federal authorities." *United States* v. *Stansfield,* 171 F.3d 806, 816 (3d Cir. 1999). This inference is permissible because "[i]f an offense constitutes a federal crime, it is more likely that an officer investigating it would be a federal officer." *United States* v. *Bell*, 113 F.3d 1345, 1349 (3d Cir. 1997).[15]

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[15] Although defendants place great reliance on *United States* v. *Causey*, 185 F.3d 407 (5th Cir. 1999), in attacking the inference instruction on the Section 1512

(continued...)

Importantly, the challenged judicial statements appear in an instruction that emphatically affirms, time and again, the government's burden of proving defendants' intent to the jury. (R. 145, Instr. 8D) ("the government must prove that the offense in question was actually a federal offense and that the defendant believed that the witness – toward whom the defendant engaged in misleading conduct – might communicate with federal authorities"); *Ibid.* ("[t]he third and fourth elements * * * may be proven by evidence establishing that the defendant acted with the purpose of causing another to delay or refrain from communicating with federal law enforcement officers * * * about a possible federal crime"). In addition, the challenged comments could not have been error when viewed in the context of the entire charge since the court repeatedly told the jury that it "alone was to decide what inferences * * * to draw" and emphasized the government's burden. (R. 145, Instr. 16).

Defendants also incorrectly argue that the court erred by instructing that a use of excessive force in contravention of 18 U.S.C. 242 "is a violation of federal

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[15](...continued)
count, the Fifth Circuit there explicitly approved of the very type of inference instruction employed by the district court in the case at bar. See *Ibid.* at 422 (statutory requirement that defendants have intended to prevent communication to federal law enforcement officer relating to a federal offense "may be inferred by the jury from the fact that the offense was federal in nature, plus appropriate evidence") (quoting *Bell*, 113 F.3d at 1349)). Moreover, unlike in *Causey*, there was undisputed evidence presented at trial here that defendants had been trained that the type of conduct in which they engaged represented a federal crime, and that such conduct was usually investigated by federal law enforcement officials.

law within the meaning of 18 U.S.C. 1512." (R. 145, Instr. 8D). This instruction is nothing more than a standard, and perfectly proper, guidance to jurors regarding an issue of law. See, *e.g., Roberts*, 185 F.3d at 1139 (court may instruct jury as to what constitutes "Indian Country"); *United States* v. *Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995) (court may instruct jury that possession of an unregistered sawed-off shot gun is a "crime of violence"); *United States* v. *Edwards*, 36 F.3d 639, 645 (7th Cir. 1994) (court may instruct jury that a drug conspiracy is a drug-trafficking crime within meaning of 18 U.S.C. 924(c)). There was, in short, no plain error in the district court's jury instructions.[16]

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[16] Even if the district court's instructions constituted error, the shortcoming would not amount to plain error. This Court has explained that an error in jury instructions "cannot be plain" where there is no Supreme Court or controlling circuit authority, and other circuit authority is divided. *United States* v. *Marshall*, 307 F.3d 1267, 1269 (10th Cir. 2002). The courts of appeals are split on what a defendant must know to establish a Section 1512 violation, and there is no controlling precedent specifying the appropriate jury charge in federal witness tampering prosecutions. See note 15, *supra*.

Furthermore, any error could not have affected the outcome of the case. As noted, defendants at trial did not contest that they had been trained that the use of excessive force is a federal offense. There was overwhelming evidence that defendants sought to keep all law enforcement officers, including federal officers, from learning about the attack on Duran through repeated false reports and statements. And defendants maintained throughout trial that they were innocent of the obstruction of justice charges, not because they did not intend federal officials to learn of their crime, but because the statements they provided to law enforcement officials were truthful and accurate. The jury clearly believed the prosecution witnesses and disbelieved the defendants.

B. *The District Court Did Not Commit Reversible Error In Refusing To Give An Accomplice Charge*

Defendants alternatively argue that their convictions should be overturned because the district court denied their request for an accomplice charge as to the testimony of Officer Robert Kersey, a government witness. (L.Br. 21-23).

A district court does not abuse its discretion in refusing to give a cautionary accomplice instruction when a defendant's involvement in the crime is substantially corroborated by other witnesses. *United States* v. *Shuckahosee,* 609 F.2d 1351, 1356-1357 (10th Cir.), cert. denied, 445 U.S. 919 (1980); accord *United States* v. *Wiktor*, 146 F.3d 815, 817 (10th Cir. 1998) (no plain error in failing to give accomplice instruction *sua sponte*). "Accomplice testimony is uncorroborated 'when the testimony * * * is the only testimony directly tying the defendant into the criminal transaction.'" *United States* v. *Gardner*, 244 F.3d 784, 789 (10th Cir. 2001).

Here, there is overwhelming evidence, irrespective of Kersey's testimony, of defendants' guilt. In addition to Kersey, five eyewitnesses (four correctional officers and a civilian), as well as Duran and original co-defendant Butler, testified that they saw Fuller repeatedly kick Duran in the head. See Tr. 7-56 (Officer Cary Escobedo); Tr. 205-230 (Jennifer Haynes); Tr. 343-378 (Officer David Rodriguez); Tr. 520-538 (Officer David Artalejo); Tr. 561-590 (Officer Heather Surratt).

Four government witnesses, in addition to Kersey, also testified about defendants' efforts to cover-up Fuller's and Butler's use of excessive force. Both

Butler and Officer Rodriguez, who each were present in the conference room after the incident, testified how defendants planned the cover-up and submitted false reports. Consistent with defendants falsely claiming that Duran had struggled and punched Butler in the face, Officer Artalejo testified that, following the incident, he saw Butler hit himself in the face just after Fuller whispered something in Butler's ear. (Tr. 522-523). Officer Perkins also testified that he overheard a conversation between Butler and Lipscomb in which Butler acknowledged that he hit himself in the face so he could claim that Duran assaulted him. (Tr. 95).

Defendants' own witnesses corroborated this cover-up evidence. Officer Hernandez, who was present during the incident, testified that Fuller and Serrata told him to put false statements in his report, including that Fuller was not in the hallway, that Duran initiated a fight, and that the black scuff marks on Duran's head resulted from his falling and hitting his head on one of the officer's boots. (Tr. 836,838-841). Officer Cagle, who was also present during the incident and in the conference room when defendants and others filled out paperwork, testified that he "lied" in his initial reports because Serrata and Fuller told him to lie, (Tr. 860), and that the officers in the conference room discussed the "lies [they] were going to tell" because they "realized that they needed to come up with a way to explain [Duran's] injuries." (Tr. 861-864). Even Warden Bravo, who said he is good friends with and hired Fuller and Serrata, testified that their written statements were inconsistent with the eyewitnesses who reported that Fuller had kicked Duran. (Tr. 894).

Lipscomb unconvincingly argues that Kersey is the only witness who (i) "placed [Lipscomb] in the P-15 hallway holding a video camera before the use of force on Duran began," and (ii) testified that Lipscomb "actively participated in creating the alleged false statement directed by * * * Fuller in the conference room after the Duran incident." (L.Br. 23). Lipscomb misconstrues both the law and the record.

There is no requirement that every detail of an accomplice's testimony must be corroborated in order for the trial court to refuse to give a cautionary instruction. Moreover, evidence as to whether Lipscomb was in the P-15 hallway with a video camera during the attack is irrelevant since he was charged only with the cover-up. In any event, Kersey's testimony was merely cumulative with regard to Lipscomb. While Lipscomb complains that Kersey is the only witness who placed him in the P-15 hallway, Lipscomb himself testified that he was in that hallway with a video camera when Duran was taken to the floor. (Tr. 1063-1066). In addition, four eyewitnesses testified that Lipscomb was in the hallway before the assault. (Tr. 25,36,117,122,149,211,567; Ex. 13).

Finally, there was no possible harm because the district court told the jury in its general instruction regarding witness credibility to consider whether a "witness [has] a personal interest in the outcome of the case." (R. 145, Instr. 17). Thus, the court clearly instructed the jury, albeit in different words, to a consider a witness's involvement in the matter during its deliberations.

IV. THE DISTRICT COURT PROPERLY CALCULATED THE TOTAL OFFENSE LEVELS FOR THE SENTENCE OF EACH DEFENDANT

A. *Standard Of Review*

This Court "review[s] the district court's interpretation and application of the Sentencing Guidelines *de novo* and its factual findings for clear error." *United States* v. *Cruz-Alcala*, 338 F.3d 1194, 1196 (10th Cir. 2003).

B. *At Sentencing, The District Court Correctly Used The Aggravated Assault Guideline To Determine The Appropriate Sentencing Guideline Range*

The base offense level for a conviction under Section 242 is governed by U.S.S.G. 2H1.1, "Offenses Involving Individual Rights," which directs the court to apply the greatest offense level of:

> (1) the offense level from the offense guideline applicable to any underlying offense;
>
> (2) **12**, if the offense involved two or more participants;
>
> (3) **10**, if the offense involved (A) the use or threat of force against a person or (B) damage or the threat of property damage; or
>
> (4) **6**, otherwise.

Because the underlying offense in this case was an aggravated assault, the court applied a base offense level of 15, pursuant to U.S.S.G. 2A2.2, the aggravated assault guideline. The court determined that defendants subjected Duran to an aggravated assault, defined as a felonious assault involving a dangerous weapon (*i.e.*, Fuller's uniform boots) with intent to do bodily harm. (11/6/02 Tr. 76-77;

Add. D).[17] See U.S.S.G. 2A2.2 Commentary, Application Note 1 (defining "aggravated assault" to include a felonious assault that involved a dangerous weapon with intent to cause bodily injury with that weapon). Fuller now argues on appeal that the district court improperly found that his boots were a dangerous weapon, and that the court therefore should have applied only the "minor assault" guideline -- with a base offense level of 6 -- under U.S.S.G. 2A2.3. (F.Br. 30-41).[18] Serrata similarly asserts that the boots had already been factored into the guideline calculus to raise the offense level to that for aggravated assault and thus cannot be used again to increase the offense level. (S.Br. 35). Both arguments are contrary to overwhelming case law.

The Sentencing Guidelines define a "dangerous weapon" to include any

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[17] Because Lipscomb was charged with, and convicted of, obstruction -- not the Section 242 assault -- determination of his sentence is governed by U.S.S.G. 2J1.2, the guideline relating to obstruction of justice. When the offense involves obstructing the investigation or prosecution of a criminal offense, the accessory after the fact guideline is used. *Ibid.* at 2J1.2(c)(1). With exceptions not relevant here, this section requires a base offense level six levels less than the offense level for the underlying crime, see *Ibid.* at 2X3.1, which, in this case, was the aggravated assault against Duran.

[18] Even if this Court were to hold that the district court's use of the aggravated assault guideline was improper, defendants' argument that the simple assault guideline with a base offense level of 6 should have been used is devoid of merit. Section 2H1.1 requires use of the *greatest* offense level listed and directs the court to apply an offense level of 12 if the offense involved two or more participants. Two persons -- Fuller and Butler -- are guilty of assaulting Duran, and Serrata is guilty of permitting the assault to occur. At a bare minimum, therefore, a level 12 would have to be applied.

instrument, even one not ordinarily used as a weapon, if the instrument is involved in the offense with the intent to commit bodily injury. U.S.S.G. 2A2.2, Commentary, Application Note 1. The boots Defendant Fuller and Officer Butler used to kick Duran repeatedly in the head as Duran lay with his hands cuffed behind his back, unable to protect or defend himself, easily satisfy this standard. The boots in this case were not only used in a way intended to injure Duran, but in a manner the defendants knew was capable of inflicting serious injury or even death. That repeated blows to an unprotected head can cause bodily injury is not a difficult concept for even a layperson to grasp. These defendants, however, were not laypersons; they were law enforcement officers who had been specifically trained that any type of blow to an inmate's head is considered deadly force because such a blow can inflict fatal injuries upon the victim.

Although defendants concede that "the jury's verdict finding that Fuller kicked Duran more than once in the head as charged in the indictment must be accepted," (F.Br. 32), Fuller nevertheless continues to highlight his own testimony, arguing that he used his feet (and boots) only with the intent to bring Duran under control rather than to injure him. (F.Br. 37,40-41). The jury clearly rejected Fuller's testimony. As noted previously, the prosecution's case established that Fuller and Butler repeatedly kicked Duran in the head *after* Duran already was handcuffed and under control.

The district court's finding that this offense involved the use of a dangerous weapon is fully supported by case law. See *United States* v. *Tissnolthtos*, 115 F.3d

759, 763 (10th Cir. 1997) ("in the proper circumstances, almost anything can count as a dangerous weapon, including walking sticks, leather straps, rakes, *tennis shoes, rubber boots*, dogs, rings, concrete curbs, clothes irons, and stink bombs") (emphasis added) (quoting *United States* v. *Dayea*, 32 F.3d 1377, 1379 (9th Cir. 1994)); see also *United States* v. *Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994) (a belt and a shoe can be dangerous weapons). Indeed, this Court has held that a "dangerous weapon," *i.e.*, an instrument capable of inflicting serious bodily injury, encompasses "anything that serves or contributes to the accomplishment" of that purpose. *United States* v. *Sherwin*, 271 F.3d 1231, 1234-1235 (10th Cir. 2001) (quotation omitted). Thus, "even innocuous objects or instruments, such as belts, *shoes*, staplers, and telephone receivers," may be characterized properly as "dangerous weapons" when they are "put to assaultive use." *United States* v. *Sturgis*, 48 F.3d 784, 787 (4th Cir.) (emphasis added), cert. denied, 516 U.S. 833 (1995) (quoted with approval in *Sherwin*, 271 F.3d. at 1235).

Notwithstanding this precedent, defendants maintain that, to be considered as deadly weapons, there must be evidence "that the boots would somehow cause more serious injury than any other type of normal footwear" or must be "*unusually* heavy – steel-toed, for example." (S.Br. 33,35) (emphasis in original). But the law clearly provides that the dispositive criterion is not simply the type of item used as a weapon, but rather whether that item is used in a way intended to cause harm. Moreover, the fact that boots worn by Fuller and Butler might have been no heavier than boots worn by other officers is immaterial. Any boot, when used to kick a

handcuffed man repeatedly in the head, is capable of causing serious injury or death. If, as this Court has observed, a tennis shoe or a rubber boot can be a dangerous weapon, so too can Fuller's and Butler's uniform boots, particularly when used to kick a defenseless man in a potentially-deadly "no-strike zone." See *Tissnolthtos*, 115 F.3d at 763.

Defendants additionally contend that the court erred in determining that the use of the boots in the assault justified a four-level enhancement under U.S.S.G. 2A2.2(b)(2)(B) because the use of a weapon is already accounted for in the underlying offense of aggravated assault. (F.Br. 30-41; S.Br. 31-35). The Tenth Circuit has expressly rejected this claim. See *United States* v. *Duran*, 127 F.3d 911, 918 (10th Cir. 1997) ("[T]he plain language of the guidelines indicates Congress intended for double counting to occur under § 2A2.2."). As this Court readily acknowledged, the structure of the guidelines makes clear that the use of a dangerous weapon justifies a four-count adjustment even if the use of that same weapon is what makes the crime an aggravated assault. *Ibid.*[19]

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[19] Defendants weakly argue that cumulative errors by the district court warrant reversal. (L.Br. 26-27). But "[c]umulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors." *United States* v. *Nichols*, 169 F.3d 1255, 1269 (10th Cir.), cert. denied, 528 U.S. 934 (1999).

V. THE DISTRICT COURT RELIED ON IMPERMISSIBLE FACTORS WHEN IT DEPARTED DOWNWARD FROM THE SENTENCES PRESCRIBED BY THE SENTENCING GUIDELINES

A. *Standard Of Review*

This Court reviews a district court's departure from the Sentencing Guidelines *de novo*, see *United States* v. *Fuentes*, 341 F.3d 1216, 1217 (10th Cir. 2003), and "shall accept the findings of fact of the district court unless they are clearly erroneous." 18 U.S.C. 3742(e). In reviewing a district court's sentencing departure, this Court must:

1. Ascertain whether the district court set forth, in a written order of judgment, its specific reasons for departure;[20]

2. Review *de novo* whether the factors the district court relied upon advance the objectives set forth in 18 U.S.C. 3553(a)(2), and ensure that the district court's reliance on those factors did not violate any specific prohibition in the Guidelines;

3. Review *de novo* the application of the Guidelines to the facts (the "heartland" determination); that is, whether the factors the district court relied upon were authorized under 18 U.S.C. 3553(b) and justified by the facts of the case; and

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[20] The requirement that the district court's reasons for departure "also be stated with specificity in the written order of judgment and commitment" became law with the enactment of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat 650 (Apr. 30, 2003) (PROTECT Act). The district court entered its judgment prior to this date and was not required to state its reasons in the judgment. The United States believes that the court's reasons for departure are stated with specificity in the transcript; remand is not required solely to permit the court to state its reasons in the judgment. See *United States* v. *Camejo*, 333 F.3d 669, 676 n.2 (6th Cir. 2003) (in post-PROTECT Act review of pre-PROTECT Act judgment, specific reasons outlined in other materials are sufficient to review decision to depart).

4. Review with deference whether the sentence imposed by the district court departs to an unreasonable degree from the applicable Guidelines range.

Fuentes, 341 F.3d at 1217.

B. *The District Court Predicated Its Downward Departure on Impermissible Factors*

The district court identified a series of purportedly mitigating factors for granting defendants a downward departure from their guideline sentences. Although the court reasoned that none of these considerations, standing alone, would warrant a departure, the judge found that their aggregation constituted adequate justification for a downward departure. (11/13/02 Tr. 68,81; Add. E). Yet *every* basis upon which the district court relied in granting defendants a downward departure from their guideline sentences was either a "forbidden factor," which the Sentencing Commission has stated definitively may not be used to justify a departure, or a "discouraged factor," which both the Commission and this Court have held may not be employed to justify a departure unless it is present to "an exceptional degree." See *United States* v. *Alvarez-Pineda*, 258 F.3d 1230, 1237 (10th Cir. 2001); U.S.S.G. 5K2.0. And, as detailed below, there is nothing so atypical about any of the defendants that would make a deviation from their sentencing guideline ranges appropriate in this case. Cf. *United States* v. *McClatchey*, 316 F.3d 1122, 1137 (10th Cir. 2003) ("Combining * * * legally impermissible and factually inappropriate grounds for departure cannot make [a] case one of the 'extremely rare' cases contemplated by § 5K2.0.") (quoting *United*

States v. *Contreras*, 180 F.3d 1204, 1212 (10th Cir. 1999)).

1. *Fuller*

The court identified five factors in support of its decision to grant Fuller a downward departure: (i) family ties and responsibilities; (ii) employment record; (iii) lack of a criminal record; (iv) community support; and (v) civic, charitable and public service. Whether considered individually or collectively, none legitimately justify a departure here.

a. *Family Ties and Responsibilities*

The court first emphasized that because Fuller is married and has a one-year-old child, his incarceration would place a financial burden on his wife and child. (11/13/02 Tr. 79; Add. E). Family ties and responsibilities, however, are a "discouraged factor" under the Sentencing Guidelines, see *McClatchey*, 316 F.3d at 1130, and "are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. 5H1.6. In fact, Congress specifically directed the Sentencing Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general *inappropriateness* of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. 994(e) (emphasis added).

To warrant a departure based on family hardship, a defendant must show that his period of incarceration would have an "extraordinary" impact on his family, *i.e.*, an effect "beyond the disruption to family and parental relationships that would

be present in the usual case." *United States* v. *Rodriguez-Velarde*, 127 F.3d 966, 968-69 (10th Cir. 1997). Fuller's circumstances are hardly exceptional. They are typical of many, if not most, defendants. See *McClatchey*, 316 F.3d at 1130-1131 (defendant, whose son had severe psychological disabilities and was in need of constant care and supervision, could not rely on this family circumstance as a basis for a downward departure); *United States* v. *Gallegos*, 129 F.3d 1140, 1146 (10th Cir. 1997) (fact that defendant was sole support for her son and partial support for her parents did not take circumstances out of the heartland); *United States* v. *Archuleta*, 128 F.3d 1446, 1450-1452 (10th Cir. 1997) (fact that defendant was "the sole support for two of his children" and "provided care for his diabetic, elderly mother" did not justify a downward departure); *Rodriguez-Velarde*, 127 F.3d at 968-969 (defendant who was a single parent with three minor children failed to demonstrate that his family ties and responsibilities were extraordinary).

Although this Court has upheld a downward departure in narrow circumstances where the sentencing guideline incarceration range would have a devastating impact on a defendant's family, it has done so only where the defendant's unique family responsibilities was combined with "the aberrational nature of [his] conduct." See *United States* v. *Pena*, 930 F.2d 1486, 1495 (10th Cir. 1991). In *Pena*, for example, the defendant was a single parent who provided the sole support for herself and her two-month-old baby, and provided financial support for a sixteen-year-old daughter, who herself had a two-month-old baby. Incarceration, therefore, would have placed two infants at risk. Here, Fuller

presented no evidence whatsoever that his child is at risk, or that his wife is incapable of taking care of their child.

b. *Economic Impact*

In a similar vein, the district court considered the economic impact that loss of Fuller's income would have on his family. This was entirely improper. Socio-economic status is a *forbidden* factor that the Sentencing Commission has determined cannot be used in support of a downward departure. See *Koon* v. *United States*, 518 U.S. 81, 93 (1996) (socio-economic status can never be used as a basis for departure); U.S.S.G. 5H1.10. Further, any economic hardship in this case is typical of most defendants with families. Fuller's wife is also a "financial supporter[] of their family," (11/13/02 Tr. 79; Add. E), and Fuller offered no evidence that his wife is not capable of providing financial support for their child. Cf. *United States* v. *Jones*, 158 F.3d 492, 499 (10th Cir. 1998) (district court erred in basing departure on defendant's family circumstances where the remaining parent was "employed and capable of providing for the children"). Any "[d]isruptions of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration," *McClatchey*, 316 F.3d at 1132 (quotation omitted), and there is nothing atypical here.

c. *Employment Record*

The court also grounded its downward departure on its finding that Fuller had "a reputation as an honest officer and a team builder" and whose work

evaluations described him as "[p]rofessional and an asset to the department."[21] (11/13/02 Tr. 79; Add. E). The court added that Fuller "exhibits leadership skills and qualities that would make him an outstanding supervisor," and has evaluation ratings that "almost always are 'Somewhat exceed standards' to 'Exceeded standards.'" (*Ibid.* at 79-80). These factors clearly fit within the rubric of either a "vocational skill," or an "employment record," both of which are discouraged factors for departure under the guidelines. See U.S.S.G. 5H1.2, 5H1.5. Even where a defendant has a "reliable employment record replete with positive statements from employers," a departure on this basis is unwarranted. *United States* v. *Ziegler*, 39 F.3d 1058, 1062 (10th Cir. 1994). There is certainly nothing in the evidence supporting a finding that Fuller's work record is atypical.

Moreover, grounding a downward departure on the court's finding that Fuller had "leadership skills," which were purportedly an "asset" to the correctional institution, cannot possibly withstand review. Fuller was a lieutenant convicted of abusing his official authority by handcuffing an inmate and kicking him repeatedly while he lay defenseless on the ground. Fuller then horribly abused his supposed "leadership skills" to induce a subordinate officer to falsify evidence and file false criminal charges. He then continued to exercise his "leadership" by

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[21] Fuller and Serrata both worked for the Texas Department of Criminal Justice (TDCJ) before accepting jobs at LCCF. Following the Duran incident, they returned to TDCJ, where they worked until their convictions in this case. As a condition of their post-conviction release, the court required them to give up their jobs in corrections.

directing a cover-up that constituted criminal obstruction of justice. Indeed, the court found, (11/6/02 Tr. 78-79; Add. D), that Fuller deserved a two-level sentencing enhancement because he played a leadership role in the offense. See U.S.S.G. 3B1.3 (2-level increase warranted "if the defendant * * * used a special skill[] in a manner that significantly facilitated the commission or concealment of the offense"). Fuller does not even challenge this finding on appeal. In short, it is difficult, if not impossible, to fathom how a downward departure for "leadership" can be reconciled with the court's well-supported finding that Fuller was an organizer or leader of criminal conduct.

d. *Lack of Criminal Record*

The district court also relied on the fact that Fuller "has no prior arrests or criminal convictions that are in any way accountable under the sentencing guidelines." (11/13/02 Tr. 79; Add. E). But a defendant's lack of criminal history is a forbidden factor that may not form any part of a downward departure calculus for individuals who, like Fuller, fall into Criminal History Category I. See U.S.S.G. 4A1.3 ("The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk recidivism. Therefore, departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of the criminal history cannot be appropriate."); *Alvarez-Pineda*, 258 F.3d at 1239.

e. *Community Support.*

The court focused on Fuller's "community ties" as an additional basis for its

aggregation-grounded departure theory. As noted above, this is a "discouraged" factor that is not ordinarily relevant to sentencing, see 28 U.S.C. 994(e); U.S.S.G. 5H1.6, and can justify a departure only "in exceptional cases." *Koon*, 518 U.S. at 95.

The court predicated its determination on this point by highlighting eight letters attached to Fuller's motion for downward departure from friends, prominent members of the community, and Fuller's brother. (11/13/02 Tr. 80; Add. E). The court characterized these letters and testimony as detailing Fuller's "good character," (*Ibid.*), but identified *nothing* in the letters indicating that Fuller's contributions are in any way "exceptional" or "atypical." Indeed, the letters are wholly conclusory in nature and do not set forth any facts from which the district court could have determined that Fuller's community ties are atypical. (R. 198, Attachments).[22]

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[22] The letters can be summarized as follows: Joe D. Tackitt, Jr. (Fuller's family has strong roots in the community, his grandfather and father were in law enforcement, and he "has no prior criminal record, to my knowledge"); Mike Clements (Fuller attends church and treats people with "utmost respect"); Gary Pelech (Fuller is involved with the community and is eager to be a model citizen); Andy M. Eubanks (Fuller gives of his time for various community events and supports the local schools); Dennis R. Gass (Fuller assisted the local Little League by "umpiring for a couple of years and coaching a baseball team for one season"); Mandy Chaney (Fuller is a "polite gentleman" who helps when needed and is a "respectful citizen"); Walter H. Goodenough (Fuller's wife's uncle) (as a fisherman, Fuller seems to have "a certain patience and calmness"); Dustin Clinkscales (Fuller's co-worker with the TDCJ) (Fuller followed rules and procedures and is a "caring and loving father and husband").

f. *Civic, Charitable and Public Service.*

The final factor relied upon the district court in its downward departure determination -- Fuller's civic, charitable, and public service -- is an equally invalid rationale for not sentencing within the guideline range. The guidelines underscore that a defendant's "civic, charitable, or public service * * * and similar prior good works" are "discouraged factors" that are ordinarily irrelevant in evaluating the appropriateness of sentencing outside the guideline range. U.S.S.G. 5H1.11. Again, only "in exceptional cases" is a departure warranted. *Koon*, 518 U.S. at 95.

The record in this case does not even begin to suggest that Fuller's public serve is "extraordinary." The district court, in fact, based its finding on the identical conclusory letters it cited previously as a foundation for the "community support" factor. (11/13/02 Tr. 80-81; Add. E). These contributions reflect no more exceptional behavior by Fuller in the context of public service than they do in the context of community support.

In sum, the district court departed from the guideline range in sentencing Fuller based on two *forbidden* factors and several other *discouraged* factors for which there exists no evidence of atypicality. There is no support for its conclusion that this case presents one of those "extremely rare" situations where a defendant's mitigating circumstances rest outside the "heartland" of conduct embodied by the Sentencing Guidelines. Accordingly, Fuller is not entitled to a downward departure, his sentence should be vacated, and the case remanded for resentencing within the guideline range (i.e., level 33).

2. *Serrata*

Turning to Serrata, the court identified five factors similar to those considered for Fuller as warranting a five-level downward departure. For virtually the same reasons discussed with regards to Fuller, none of the factors cited during the Serrata sentencing justify departing from the guideline range.

a. *Family Ties and Responsibilities*

The court first pointed out that Serrata "is married and, although he and his wife have no children, they are planning on having a family in the future." (11/13/02 Tr. 67; Add. E). These circumstances involve absolutely no element of atypicality and provide no support whatsoever for a downward departure. See pp.53-55, *supra.*

b. *Employment Record.*

The court next noted that Serrata had been employed as a correctional officer from 1992 to 2002, and there was "no information to indicate that he had any disciplinary problems up until his involvement in the incident offense." (11/13/02 Tr. 67; Add. E). The court added that Serrata was "a well-respected correctional officer" who had been promoted on two separate occasions, thus "demonstrating" that his criminal behavior was a "deviation," and that he is otherwise "a law-abiding citizen and employee." (11/13/02 Tr. 67; Add. E).

As noted above, the Guidelines specify that a defendant's employment record is a discouraged factor, U.S.S.G. 5H1.5, as is consideration of his "employment-related contributions." U.S.S.G. 5H1.11. Being a well-respected

correctional officer who was promoted to sergeant and later lieutenant, (11/13/02 Tr. 67; Add. E), hardly provides a measure of atypicality that would warrant using such findings to justify a downward departure. Almost lost in the district court's discussion is the fact that Serrata's conviction on Count II of the indictment was based on his *failure* to exercise his responsibilities as a lieutenant and stop the assault. Moreover, the court's finding that Serrata "is a law-abiding citizen" is already taken into account by his placement in Criminal History Category I.[23] There is, in short, no valid basis for allowing Serrata's employment history to support a downward departure.

c. *Lack Of Prior Criminal History.*

Serrata is in Category I and his lack of criminal history is a forbidden factor. See p.57, *supra.*

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[23] Ironically, the district court had earlier rejected -- entirely properly -- Serrata's request for a downward departure based on aberrant behavior. (11/13/02 Tr. 58; Add. E). Perhaps recognizing this circuit's precedent that a "prior law-abiding life * * * does not in itself distinguish [a defendant] from other first offenders and is not a permissible factor to consider in granting such [an aberrant-behavior] departure," *McClatchey*, 316 F.2d at 1134, the district court was endeavoring to make an end-run around the guidelines. But the court may not circumvent the requirements of the aberrant behavior departure by calling the defendant's criminal conduct a "deviation" rather than an "aberration." Furthermore, "behavior is aberrant only if it represents 'a *short-lived*, marked departure from an otherwise law-abiding life.'" *Ibid.* at 1135 (quotation omitted). Serrata's criminal behavior included conspiracy to obstruct justice and obstruction of justice that extended over a period of several years.

d. *Educational History.*

The court also attached considerable significance in its downward departure determination to the fact that Serrata is a high school graduate who played varsity basketball, tennis, and track; was an "active member of the Future Farmers of America; was voted "Most Athletic" in 1989 and "Mr. McMullen High School" in 1990; and then attended college for two semesters. (11/13/02 Tr. 68; Add. E). The court opined that, "[a]lthough educational history is not ordinarily relevant, the defendant shows participation in his education and responsibility through his teen years leading up, for the most part, to a responsible adult lifestyle." *Ibid.*

A defendant's educational history is a discouraged factor under the Sentencing Guidelines, see 28 U.S.C. 994(e); U.S.S.G. 5H1.2, and can justify a departure only "in exceptional cases." *Koon*, 518 U.S. at 95.

> [I]n passing 28 U.S.C. § 994(e), Congress was preoccupied with ensuring that people who lack educational skills do not receive heavier sentences than people who do have such skills. See Senate Report, supra, at 175 ("The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.").

United States v. *Floyd*, 945 F.2d 1096, 1101 (9th Cir. 1991). Reducing one defendant's sentence because of positive educational skills has the same effect as giving another defendant a heavier sentence because of his lack of educational skills, precisely the result Congress intended to prevent. Furthermore, attending two semesters of college cannot possibly represent "exceptional" educational achievement, and characterizing popularity votes like "Most Athletic" or "Mr.

McMullen High School" as "educational skills" is nothing short of insulting to academic-minded students.

e. *Community Support and Charitable Service.*

The court additionally found that, at the evidentiary hearing, Serrata's pastor provided excellent character testimony on his behalf and outlined how "the defendant had helped the church when the church was asking for voluntary workers." (11/13/02 Tr. 68; Add. E). As with Fuller, however, Serrata's charitable service is not exceptional in nature. See pp. 59, *supra.* Nor are any of the factors cited by the district court in its downward departure determination present to such an unusual degree that they justify sentencing outside the guideline range. Serrata's sentence, therefore, should be vacated, and he should be resentenced at level 29.

3. *Lipscomb*

As for Lipscomb, the court cited an aggregation of four factors as warranting a five-level downward departure. None are defensible in this case.

a. *Family Ties and Responsibilities.*

The court found that Lipscomb "is married and, although he and his wife do not have children together, he does provide care for his 12-year-old stepson." (11/13/02 Tr. 60; Add. E). Being married and providing care for a stepchild are not atypical and do not provide support for a downward departure. See pp. 53-55, *supra.*

b. *Employment Record.*

The court also emphasized that Lipscomb "has maintained *relatively* stable employment" as a correctional officer and in the oil fields. (11/13/02 Tr. 60; Add. E) (emphasis added). It is hard even to understand how the district court could find that such a record is "extraordinary" or presents circumstances atypical of most defendants. Under the court's reasoning, any defendant without substantial periods of unemployment would be eligible for a departure from the guidelines.

c. *Economic Impact*

The court next observed that although Lipscomb's "wife is employed, [his] income provides added financial income that, should it stop, [his] wife and stepson would experience financial difficulties." (11/13/02 Tr. 60; Add. E). But as noted earlier, p.55, *supra*, any "disruptions of [Lipscomb's] life, and the concomitant difficulties for those who depend on [Lipscomb], are inherent in the punishment of incarceration." *McClatchey*, 316 F.3d at 1132.

d. *Civil, Charitable and Public Service.*

Finally, the court accentuated Lipscomb's involvement with his church and community. Citing apparent comments from Lipscomb's pastor, the court noted that Lipscomb performed repair work on the church and often engaged in group activities with children at the congregation. (11/13/02 Tr. 61; Add. E). In addition, Lipscomb was a member of the Elks Lodge where, according to his father, he painted homes, provided food for senior citizens, and donated gifts to needy children. *Ibid.* While these activities are perfectly respectable, they are not so

exceptional to as to warrant a downward departure. See p.57-58, *supra*. Indeed, there is *no* evidence in the record that defendant's contributions to his church and community were of such an extraordinary degree as to render them unique when compared to other criminal defendants (let alone law-abiding members of the community).

The downward departure granted to Lipscomb is unsupportable. This case cannot be characterized as one that differs significantly from the "heartland," and the sentence thus must be vacated. On remand, the district court should be instructed to sentence Lipscomb under the appropriate guideline range, *i.e.*, level 21 in Criminal History Category II.[24]

In the end, the court's unlawful sentences here reflected its personal unease with the constraints imposed on it by the Sentencing Guidelines, and its disagreement with the sentencing range mandated in this case. (11/13/02 Tr. 58; Add. E). Although the government certainly respects the trial judge's opinions, the law is clear: "Dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside applicable guideline range." U.S.S.G. 5K2.0,

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[24] If this Court somehow finds that any of the discouraged factors upon which the district court relied are sufficiently atypical to justify inclusion in an aggregation of the factors, it is required to remand the case unless it is clear that the district court could have validly imposed the same sentence without relying on the invalid considerations. *Jones*, 158 F.3d at 497. No such legitimate sentencing could have occurred on this record in this case. Accordingly, at a minimum, a remand is required.

Commentary. Accord *Alvarez-Pineda*, 258 F.3d at 1240; *United States* v. *Cruz-Guevara*, 209 F.3d 644, 648 (7th Cir. 2000).

CONCLUSION

This Court should affirm the convictions of each of the defendants, vacate their erroneously imposed sentences, and remand for resentencing in compliance with the Sentencing Guidelines.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument because it believes argument would be helpful to the Court.

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

As required by Federal Rule of Appellate Procedure 32(a)(7)(B), I, Lisa J. Stark, counsel for appellee/cross-appellant United States, certify that this brief is proportionally spaced Times New Roman, 14 point font, and contains 17,068 words. I relied on my word processor to count the words and it is WordPerfect 9 software.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2003, two copies of the Brief for the United States as Appellee/Cross-Appellant were sent by Federal Express, overnight delivery, to the following counsel of record:

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