No. 07-5653

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL GILPATRICK,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PROOF BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE

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FEDERAL SENTENCING GUIDELINES:

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STATEMENT OF JURISDICTION

The district court's jurisdiction of this prosecution under 18 U.S.C. 241 and 18 U.S.C. 242 was based on 18 U.S.C. 3231. This appeal is from a final judgment entered by the district court on May 22, 2007. The defendant, Michael Gilpatrick, filed a notice of appeal on May 30, 2007. The jurisdiction of this Court is based on 28 U.S.C. 1291 and 18 U.S.C. 3742.

ISSUES PRESENTED

1. Whether the district court committed plain error in imposing a period of confinement in a community corrections facility as a condition of supervised release.

2. Whether the district court erred in adding a two-level adjustment to Gilpatrick's base offense level for obstruction of justice, pursuant to U.S.S.G. § 3C1.1.

3. Whether the district court erred in adding a four-level adjustment to Gilpatrick's base offense level based upon his leadership role in the offense, pursuant to U.S.S.G. § 3B1.1.

STATEMENT OF THE CASE

On November 16, 2005, a grand jury sitting in the Middle District of Tennessee issued a superseding indictment charging Michael Gilpatrick (Gilpatrick), Gary Grigg (Grigg), and Johnny Gann (Gann), then employed by the Overton County Sheriff's Department, Livingston, Tennessee, with violating 18 U.S.C. 241 and 242. Count One charged the three men with conspiracy to deprive detainees at the Overton County Jail of their due process rights, in violation of 18 U.S.C. 241. Count Two charged them with acting under color of law to aid and abet two inmates who struck, kicked, and beat a pretrial detainee of the Overton

County Jail, in violation of 18 U.S.C. 242 and 18 U.S.C. 2.[1]

Trial was held before The Honorable William J. Haynes, Jr., from October 3-12, 2006.[2] The jury returned a guilty verdict on counts one and two of the superseding indictment. (10/12 Tr. 63-65, Apx. __).[3]

A sentencing hearing was held on May 14, 2007. On May 21, 2007, the district court entered a final judgment sentencing Gilpatrick to a term of 84 months in prison and three years of supervised release, and ordered him to pay $2,416.78 in restitution. (5/21/07 Judgment, Apx. __).

STATEMENT OF THE FACTS

1. Background

The Overton County Jail, located in Livingston, Tennessee, is operated by the Overton County Sheriff's Department, which has responsibility for policing

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[1] A third count of the superseding indictment charging Gary Grigg with violating 18 U.S.C. 373 is not at issue in this appeal.

[2] Grigg and Gant entered guilty pleas on October 5, 2006. When trial resumed on October 10, 2006, the Court instructed the jury not to draw any inferences as to either Gilpatrick or the government from the fact that only one defendant remained in the case. (10/10 Tr. 4, Apx. __).

[3] Citations to "R. __" refer to documents in the district court record. Citations to " __ Tr. __" refer by date to the trial or sentencing transcripts. Citations to "Br. __" refer to the Proof Brief Of The Appellant. Citations to "GX" identify by number the government's trial exhibits. Citations to "PSR" refer to the Presentence Investigation Report.

areas of Overton County outside the City of Livingston. (10/10 Tr. 8, Apx. __). The City of Livingston has its own police department, but anyone arrested in Overton County, including the City of Livingston, is brought to the Overton County Jail. (10/10 Tr. 9, Apx. __).

In January 2005, the sheriff of Overton County was Bud Swallows. (10/10 Tr. 14, Apx. __). Gilpatrick was the administrator of the Overton County Jail, (10/10 Tr. 20, Apx. __), and he was assisted by two lieutenants, Johnny Gann, who shared an office with Gilpatrick, and Jim Loftis. (10/10 Tr. 89, Apx. __). In addition, there were three sergeants, one for each of the three shifts. (10/10 Tr. 147, Apx. __).

The public entrance to the jail is through the sheriff's department. (10/10 Tr. 13-14, Apx. __; GX 1 & 2, Apx. __). Between the sheriff's offices and the jail's secure area is a break room for correctional officers, with vending machines and a coffee pot, in which correctional officers can congregate and eat meals. (10/10 Tr. 13, Apx. __).

The secure area of the jail's first floor contains a booking area where inmates brought into the jail are searched and fingerprinted, booking sheets are completed, and the inmate's personal property is taken away and inventoried. (10/10 Tr. 15-16, Apx. __; GX 2, Apx. __). The booking area also contains three

holding cells, two for male inmates and one for female inmates. (10/10 Tr. 16, Apx. __).

A hallway leading from the booking area opens onto several numbered pods each housing multiple minimum security inmates. (10/10 Tr. 17-18, Apx. __ ; GX 2, Apx. __). Between the minimum security pods and the administrator's office is a corridor lined by walls with windows above waist level that allow correctional officers to see what is happening in the pods as they walk around the corridor. (10/10 Tr. 21-22, Apx. __). The windows are mirrored on the outside so that inmates in the pods can see only light and shadows from the corridor. (10/10 Tr. 22, Apx. __). Someone sitting in the administrator's office, however, has a direct view into Pod 133, where one of the assaults involved in this case took place. (10/10 Tr. 23, Apx. __).

Correctional officers in the control tower, located on the second floor above the administrator's office, control all of the doors in the jail's secure area and monitor what is happening in the jail from cameras placed throughout the building. (10/10 Tr. 27-28, Apx. __). The cameras can also be monitored from the booking area. (10/10 Tr. 27, Apx. __).

2. Beaty Incident

a. Beaty's Arrest

On January 30, 2005, between 11:30 p.m. and midnight, Livingston Police Department Sergeant Ricky Brown was called to investigate a domestic assault that took place in the City of Livingston. (10/10 Tr. 79, Apx. __). Brown met with the 18-year-old victim at the police department, took statements, and obtained a warrant for the arrest of Ricky Beaty on a domestic assault charge. (10/10 Tr. 80, Apx. __). The victim's mother and Sheriff's Deputy Gary Grigg, who was dating the victim's mother, were also present at the police station when the warrant was issued. (10/10 Tr. 70-71, 80, Apx. __).

Because police department procedures required two officers for domestic assault arrests, Brown called Officer Timothy Poore, who had just arrived home from working the second shift, to return to the station to assist in the arrest. (10/10 Tr. 68-69, 81, Apx. __). After Poore arrived at the station, Grigg, who was not in uniform, motioned for Poore to step out into the hallway and asked Poore whether he and Brown could "rough him (Beaty) up" when they went to arrest him. (10/10 Tr. 73, Apx. __). Grigg did not explain why he was making that request. Poore told Grigg that he would not do so, but rather would use only the force necessary to make the arrest. (10/10 Tr. 74, Apx. __).

Brown and Poore arrested Beaty at his mother's house. (10/10 Tr. 74-75, 82-83, Apx. __). Beaty did not give the officers any trouble, but was "easy going," "calm," and "meek." (10/10 Tr. 75-77, 83, Apx. __). Brown took Beaty to the Overton County Jail for booking, and photographs were taken, none of which showed any injury to Beaty's face. (10/10 Tr. 83-84, Apx. __; GX 16A & 16B, Apx. __). The booking log from the Overton County Jail reflects that Beaty was booked at 1:19 a.m. on January 31, 2005. (10/10 Tr. 42, Apx. __); (GX 11 (booking sheet), 23 (booking log), Apx. __).

When first shift correction officer Kathy Goolsby arrived for work, Beaty was in one of the holding cells in the booking area. (10/10 Tr. 98, Apx. __). She was told that Beaty was there on a domestic assault charge and would be "bonding out" later that day. (10/10 Tr. 99, Apx. __). Lieutenant Jim Loftis and Grigg told Goolsby that the victim of the domestic violence was Grigg's girlfriend's daughter. (10/10 Tr. 99, Apx.__).

An individual under arrest for a domestic violence offense was required to stay in the jail at least 12 hours in order "to cool down." (10/10 Tr. 94, Apx. __). Individuals who were expected to "bond out" the same day were kept in the holding cells, rather than taken to the pods in the back of the jail, and were not required to change into a jail uniform. (10/10 Tr. 93, 95, Apx. __).

b. Events Leading Up To Assault On Beaty

Loftis, who came on duty at around 6:30 a.m. on January 31, 2005, talked to Gilpatrick in the break room about the fact that an investigator in the sheriff's office, Mark Ramsey, had called to say he would not be in that day because his teenage daughter was in the hospital after having been raped the night before. (10/10 Tr. 150-153, Apx.__). Gilpatrick told Loftis that the rape suspect was a man named Bowman. (10/10 Tr. 154, Apx.__). Both Gilpatrick and Loftis were upset about the alleged rape and continued to talk about it outside the jail, where Gilpatrick went to smoke a cigarette. (10/10 Tr. 154-155, Apx.__).

While they were standing outside, Gary Grigg pulled up in his patrol car. (10/10 Tr. 155-157, Apx.__). Grigg, who was in his sheriff's department uniform, told Loftis and Gilpatrick that Beaty, who was in the jail, was "the boy that beat up [his] old lady's little girl," and Grigg asked if there were any inmates back in the jail "that could whoop [Beaty's] ass." (10/10 Tr. 157-159, Apx.__). The men lamented the fact that a former inmate named Peak was not in the jail that day, because he was known for fighting, but Steve Wright and Richard Mullins, who were housed in Pod 133 at the jail that day, were mentioned as possibilities, because they had a reputation for liking to fight. (10/10 Tr. 159-160, 164, Apx.__). Grigg felt comfortable going to the jail and asking Gilpatrick if he had

anyone in the back who could "whoop" Beaty, because he had previously heard Gilpatrick make comments that led him to believe that he had moved a "baby raper" to another cell in order to have him beaten. (10/11 Tr. 167-168, Apx.__).

Later that morning, Gilpatrick told Loftis to "go back there and get Wright and Mullins" to "take care of" Beaty and rape suspect Bowman, who they expected to be brought into the jail later that day. (10/10 Tr. 164, Apx.__). In response to Gilpatrick's request, Loftis went back to Pod 133, woke Wright and Mullins, and brought them out to Gilpatrick's office. (10/10 Tr. 164-165, 218-219, Apx.__). Gilpatrick was not in the office, but Deputy Johnny Gann was there. (10/10 Tr. 166, Apx.__). Loftis told Wright and Mullins, "Fellows, I ain't never done nothing like this before, but there is a couple of smart alecks coming in here that y'all need to take care of." (10/10 Tr. 167, Apx.__). Loftis told Wright and Mullins that it would be the next two guys that were put in their pod, and they should not hurt the first one – Beaty – too badly, but "kind of left it open what they was [sic] going to do with the second one" – Bowman. (10/10 Tr. 167-168, Apx.__). Wright and Mullins asked Loftis if it was all right with Gilpatrick for them to whip Beaty and Bowman, and Loftis told them it was. (10/10 Tr. 168, Apx.__).

Wright testified that Loftis asked them to "take care of" two inmates who were going to be brought back to their pod. (10/10 Tr. 219, Apx.__). When

Wright asked what Loftis meant, Loftis said that one of the inmates had raped a little girl (Bowman) and the other had beat a little girl up (Beaty), and that Loftis wanted them to "whoop the hell out of" the one who raped a little girl and did not care if they killed him. (10/10 Tr. 219, Apx.__). Loftis assured them that not only would they not get in trouble, because Gilpatrick was aware of it and everything was taken care of, but they would be "paid dearly" for doing this favor. (10/10 Tr. 219-220, Apx.__).

Gilpatrick had told Goolsby that Beaty was going to be moved to the back because some inmates were going to clean the holding cells. (10/10 Tr. 105, Apx. __). Goolsby thought it was unusual to move an inmate who was going to be released on bond into the back of the jail, and Beaty had not been causing any problems in the holding cell. (10/10 Tr. 105, 108, Apx.__). Later, Goolsby, who had turned on the monitor linked to a camera in Gilpatrick's office to look for one of the lieutenants, saw Loftis talking to Wright and Mullins in Gilpatrick's office. (10/10 Tr. 103-104, Apx.__). Loftis subsequently told Goolsby that if anything happened in the back, she should not hurry to get back there. (10/10 Tr. 108, Apx. __). Sometime later, Loftis came out to the booking area and told two correctional officers to move Beaty to the back. (10/10 Tr. 106, Apx.__). Goolsby made a notation in the booking log at 8:30 a.m. that Beaty was being moved to Pod 133.

(10/10 Tr. 106-107, Apx.__; GX 23, Apx.__).

c. The Assault On Beaty

When Beaty came in, Wright asked him what he was in jail for, but Beaty just said he would probably be back. (10/10 Tr. 223, Apx.__). After Beaty sat down at a table, Wright walked up and hit him with his fist in the left side of Beaty's jaw. (10/10 Tr. 223-224, Apx.__). Beaty fell between the table and the wall, and Mullins came around and hit Beaty in the forehead. (10/10 Tr. 224, Apx.__). Mullins swung three or four times and also kicked Beaty, while Wright continued to kick him and punch him about seven or eight times. (10/10 Tr. 224, Apx.__). Beaty was covering his head and never tried to fight back. (10/10 Tr. 224-22, Apx.__). Eventually, Loftis and Gann came in and pulled Wright off of Beaty. (10/10 Tr. 225, Apx.__). Beaty was on the floor bleeding, and some of his teeth had been knocked out. (10/10 Tr. 225, Apx.__).

Goolsby had turned on the monitor linked to one of the cameras in Pod 133 after Beaty was moved back there because she "knew something was going on," based on the fact that it was unusual for Beaty to be moved into the pod and that Loftis had told her not to be in a hurry to respond if something happened in the back. (10/10 Tr. 109-110, Apx.__). Goolsby's testimony of the beating was consistent with that of Wright. (10/10 Tr. 109-111, Apx.__). She did not see

Beaty make any kind of threatening gesture to either Wright or Mullins before they punched him in the head. (10/10 Tr. 111, Apx.__).

When Beaty hit the floor, a call came through to the booking area from the control tower, where Eric Hamick had been monitoring the camera from Pod 133 as well. (10/10 Tr. 112, Apx.__). Hamick told Goolsby to send some "rovers" back there because a fight had broken out. (10/10 Tr. 112, Apx.__). Goolsby could not leave the booking area, because she was the only one there. (10/10 Tr. 112, Apx.__).

Beaty was taken at 9:00 a.m. from Pod 133 to the medical room. (10/10 Tr. 112, Apx.__; GX 10 (medical log), Apx.__). Beaty asked to see a doctor, but his request was refused. (10/10 Tr. 47-48, 253, Apx.__). When Beaty was returned to the booking area, his face was swollen, he appeared to have some teeth missing, and he was bloody. (10/10 Tr. 113, Apx.__).

d. Post-Beating Activity

Following the fight, Loftis took Wright and Mullins into the break room, which is outside the jail's secure area, to see Gilpatrick. (10/10 Tr. 172-175, Apx.__). Gilpatrick, who was not surprised to see Wright and Mullins, asked them if Beaty had come back into the pod "running his mouth." (10/10 Tr. 178-179, Apx.__). Gilpatrick gave Wright and Mullins cigarettes and coffee, and Loftis cut them

each a piece of cake. (10/10 Tr. 179, Apx.__). Gilpatrick then started talking to Wright and Mullins about going out on a work truck as trusties. (10/10 Tr. 179, Apx.__). Trusty status carries special privileges. (See 10/11 Tr. 120, Apx.__). For every day an inmate spends as a trusty, he gets two days taken off his sentence. (10/10 Tr. 180, Apx.__). In addition, the inmate is out of his cell for the day and has the opportunity to smoke. (10/10 Tr. 180, Apx.__).[4] Loftis testified that he had never seen anyone "punished" for fighting by being given trusty status. (10/10 Tr. 180, Apx.__).[5]

Gilpatrick told Wright he could go out the next day and that Mullins would get the next opening. (10/10 Tr. 180, Apx.__). Gilpatrick testified that ordinarily the final decision about who would be made a trusty rested with the sheriff and Bobby Lawson, who was in charge of taking trusties out in a truck to work at the

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[4] Wright testified that he really wanted to be a trusty because they get sunshine, the opportunity to smoke, and ten extra days a month in "good time." (10/10 Tr. 230, Apx.__).

[5] Goolsby heard Gilpatrick tell Wright and Mullins that he was going to make them trusties. (10/10 Tr. 113-115, Apx.__). She would not have expected either of those inmates to be considered for a trusty position, especially right after being in a fight. (10/10 Tr. 117, 140, Apx.__). Goolsby, Loftis, and trusty supervisor Bobby Lawson all testified that Wright and Mullins were eating cake (or brownies), drinking coffee, and smoking cigarettes while in the break room, which was a non-smoking area. (10/10 Tr. 116-117, 141, 179, 272, Apx.__).

recycling center, because Lawson had to be out on the road with the trusties. (10/11 Tr. 82, Apx.__). Lawson was in the break room at the time Gilpatrick told Wright and Mullins he would make them trusties. (10/10 Tr. 269, Apx.__). Gilpatrick told them that Lawson would be the man they would be working for. (10/10 Tr. 269, Apx.__). Lawson testified that it "wouldn't hardly seem right" for someone involved in a fight to be offered trusty status; nonetheless, he wrote their names down on a piece of paper that was introduced into evidence. (10/10 Tr. 269-271, Apx.__; GX 21, Apx.__).[6]

At some point, Grigg came into the break room and asked what was going on. (10/10 Tr. 181, Apx.__). When Loftis told him that Wright and Mullins were the ones who beat up Beaty, Grigg asked if he could shake their hands. (10/10 Tr. 181, Apx.__). Loftis told Grigg he did not think that would be a good idea, both because Lawson was in the room and because he did not think it was right to "shake a man's hand for beating somebody up." (10/10 Tr. 181, Apx.__; see also 10/10 Tr. 273, Apx.__). When Grigg first learned that Beaty had been beaten up, it struck him as "unusual" because he had just asked for that to happen. (10/11 Tr.

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[6] The next day, when Lawson saw Grigg in the parking lot of the justice center, Grigg said that Beaty was stirring up some fuss about the beating, and Grigg did not think it would be a good idea for Wright and Mullins to go out on trusty status at that time. (10/10 Tr. 274-275, Apx.__). Grigg said he was going to talk to Gilpatrick about it. (10/10 Tr. 275, Apx.__).

173, Apx.__). He also thought it was unusual that Wright and Mullins were in the break room eating brownies. (10/11 Tr. 173, Apx.__).

Thereafter, Loftis and Gann took Wright and Mullins back to Pod 133. (10/10 Tr. 181-182, Apx.__). The two inmates received none of the usual punishment for fighting. (10/10 Tr. 182, Apx.__).

On the afternoon of the beating, Beaty's mother came to see Sheriff Swallow, who told her to come back the next day to see Gilpatrick, because he was the one investigating the fight. (10/10 Tr. 286, Apx.__). When she returned at around 7 a.m. the next day, she complained to Gilpatrick that her son was not taken to a doctor, and she told Gilpatrick that he needed to look into what had happened. (10/10 Tr. 287-288, Apx.__). Gilpatrick told her he did not "run a dirty jail." (10/10 Tr. 287, Apx.__). She asked him what was being done to the men who had done this to her son, and Gilpatrick said he added more time to their sentences. (10/10 Tr. 288, Apx.__).[7]

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[7] Loftis said that Beaty "looked bad" and was missing some teeth. (10/10 Tr. 184-185, Apx.__; see GX 17A-17E (photographs of Beaty identified by Loftis as accurately picturing the injuries to Beaty's face), Apx.__). Loftis testified that Beaty and his mother alleged that Beaty was set up to get whipped by one of the officers from Jackson County. (10/10 Tr. 186, Apx.__). Loftis knew she was referring to Gary Grigg. (10/10 Tr. 187, Apx.__; see also 10/11 Tr. 148, Apx.__). Gilpatrick denied it and said that would not happen in his jail. (10/10 Tr. 186, Apx.__).

After Beaty and his mother left, Gilpatrick told Loftis, "This right here is going to bite us in the ass. * * * Go up there and pull them tapes and see what you see." (10/10 Tr. 187, Apx.__). Loftis went up to the tape room, but there were no tapes from that day. (10/10 Tr. 188, Apx.__).[8]

Wright testified that Gilpatrick asked him and Mullins to write a statement about the beating because Beaty's family was complaining. (10/10 Tr. 232, Apx._). Gilpatrick told him to say that Beaty came in being loud and that he would not stop yelling after they asked him to be quiet. (10/10 Tr. 231-232, Apx.__). After the FBI started investigating the incident, Gilpatrick asked Loftis to find out whether the report had been written, and Loftis sent Gann back to Wright to get the report. (10/10 Tr. 189-190, Apx.__). Wright said the report he wrote was not true, but he wrote it that way because Gann told him that was what Gilpatrick wanted him to say. (10/10 Tr. 234, Apx.__). Gilpatrick submitted Wright's and Mullins's false report to the FBI. (10/10 Tr. 59-61, Apx.__; GX 14, Apx.__).

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[8] Gilpatrick testified that there was no recording of the beating because the correctional officer whose duty it was to change the video tapes was out on sick leave the day Beaty was beaten. (10/10 Tr. 282, Apx.__). That officer testified that she had called Gilpatrick that morning to tell him to change the tapes, but when she returned to work the next day, the tapes had not been changed. (10/10 Tr. 282, Apx.__; see also 10/10 Tr. 71, Apx.__). Gilpatrick said that he had become "distracted" by Ramsey's phone call about his daughter's rape, and he had forgotten to change the tapes. (10/10 Tr. 71, Apx.__).

When Loftis learned that the FBI wanted to speak to him, he told Gilpatrick that he did not want to be interviewed because he was not a good liar. (10/10 Tr. 192, Apx. __). Gilpatrick told him it was "just a matter of jumping through hoops," and that it was "just three or four inmates against us officers. Who are they going to believe?" (10/10 Tr. 192-193, Apx. __). Loftis initially lied to the FBI, but later retained counsel and told the truth. (10/10 Tr. 193, Apx. __). Loftis was charged in an information with conspiracy, under 18 U.S.C. 241, and entered a guilty plea prior to trial. (10/10 Tr. 195-197, Apx. __); (GX 18A & 18B, Apx. __).

3. Plan To Have Bowman Beaten

The man accused of the alleged rape of Ramsey's daughter was Danny Bowman. (10/10 Tr. 154, Apx.__). Loftis said that he and Gilpatrick were angry about the alleged rape, and they assumed that Bowman was going to be brought into the jail the morning of January 31, 2005 -- the same day that Beaty was brought in -- and that the charge would be rape. (10/10 Tr. 162, 182, Apx.__). When Gilpatrick told Loftis to go to the back of the jail to have Wright and Mullins "take care of them two boys," Loftis interpreted that to include Beaty and Bowman. (10/10 Tr. 163-164, Apx.__). Accordingly, when he spoke to Wright and Mullins about taking care of "the next two guys" that would be put into their pod, he told them that they should not hurt the first one, Beaty, "too bad," but left open what

they should do with the second one, Bowman. (10/10 Tr. 167-168, Apx.__).

In fact, however, Bowman did not arrive at the jail until later that day, and his charge was contributing to the delinquency of a minor, rather than rape. (10/10 Tr. 183-184, Apx.__; see also 10/10 Tr. 118, Apx.__). Because Bowman was charged with a misdemeanor, he was released from the jail before there was time to act on the plan to have him beaten. (10/10 Tr. 118, 120, 135-136, 184, Apx.__; GX 23 (booking log), 24 (Bowman's booking sheet), Apx.__). Bowman was never moved to the back of the jail. (10/10 Tr. 120-121, Apx.__).

4. *Evidence Concerning Other Beating Incidents*

The government introduced testimony concerning other incidents in which Gilpatrick asked inmates to "whip" other inmates.

a. Beating Of Inmate Strode

Correctional officer Jeff Hogue testified that Gilpatrick had told him on several occasions that an inmate named Strode "was a loud mouth individual" and "needed to get his ass whipped." (10/11 Tr. 15-16, Apx.__).

On March 18, 2004, Hogue was the escort officer for a trusty named Peek, who was delivering the evening meal trays. (10/11 Tr. 12-13, Apx.__). Hogue said that Peek had "a unique relationship with Gilpatrick," which involved smoking and talking together often in the sally port and other areas of the jail. (10/11 Tr. 13-14,

Apx.__). As Hogue and Peek approached Pod 133, where Strode was housed, Peek told Hogue that he was going to "whip" Strode and that Hogue should stay out of the way so he would not get hurt. (10/11 Tr. 16, Apx.__). Hogue told Peek that he (Hogue) would have to intervene if that happened. (10/11 Tr. 11, Apx.__).

Hogue opened the door to Pod 133, and Peek started handing out trays. (10/11 Tr. 17, Apx.__). When Strode came up to get his tray, Peek lunged at Strode and hit him with his fist and bit him. (10/11 Tr. 17-20, Apx.__). The attack was totally unprovoked. (10/11 Tr. 18, Apx.__). Hogue did not include in the required incident report what Peek had told him about planning to whip Strode, because he remembered that Gilpatrick had told him that Strode needed to get his ass whipped, and he was afraid Gilpatrick would fire him if he included anything in the report about what Peek had said prior to attacking Strode. (10/11 Tr. 27-28, Apx.__).

b. Beating Of Inmate Hill

Kevin Gilliam, who was an inmate for a little over three years in the Overton County Jail, also had gotten to know Gilpatrick as "kind of friends," told people he was "Gilpatrick's boy," and thought of himself as special in Gilpatrick's eyes. (10/11 Tr. 40-41, 44-45, Apx.__; see also 10/11 Tr. 170, Apx.__). Gilliam testified that Gilpatrick asked him to "whoop" inmates three or four times, including an inmate named Hill who was arrested in 2001 for assaulting someone who was either

related to Gilpatrick or someone he was close to. (10/11 Tr. 41-43, Apx.__). Correctional officer Frank Robertson testified that Gilpatrick had sent him to ask Gilliam to "whoop" Hill because he was drunk and "raising cane," that it would not be on camera, and that nothing would be said about it. (10/11 Tr. 43, 52, Apx.__). Then Gilpatrick himself came in to visit Gilliam in Pod 133 and said he wanted Hill's mouth "mashed." (10/11 Tr. 4, Apx.__). When Hill was brought back to Pod 133, Gilliam "whooped" him badly enough to cause "pretty serious" injuries, including a broken nose. (10/11 Tr. 44, Apx.__). After Gilliam beat Hill, Gilpatrick made Gilliam a trusty. (10/11 Tr. 44-45, Apx.__).

c. Request By Gilpatrick That Gilliam Beat Strode

Gilpatrick later told Gilliam that he wanted Strode's "mouth mashed because he had been running up his mouth all night being loud and kept his trusties up all night." (10/11 Tr. 46, Apx.__). Gilliam refused to do it because he and Strode had become friends during the time they were both housed in the same pod. (10/11 Tr. 46, Apx.__). Gilpatrick responded by telling Gilliam to do what he was told and keep his mouth shut or he would be put in maximum security, have his good time taken away, and sent as far away from his family as possible. (10/11 Tr. 46, Apx.__). After Gilliam refused to "whoop" Strode, he saw Gilpatrick talking to Peek, who had a reputation for fighting and who was very friendly with Gilpatrick.

(10/11 Tr. 46-47, Apx.__). Gilliam later learned that Strode had been beaten up by Peek and that Peek was not disciplined for attacking Strode. (10/11 Tr. 48, Apx.__).

5. *Facts Relevant To Sentencing*

The Presentence Report (PSR), based on the 2006 edition of the Sentencing Guidelines, calculated Gilpatrick's total offense level at 31.[9] PSR 9-10.[10] Given his criminal history category of I, the guidelines advisory sentence range was 108 to 135 months' imprisonment. U.S.S.G. Ch. 5, Pt. A. Gilpatrick objected to the PSR, arguing that (1) it was not clear that the offense was committed under color of law, (2) there was no indication that the victim was restrained beyond the restraint of incarceration, (3) there was no proof that he was a leader or organizer, and (4) he did not obstruct justice because he submitted a true report to the FBI. (Position Of

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[9] The guideline for violations of 18 U.S.C. 241 and 242 is U.S.S.G. § 2H1.1. Pursuant to U.S.S.G. § 2H1.1(a)(1), the base offense level is derived from the offense level applicable to any underlying offense. Using the assault on Beaty as the underlying offense, the PSR used the guideline applicable to aggravated assault, U.S.S.G. § 2A2.2, which corresponds to a base offense level of 14. Three levels were added because the victim sustained bodily injury. U.S.S.G. § 2A2.2(b)(3)(A). The PSR then added six levels because the offense was committed under color of law, U.S.S.G. § 2H1.1(b)(1)(B), two levels because the victim was physically restrained, U.S.S.G. § 3A1.3, four levels because Gilpatrick was an organizer or leader, U.S.S.G. § 3B1.1(a), and two levels because Gilpatrick obstructed justice, U.S.S.G. § 3C1.1.

[10] The PSR is under seal.

Defendant With Respect To Sentencing Factors (R. 204), Apx.__).

At the sentencing hearing on May 14, 2007, Gilpatrick raised another objection to the guidelines calculation based on the disparity between his proposed sentencing range and the sentences actually received by original co-defendants Grigg and Gann, both of whom pled guilty and received reduced sentences pursuant to plea agreements. (5/14/07 Tr. 10-11, Apx.__; see PSR 2, Apx.__). Gilpatrick sought a sentencing range of 48 to 60 months. (5/14/07 Tr. 11, Apx.__). The district court denied all of the objections made by Gilpatrick in writing before the hearing. (5/14/07 Tr. 5-9, Apx.__). As to the disparity objection made orally at the hearing, the court stated that it would consider both the sentences received by other defendants nationwide and also the other sentences in this case. (5/14/07 Tr. 19, 21, Apx.__).

The court sentenced Gilpatrick to 84 months in prison; three years of supervised release, 24 months of which would be served in a community corrections center; and payment of restitution to the victim, for which he would be jointly and severally liable with former co-defendants Grigg and Gann. (5/14/07 Tr. 20, 22, Apx.__). The court stated that sentencing Gilpatrick to a term of imprisonment two times greater than the sentence for Grigg reflected the court's consideration of his role as jail administrator, his involvement in the offense, his

lack of criminal history, and the seriousness of the offense. (5/14/07 Tr. 23, Apx.__). The court stated that it believed community confinement following imprisonment was appropriate "given that it is going to be 84 months in custody." (5/14/07 Tr. 23, Apx.__).

SUMMARY OF ARGUMENT

Gilpatrick does not challenge the validity of his conviction for conspiracy and the substantive count of aiding and abetting the beating of pretrial detainee Ricky Allen Beaty. This appeal involves only sentencing issues.

1. Gilpatrick raises for the first time on appeal the argument that the district court was not statutorily authorized to impose a period of confinement in a community corrections facility as a condition of supervised release. Because Gilpatrick failed to raise this issue below, this Court reviews for plain error. Gilpatrick's contention that 18 U.S.C. 3583(d) precludes the district court from imposing community confinement as a condition of supervised release has been rejected by all of the courts of appeals that have considered the issue. *United States* v. *Bahe*, 201 F.3d 1124 (9th Cir.), cert. denied, 531 U.S. 1027 (2000); *United States* v. *Griner*, 358 F.3d 979 (8th Cir. 2004); *United States* v. *Del Barrio*, 427 F.3d 280 (5th Cir. 2005); *United States* v. *D'Amario*, 412 F.3d 253 (1st Cir.) (per curiam), cert. denied, 546 U.S. 896 (2005). Those decisions are correct, and the unanimity

with which the courts have rejected Gilpatrick's argument precludes an argument that the district court committed plain error in this aspect of his sentence.

2. The district court did not err in adding a two-level adjustment to Gilpatrick's base offense level for obstruction of justice. This adjustment was based on Gilpatrick's submission to the FBI of the false report that Wright and Mullins signed at Gilpatrick's direction. U.S.S.G. § 3C1.1. Gilpatrick's argument that he did not commit perjury at trial is irrelevant. The district court neither committed clear error in finding that the report was false, nor erred as a matter of law in finding that the facts in this case constitute an obstruction of justice within the meaning of the guidelines.

3. Gilpatrick argues that the district court erred in adding a four-level adjustment to his base offense level because he had a leadership role in the criminal activity. This adjustment, however, was not applied merely because he was the jail administrator, but because he qualified for the adjustment under the factors enumerated in the commentary to Section 3B1.1 of the Sentencing Guidelines. The district court did not clearly err in making the required findings.

ARGUMENT

I

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN

IMPOSING A PERIOD OF CONFINEMENT IN A COMMUNITY CORRECTIONS FACILITY AS A CONDITION OF SUPERVISED RELEASE

A. Standard Of Review

Ordinarily, this Court reviews *de novo* a claim that the district court erred in interpreting a statute. *United States* v. *Alvarez*, 266 F.3d 587, 592 (6th Cir. 2001), cert. denied *sub nom.*, *Gonzales-Garcia* v. *United States*, 535 U.S. 1098 (2002). Since Gilpatrick did not raise this argument in the district court, however, this Court's review is for plain error. *United States* v. *Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998), cert. denied, 526 U.S. 1030 (1999).

B. Given The Unanimity Of The Courts Of Appeals To Consider Whether A District Court May Impose Community Confinement As A Condition Of Supervised Release, The District Court Did Not Commit Plain Error In Doing So

Gilpatrick asserts (Br. 11-12) that the district court was not authorized by 18 U.S.C. 3551 and 18 U.S.C. 3583(d) to provide for a period of confinement in a community corrections facility as a condition of supervised release following imprisonment. To establish "plain error," a defendant must show "(1) that an error occurred in the district court; (2) that the error was plain, *i.e.*, obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Koeberlein*, 161 F.3d at 949 (citing *Johnson* v. *United States*, 520

U.S. 461, 467 (1997)). Gilpatrick has not shown that the district court committed error, let alone plain error.

1. The conditions that a district court may impose with regard to a period of supervised release after imprisonment are found in 18 U.S.C. 3583(d). That provision states, in pertinent part:

> The court may order, as a further condition of supervised release, to the extent that such condition –
>
> (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
>
> (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D); and
>
> (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);
>
> any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.

Section 3583(d) does not cross-reference 18 U.S.C. 3563(b)(11), which authorizes a district court to order residence at a community corrections center as a condition of probation.

This issue was first addressed by the Ninth Circuit in *United States* v. *Bahe*, 201 F.3d 1124 (9th Cir.), cert. denied, 531 U.S. 1027 (2000). The defendant in

Bahe argued that because subsection 3563(b)(1) is not cross-referenced in Section 3583(d), the district court lacked authority to sentence him to community confinement as a condition of his supervised release. 201 F.3d at 1128. The court of appeals, while acknowledging the "superficial appeal" of such an argument based on the statutory language, *ibid*., found that "an examination of the statute's legislative history, its language and structure as a whole, the governing case law, and the applicable Sentencing Guidelines" demonstrate that a district court has the authority to impose community confinement as a condition of supervised release, 201 F.3d at 1130.

The court in *Bahe* found that an internal inconsistency in Section 3583(d) created sufficient ambiguity concerning its meaning that it was proper to probe beyond the language defendant relied on. 201 F.3d at 1128-1129. Specifically, the court noted that subsection 3583(d)(3) states that a sentencing court may impose any condition of supervised release that "is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)." *Ibid*. A policy statement in Sentencing Guideline Section 5D1.3 states that "community confinement" may be imposed as a "special condition" of supervised release where "appropriate on a case-by-case basis." U.S.S.G. § 5D1.3(e). In addition, Sentencing Guideline Section 5F1.1 provides that "community

confinement may be imposed as a condition of probation or supervised release." U.S.S.G. § 5F1.1.

The court found that, "[a]s originally enacted in 1984, § 3583(d) unequivocally gave a sentencing court the authority to confine a defendant to a community correction facility for rehabilitative treatment as a discretionary condition of his or her supervised release following imprisonment." *Bahe*, 201 F.3d at 1131. At that time, the authority to impose confinement in a community treatment facility as a condition of *probation* was contained in subsection (b)(12) of 18 U.S.C. 3563. See 18 U.S.C. 3563(b)(12) (1984). Thus, it was clear in 1984, by virtue of the reference in 18 U.S.C. 3583(d), that Congress intended to permit a court to impose confinement in a community treatment facility as a condition of *supervised release* following imprisonment. See 201 F.3d at 1131.

In 1996, however, Congress deleted subsection (2) of section 3563(b), which authorized the imposition of a fine as a condition of probation, and renumbered the remaining subsections of section 3563(b). "As a result, the community confinement subsection shifted from § 3563(b)(12) to [3563(b)](11)," the subsection of section 3563(b) that section 3583(d) does not mention. See *Bahe*, 201 F.3d at 1131.[11]

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[11] As the court in *Bahe* explained, in the original version of Section 3563, subsection (b)(11) permitted intermittent incarceration as a condition of probation.

(continued...)

Congress did not make a corresponding change to the cross-referenced sections in Section 3583(d). The court in *Bahe* found, however, that "[n]othing in the text or legislative history of" the statute that made the change to Section 3563(b) "suggests that Congress intended to alter the conditions that a sentencing court may attach to a term of supervised release under § 3583(d)." 201 F.3d at 1131. The court reasoned that "if Congress intended to abandon a discretionary condition of supervised release that had been the law for over twelve years, surely it would have mentioned this intent somewhere in the legislative history." *Id.* at 1132 (citing *Taylor* v. *United States*, 495 U.S. 575, 601 (1990)).

All of the other courts of appeals to have considered this issue have agreed with *Bahe*. See *United States* v. *Griner*, 358 F.3d 979 (8th Cir. 2004); *United States* v. *Del Barrio*, 427 F.3d 280 (5th Cir. 2005); *United States* v. *D'Amario*, 412 F.3d 253 (1st Cir.) (per curiam), cert. denied, 546 U.S. 896 (2005).[12] In *Griner*, the court additionally relied on the canon of statutory construction described by the

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[11](...continued)
It thus made sense for subsection (b)(11) as it then existed to be excluded from the list of conditions applicable to supervised release under Section 3583(d) because supervised release does not involve incarceration. 201 F.3d at 1132-1133. See *United States* v. *Lewis*, 498 F.3d 393, 397 (6th Cir. 2007) (citing *Johnson* v. *United States*, 529 U.S. 694, 708-709 (2000)).

[12] Gilpatrick also cites the unpublished decision of the Tenth Circuit in *United States* v. *Huffman*, 146 F. App'x 939 (10th Cir. 2005).

Supreme Court in *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938) (quoting 2 *Sutherland on Statutory Construction*, 787-788 (2d ed. 1904) (footnotes omitted):

> "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute; such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent." The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended.

Griner, 358 F.3d at 982. Accord *D'Amario*, 412 F.3d at 253. In other words, when Section 3583(d) was enacted, it incorporated 18 U.S.C. 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), as they then existed. Because, at that time, Section 3563(b)(12) authorized a district court to impose confinement in a community treatment center as a condition of probation, Section 3583(d) should be read as allowing such confinement as a condition of supervised release.

Gilpatrick acknowledges that four courts of appeals have rejected his argument but asserts (Br. 11-12) that this Court should not follow those decisions because Congress has not taken steps to correct the inadvertent clerical error since the statute was amended in 1996. This argument might have some merit if any of the courts of appeals that have considered the issue had decided that 18 U.S.C. 3583(d) no longer permitted community confinement as a condition of supervised

release, which Congress clearly meant to authorize when it enacted Section 3583(d) in 1984. But all of the courts that have decided the question have interpreted the statute so as to carry out Congress's originally expressed intent. Under these circumstances, there is no need for Congress to amend the statute, and its failure to do so should be read not as a rejection of the courts' holdings, but as agreement with them. *Johnson* v. *Transportation Agency*, 480 U.S. 616, 629 n.7 (1987); *PDV Midwest Refining, L.L.C.* v. *Armada Oil and Gas Co.*, 305 F.3d 498, 512 (6th Cir. 2002), cert. denied, 537 U.S. 1111 (2003) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.")).[13]

Accordingly, the district court did not err by including a period of confinement in a community corrections facility as a condition of supervised release. Moreover, in the face of four courts of appeals decisions to the contrary, there can be no argument that the district court committed plain error.

2. In addressing the types of conditions a court may impose as a condition of

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[13] See also H.R. Conf. Rep. No. 685, 107th Cong., at 188-189 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1141 (clarifying statutory provisions after conflict developed among circuits in which courts had begun to deviate from original legislative intent).

supervised release, 18 U.S.C. 3583(d) provides that a court may order any condition that "is reasonably related to the factors in section 3553(a)(1), (a)(2)(B) , (a)(2)(C), and (a)(2)(D)." As the Supreme Court recognized in *United States* v. *Johnson*, 529 U.S. 53, 59 (2000), "Congress intended supervised release to assist individuals in their transition to community life." Section 3553(a)(1) directs the court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant;" Section 3553(a)(2)(B) directs consideration of the need for the sentence "to afford adequate deterrence to criminal conduct;" Section 3553(a)(2)(C) instructs a court to consider the need "to protect the public from further crimes of the defendant;" and Section 3553(a)(2)(D) directs consideration of the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[14]

Although Gilpatrick asserts (Br. 12) that "it is difficult to see how [the community confinement portion of the sentence] would survive the requirements of 18 U.S.C. 3553(a)(2)," he does not even attempt to demonstrate why the court's imposition of 24 months of confinement in a community corrections center does not

[14] Section 3584(d) omits from those categories 18 U.S.C. 3553(a)(2)(A), which is "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

take into consideration the factors enumerated in Section 3553(a)(2).[15] Again, since Gilpatrick did not raise this argument in the district court, this Court will only reverse if the district court committed plain error. Gilpatrick has made no effort even to address the plain error standard and certainly has not carried his heavy burden of proving plain error.

II

THE DISTRICT COURT DID NOT ERR IN ADDING A TWO-LEVEL ADJUSTMENT FOR OBSTRUCTION OF JUSTICE

A. Standard Of Review

This Court reviews "for clear error a district court's factual findings underlying its decision to impose an obstruction-of-justice enhancement under § 3C1.1," and "[c]onclusions as to what facts constitute obstruction of justice are then reviewed de novo." *United States* v. *Davist*, 481 F.3d 425, 427 (6th Cir. 2007) (citing *United States* v. *Chance*, 306 F.3d 356, 389 (6th Cir.2002)). "Where * * * the facts underlying the obstruction enhancement are undisputed, [the Court] review[s] de novo whether the undisputed facts are sufficient to establish obstruction

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[15] Gilpatrick states (Br. 12) that the Application Notes to U.S.S.G. § 5F1.1 provide that "community confinement generally should not be imposed for a period in excess of six months." U.S.S.G. § 5F1.1, comment. (n.2). The Second Circuit in *United States* v. *Stephens*, 347 F.3d 427, 430 (2003), however, concluded that "by its use of the term 'generally,' the application note gives sentencing judges flexibility."

of justice." *United States* v. *Carter*, 510 F.3d 593, 597 (6th Cir. 2007). A factual finding is clearly erroneous "when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tran* v. *Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006).

A claim that the district court erred in calculating the Guidelines range is an attack on the procedural reasonableness of the sentence. *United States* v. *Moon*, No. 06-5581, 2008 WL 140967, at *8 (6th Cir. Jan. 16, 2008); *United States* v. *McBride*, 434 F.3d 470, 474 (6th Cir. 2006). The district court's sentencing determinations are reviewed for reasonableness. *Gall* v. *United States*, 128 S. Ct. 586, 594 (2007); *United States* v. *Rita*, 127 S. Ct. 2456, 2459 (2007). Although the Supreme Court in *United States* v. *Booker*, 543 U.S. 220, 261 (2005), invalidated the statutory provisions making the guidelines mandatory, thereby rendering them advisory, a district court should "take them into account when sentencing," 543 U.S. at 224.

B. The District Court Did Not Err In Adding A Two-Level Adjustment For Obstruction of Justice

Gilpatrick argues (Br. 12-13) that the district court erred in adding a two- level adjustment to his sentence for obstruction of justice under U.S.S.G. § 3C1.1. The obstruction enhancement was assessed pursuant to Application Note 4(c), which authorizes a two-level adjustment to the offense level for "producing or attempting

to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding." U.S.S.G. § 3C1.1, comment. (n.4). (PSR 8-9, Apx. __). The court based the enhancement not on Gilpatrick's trial testimony, as he claims (Br. 11-12), but on the false report that Gilpatrick asked inmate Wright to prepare concerning the circumstances of the assault on Beaty, and which Gilpatrick himself delivered to the FBI. (5/14/07 Tr. 8-9, Apx. __).

Gilpatrick contends (Br. 12) that the district court was required under *United States* v. *Dunnigan*, 507 U.S. 87 (1993), to make a separate finding that he committed willful perjury in order to add the obstruction of justice enhancement. He acknowledges, however, that the holding in *Dunnigan* involved a defendant who obstructed justice by committing perjury at trial. See *id.* at 95 ("[I]f a defendant objects to a sentence enhancement *resulting from her trial testimony*, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice.") (emphasis added). Gilpatrick cites no authority supporting his bald assertion that *Dunnigan* should apply in cases, like this one, where the obstruction enhancement is based on the submission of a false report during an investigation. Thus, *Dunnigan* is inapposite.

There was ample evidence showing that Gilpatrick solicited a false report from Wright and that he submitted that report to the FBI during its investigation.

Loftis testified that shortly after the beating, while Wright and Mullins were in the break room, Gilpatrick asked Wright if Beaty had "come back there running his mouth." (10/10 Tr. 178, Apx. __). Wright testified that Gilpatrick said, "I guess he needed a little attitude adjustment, didn't he?" (10/10 Tr. 228, Apx. __). Wright said that Gilpatrick later asked him and Mullins to write a statement because "that guy's [Beaty's] family is raising hell on me." (10/10 Tr. 232, Apx. __). When Wright asked what he should say, Gilpatrick said to say that Beaty came in there being loud, and he and Mullins asked him to be quiet. (10/10 Tr. 231-233, Apx. __).

Wright did not prepare the report at that time because he was angry that Gilpatrick had not made him a trusty as he had promised. (10/10 Tr. 232-233, Apx. __). After the FBI started its investigation, Gilpatrick asked Loftis whether Wright and Mullins had ever written a report of what happened. (10/10 Tr. 189-190, Apx. __). When no report could be found, Loftis told Gann to ask Wright to prepare another report. (10/10 Tr. 190, Apx. __).

Wright testified that Gann told him to write that Beaty "came in being loud and they asked him to be quiet and he wouldn't and smarted off to them." (10/10 Tr. 233, Apx. __). Loftis testified that the report that Wright prepared said he had assaulted Beaty because Beaty was running his mouth, and the first time Loftis had

heard that story was when Gilpatrick said it to Wright in the break room. (10/10 Tr. 191, Apx. __).

When Wright was asked at trial whether the report he wrote (GX 14, Apx. __) was true, he testified that it was not, but he wrote it that way because Gann said that was what Gilpatrick wanted. (10/10 Tr. 234, Apx. __).

In contrast to other types of obstructive conduct listed in the guidelines, Sentencing Guideline 3C1.1 Application Note 4(c) does not require a finding that the production of a false document during an official investigation materially misled federal authorities. Compare Application Note 4(d) and 4(g). Nevertheless, during the sentencing hearing, the district court made reference to its previous finding "that th[e] false report that was alleged in the indictment [was] part of the overt act in the jury's verdict, * * * that that statement affected three or more persons, [and] that [it] was a significant impediment to [the investigation of Gilpatrick's] involvement." (5/14/07 Tr. at 8-9, Apx. __). Thus, the district court made all of the findings required by Application Note 4(c) and more, and it did not err in adding the two-level adjustment for obstruction of justice.

III

THE DISTRICT COURT DID NOT ERR IN ADDING A FOUR-LEVEL ADJUSTMENT BASED UPON GILPATRICK'S ROLE IN THE OFFENSE

A. Standard Of Review

The district court's factual findings in support of an adjustment are reviewed for clear error. *United States* v. *Burke*, 345 F.3d 416, 428 (6th Cir. 2003), cert. denied, 541 U.S. 966 (2004). See 18 U.S.C. 3742(e) (court of appeals "shall accept the findings of fact of the district court unless they are clearly erroneous and, * * * shall give due deference to the district court's application of the guidelines to the facts"); *United States* v. *Charles*, 138 F.3d 257, 266 (6th Cir. 1998). The "degree of participation and culpability is a factual determination entitled to review for only clear error." *United States* v. *Allen*, Nos. 06-5077, *et seq*., 2008 WL 298878, at *10 (6th Cir. Feb. 5, 2008).

B. The District Court Did Not Err In Adding A Four-Level Adjustment For Gilpatrick's Role In The Offense

Section 3B1.1 of the Sentencing Guidelines directs the sentencing court to increase a defendant's base offense level by four levels "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a).[16] Gilpatrick argues (Br. 13-14) that the district court improperly increased his offense level pursuant to this provision.

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[16] Gilpatrick does not dispute that these offenses involved five or more participants. The record shows that at least six persons were involved in the criminal activity in this case: Gilpatrick, James Loftis, Stevie Wright, Richard Mullins, Gary Grigg, and Johnny Gann.

Contrary to Gilpatrick's contention (Br. 13-14), this four-level enhancement was applied not simply because he was the jail administrator, but rather because he organized and led the criminal activity for which he was convicted.

The commentary to Section 3B1.1 of the Sentencing Guidelines directs a court to consider in determining whether a defendant qualifies as a leader or organizer such factors as

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1, comment. (n. 4).

The district court's finding that Gilpatrick qualified as a leader or organizer under this standard is not clearly erroneous. As related in the Statement of Facts, pp. , *supra*, the evidence showed that Gilpatrick engaged in conversation with Grigg and Loftis concerning whether there were inmates in the jail, including Wright and Mullins, who could beat up Beaty for assaulting Grigg's girlfriend's daughter. (10/10 Tr. 158-160, 164, Apx. __). Shortly thereafter, Gilpatrick told deputy Jim Loftis to talk to Wright and Mullins about beating Beaty and Bowman. (See 10/10 Tr. 163-164, Apx. __). Loftis told Wright and Mullins to beat Beaty and Bowman

and assured them that they would not get into trouble for assaulting Beaty, because Gilpatrick was aware of the plan and had taken care of everything. (10/10 Tr. at 219-220, Apx. __). Loftis also told Wright and Mullins that they would be rewarded for doing this favor. (10/10 Tr. 219-220, Apx. __).

Gilpatrick told Goolsby that Beaty was to be removed from the booking area and taken to the back of the jail; ordinarily Beaty would have remained in the booking area because he was going to be released later that day. (10/10 Tr. 93-95, 99, 105, 108, Apx. __). By having Beaty moved to the pod where Wright and Mullins were housed, Gilpatrick facilitated the beating. Following the beating, Gilpatrick told Wright and Mullins that he would place them on trusty status, something he was authorized to recommend to the sheriff. (10/10 Tr. 83, 116, 178-180, Apx. __). He also requested that Wright prepare a report concerning Beaty's beating in which Wright should state that Beaty provoked the beating by "running his mouth" and refusing to keep quiet when asked to do so. (10/10 Tr. 231-234, Apx. __).

Applying the criteria outlined in the guideline commentary, it is clear that Gilpatrick had "decision making authority," was deeply involved in "the commission of the offense," recruited Wright and Mullins as accomplices, was chiefly responsible for "planning" and "organizing the offense," and exercised "control and

authority * * * over others." U.S.S.G. § 3B1.1, comment. (n. 4).

Gilpatrick quotes selectively from the sentencing transcript in contending that the district court relied solely on his position as jail administrator in applying this adjustment. In fact, the court stated that it relied on the facts set forth in paragraphs seven, eight, nine, eleven, and twelve of the Presentence Report in determining that Gilpatrick was a leader in the crimes of which he was convicted. Paragraph nine specifically states that Gilpatrick instructed Loftis to speak to Wright and Mullins about "tak[ing] care" of Beaty and Bowman. (PSR at 6, Apx. __). In addition, the court stated, in its discussion of the obstruction of justice enhancement, that "as reflected in Paragraph 13, the Court believes that the proof reflected at trial that Gilpatrick instructed Loftis to get [the false] report from Wright and Mullins." (5/14/07 Tr. 9, Apx. __).[17]

Accordingly, the district court did not err in finding that Gilpatrick was a leader or organizer of the criminal activity in this case and in adding four levels to his base offense level to reflect that role.

CONCLUSION

For the foregoing reasons, this Court should affirm Gilpatrick's sentence.

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[17] The sealed Statement of Reasons for the sentence states that the court adopted the presentence report and guideline application without change. (R. 212 (sealed document), Apx. __).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 9 software, the brief contains 9865 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

_____

MARIE K. McELDERRY
Attorney

DATED: February 19, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2008, a copy of the foregoing PROOF BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE was served by first class mail, postage prepaid, on counsel of record at the following address:

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_____
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Attorney

PLAINTIFF-APPELLEE'S APPENDIX DESIGNATIONS

PLAINTIFF-APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

Pursuant to Sixth Circuit Rules 10(d) and 11(b), plaintiff-appellee, United States of America, designates the following items to be included in the Joint Appendix.

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