ORAL ARGUMENT REQUESTED

Nos. 03-1515, 03-1522, 03-1523, 04-1000

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant,

v.

MIKE LAVALLEE, ROD SCHULTZ, AND ROBERT VERBICKAS,
Defendants-Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE WILEY P. DANIEL

OPENING BRIEF OF THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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Prior Related Cases

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United States v. *LaVallee*, No. 03-1314

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United States v. *LaVallee*, No. 04-1538

United States v. *Schultz*, No. 04-1540

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 03-1515, 03-1522, 03-1523 & 04-1000

UNITED STATES OF AMERICA,

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MIKE LAVALLEE, ROD SCHULTZ, & ROBERT VERBICKAS,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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THE HONORABLE WILEY P. DANIEL

OPENING BRIEF OF THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

JURISDICTION

These are appeals and a cross-appeal arising out of a federal criminal prosecution. The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction over the defendants' appeals from their final judgments of conviction and their sentences under 28 U.S.C. 1291 and 18 U.S.C. 3742(a). This Court has jurisdiction over the government's cross-appeal of the defendants' sentences under 18 U.S.C. 3742(b).

ISSUES PRESENTED

The defendants' appeals present the following issues:

1. Whether the district court's jury instructions regarding the elements of a violation of 18 U.S.C. 241 and 242 correctly stated the law and did not mislead the jury.

2. Whether the district court's supplemental jury instruction regarding partial verdicts improperly invaded the jury's deliberative process and coerced it into convicting the defendants.

3. Whether inconsistencies in the testimony of government witnesses make the evidence supporting Schultz's convictions constitutionally insufficient.

4. Whether the district court abused its discretion in not granting the defendants a mistrial based on the government's questioning of a witness regarding the defendants' reputations for unnecessary violence pursuant to Federal Rules of Evidence 404(a) and 405.

5. Whether the district court abused its discretion in not granting a mistrial in response to the government's questioning of a witness regarding a meeting with LaVallee's lawyer.

6. Whether the district court's limits on the scope of discovery or its rulings on the admissibility of testimony, individually or in combination, rendered the defendants' trial unfair.

7. Whether the district court plainly erred in denying the defendants' untimely motion to disqualify a Bureau of Prisons attorney from participating in

this matter on behalf of the United States.

8. Whether the district court plainly erred by applying the Federal Sentencing Guidelines as mandatory rather than advisory.[1]

The government's cross appeal of the defendants' sentences presents the following issues:

9. Whether the district court erred in downwardly departing two levels under Sentencing Guidelines § 5K2.0 for each defendant based on its conclusion that they would be susceptible to abuse in prison because they are former corrections officers.

10. Whether the district court erred in awarding Verbickas a two-level downward departure under Sentencing Guidelines § 5K2.10, p.s. for victim misconduct and under Section 5K2.20 for aberrant behavior.

11. Whether the district court erred in concluding that the defendants' submission of false reports to their supervisors regarding use-of-force incidents did not satisfy the requirements for the two-level obstruction of justice enhancement under Sentencing Guidelines § 3C1.1.

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[1] Schultz also raises issues regarding whether the government violated the requirement of *Brady* v. *Maryland*, 373 U.S. 83 (1999) by not turning over a videotape until September 2004. When Schultz filed his brief, that issue was still pending in the district court as part of Schultz's and LaVallee's motions for a new trial. Those motions have now been denied and are the subject of two related appeals: *United States* v. *LaVallee*, No. 04-1538, and *United States* v. *Schultz*, No. 04-1540. As yet there is no briefing schedule in those cases.

STATEMENT OF THE CASE

This prosecution arose out of an investigation of wide-spread abuse of prisoners and falsifying records to cover up that abuse at the United States Penitentiary in Florence, Colorado (USP-Florence). As a result of that investigation, eight Bureau of Prisons corrections officers were indicted and two were charged by information. Three corrections officers pleaded guilty and cooperated with the government by providing testimony at trial.[2]

On February 6, 2001, seven corrections officers, including the defendants in these appeals, were charged in a superceding indictment with one count of violating 18 U.S.C. 241 (conspiracy to deprive the inmates of their rights) and nine counts of violating 18 U.S.C. 242 (deprivation of rights under color of law). The indictment alleged a conspiracy among the correctional officers to physically abuse inmates and to conceal the truth about the incidents through, among other means, filing false reports and creating apparent injuries to support claims of being attacked by inmates.

After a three-month trial, on June 24, 2003, the jury returned not guilty

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[2] Those three officers were Lieutenant David Armstrong, who pleaded guilty to one felony count of violating 18 U.S.C. 241 (conspiracy to deprive rights), see *United States* v. *Armstrong*, No. 99-cr-00190; and Officers Charlotte Gutierrez and Jake Geiger, who each pleaded guilty to a misdemeanor count of violating 18 U.S.C. 242 (deprivation of rights under color of law), see *United States* v. *Gutierrez*, No. 00-cr-00299, and *United States* v. *Geiger*, No. 00-cr-00198.

verdicts on all counts submitted to it for four defendants.[3] For Schultz and LaVallee, it returned a guilty verdict on the conspiracy count (Section 241) and one count (Count V) of violating Section 242. It found LaVallee not guilty on the remaining three counts against him and it found Schultz not guilty on the remaining two counts against him. For Verbickas, the jury returned a guilty verdict on one count of violating Section 242. It returned not guilty verdicts on the other three counts.

On November 21, 2003, the district court sentenced the defendants. For defendants Schultz and LaVallee, the court found the sentencing range to be 51 to 63 months, but departed downward to sentence each defendant to 41 months. For defendant Verbickas, the district court found the sentencing range to be 41 to 51 months, but downwardly departed to sentence him to 30 months.

Verbickas, LaVallee, and Schultz each timely appealed his conviction and sentence. The government timely cross-appealed the defendants' sentences.

STATEMENT OF THE FACTS

This is a case that dealt with defendant corrections officers who willfully violated the constitutional rights of the inmates in their charge. They brutally beat inmates as punishment for the inmates' prior misconduct, some of which was quite minor. These were not situations in which defendants used physical force in response to an actual or perceived threat to themselves, the institution, or other

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[3] The four acquitted defendants were Ken Shatto, David Pruyne, Brent Gall, and James Bond.

inmates. These were not situations in which force was needed to restore or maintain order. Rather, the defendants chose times and places to administer physical punishment to restrained and compliant inmates to teach them a lesson. The defendants concealed their actions through false reports and memoranda precisely because they knew their actions were unlawful.

In late 1994 or early 1995, newly transferred inmates at USP-Florence were assaulting staff and being disruptive, creating substantial problems at the prison. Trl. Tr. at 3684 (LXII).[4] The seven defendants originally charged often worked in the Special Housing Unit (SHU), where inmates who were unruly or were being punished through administrative segregation would be placed. At that time, defendant Mike LaVallee reported to David Armstrong and other corrections officers that he had discussed the situation with Captain Terry Hines and that Hines had given the corrections officers the "green light to take care of business with the inmates that were assaulting staff and being aggressive towards staff members." Trl. Tr. at 3682 (LXIII). Armstrong understood this to mean "[t]o take care of business if an inmate assaulted staff, make sure they knew they couldn't

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[4] This brief uses the following abbreviations: "Trl. Tr. at ___ (___)" refers to the page number, followed by the volume number, of the trial transcript. "R. ___), date at ___ (___)" refers to entries on the district court docket sheet, followed by their page number and volume number. "Lavallee Br. at ___" refers to pages in defendant Lavallee's opening brief. "Schultz Br. at ___" refers to pages in defendant Schultz's opening brief. "Verbickas Br. at ___" refers to pages in defendant Verbickas's opening brief. "Verbickas Supp. Br. at ___" refers to pages in defendant Verbickas's supplemental brief. "Sent. Tr. at ___ (___)" refers to pages of the sentencing hearing conducted on November 21, 2003, followed by volume number. "Gov't Exh" refers to exhibits submitted by the government at trial.

get away with it." Trl. Tr. at 3682 (LXIII). Armstrong explained that they were "to let the inmates know they weren't going to get away with anything, * * * to let them know who was the boss in the institution." Trl. Tr. at 3685 (LXIII). This message would be sent "[b]y beating [unruly inmates], taking them down hard, punishing them," all which would be contrary to Bureau of Prisons (BOP) policy. Trl. Tr. at 3685 (LXIII). Warden Raymond Holt testified extensively regarding BOP's use of force policy, which Holt had helped to revise. Trl. Tr. at 2970-2980 (LIX) & Gov't Exh. 240 (use of force policy). Holt testified that an immediate use of force was justified only in response to a "serious threat" to another inmate, staff, or the institution. Trl. Tr. at 2976-2977 (LIX). Holt also testified that force cannot be used to punish an inmate. Trl. Tr. at 2977 (LIX).

Armstrong explained that he was not concerned about unnecessarily beating an inmate where a supervisor might see him because the officers understood that their superiors would back them. Trl. Tr. at 3637-3638 (LXIII). Charlotte Gutierrez stated that the officers considered internal investigations of alleged misconduct to be "a joke." Trl. Tr. at 1331 (LII). The officers had to be careful which staff or supervisors were around when they beat inmates, however, because not all were tolerant of this wrongful conduct. Trl. Tr. at 1333 (LII).

In approximately early 1996, Gutierrez joined LaVallee and Schultz in the abuse of inmate Ronnie Beverly to demonstrate that she was "with them." Trl. Tr. at 1310 (LII). Gutierrez was working in the property room in the SHU, Trl. Tr. at 1307 (LII), when she heard someone yell "fight" and she responded. When she

got to Beverly's cell he was on the floor, face down, and not moving. Trl. Tr. at 1308-1309 (LII). LaVallee was punching him in the torso, while Schultz stood by. Trl. Tr. at 1309 (LII). LaVallee told Gutierrez to "get the fuck out." Trl. Tr. at 1310 (LII). Gutierrez interpreted that to mean that she was not willing to participate with them in abuse of the inmates. To show them otherwise, Gutierrez stepped on Beverly's head before walking out. Trl. Tr. at 1310-1311 (LII).[5]

The standard procedure was that after any use of force, the officers had to document through memoranda what had happened. Trl. Tr. at 1025 (LI). To cover up the beatings, the corrections officers would write false reports and memoranda justifying their actions. For example, a report or memoranda might falsely assert that the inmate had assaulted a staff member, or falsely assert that an inmate had tried to pull away from a staff member during an escort. The corrections officers would also fake injuries to themselves to support these false claims of inmate assaults. Trl. Tr. at 3672, 3674 (LXII). For example, in March 1996, Schultz was escorting an inmate named Hron from a holding cell in the SHU to Lieutenant Lorna King's office. Armstrong was in the Lieutenant's office when they arrived and saw that Hron had injuries to his face; he did not see how it happened. Trl. Tr. at 3750-3751 (LXIII). At Schultz's request, Armstrong wrote a false report asserting, consistent with Schultz's explanation, that Hron had pulled away from him and injured his face when they fell. Trl. Tr. at 3752 (LXIII). The

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[5] The incident with inmate Beverly was charged as overt acts "m" and "n" in Count I (18 U.S.C. 241).

report also asserted that Schultz had been injured when Hron kicked him, although Armstrong knew Schultz had faked the injury to himself. Trl. Tr. at 3751-3752 (LXIII).[6] Armstrong explained that by "sticking" to the false reports and memoranda justifying the assaults, they would escape discovery because "no one was going to believe an inmate." Trl. Tr. at 3675 (LXIII). The officers had to ensure that their reports and memoranda contained the same justifications, so that they would be taken as true. Trl. Tr. at 3656 (LXIII).

The officers also took care about how they delivered the beatings because they did not want to leave any marks. See Trl. Tr. at 1365 (LIII). Beating an inmate in the face was undesirable because it would leave marks and draw attention. Trl. Tr. at 1365-1366 (LIII). For example, when Gutierrez observed Schultz beating an inmate in the kidneys, Schultz explained he was inflicting "[k]idney shots, just kidney shots." Trl. Tr. at 1366 (LIII). If there were no visible injuries, there would not be a need to file a report, Trl. Tr. at 1409 (LIII), but reports would have to be filed if the inmate was visibly injured or complained, Trl. Tr. at 1443 (LIII).

A. The Howard Lane Incident

Defendant Verbickas was convicted of violating 18 U.S.C. 242 for beating inmate Howard Lane on March 19, 1996. Charlotte Gutierrez pleaded guilty to a misdemeanor count of violating Section 242 for her role in the beating of Lane.

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[6] This incident with Hron was charged as overt acts "s," "t," and "u" in Count I (18 U.S.C. 241).

That morning, Captain Hines asked Officer Dennis Britt to step into his office. Trl. Tr. at 1004 (LI). Shortly thereafter, Verbickas arrived with inmate Lane. Trl. Tr. at 1005-1006 (LI). When Lane sat down, Hines told him that nobody had told him to sit and directed him to stand up. Trl. Tr. at 1006 (LI). Lane did so and apologized. Trl. Tr. at 1006 (LI). Lane had been brought to the Captain's office because he had written letters containing sexual advances to a female staff member at USP-Florence. Trl. Tr. at 1006 (LI). Captain Hines told Verbickas and Britt "to take this piece of shit down to [the] SHU and give him a treatment." Trl. Tr. at 1006 (LI). Britt understood this to mean "[t]each the inmate we're not going to tolerate sexual advances towards any of our staff members," Trl. Tr. at 1006 (LI), by administering "physical punishment" to Lane. Trl. Tr. at 1008-1009 (LI).

Britt and Verbickas then restrained Lane with hand restraints behind his back and escorted him to the SHU. Trl. Tr. at 1007 (LI). During the escort, Lane verbally harrassed Britt and Verbickas by saying such things as "[p]iece of shit, I'll write whatever I want to, you going to die." Trl. Tr. at 1009 (LI). During the escort, Lane was also "turning and shifting, which caused [Britt and Verbickas] to put a * * * stronger hold on [Lane] to control him." Trl. Tr. at 1011 (LI).

When they arrived at the SHU, Gutierrez opened the door and walked to the holding cell with Britt and Verbickas, and they put Lane into the cell. Trl. Tr. at 1011 (LI). Britt saw Lane turn toward the door, which was unusual, because inmates normally remained with their backs to the door so that they can put their hands through the food slot to have their hand restraints removed. Trl. Tr. at 1012

(LI). Britt "saw there wasn't any act of aggression coming, so [he] continued on to the officer's station." Trl. Tr. at 1012 (LI).

After Britt left, Verbickas punched Lane while Lane was standing against the wall with his hands cuffed behind his back. Trl. Tr. at 1362 (LIII). When Lane was placed on the floor, Gutierrez kicked him in the ribs "a couple of times," Trl. Tr. at 1362 (LIII); she kicked him in the ribs so that it would not leave any marks, Trl. Tr. at 1365-1366 (LIII). When Britt heard "fluctuation[s] in voices," he returned to the cell "to make sure that everything was okay." Trl. Tr. at 1013-1014 (LI). When Britt arrived, he saw Lane face down on the floor, with Verbickas standing over him. Trl. Tr. at 1014 (LI). Lane was still handcuffed behind his back. Trl. Tr. at 1014-1015 (LI). Verbickas told Lane to get up, then immediately grabbed him by his collar and the seat of his pants and lifted him about waist high. Trl. Tr. at 1014-1015 (LI); Trl. Tr. at 1362 (LIII). Verbickas then said, "No, as a matter of fact, stay there," and dropped Lane face-first onto the floor. Trl. Tr. at 1014, 1020 (LI). The fall "busted" Lane's lip, Trl. Tr. at 1361 (LIII), and blood oozed from Lane's mouth, Trl. Tr. at 1015 (LI). Before Verbickas picked Lane up, Lane was not moving and was not being aggressive. Trl. Tr. at 1020 (LI). Britt could not believe what he had seen and left the area. Trl. Tr. at 1021-1022 (LI). Gutierrez was frightened when she saw the blood coming from Lane's mouth; she thought that Lane may have had internal bleeding. Trl. Tr. at 1365 (LIII). When Verbickas picked Lane up off the floor and pushed him against the wall, Lane left blood on the wall. Trl. Tr. at 1365 (LIII).

The officers then went back to the officers' station in the SHU and reported what had happened to Lieutenant Lorna King, who went to the holding cell. Trl. Tr. at 1022 (LI). King was "fuming" when she saw the mess and directed them to "fix it" and to clean it up. Trl. Tr. at 1366-1367 (LIII); Trl. Tr. at 1022 (LI). Verbickas, Gutierrez, and Britt all wrote reports on the incident. Trl. Tr. at 1031 (LI). In the officer's station after the incident, Britt, Verbickas, and Gutierrez discussed how they would write their reports. Trl. Tr. at 1040 (LI); Trl. Tr. at 1368 (LIII). Because of the injuries to Lane, "something had to be done to cover [their] tracks." Trl. Tr. at 1032 (LI). They discussed what false facts they would put in the reports to justify the use of force against Lane. Trl. Tr. at 1040 (LI); Trl. Tr. at 1368 (LIII).

Britt's report omitted any mention of Lane being dropped on his face. Trl. Tr. at 1026 (LI); see also Trl. Tr. at 1270 (LII) ("[w]e weren't going to rat on ourselves"). His report falsely stated that while Lane was being moved into the holding cell, Lane kicked Verbickas and kneed him in the thigh. It also falsely reported that Lane kicked Gutierrez when Verbickas and Gutierrez put him on the floor. Trl. Tr. at 1027-1028 (LI). Verbickas's report also made these false assertions, Trl. Tr. at 1036 (LI), as did Gutierrez's, Trl. Tr. at 1368 (LIII). Verbickas's report also falsely asserted that Lane attempted to kick Britt. Trl. Tr. at 1038 (LI).

Britt's and Verbickas's reports also falsely stated that the officers observed Lane throwing himself against the wall of the holding cell. Trl. Tr. at 1029, 1038

(LI). A physician's assistant came to examine Lane, Trl. Tr. at 1030 (LI), and also examined Verbickas and Gutierrez, Trl. Tr. at 1368-1369 (LIII). Gutierrez slapped herself on the leg to make it appear to the physician's assistant that she had been kicked. Trl. Tr. at 1372 (LIII). Based on the officers' false assertions regarding Lane's behavior, a member of the psychology staff came to the SHU to examine Lane. See Trl. Tr. at 1031 (LI).

2. The Pedro Castillo Incident

Schultz and LaVallee were each convicted of a felony violation of 18 U.S.C. 242 for beating inmate Pedro Castillo on April 5, 1996. On the day shift that day, LaVallee was the officer in charge of the segregation unit. Trl. Tr. at 1874 (LV). Castillo was known as a self-mutilator, that is, when he was upset or did not get his way, he would cut himself with something, such as a paper clip. He also did this to get attention. Trl. Tr. at 1402 (LIII). Castillo was an orderly in the SHU and so was responsible for cleaning as directed by the officers. Trl. Tr. at 1385 (LIII); Trl. Tr. at 1391 (LIII). As an orderly, he would be permitted more freedom in his movements within the SHU; unlike other prisoners, he was not in lock down 23 hours per day. Trl. Tr. at 1391 (LIII).

Earlier, Officer Gutierrez had gotten into an argument with Castillo's cellmate, Mendez. Castillo intervened in the argument and Gutierrez then argued with Castillo. Trl. Tr. at 1391-1392 (LIII); see also Trl. Tr. at 1879 (LV); Trl. Tr. at 1733 (LIV). Castillo became upset with Gutierrez, and he threw a mop and bucket of water onto the floor. Trl. Tr. at 1392 (LIII). Because of this, Castillo

lost his job as orderly and had to return to his cell like the rest of the inmates in segregation. Trl. Tr. at 1392 (LIII).

Later in the shift, officers met in the officer's station to discuss "how to get back at inmate Castillo" for his earlier misconduct. Trl. Tr. at 1875 (LV). The officers present included LaVallee, Schultz, Gutierrez, and Kenneth Mitchell. See Trl. Tr. at 1875 (LV); Trl. Tr. at 1395 (LIII). LaVallee stated that Castillo had to be taught a lesson and it was time to "tune him up." Trl. Tr. at 1395-1396 (LIII). Gutierrez understood this to mean Castillo would have "his butt whooped." Trl. Tr. at 1397 (LIII). The officers discussed how they would justify going into Castillo's cell to beat him. Trl. Tr. at 1398 (LIII). Because the matter was personal between Gutierrez and Castillo, she did not want to be part of the discussions of how it would be "set up," so she left the officer's station and went to the property room. Trl. Tr. at 1398 (LIII).

The officers were assigned different roles. Schultz was to "accidentally" knock over the camera that had been set up outside Castillo's cell so that it would not record the officers entering the cell. Trl. Tr. at 1877-1878 (LV). Officer Freeman was to observe Castillo and report that he was harming himself, and Mitchell was to respond to Freeman's report. Trl. Tr. at 1878 (LV). Schultz knocked the camera over as planned, Trl. Tr. at 1880 (LV), and Freeman stated "he's doing it," so Mitchell responded, Trl. Tr. at 1879 (LV). Freeman opened the door to Castillo's cell and Mitchell followed him inside, and defendant Shatto also entered the cell. Trl. Tr. at 1879-1881 (LV). Castillo was sitting on his bunk,

doing nothing. Trl. Tr. at 1881 (LV). Mitchell and another officer pulled Castillo off the top bunk, took him down to the floor and restrained him with handcuffs. Trl. Tr. at 1879, 1882 (LV). Castillo struggled somewhat, but Mitchell and the other officer were able to put the restraints on. Trl. Tr. at 1882 (LV). Castillo did not hit anyone. Trl. Tr. at 1882-1883 (LV). Schultz restrained Mendez and removed him from the cell, Trl. Tr. at 1879-1880 (LV), and Gutierrez put him in a holding cell. Trl. Tr. at 1399-1400 (LIII). Schultz then returned to Castillo's cell. Trl. Tr. at 1880 (LV).

Mitchell, Schultz, and Shatto escorted Castillo to a holding cell. Trl. Tr. at 1880-1881, 1883 (LV). When they got there, Mitchell, LaVallee, and Schultz entered. Trl. Tr. at 1883 (LV). Mitchell held Castillo against the wall, facing it; Castillo was talking and possibly yelling, but he was not moving. Trl. Tr. at 1884 (LV). As Mitchell held him, Schultz and LaVallee came up behind him and each struck him two or three times in the back with his fist. Trl. Tr. at 1884-1885 (LV). Both officers hit Castillo hard enough that it made a smacking sound. Trl. Tr. at 1885 (LV). While he was being struck, Castillo posed no threat, and he was still handcuffed. Trl. Tr. at 1884-1885 (LV). Mitchell then released Castillo and backed out of the cell. Trl. Tr. at 1885 (LV). As he left the cell, Gutierrez entered. Trl. Tr. at 1885-1886 (LV). Mitchell returned to the officer's station, which was 15 to 20 feet away, and he could hear from the holding cell the smacking sound as the officers continued to strike Castillo. Trl. Tr. at 1886.

When Gutierrez entered the holding cell, LaVallee told her to kick Castillo.

Gutierrez at first kicked LaVallee's hand, and he gave her a disapproving look; she felt he was implying she was a "wimp." Trl. Tr. at 1401 (LIII). Gutierrez kicked again and struck Castillo in the buttocks. Trl. Tr. at 1401 (LIII). LaVallee told Gutierrez that they had done this – beaten Castillo – for her, and she expressed appreciation. Trl. Tr. at 1401 (LIII). After Castillo was beaten, Mitchell escorted him to the health services unit. Trl. Tr. at 1887 (LV).

The officers involved in the incident with Castillo filed false reports to justify the beating. Mitchell did not write his own report; it was written by one of the other officers and he signed it. Trl. Tr. at 1888 (LV). Schultz or LaVallee told Mitchell to "stick to your [report], and there will be no problems." Trl. Tr. at 1889 (LV). Mitchell understood that if any supervisors or investigators from the USP-Florence internal investigations office questioned him about the incident, he was to maintain that the events occurred as described in the report. Trl. Tr. at 1890 (LV). The report Mitchell signed falsely stated that Castillo had punched Freeman in the head. Trl. Tr. at 1893 (LV). Shatto's report falsely asserted the same. Trl. Tr. at 1896 (LV). After the beating, Mitchell observed Freeman rubbing his eye area. Trl. Tr. at 1887 (LV). Schultz's report falsely stated that Castillo had been cutting himself with a paper clip. Trl. Tr. at 1908 (LV). None of the reports mentioned that Castillo was beaten in the holding cell.

SUMMARY OF THE ARGUMENT

The government's arguments regarding the defendants' appeals are as follows:

1. The district court's jury instructions were not erroneous.

a. The district court's instructions regarding the elements of a violation of 18 U.S.C. 241 and 242 correctly stated the law and were not misleading. Some of the objections on appeal were not made below and the defendants have not shown they satisfy the plain error standard. The defendants argue that the instructions were inconsistent with *Hudson* v. *McMillian*, 503 U.S. 1 (1992), in which the Supreme Court held that no significant injury need be shown to satisfy the Eighth Amendment's prohibition on cruel and unusual punishments. While the Supreme Court held that *de minimis* uses of force were generally not a violation of the Eight Amendment, the Court did not hold, as the defendants argue, that *de minimis* injuries were similarly generally not a violation of the Eighth Amendment.

Moreover, the trial in this matter did not involve disputes about the appropriate level of force needed to control an out of control inmate or to protect staff from attacks. The government's theory was that the uses of force charged were without legitimate purpose, not simply excessive. That is, the officers beat the inmates to administer physical punishment in response to real or perceived misconduct. The defendants did not justify the uses of force as necessary responses to inmate violence, but claimed the alleged beatings never took place. Thus, the defendants' arguments on appeal regarding the appropriate instructions about excessive force claims are simply not particularly relevant in this context.

b. The district court's supplemental jury instruction regarding partial verdicts neither improperly invaded the jury's deliberative process nor coerced it

into convicting the defendants. The court instructed the jury that if they reached unanimous verdicts as to any defendants, they should report those verdicts by placing them in a sealed envelope. The partial verdicts that the jury returned were acquittals for four defendants on all counts and for Verbickas on all counts but one. The jury's verdicts demonstrate it was not coerced into convicting any defendant.

2. Sufficient evidence supports Schultz's convictions. He argues that inconsistencies in the testimony of government witnesses rendered them not credible. These inconsistencies in recollection go merely to credibility, not to sufficiency. See *United States* v. *Washita Constr. Co.*, 789 F.2d 809, 816-817 (10th Cir. 1986). Resolving the conflicts was the jury's "exclusive function." *Ibid.*

3. None of the district court's evidentiary rulings was prejudicial error.

a. The district court did not abuse its discretion in denying the defendants a mistrial based on the government's questioning of a witness — pursuant to Federal Rules of Evidence 404(a) and 405 — regarding the defendants' reputations for unnecessary violence. The district court excluded the challenged testimony under Federal Rule of Evidence 403.

b. The district court did not abuse its discretion in denying a mistrial in response to the government's questioning of a witness regarding a meeting with LaVallee's lawyer. The jury was instructed to disregard the question and answer. LaVallee has not shown that the government's questions amounted to an improper

comment on his exercise of his right to counsel.

c. Verbickas's cumulative error argument is wholly without merit. Verbickas does not show or even attempt to show that any of the evidentiary rulings about which he complains were error (or, in some cases, plain error). Non-errors cannot be accumulated to show any prejudice.

4. The district court did not abuse its discretion in denying without a hearing the defendants' motion to disqualify a BOP attorney from participating in this matter on behalf of the United States. Because the motion came three weeks into trial and the defendants had been aware of the facts upon which they based their motions for two years, the district court was justified in summarily denying it as untimely. The defendants failed to demonstrate any conflict of interest. The record established only that as part of her duties as a government attorney, the BOP attorney had previously represented one defendant in an unrelated civil suit.

5. The defendants have not shown that under *United States* v. *Booker*, 125 S. Ct. 738 (2005), the district court plainly erred in sentencing them. For each defendant, the district court departed downward from the calculated Guideline range. The defendants cannot show that the district court was constrained by the mandatory nature of the Guidelines in imposing sentences on them.

The government's arguments regarding its cross-appeal are as follows:

6. The district court erred in concluding that the defendants' submission of false reports and memoranda to their supervisors regarding use-of-force incidents

did not warrant an enhancement for obstruction of justice under Sentencing Guidelines § 3C1.1, and that error was not harmless. The district court recognized that defendants knew their reports would be reviewed by prison officials and concluded that they submitted the false reports to thwart any investigation of their action. Those facts are sufficient to support the enhancement.

7. The district court erred in awarding the defendants downward departures under the Sentencing Guidelines, and those errors were not harmless.

a. The district court erred in concluding that under Sentencing Guidelines § 5K2.0, the facts of this case supported a two-level downward departure for susceptibility to abuse in prison. The court made no finding that the defendants, compared to other law enforcement officers, were *unusually* susceptible to abuse. Corrections officers are not automatically entitled to a downward departure on that basis.

b. The district court erred in awarding Verbickas downward departures under Sentencing Guidelines § 5K2.10, p.s. for victim misconduct and under Section 5K2.20 for aberrant behavior. The district court's findings regarding victim misconduct were inadequate. A downward departure for victim misconduct is not appropriate where a prisoner is beaten as punishment for past behavior. Although the district court found that the victim was being "surly," the district court did not explain what behavior was supposed to have been "surly." The victim's verbal abuse of Verbickas and another officer while they moved him to a holding cell occurred after the decision had been made to beat him in retaliation

for prior misconduct. Verbickas was ineligible for the aberrant behavior departure because his offense involved more than minimal planning and because he took steps to cover up his crime.

ARGUMENT

I

THE JURY INSTRUCTIONS WERE NOT ERRONEOUS

A. Standard Of Review

When a defendant has properly preserved an objection to the jury instructions, this Court reviews the district court's decision to give particular instructions for abuse of discretion and reviews *de novo* the entire instructions to determine whether they accurately informed the jury of the governing law. *United States* v. *Cota-Meza*, 367 F.3d 1218, 1221 (10th Cir. 2004). "[T]his court merely determines whether the jury was misled by the instructions and whether it had an understanding of the issues and its duty to resolve those issues." *Ibid.* Even if the district court errs in instructing the jury, the resulting conviction will not be reversed if the error is harmless. *Ibid.* Also, under Federal Rule of Criminal Procedure 30, parties have an obligation when objecting to jury instructions to state distinctly the matter to which they object and to state the grounds upon which the objection is based; where such an objection is not made, this Court reviews only for plain error. *United States* v. *Bornfield*, 145 F.3d 1123, 1129 (10th Cir. 1998).

B. The Jury Instructions Regarding The Elements of the Offenses Were Not Erroneous

LaVallee contends the district court's instructions improperly "diluted" the standard necessary to prove a violation of the Eighth Amendment's prohibition on cruel and unusual punishments. First, LaVallee contends that the jury could have been confused by the district court's use of the language of Section 241 in the instructions. Second, LaVallee asserts that three instructions regarding the meaning of "injure" or "injury" in different contexts were erroneous and confusing. These instructions were neither erroneous nor confusing.

1. The Statutory Language And The District Court's Instructions

a. 18 U.S.C. 241 (Conspiracy To Deprive Rights)

Section 241 provides in relevant part: "If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same * * * [t]hey shall be fined under this title or imprisoned for not more than ten years, or both." As LaVallee notes (LaVallee Br. at 36-37), the district court gave multiple instructions regarding Count I, which charged a conspiracy in violation of Section 241. See Trl. Tr. at 6896-6906 (LXXVIII) (Instruction Nos. 32 through 45).

Instruction No. 32 quoted the relevant language of Section 241. Trl. Tr. at 6896 (LXXVIII). Instruction No. 33, to which LaVallee objects on appeal, set out

four elements the jury was required to find in order to convict under Section 241:

> Instruction no. 33. In order to sustain its burden of proof for the crime of conspiracy to injure, oppress, threaten, or intimidate persons in the free exercise or enjoyment of rights or privileges secured to them by the Constitution or laws of the United States, as charged in count one of the superseding indictment, the government must prove the following four essential elements beyond a reasonable doubt as to each defendant:
>
> 1. The defendant whose case you are considering entered into a conspiracy with one or more persons to injure, oppress, threaten, or intimidate inmates;
>
> 2. The conspiracy was directed at the deprivation of a right which is secured or protected by the Constitution or laws of the United States — here, the right not to be subjected to cruel and unusual punishment;
>
> 3. The defendant acted willfully to deprive inmates of such right;
>
> 4. The defendant acted under the color of law[.][7]
>
> If you should find from your consideration of all the evidence as to each defendant that any of these elements has not been proved by — beyond a reasonable doubt, then you should find that defendant not guilty.

Trl. Tr. at 6896-6897 (LXXVIII). The court then gave further instructions on each of the elements. Instruction Nos. 34-39 explained the first element — a conspiracy to injure, oppress, threaten, or intimidate. See Trl. Tr. at 6897-6903

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[7] Acting under color of law is an element of a violation of Section 242, but not of Section 241. Cf. *United States* v. *Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000) (elements under Section 241), with *United States* v. *Lanier*, 520 U.S. 259, 264 (1997) (elements under Section 242). The government did not object to this instruction because the constitutional right at issue here — to be free from cruel and unusual punishment — could only be committed under color of law. See Trl. Tr. at 3471 (LXII).

(LXXVIII). Instruction No. 39 informed the jury:

> Instruction no. 39. The words, quote, injured, unquote, quote, oppressed, unquote, quote, threatened, unquote, or, quote, intimidate, unquote, as referred to in these instructions are not used in any technical sense but may cover a variety of conduct intended to harm, frighten, prevent, or punish the free action of other persons.

Trl. Tr. at 6903 (LXXVIII).

Instruction No. 40 elaborated on the second element — the deprivation of a constitutional right — here, the right to be free from cruel and unusual punishment:

> Instruction no. 40. The government must prove that the conduct of the defendant charged deprived the victim inmate of a right or rights secured by the Constitution of the United States. The superseding indictment charges that the defendant deprived an inmate of the right not to be subjected to cruel and unusual punishment. This is a right secured by the Constitution of the United States.
>
> The unnecessary and wanton infliction of pain constitutes cruel and unusual punishment. The question whether the action taken by the defendant whose case you are considering inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.
>
> Factors to be considered in making this determination include the extent of injury suffered by an inmate, the need for the application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the person using force on the inmate, and any efforts made to temper the severity of a forceful response.

Trl. Tr. at 6903-6904 (LXXVIII).

Instruction No. 41 defined "willfully," Trl. Tr. at 6904, Instruction No. 42 related to intent, Trl. Tr. at 6904-6905 (LXXVIII), and Instruction No. 43 defined

"under color of law," Trl. Tr. at 6905-6906 (LXXVIII).

b. 18 U.S.C. 242 (Deprivation Of Rights Under Color Of Law)

Section 242 provides in relevant part: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * and if bodily injury results from the acts committed in violation of this section * * * shall be fined under this title or imprisoned not more than ten years, or both."

Instruction No. 46 informed the jury of the relevant statutory language. Trl. Tr. at 6906 (LXXVIII). Instruction No. 47 set out the elements of a violation of Section 242:

> Instruction no. 47. In order to sustain its burden of proof for the crimes of deprivation of a constitutional right under color of law as charged in counts two through eight and ten of the superseding indictment, the government must prove the following four essential elements beyond a reasonable doubt:
>
> 1. The defendant whose case you are considering deprived an inmate or inmates of a right which is secured or protected by the Constitution of the United States; namely, the right not to be subjected to cruel and unusual punishment;
>
> 2. The defendant acted willfully to deprive the inmate of such right;
>
> 3. The defendant acted under the color of law;
>
> 4. The inmate suffered bodily injury as a result of the defendant's conduct;

> If you should find from your consideration of all the evidence as to each defendant that any of these elements has not been proved beyond a reasonable doubt, then you should find that defendant not guilty.

Trl. Tr. at 6906-6907 (LXXVIII).

LaVallee complains of only one aspect of the district court's instructions regading Section 242: the instruction explaining "bodily injury." Instruction No. 48 informed the jury:

> Instruction no. 48. The term, quote, bodily injury, unquote, as used in these instructions means: One, a cut, abrasion, bruise, burn, or disfigurement; two, physical pain; three, illness; four, impairment of the function of a bodily member, organ, or mental faculty; or five, any other injury to the body no matter how temporary.

Trl. Tr. at 6907-6908 (LXXVIII).

2. The Jury Instructions Did Not Misstate The Law Or Confuse The Jury

LaVallee complains that the jury instructions both misstated the law and were confusing. Specifically he complains that the district court's instruction regarding elements of a violation of Section 241 (Instruction No. 33), its instruction regarding the word "injure" in Section 241 (Instruction No. 39), its instruction regarding cruel and unusual punishment (Instruction No. 40), and its instruction regarding "bodily injury" under Section 242 (Instruction No. 48) combined to confuse the jury and would have permitted it to convict on a finding less than that necessary to satisfy the Eighth Amendment standard. Some of the objections were not raised below and are therefore reviewed only for plain error. In any event, none of the arguments demonstrates any error here.

a. The Eighth Amendment Is Violated By Wanton And Unnecessary Infliction Of Pain Even If It Does Not Cause Significant Injury

LaVallee purports to base his arguments on *Hudson* v. *McMillian*, 503 U.S. 1 (1992), in which the Supreme Court held that there was no minimum level of injury necessary to establish a claim under the Eighth Amendment's prohibition of cruel and unusual punishment. The facts in *Hudson* are strikingly similar to the beatings of Castillo and Lane. In *Hudson*, the plaintiff-inmate alleged that after an argument with a guard, that guard and another restrained him with handcuffs and transported him to administrative lockdown. On the way, the guards punched and kicked him while he was held. 503 U.S. at 4. The Fifth Circuit held that the inmate failed to state a claim for cruel and unusual punishment under the Eighth Amendment. The court of appeals found that the use of force was excessive and that it "occasioned wanton and unnecessary infliction of pain," but held that the claim failed because the injuries were "minor," requiring no medical attention. *Id.* at 5. The Supreme Court reversed.

The Supreme Court held that "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is * * * whether force was applied in a good-faith effort to maintain and restore discipline, or maliciously and sadistically to cause harm." Hudson, 503 U.S. at 6-7. The Court also held that "the extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation 'or instead

evidenced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.'" *Id*. at 7. "The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it." *Ibid.*

The Court further noted that not "every malevolent touch by a prison guard gives rise to a federal cause of action." *Hudson*, 503 U.S. at 9; see also *ibid*. ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights."). "The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not the sort repugnant to the conscience of mankind." *Id.* at 9-10 (internal quotation marks omitted). LaVallee confuses the Court's reference to uses of *de minimis* force, which are generally not a violation of the Eighth Amendment, with uses of force resulting in little or no injury — which LaVallee calls a *de minimis* injury — which, under *Hudson*, may violate the Eighth Amendment.

b. The District Court Did Not Err By Instructing The Jury Using The Language Of Section 241

LaVallee argues (LaVallee Br. at 45-47) that the first element of Instruction No. 33 and the subsequent instructions elaborating on it would permit the jury to convict even if there was no showing of a conspiracy to violate the Eighth Amendment violation. LaVallee contends that using 18 U.S.C. 241's statutory

language "threaten, injure, oppress, or intimidate" confused the jury and permitted it to convict him based on a finding that he conspired to threaten or intimidate inmates, not that he conspired to violate their Eighth Amendment rights. But it is clear that the jury was instructed properly. The district court cannot be faulted for using the statutory language in its instructions. See *Cota-Meza*, 367 F.3d at 1221 (court reviews to determine if instruction accurately stated law).

It was clear from Instruction No. 33 that the jury could not convict LaVallee of violating Section 241 without finding that he conspired to deprive inmates of their Eighth Amendment rights. See *United States* v. *Almaraz*, 306 F.3d 1031, 1037 (10th Cir. 2002) (Court "presume[s] jurors attend closely to the language of the instructions in a criminal case and follow the instructions given them"), cert. denied, 537 U.S. 1241 (2003). After describing the elements of a Section 241 violation in Instruction No. 33, the court went on to discuss each element in separate instructions. That approach is designed to minimize confusion. LaVallee's argument implies that any set of instructions would be reversible error unless every instruction contained all the elements of the offense. The district court rightly rejected such a view. See Trl. Tr. 3484 (LXII) (discussing objection as it relates to Instruction No. 35) ("What you're really asking me to do is to put in every instruction everything that's in every other instruction so the instructions would in effect be so confusing that no one would ever understand what they mean, and I reject that.").

Further, Instruction No. 40 reiterated that the cospiracy must be to deprive

inmates of their Eighth Amendment rights. Trl. Tr. at 6903 (LXXVIII) ("The government must prove that the conduct of the defendant charged deprived the victim inmate of a right or rights secured by the Constitution of the United States.") Indeed, this instruction placed a burden of proof on the government greater than that required by Section 241, because the statute does not even require proof that a right was violated: the agreement to injure a person in the exercise or enjoyment of his federal rights is the crime. See *United States* v. *Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000). Thus, rather than permitting the jury to convict on a standard less than that required by the statute, the instructions required the jury to find more than the statute required.

c. The District Court's Instructions Regarding "Injure" Under Section 241 And "Bodily Injury" Under Section 242 Were Not Erroneous Or Confusing

LaVallee complains (LaVallee Br. at 48) that Instruction No. 40, which he concedes is faithful to the language of *Hudson* v. *McMillan*, did not inform the jury that "not every malevolent touch by a prison guard gives rise to a violation of an inmate's constitutional rights or that de minimis uses of physical force are necessarily excluded from constitutional recognition." But neither LaVallee nor any other defendant requested that such language be included in the instruction. See Trl. Tr. at 3502-3504 (LXII) (court agrees to defendants' request to change one word). LaVallee bears the burden of demonstrating that the elements of plain error were met here. See *United States* v. *Olano*, 507 U.S. 725, 734 (1997). LaVallee has not acknowledged his burden, much less attempted to meet it; his

argument must, therefore, be rejected. Cf. *United States* v. *Brown*, 316 F.3d 1151, 1161 (10th Cir. 2003) (refusing to find plain error standard satisfied when defendant failed to argue one of the necessary prongs had been met). In any event, there was no error here, plain or otherwise.

While the quoted language is a correct statement of the law drawn from *Hudson*, it is not an element of the crime, nor otherwise necessary for the jury to apply the correct Eighth Amendment standard. The trial did not present the jury with a dispute about whether the force used was *de minimis*, and, in any event, the evidence showed the use of more than *de minimis* force.

The government proved that Schultz and LaVallee punched Castillo in the back numerous times while he was restrained and compliant, punching him so hard, in fact, that the sound of the blows could be heard in the officer's station 15 to 20 feet away. It also proved that Verbickas punched Lane while he was restrained and compliant and picked him up off the floor waist-high then dropped him on his face, causing blood to ooze from his mouth. The defendants' defenses were that they did not punch, kick, or drop the inmates, but that the inmates injured themselves. Indeed, LaVallee conceded that if the government witnesses' testimony regarding retaliatory beatings was true, those beatings would be unlawful. See Trl. Tr. at 6475-6480 (LXXVI).

On the evidence presented, there was no occasion for the jury to consider whether the force used might have been *de minimis*, and the district court's failure to *sua sponte* give such an instruction was not error, and certainly was not plain

error. See *United States* v. *Haar*, 931 F.2d 1368, 1371 (10th Cir. 1991) (defendant not entitled to instruction not supported by the evidence).

LaVallee further complains that Instruction No. 39, which informed the jury that, for Section 241, the terms "injure, oppress, threaten, or intimidate" have no technical meaning, is incorrect because "injure" has a technical meaning under *Hudson*. This objection was not made below and is therefore reviewed only for plain error. Again, LaVallee has not attempted to show that he satisfies the elements of the plain error standard and his argument must be rejected.

Instruction 39 addresses the meaning of the language used in Section 241. It does not purport to set forth the Eighth Amendment standard. *Hudson* states the standard for an Eighth Amendment violation and, therefore, does not govern the meaning of the statute. The standard for an Eighth Amendment violation was set out in Instruction No. 40, and no defendant requested the addition of language about injury to that instruction.

Similarly, LaVallee complains that Instruction No. 48 regarding "bodily injury" under Section 242 was inconsistent with *Hudson*. This objection is wholly meritless. *Hudson* does not address the definition of "bodily injury" under Section 242. No defendant asserted below, nor do they assert here, that the district court's instruction was an incorrect statement concerning *Section 242*.[8] See Trl. Tr. at

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[8] The district court's instruction was taken from the instruction approved by the Eleventh Circuit in *United States* v. *Myers*, 972 F.2d 1566 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993). It appears that this Court has never addressed the scope of "bodily injury" under Section

(continued...)

3555 (LXII). The jury was instructed to determine whether there was a violation of the Eighth Amendment, and if so, whether bodily injury resulted from it. There is nothing confusing about this analysis.

C. The District Court's Decision To Repeat The Instruction Regarding Partial Verdicts Was Not Error

Schultz and LaVallee complain that after the jury had deliberated for ten days, the district court repeated to the jury its instruction regarding partial verdicts and told them that if they had reached any partial verdicts, they should place the verdicts into envelopes that would be sealed until they finished deliberating. LaVallee argues that the district court's instruction impermissibly invaded the jury's deliberations. Schultz argues that the district court's instruction coerced the jury into convicting him, thus depriving him of his right to an impartial jury. Neither argument provides any basis for reversal here.

1. The District Court's Instructions And The Jury's Verdicts

The district court instructed the jury that it could return partial verdicts at any time and that it had to consider each defendant and each count separately. Instruction No. 29 stated:

> A separate crime is alleged in each count of the indictment. Under these instructions, you may find one or more of the defendants guilty or not guilty as charged.
>
> At any time during your deliberations, you may return into court with your verdict of guilty or not guilty as to any defendant

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[8](...continued)
242.

concerning whom you have unanimously agreed.

> During this trial, evidence has been received against one defendant which is not admissible against other defendants. You may consider this evidence when deliberating your verdict only as to the defendant which it was admitted against. You must consider the charges against each defendant separately. Your verdict must be based solely upon the evidence received during the trial concerning each defendant. Your verdict concerning one defendant should not control your verdict regarding any other defendant.

Trl. Tr. at 6894-6895 (LXXVIII).

At the charge conference, no defendant objected to this instruction, and Gall's and Verbickas's counsel urged that the instruction be given. Trl. Tr. at 3583 (LXII). Gall's counsel noted the "unequal evidence" in the case and stated that if the jury wanted to return a verdict as to his client, it should have that opportunity. Trl. Tr. at 3583 (LXII). The district court agreed with this reasoning, noting "[t]here is clear disparity in the evidence, as the Court has heard it thus far[.] * * * Some of the defendants, I think, are involved in many allegations of misconduct. Some of the defendants are involved in very limited incidents of misconduct." Trl. Tr. at 3584 (LXII).

The jury began its deliberation on June 10, 2003. On June 23, 2003, after approximately ten days of deliberation, the court convened counsel outside the presence of the jury and stated:

> As you know, we have a jury instruction that allows the jurors to return verdicts as they reach them. In the likely or unlikely event the jurors have reached verdicts as to any of the defendants, it would seem to me it would make some sense for them to be put into a sealed envelope immediately; and my greatest concern is that as each passing day goes along, we could very well have a juror not show up.

> And then we could only continue with the deliberations if everybody stipulated to a jury deliberating less than twelve.

Trl. Tr. at 7262 (LXXXVI). The court suggested repeating the part of Instruction No. 29 dealing with partial verdicts and directing that any such verdicts that had been reached be put into sealed envelopes. Each of the defendants objected to the district court's suggestion, but when questioned about the possibility of stipulating to a jury of less than twelve, all indicated they would not so stipulate. Trl. Tr. at 7265-7267 (LXXXVI).

The district court then explained its concerns:

> The Court's observation here is that we have been in trial [*sic*] for almost two weeks. While to date we have not lost any of the twelve jurors, it was reported to me that last week, certain jurors asked to leave early because of work obligations, full days weren't put in on certain days. It is a concern to the Court and the Court's overriding objective here is to ensure that there's justice for all.
>
> * * * * *
>
> So all I'm doing is giving the jurors an opportunity, while we still have twelve jurors, to put in a sealed envelope any verdicts they may have reached.

Trl. Tr. at 7268-7269 (LXXXVI).

Counsel for Schultz asked if the jurors would be permitted to change their verdicts once placed in the sealed envelope, and the district court stated: "I think that question would have to be raised by them. * * * [I]f the jurors come in and say they changed their mind on something they sealed yesterday, if all twelve of them are here, they should have the right to change their mind." Trl. Tr. at 7269-

7270 (LXXXVI).[9]

The jury was called in at 3:58 p.m., and they were instructed as follows:

> I want to read an instruction to you, and I'm going to explain what I'm about to say and also I want to tell you what I'm not saying.
>
> Instruction no. 29 reads in part: A separate crime is alleged in each count of the indictment. Under these instructions, you may find that one or more of the defendants guilty or not guilty as charged. At any time during your deliberations, you may return into court with your verdict of guilty or not guilty as to any defendant concerning whom you have unanimously agreed.
>
> What I'm ordering you to do is to the extent, consistent with instruction no. 29 and all of the other instructions that you have received and presumably read, if you have reached a verdict of either guilty or not guilty as to any defendant, I'm ordering you to put that verdict, if you've reached it, into an envelope, and we will seal that envelope and on the front of the envelope, you should write the words this is the verdict for defendant blank and then each of you would then sign that envelope and it would be returned to [the courtroom deputy] for safekeeping. It will not be returned to me because I don't want to see it.
>
> And so that's what I'm directing you to do. And again, I want to reiterate, I want you to do that only if, consistent with instruction no. 29, you have reached a verdict of guilty or not guilty as to any defendant concerning whom you have unanimously agreed.
>
> If you've not reached unanimous agreement, then you don't have to do anything. If you have reached unanimous agreement, then I'm instructing you to do what I've just said.

Trl. Tr. at 7271-7272 (LXXXVI).

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[9] It is unclear that the procedure adopted by the district court would in fact have succeeded in preserving a verdict if a juror subsequently become unavailable. The jury's verdict must be returned in open court. Fed. R. Crim. P. 31(a). And if any party requests it, the jury must be individually polled to assure its verdict is unanimous. Fed. R. Crim. P. 31(d); see also *United States* v. *McElhiney*, 275 F.3d 928, 935 (10th Cir. 2001) (Sixth Amendment requires unanimous verdict).

The jury then returned to deliberations at 4:00 p.m. Trl. Tr. at 7272 (LXXXVI). At 4:52 p.m., the court reconvened outside the presence of the jury and informed counsel that "shortly after the court's instruction," the jury returned five verdicts in sealed envelopes. The court had not seen the verdicts. Trl. Tr. at 7273 (LXXXVI). The jury was sent home for the evening.

The next day, June 24, 2003, the court reconvened counsel at 4:06 p.m., and informed them on the record that at 2:30 p.m. that afternoon, the jury had sent out a note indicating it had reached final verdicts on all counts. Trl. Tr. at 7278 (LXXXVII). The jury was brought in, all the verdicts were read, and the jury was polled individually as to the verdict for each defendant. Trl. Tr. at 7279-7296 (LXXXVI).

Because the verdict forms were dated, the record is clear that the verdicts that the jury put into the sealed envelopes on June 23 were verdicts acquitting Shatto, Pruyne, Bond, and Gall of all counts, and a verdict convicting Verbickas of one count of violating Section 242 and acquitting him on all other counts. See R. 1341 (VI). The verdicts returned the following day convicted LaVallee and Schultz of the conspiracy count and one Section 242 count and acquitted them of the other counts. R. 1337 (VI), R. 1338 (VI).

2. The District Court Did Not Abuse Its Discretion By Improperly Invading The Jury's Deliberative Process

The decision whether to give supplemental instructions to the jury after it has retired to begin its deliberations, including whether to re-read instructions

already given, is one within the discretion of the district court. *United States* v. *Arias-Santos*, 39 F.3d 1070, 1075-1076 (10th Cir. 1994), cert. denied, 513 U.S. 1175 (1995). The jury may at any time return partial verdicts in a case with multiple defendants, Fed. R. Crim. P. 31(b)(1), so the district court's instruction was a correct statement of the law. LaVallee asserts (LaVallee Br. at 59) that the district court abused its discretion by "invad[ing] the province of the jurors to conduct their deliberations as they saw fit."

This Court appears not to have addressed the precise issue raised here: What are the limits on the district court's discretion regarding partial verdict instructions. LaVallee relies on a Second Circuit case, *United States* v. *DiLapi*, 651 F.2d 140 (2d Cir. 1981), cert. denied, 455 U.S. 938 (1982). In that case, the district court had not given any instruction regarding partial verdicts, although the defendant had requested it to do so.

The *DiLapi* court was troubled by the judge *not* instructing the jury it could return partial verdicts when the jury indicated it had reached verdicts as to some defendants but not others. The Second Circuit emphasized that in multi-defendant cases, "the fundamental precept that guilt is individual must be observed in the deliberative process." 651 F.2d at 146. The court noted that prohibiting or requiring partial verdicts presents two distinct risks:

> If jurors are prohibited from returning partial verdicts as to some defendants, they might mistakenly infer that the individual consideration they had already given to some of the defendants is expected to be reassessed in light of their subsequent deliberations. On the other hand, if they are required to return a partial verdict, there

> is risk that some jurors might mistakenly permit a tentative vote to become an irrevocable final vote and forgo the opportunity to gain new insights concerning the evidence in one defendant's case from consideration of the same evidence as it bears upon other defendants.

Id. at 146-147. The court noted, however, that the failure to instruct regarding partial verdicts in that case did not deny the defendants any rights because the jury had not tried to return partial verdicts and, importantly for this case, "the jury's ultimate decision to convict the two appellants and acquit four co-defendants adequately indicates that individual consideration was given to the case against each defendant." *Id.* at 147. Similarly in this case, the jury's acquittal of four defendants of all counts and the remaining three defendants of most counts shows that it carefully considered each defendant and each count separately.

The district court here instructed the jury to return its partial verdicts only if it had in fact reached a unanimous verdict. Again, this Court must presume the jury carefully followed this instruction. See *Almaraz*, 306 F.3d at 1037. The timing of the jury's returning the verdicts is fully consistent with this presumption. The jury placed the five verdicts in the envelopes shortly after the court's instruction — indicating it had reached agreement on those verdicts previously — and then continued deliberating until it reached verdicts on the final two defendants. There is no basis on this record to conclude that the jury was in any way pressured to return verdicts it had in fact not reached. In short, as in *DiLapi*, the district court's handling of this matter, although perhaps not ideal, did not deny the defendants any protected right.

3. The District Court's Supplemental Instruction Did Not Coerce The Jury To Convict The Defendants

Schultz argues that the district court's supplemental jury instruction improperly coerced the jury into convicting him. Schultz characterizes the supplemental instruction as an improper "*Allen* instruction," and goes on to state that the instruction did not contain the necessary cautionary language. Schultz is wrong. As this Court has explained, the so-called *Allen* instruction — named after *Allen* v. *United States*, 164 U.S. 492 (1896), in which such an instruction was approved — is intended "to encourage unanimity (without infringement upon the conscientious views of each individual juror) by urging each juror to review and reconsider the evidence in light of the views expressed by other jurors, in a manner evincing a conscientious search for truth rather than a dogged determination to have one's way in the outcome of the deliberative process." *United States* v. *Arney*, 248 F.3d 984, 987 (10th Cir. 2001). As it was in *Arney*, such an instruction can be given after the jury has indicated that it is deadlocked and in such cases the issue on appeal is whether the instruction was "impermissibly coercive." *Ibid.*

In this case, however, the only "*Allen* instruction" was given prior to the jury beginning its deliberations as a part of Instruction No. 50, see Trl. Tr. at 6909-6910 (LXVIII), which provided the usual instructions regarding the jury's deliberations. No defendant objected to that instruction. Trl. Tr. at 3571 (LXII). And the instruction was not repeated to the jury after it began deliberating; there

was never any indication that jury could not reach a verdict. Therefore, Schultz's argument (Schultz Br. at 21-22) that the supplemental instruction was *per se* improper is wholly without merit.

To the extent Schultz is making a broader argument, that is, that the order to put any verdicts already reached into sealed envelopes somehow coerced the jury into finding him guilty, that argument is also without merit. Supplemental instructions must be read as a whole and in context. See *Arias-Santos*, 39 F.3d at 1075-1076. The instruction here directed the jury to place the verdict in the envelope only if it had, consistent with all the instructions, reached a unanimous decision, but that if it had not reached a unanimous decision, it was to do nothing. Trl. Tr. at 7272 (LXXXVI). Again, because this Court must presume the jury closely attended to the jury instructions and followed them, see *Almaraz*, 306 F.3d at 1037, it must presume that the jury returned the five verdicts because it had already reached agreement as to those defendants. The jury's placing the verdicts in the envelopes shortly after the instruction was given is fully consistent with this presumption.

Schultz complains (Schultz Br. at 23-24) that the timing of the jury's verdict demonstrates that the instruction coerced the jury into finding him guilty. The result of the instruction was that the jury immediately placed in the envelopes verdicts acquitting four defendants of all counts and one verdict acquitting Verbickas of all counts except one. Schultz does not explain how the supplemental instruction coerced the jury into convicting him the following day.

II

SUFFICIENT EVIDENCE SUPPORTS SCHULTZ'S CONVICTION

A. Standard Of Review

This Court reviews the sufficiency of the evidence *de novo*. *United States* v. *Hien Van Tieu*, 279 F.3d 917, 921 (10th Cir. 2002). "Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the government, a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Ibid.* "In reviewing the evidence, [this Court] do[es] not weigh conflicting evidence or consider witness credibility, as that duty is delegated exclusively to the jury. [This Court] resolve[s] any conflicts in the evidence in favor of the government." *Ibid.*

B. Sufficient Evidence Supports Schultz's Convictions

Schultz asks this Court to reweigh the evidence and declare that because of inconsistencies in their testimony, two government witnesses — Kenneth Mitchell and Charlotte Gutierrez — were not credible. This invitation must be rejected. See *United States* v. *Owens*, 70 F.3d 1118, 1126 (10th Cir. 1995) ("To the extent evidence conflicts, we accept the jury's resolution of conflicting evidence and its assessment of the credibility of witnesses."). Schultz does not dispute that Mitchell's and Gutierrez's testimony satisfies all the elements of both offenses of which he was convicted. Rather, Schultz points out that Mitchell's and Gutierrez's testimony was in conflict on some details. (It should be noted that the witnesses were testifying to events that took place more than seven years

previously.) Schultz asserts that these details are so strikingly in conflict, that *neither* witness could have seen the incident he or she describes. Thus, Schultz concludes, both must be found to be not credible.

These inconsistencies in recollection go merely to credibility, not to sufficiency. See *United States* v. *Washita Constr. Co.*, 789 F.2d 809, 816-817 (10th Cir. 1986) (rejecting sufficiency argument based on inconsistencies in testimony of government witnesses). Evaluating credibility and resolving the conflicts was the jury's "exclusive function." *Ibid*. There are no grounds upon which this Court can revisit the jury's decision.

III

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN ANY OF ITS EVIDENTIARY RULINGS

A. There Was No Error Regarding The Introduction Of Testimony Under Federal Rule Of Evidence 404

Verbickas argues (Verbickas Br. at 20-26) that his conviction should be reversed because Raymond Holt, a former warden of USP-Florence, testified that he had knowledge of whether the defendants had a reputation for unnecessary violence and such testimony violated Federal Rules of Evidence 404(b). First, the witness never testified that Verbickas had a reputation for unnecessary violence. But, even if he had, that testimony would have been admissible under Federal Rule of Evidence 404(a). Rule 404(b) is simply not implicated. In any event, the district court excluded the testimony on other grounds.

1. Standard Of Review

A district court has broad discretion regarding the admissibility of evidence, and this Court will review its decision only for an abuse of that discretion. *United States* v. *Bautista*, 145 F.3d 1140, 1151 (10th Cir.), cert. denied, 525 U.S. 911 (1998). Where there was no objection, the review is only for plain error. *United States* v. *Stiger*, 371 F.3d 732, 744 (10th Cir. 2004). The district court's denial of a motion for a mistrial is also reviewed for an abuse of discretion. See *United States* v. *Gabaldon*, 91 F.3d 91, 94 (10th Cir. 1996). "[M]otions for mistrial * * * call for an examination of the prejudicial impact of the error or errors when viewed in the context of an entire case." *Ibid.*

2. The District Court Did Not Abuse Its Discretion In Denying Verbickas's Request For A Mistrial

Federal Rule of Evidence 404(a)(1) is an exception to the prohibition in Rule 404(a) that evidence of character cannot be admitted to prove conformity therewith. In response to a defendant introducing evidence that the victim had a particular character trait, Rule 404(a)(1) permits introduction of evidence that the defendant had the same trait.[10] Under Rule 405(a), where a character trait is

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[10] Rule 404(a) provides in relevant part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> > (1) Character of Accused — Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut

(continued...)

admissible, the appropriate means for proving it is by evidence of reputation or opinion.[11] Here, the government sought admission of evidence of the defendants' reputation for using unnecessary violence because the defendants, through cross examination of the government's witnesses, had introduced evidence that the inmates at USP-Florence, and particularly the victims in this case, were violent. See Trl. Tr. at 2994-2995 (LIX).

Raymond Holt had served as warden of USP-Florence from March 1998 to June 2001. Trl. Tr. at 2967 (LIX). At trial, Holt testified regarding BOP's use-of-force policies as well as the BOP procedures for reviewing the appropriateness of uses of force. See Trl. Tr. at 2968-2985 (LIX). Holt also testified that prior to coming to USP-Florence as its warden, he was the warden at the United States Penitentiary at Beaumont, Texas. Trl. Tr. at 2987 (LIX). While still at USP-Beaumont, Holt made an effort to get information regarding USP-Florence. Trl. Tr. at 2988 (LIX).

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[10](...continued)

> the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

Rule 404(a) was amended in 2000 to add this provision regarding offering the character trait of the accused in response to the accused putting on evidence of the same character of the victim. See Notes, 2000 Amendments.

[11] Rule 405(a) provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."

Counsel for the government asked Holt: "Did you obtain information about the reputation of certain individuals — I'm not going to ask you the names yet — regarding certain character traits?" Trl. Tr. at 2989 (LIX). Verbickas's counsel objected based on Federal Rule of Evidence 404(b), and the district court allowed a yes-or-no answer; Holt answered "Yes." Trl. Tr. at 2989 (LIX). Counsel for the government then asked: "Did you obtain information — excuse me — did you learn the reputation of certain individuals at Florence for a character trait relating to unnecessarily violent behavior?" Trl. Tr. at 2989 (LIX). After Holt answered "Yes," counsel for Verbickas again objected based on hearsay and Federal Rule of Evidence 404(b). Trl. Tr. at 2989 (LIX). The district court ruled: "The objection is premature. The witness has answered yes. And if he's asked a question *to reveal what he knows*, then the Court will rule on that objection, if made at that time." Trl. Tr. at 2990 (LIX) (emphasis added).

Counsel for the government then asked a series of questions about the various defendants, including the following:

> Q: Did you obtain information — excuse me. Did you learn the reputation of individuals or [*sic*] the character of being unnecessarily violent relating to certain correctional officers at Florence?
>
> A: Yes.
>
> Q: Did you learn that reputation for a correctional officer named Rod Schultz?
>
> A: Yes.
>
> * * * [Schultz's counsel objected and the objection was overruled]

Q: Did you learn that reputation for a correctional officer named Mike La Vallee?

A: Yes.

Q: Did you learn that reputation for a correctional officer named Ken Shatto?

A: Yes.

Q: Did you learn that information related to a correctional officer named David Pruyne?

A: Yes.

Q: Did you learn that information regarding a correctional officer named Robert Verbickas?

A: Yes.

* * * * *

Q: What was that reputation for those people that you learned prior to coming to Florence?

Trl. Tr. at 2990-2992 (LIX). When the defendants objected to this last question, the jury was excused and the court heard what Holt would testify in answer to the question, namely that the defendants had reputations for using unnecessary violence. Trl. Tr. at 2992-2993 (LIX).

After hearing the defendants' objections, the court ruled that Holt's testimony would not be admitted, basing its decision on Federal Rule of Evidence Rule 403 and the failure of the government to provide notice that Holt would offer reputation evidence. Trl. Tr. at 3012-3013 (LIX); see also Trl. Tr. at 3015 (LIX) (court stating "[Rule] 403 is the main reason that I'm disallowing this evidence.").

The defendants moved for a mistrial, which the district court denied because Holt had testified that he was aware of the defendants' reputations, but did not testify as to the reputations themselves. Trl. Tr. at 3017 (LIX).[12]

Verbickas's argument that he is entitled to a mistrial is utterly without merit. Holt never testified, at least not before the jury, as to what the defendants' reputations for violence were. Even if he had so testified, it would have been admissible under Rule 404(a)(1). See Trl. Tr. at 2997 (LIX) (district court noting that government's position regarding Rule 404(a)(1) was meritorious).

Verbickas argues that Holt's testimony was prejudicial.[13] Even if the testimony was prejudicial, the admission of prejudicial testimony is reversable error only where the testimony renders the trial fundamentally unfair. *United States* v. *Kravchuk*, 335 F.3d 1147, 1155 (10th Cir.), cert. denied, 540 U.S. 941 (2003). The district court was not mistaken that this question and answer did not render the trial fundamentally unfair. Although Verbickas argues (Verbickas Br. at 24) that Holt's testimony was "highly prejudicial," two defendants about whom

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[12] Verbickas now states (Verbickas Br. at 22-23) that the district court was incorrect in its understanding of what questions had been asked. But the district court, in disagreeing with defendants' assertions as to what questions had been asked, read back verbatim the questions that were asked and the answers given. Trl. Tr. at 3017-3018 (LIX). Thus, it is clear that the district court was fully aware of what the questions were; its disagreement with the defendants was as to the meaning of the questions and answers.

[13] After the district court judge denied Verbickas's objection as premature, he instructed Verbickas to object when the government asked what Holt knew about the defendants' reputations for unnecessary violence; Verbickas did not object to the question he now challenges but waited until the follow-up question was asked. If he believed that Holt was being asked the substance of Verbickas's reputation, he should have objected to that question.

Holt testified — Shatto and Pruyne — were acquitted of all charges. There is simply no realistic probability that the jury convicted Verbickas because of Holt's answer rather than as a result of the substantial testimony demonstrating Verbickas's guilt. Cf. *Kravchuk*, 335 F.3d at 1155 (affirming decision to deny mistrial where single statement did not "change[] the basic nature of [defendant]'s trial).[14]

B. The District Court Did Not Abuse Its Discretion In Denying LaVallee's Request For A Mistrial Based On The Government's Questions Referring To His Counsel

1. Standard Of Review

In addressing a defendant's request for a mistrial, the district court must determine whether there was an error and, if so, whether it "impaired [the defendant's] right to a fair trial." *United States* v. *Pulido-Jacobo*, 377 F.3d 1124, 1133 (10th Cir. 2004). This Court reviews the district court's decision to deny a request for a mistrial for an abuse of discretion. *Ibid.* The prejudicial impact of

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[14] Verbickas also argues (Verbickas Br. at 24-25) that Holt's testimony regarding the defendants' reputations was based on hearsay and therefore its admission violated his rights under the Confrontation Clause of the Sixth Amendment. Although Verbickas did object in the district court based on hearsay grounds, he did not raise any objections based on the Confrontation Clause. This Court's review is for plain error. *United States* v. *LaHue*, 261 F.3d 993, 1009 (10th Cir. 2001), cert. denied, 534 U.S. 1083 (2002). Again, Verbickas has not acknowledged his burden to show plain error, much less attempted to meet it. Moreover, there was no error here. Under Federal Rule of Evidence 405(a), testimony regarding a person's reputation is an appropriate method of proving a trait of character. *United States* v. *Talamante*, 981 F.2d 1153, 1156 (10th Cir. 1992). The federal courts have long recognized that all testimony regarding reputation is essentially hearsay testimony. See *Michelson* v. *United States*, 335 U.S. 469, 477 (1948); *Hayes* v. *United States*, 227 F.2d 540, 545 (10th Cir. 1955).

any error or errors must be viewed in the context of the whole trial. *United States* v. *Meridyth*, 364 F.3d 1181, 1183 (10th Cir. 2004). Where the claimed basis for mistrial is alleged prosecutorial misconduct, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Kravchuk*, 335 F.3d at 1153 (quoting *United States* v. *Young*, 470 U.S. 1, 11 (1985)). Whether a prosecutor's comments are prosecutorial misconduct is a mixed question of law and fact that this Court reviews *de novo*. *United States* v. *Caballero*, 277 F.3d 1235, 1248 (10th Cir. 2002).

2. The Proceedings In The District Court

LaVallee's primary argument on appeal is that the government improperly commented on his exercising his right to counsel by asking Charlotte Gutierrez if she had ever met with LaVallee's counsel. He also complains about the government's questioning of him on cross-examination.

a. Gutierrez's Testimony Regarding A Meeting With LaVallee's Counsel

When counsel for several of the defendants cross-examined Gutierrez, they asked her if she had ever met with them before; counsel for LaVallee did not. On redirect examination, counsel for the government asked Gutierrez about these questions and then asked whether Gutierrez had ever met with LaVallee's counsel in the presence of the defendants. She indicated that she had and that the meeting

took place after she had met with the government investigators, but before she had begun cooperating with the government. The district court then granted LaVallee's counsel's request for a sidebar conference. Trl. Tr. at 1779-1781 (LIV).

At sidebar, the court requested government counsel to explain where the testimony was going. Counsel proffered that Gutierrez would testify that after this meeting, outside the presence of LaVallee's counsel, defendants told Gutierrez that they could not tell their lawyers the truth, because if they did, the lawyers could not put them on the stand. Trl. Tr. at 1782 (LIV). LaVallee's counsel moved for a mistrial based on the proffer, but the court denied it because the jury had not heard anything in the proffer. Trl. Tr. at 1783 (LIV). The court noted that by defense counsel asking whether Gutierrez had met with them, they had opened the door for the government to question with whom she had met. Trl. Tr. at 1784 (LIV).

Outside the presence of the jury, Gutierrez testified that she met with the government investigators in July 1999 and the meeting at which LaVallee's counsel was present took place that month. Trl. Tr. 1799-1800 (LIV). In approximately September 1999, she had a conversation with Schultz, which had been prompted by Gutierrez's decision to hire an attorney. Trl. Tr. at 1800-1801 (LIV). Schultz told her not to tell her attorney the truth, but to stick to the reports. He told her "don't give yourself up" to your attorney. Trl. Tr. at 1802 (LIV).

The court questioned counsel for the government about the discrepancy

between counsel's proffer and Gutierrez's testimony; counsel explained that it was his recollection from a conversation with Gutierrez in 2000 that Schultz was not the only defendant involved in the conversation. Trl. Tr. at 1803-1805 (LIV). The defendants pointed out to the court that the FD-302 memorializing the FBI agents' February 9, 2000, interview with Gutierrez noted that Schultz had told her not to tell the lawyers the truth. The court stated that counsel for the government had misrepresented what had been in the 302, and counsel stated he had not recalled the statement being in the 302. Trl. Tr. at 1818, 1824-1825 (LIV). The court ordered that, as a sanction against the government, it would not be permited to put on testimony regarding Schultz's statement to Gutierrez. Trl. Tr. at 1825 (LIV).

The court denied the defendants' motions for mistrial because it concluded that the way the testimony had come up before the jury was not objectionable. Trl. Tr. at 1827-1829 (LIV). In addition to excluding the proffered testimony, the court instructed the jury to disregard any evidence it heard regarding a meeting with LaVallee's counsel. Trl. Tr. at 1856 (LIV).

b. Questions On Cross-Examination

LaVallee testified in his defense. He complains about three questions posed to him by counsel for the government.

First, he complains about counsel's question regarding LaVallee's knowledge of how many murders had been committed at USP-Florence. Counsel cross-examined LaVallee about his statement that in January 1995 (the beginning date of the charged conspiracy) USP-Florence had been out of control and there

were murders. Eventually LaVallee agreed that there had in fact only been one murder in 1994 and two murders in 1997. Trl. Tr. at 6453 (LXXVI) ("That does sound right."). But LaVallee initially testified he was not sure if there had been two murders in 1997. Trl. Tr. at 6453 (LXXVI). When asked why he did not know about what happened in 1997, LaVallee stated: "I personally have no knowledge of those murders." Trl. Tr. 6453 (LXXVI). Government counsel asked: "Was that because you didn't prepare for that with [your counsel]?" Trl. Tr. 6453 (LXXVI). LaVallee's counsel objected that the question was improper, but was overruled. LaVallee then stated that he had not prepared with his lawyer for any of the questions government counsel was asking. Trl. Tr. 6453 (LXXVI). LaVallee's counsel did not move for a mistrial.

LaVallee next complains that counsel for the government impugned defense counsel by referring to them "peddling" defenses. Trl. Tr. at 6468 (LXXVI). Counsel for Schultz objected to the characterization, and counsel for Verbickas objected that it was argumentative. The district court sustained the objection and directed: "Let's ask questions." Trl. Tr. at 6468 (LXXVI). No defendant moved for a mistrial and that question was not answered.

LaVallee next complains (LaVallee Br. at 67) that government counsel mentioned Gutierrez's lawyer. Counsel for the government questioned LaVallee regarding the use-of-force model about which he had testified. (The model described escalating uses of force in response to inmate actions.) LaVallee agreed that nothing in the use-of-force model would permit an officer to plan the beating

of an inmate, falsify memos or injuries, or beat an inmate in retaliation for prior misconduct. Trl. Tr. at 6472-6479 (LXXVI). Counsel for the government then engaged LaVallee in lengthy questioning about witnesses who had testified to specific instances in which LaVallee or others had planned retaliatory beatings of inmates. See Trl. Tr. at 6479-6486 (LXXVI). LaVallee stated that the testimony of Officer Garrett Fozzard could not be believed because he had been given immunity. Trl. Tr. at 6486 (LXXVI).

Counsel for the government then questioned LaVallee regarding Fozzard's testimony being similar to the testimony of Britt and Guiterrez, and asked: "So in order for that chain to work, you're saying that Garrett Fozzard got together both with Charlotte and Dennis Britt to make sure that their stories all flowed together?" Trl. Tr. at 6490 (LXXVI). LaVallee responded: "No, I'm saying they all talked to you, sir." Trl. Tr. at 6490 (LXXVI). Counsel for the government then asked whether LaVallee was accusing him of coordinating the witnesses' testimony, and when LaVallee said he did not know who was coordinating the testimony, counsel asked if he thought it was the other government counsel. LaVallee stated that there had been testimony indicating that the U.S. Attorney for the District of Colorado may have coordinated Britt's, Gutierrez's, and Fozzard's testimony. Trl. Tr. at 6491 (LXXVI). (It is unclear to what LaVallee was referring.) LaVallee admitted he did not know if the U.S. Attorney had coordinated Britt's, Gutierrez's, and Fozzard's testimony, but stated: "The only common denominator is the people at your table talking to the witnesses. That's

all I'm saying." Trl. Tr. at 6492 (LXXVI).

Counsel for the government then asked: "Is it your testimony that [Gutierrez's lawyer] participated in coordinating the testimony of Charlotte Gutierrez, Garret Fozzard, and Dennis Britt, and let's throw in Rachel Lyons while we're there." Trl. Tr. at 6493 (LXXVI). LaVallee's counsel moved for a mistrial, the court denied the motion and stated he could make a record later. Trl. Tr. at 6493 (LXXVI). LaVallee testified he had no way of knowing if Gutierrez's lawyer had coordinated anyone's testimony. Trl. Tr. at 6494 (LXXVI). When counsel for the government asked if Garrett Fozzard's lawyer coordinated witness testimony, LaVallee's lawyer objected that the question was an improper comment on the Sixth Amendment right to counsel and renewed his motion for a mistrial, which was denied. Trl. Tr. at 6494 (LXXVI).

3. The District Court Did Not Abuse Its Discretion In Denying LaVallee's Motions For Mistrial

LaVallee did not request a mistrial for two of the four questions about which he now complains. Where there has been no motion for a mistrial based on alleged prosecutorial misconduct, the district court has not exercised its discretion, and so this court cannot review that exercise for abuse. *United States* v. *Galdon*, 91 F.3d 91, 94 (10th Cir. 1996). This Court instead asks whether the prosecutor's comment was in fact improper and whether it was harmless. *Ibid.* "A prosecutor's improper statement to the jury is harmless unless there is reason to believe that it influenced the jury's verdict." *Ibid.* "To warrant reversal, the misconduct must

have been flagrant enough to influence the jury to convict on grounds other than the evidence presented." *Ibid*.

This Court need not decide the extent to which the question referring to the defense "peddling" a theory may have been improper.[15] LaVallee objected to it and the district court sustained the objection and directed counsel to ask questions. There is no reasonable chance that that question caused the jury to convict LaVallee on any basis other than the evidence presented. See *United States* v. *Harrison*, 296 F.3d 994, 1007-1008 (10th Cir. 2002) (prosecutor's sarcastic question to which an objection was sustained caused "no substantial prejudice" to the defendant), cert. denied, 537 U.S. 1134 (2003); see also *Caballero*, 277 F.3d at 1244 (where district court sustained objection, question was not answered, and district court struck question, there was no prejudice to defendants).

Similarly, there is no likelihood of prejudicial impact from the somewhat sarcastic question whether the reason LaVallee was unaware of how many murders had been committed in 1997 was that he had not discussed it with his counsel. The district court ruled the question was proper on cross examination. Government counsel was questioning whether LaVallee had exaggerated his testimony regarding the number of murders at USP-Florence. LaVallee's answer that he "personally ha[d] no knowledge" of the murders in 1997 was evasive and it

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[15] The flip remark about "peddling" defenses is primarily a comment on the defenses, not on the integrity of counsel, as is made clear by the context before and after it was made. See Trl. Tr. 6454-6468 (LXXVI).

prompted counsel's somewhat sarcastic follow-up question. In fact, LaVallee eventually agreed that government counsel's statement that there had been only two murders in 1997 sounded correct to him. In the context of this three-month trial, this brief question and answer cannot have caused the jury to convict on grounds other than the evidence presented. See *Pulido-Jacobo*, 377 F.3d at 1134 (in concluding question was harmless, court noted question and answer were three lines in a 300-page trial transcript).

LaVallee did object and ask for a mistrial in response to Gutierrez's testimony that she met with some of the defendants and with LaVallee's counsel. The district court did not abuse its discretion in denying the motion. First, the question regarding Gutierrez meeting with LaVallee's lawyer came in response to the defendants' counsel asking Gutierrez whether they had met with her. As the district court noted, these questions invited the government to inquire about who had met with her.

Second, the district court directed the jury to disregard all of Gutierrez's testimony regarding meeting with LaVallee's counsel. This Court presumes "that jurors will follow clear instructions to disregard evidence unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant." *Caballero*, 277 F.3d at 1243 (internal quotation marks omitted); see also *United States* v. *Castillo*, 140 F.3d 874, 884 (10th Cir. 1998) ("A central assumption of our jurisprudence is that juries follow the

instructions they receive.").

Third, the jury's acquitting LaVallee on three of the five counts against him is a strong indication that it was not improperly influenced. See *United States* v. *Evans*, 542 F.2d 805, 815 (10th Cir. 1976) ("diversity of the verdicts" supports conclusion that jury "deliberated impartially" despite instances of defendant's disruptive conduct), cert. denied, 429 U.S. 1101 (1977); see also *United States* v. *Martinez*, 877 F.2d 1480, 1482 (10th Cir.) (acquitting defendant of one of three counts against her indicates jury complied with instruction to disregard absence of co-defendant) (citing *Evans*), cert. denied, 493 U.S. 981 (1989).

LaVallee argues, however, that the mere question regarding a meeting at which his attorney was present was an improper comment on his exercising his Sixth Amendment right to counsel. He argues that, akin to a prosecutor's improper comment on a defendant's exercise of his right to remain silent, any comment on a defendant having counsel is constitutional error. But LaVallee ignores a critical distinction between an improper comment on a defendant's invoking his right to remain silent or his exercise of his right to counsel in response to his arrest — which is not the situation here — and the jury learning that, during the course of a lengthy investigation of which he was the subject, the defendant hired an attorney — which is the situation here. In *United States* v. *De La Luz Gallegos*, 738 F.2d 378 (10th Cir.), cert. denied, 469 U.S. 1076 (1984), this Court addressed a challenge to the prosecutor questioning the defendant about invoking his right to remain silent and his right to counsel *when he was being*

questioned by investigators. This Court held that "in a situation where a defendant makes no statement to law enforcement officials after the giving of *Miranda* rights, evidence that a defendant has invoked his right to remain silent or requested an attorney is not admissible evidence at trial" because "a defendant should not be penalized for exercising his constitutional rights and a jury should not be allowed to draw an inference of guilt from such exercise." *Id.* at 382. However, in *United States* v. *Donnat*, 311 F.3d 99, 104 (1st Cir. 2002), the court found no impropriety in a prosecutor's comment that "was not designed to draw a negative inference from [defendant's] exercise of his Sixth Amendment right to rely on counsel as a medium [of communication] * * * and did not unfairly burden [defendant's] Sixth Amendment right to counsel." Here, the jury heard no testimony regarding LaVallee declining to answer questions at an interview or invoking his right to counsel. It only heard testimony, which the district court directed it to disregard, that during the government's lengthy investigation, LaVallee had hired an attorney.

The cases upon which LaVallee relies do not support his argument. See *United States* v. *Liddy*, 509 F.2d 428, 443 (D.C. Cir. 1974) (noting that some courts had found reversible error where prosecutor commented on "defendant's silence and request for counsel *upon arrest*") (emphasis added); but see *id*. at 445 (district court's instructing jury it could draw inferences regarding defendant's state of mind from his having decided to hire attorney at 3:40 a.m. was harmless error beyond a reasonable doubt), cert. denied, 420 U.S. 911 (1975); *United States*

v. *Daoud*, 741 F.2d 478, 481-482 (1st Cir. 1984) (where prosecutor elicited testimony that defendant had asked for lawyer upon arrest, district court's error in declining to give curative instruction was harmless beyond a reasonable doubt); *United States* v. *McDonald*, 620 F.2d 559, 564-565 (5th Cir. 1980) (reversible error where prosecutor's argument implied that defendant had used defense counsel to help him destroy incriminating evidence); *United States ex rel. Macon* v. *Yeager*, 476 F.2d 613, 616-617 (3rd Cir. 1973) (error not harmless where prosecutor stated in closing that defendant's hiring attorney immediately after commission of crime was inconsistent with claim of innocence). LaVallee also argues that the prosecutor's question regarding *Gutierrez's* counsel was grounds for a mistrial. LaVallee cites no case, and the government is aware of none, that would suggest a defendant is somehow penalized by a question that notes another person had hired an attorney.

The district court thus did not abuse its discretion in denying the motions for mistrial.

C. Verbickas Has Not Shown That Any Of The Numerous Discovery Or Evidentiary Rulings About Which He Complains Was Error

Verbickas argues (Verbickas Br. at 44-67) that numerous rulings by the district court regarding the scope of permitted discovery and the admissibility of evidence combined to create "cumulative error." Verbickas's argument is entirely without merit. Verbickas does not show — indeed in most cases does not attempt to show — that the rulings about which he complains were error. In some

instances, he does not cite to any portion of the record where the alleged error occurred. In some instances, he misrepresents what occurred.

1. Standard Of Review

The cumulative error analysis upon which Verbickas relies is actually the third step in a three-step process. "A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *United States* v. *Sarracino*, 340 F.3d 1148, 1169 (10th Cir. 2003), cert. denied, 540 U.S. 1131 (2004). Obviously, then, the first step is that Verbickas must show that there was in fact an error. See *United States* v. *Toles*, 297 F.3d 959, 972 (10th Cir. 2002) ("Only actual errors are considered in determining whether the defendant's right to a fair trial was violated.").

2. Verbickas Has Not Shown That Any Of The District Court's Discovery Rulings Were Error

"Discovery rulings rest within the sound discretion of the district court, and [this Court] review[s] them only for abuse of discretion." *United States* v. *Hernandez-Muniz*, 170 F.3d 1007, 1010 (10th Cir. 1999).

a. Charlotte Gutierrez

Verbickas first complains (Verbickas Br. at 47) that the district court denied his request for discovery of mental health records relating to Charlotte Gutierrez. Verbickas does not fully describe what occurred in the district court, nor does he

provide any authority to support his assertion that the district court improperly denied his request. Verbickas's request was not for discovery under Federal Rule of Criminal Procedure 16, but for a subpoena under Rule 17(c). The district court ruled that the request was an attempt to improperly use a subpoena under Rule 17 rather than discovery under Rule 16. R. 553, 5/8/02 Order at 6 (II) (citing *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 219 (1951) ("Rule 17(c) * * * 'was not intended to provide an additional means of discovery.'")). The court concluded that Verbickas, through his multiple requests for subpoenas, was seeking to obtain documents prior to the time when disclosure was due under Rule 16. See *Id*. at 5. Also, the court concluded Verbickas failed to satisfy all the requirements for the issuance of a subpoena. *Id*. at 6-7 (citing *United States* v. *Nixon*, 418 U.S. 683, 700 (1974)). Finally, the court held the records were not admissible because they related to consultations between Gutierrez and a treating psychologist and so were privileged. *Id*. at 7 (relying on *Jaffee* v. *Redmond*, 518 U.S. 1, 10-14 (1996), and *United States* v. *Glass*, 133 F.3d 1356, 1358 (10th Cir. 1998)). Verbickas does not explain why the district court's decision was an abuse of discretion, other than to state (Verbickas Br. at 47) that the cases upon which the district court relied were distinguishable because he wanted the records for cross-examination. But invoking the need for cross-exmination does not trump all other discovery rules, nor, most importantly, entitle him to subpoena documents long before trial. See *Id*. at 5 ("[T]he Supreme Court has indicated that pretrial production of impeachment evidence under Rule 17(c) is generally not

appropriate.") (citing *Nixon*, 418 U.S. at 701). Moreover, Verbickas does not explain why he could not seek these records from the government under the discovery provisions of Federal Rule of Criminal Procedure 16(a)(1)(E)(i). Verbickas has failed to show that the district court's denial of his request for a subpoena was an abuse of discretion.

Verbickas also complains (Verbickas Br. at 48) that he was not permitted discovery of supposed statements made by the prosecutor to the magistrate judge at Charlotte Gutierrez's sentencing hearing. Verbickas fails to cite to any part of the record in support of this argument. He does not show where such a request was made, or, if it was made, whether it was denied or why. Nor does he cite any part of the record to support his version of what occurred. In short, Verbickas has wholly failed to satisfy his obligation under Federal Rule of Appellate Procedure 28(a)(9)(A) (requiring appellant's argument section to contain "citations to the authorities and parts of the record on which the appellant relies"), and 10th Circuit Rule 28.2(C)(1) & (2) (requiring specific record citations). By failing to develop this argument even enough to identify the request and ruling to which he objects, Verbickas waives this argument. See *United States* v. *LaHue*, 261 F.3d 993, 1014-1015 (10th Cir. 2001), cert. denied, 534 U.S. 1083 (2002); *United States* v. *McClatchey*, 217 F.3d 823, 835-836 (10th Cir.), cert. denied, 531 U.S. 1015 (2000).[16]

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[16] Verbickas, relying on *United States* v. *Brady*, 373 U.S. 83 (1963), and *Giglio* v. *United* (continued...)

b. Dennis Britt

Verbickas argues that the district court improperly limited his discovery regarding witness Dennis Britt. He complains (Verbickas Br. at 50) that the district court did not require the government to produce a statement made by Britt. He also complains (Verbickas Br. at 50-51) that he was not permitted discovery regarding an alleged meeting between Britt and BOP attorney Jenifer Grundy during a recess in Britt's testimony. Some of Verbickas's assertions have no record citations to support them; others have citations to the record that either do not support Verbickas's assertions or contradict them.

First, Verbickas asserts that multiple requests for a memorandum of Britt's "second statement" were made but denied. Verbickas Br. at 52 & n. 8. The record indicates that there was no memorandum regarding a supposed "second statement." During a sidebar conference in Britt's re-direct, counsel for defendant Pruyne asked whether Britt's previous answer regarding a "prior statement" indicated there was an interview that had not been recorded. Trl. Tr. at 1275 (LII). Counsel for the government stated that this was the grand jury testimony. Trl. Tr.

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[16](...continued)
States, 405 U.S. 150 (1972), argues that the government "suppressed" the information he sought in these discovery requests, thereby denying him of a fair trial. Verbickas Br. at 58-59. Verbickas cites no case, and the government is aware of none, to support the argument that the district court's denial of a discovery request — even if incorrect — triggers the analysis under *Brady* and *Giglio*. Even if the district court was incorrect in denying his requests — which, as discussed above, Verbickas has failed to show — the question would be whether the district court's erroneous ruling was prejudicial or harmless, not whether the government suppressed exculpatory evidence.

at 1275 (LII).

Verbickas's lawyer stated there was a "Brady" issue: "It was my understanding from Mr. Britt's testimony that he had had a prior meeting with the government lawyers," but only one memorandum of interview provided. Trl. Tr. at 1317 (LII). Verbickas's lawyer explained why he wanted Britt put back on the stand:

> I would like the opportunity to put Mr. Britt back on the witness stand and elicit from him who was present, how long he was interviewed, what was talked about, what the substance of it was, and whether or not there was any FBI agent present and whether or not there were any notes being taken. If he answers those things and says that there were notes being taken, then I think under Rule 16 and *Brady*, the Court should enter an order of discovery and order those notes disclosed to all defense counsel.

Trl. Tr. at 1318 (LII). Government counsel responded: "There were no further recorded interviews. The conversation he was talking about occurred immediately before he was put in the grand jury and provided the testimony which has already been provided to the defense." Trl. Tr. at 1318 (LII).

When the matter was raised again, the court stated it did not see why Britt's testimony was needed because the government counsel "as an officer of the court" had stated there were no other recorded interviews. Trl. Tr. at 1323 (LIII). Counsel for the government repeated that "[t]here are none." Trl. Tr. at 1323 (LIII). The court accepted this statement as true, and when Verbickas's counsel stated he wanted to make a record and needed Britt's "testimonial outline," the court directed him to make a "written submission." Trl. Tr. at 1323-1324 (LIII).

Verbickas appears never to have submitted anything further on this issue.

Verbickas next argues that Grundy improperly met with Britt during a break in his testimony. That assertion is actually contradicted by the citation to the record that Verbickas provides, Trl. Tr. at 1017 (LI). See Verbickas Br. at 52. On that page of the transcript the court took its first break during Britt's testimony. Verbickas's counsel — who is his counsel on appeal — requested that the court direct that no government counsel meet with witnesses about their testimony during breaks in the testimony. Counsel for Verbickas stated that he was requesting the order because "*[t]he last witness that we had on the witness stand*, as I observed during the recess, he went back to the witness room, and Ms. Grundy went into the witness room with him." Trl. Tr. at 1017 (LI) (emphasis added). The last witness was Harvey Wall, not Britt. Verbickas's argument regarding a supposed meeting between Grundy and Britt is based on a misrepresentation of the record.

3. Verbickas Has Not Shown That Any Of The District Court's Rulings Regarding Government Witness Testimony Was Error

"Because evidentiary rulings are within the sound discretion of the district court, this [C]ourt will reverse only upon a 'definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *United States* v. *Samaniego*, 187 F.3d 1222, 1223 (10th Cir. 1999).

a. Charlotte Gutierrez

Verbickas complains (Verbickas Br. at 48-49) that some of the government's questions of Charlotte Gutierrez were leading, referring to questions asked at Trl. Tr. 1362-1363 (LIII). Verbickas did not object to the questions about which he now complains. He did object to two other questions as leading, and those objections *were sustained*. See Trl. Tr. at 1362-1363 (LIII). Verbickas has not even attempted to show plain error. Indeed, it is questionable whether a defendant could ever satisfy the plain-error standard based upon leading questions to which there was no objection. See *United States* v. *Meza-Urtado*, 351 F.3d 301, 303 (7th Cir. 2003), cert. denied, 541 U.S. 982 (2004). In *Meza-Urtado*, the court noted that where an objection is sustained as to the form of a question, the examiner has an opportunity to rephrase the question. Thus, even if the objection succeeds, it does not mean the testimony is inadmissible, only that it is admissible after an appropriate question is asked.[17]

b. Dennis Britt

Verbickas's argument regarding Britt's testimony is confusing, but he seems to argue that his Sixth Amendment right to confront Britt was denied because he was not allowed to cross-examine Britt regarding Britt's knowledge of Howard Lane's history of violence. See Verbickas Br. at 51 (citing Trl. Tr. at 1101-1106

[17] Verbickas also complains (Verbickas Br. at 49-50) about the questioning of Gutierrez that referred to LaVallee's attorney. As discussed in the previous section, LaVallee has not demonstrated any error regarding that questioning. Moreover, Verbickas does not attempt to show how any supposed error relating to *LaVallee*'s attorney prejudiced Verbickas.

(LII)) and Verbickas Br. at 62 (same)). Verbickas claims this cross-examination was necessary to show the supposed error of Britt's opinion that dropping Lane on his face while he was restrained and compliant had been excessive force. Verbickas claims that under BOP's "use of force" policy, Lane's history of violence permitted Verbickas to use more force to control him. Verbickas's version of what occurred is not supported by the record.

The relevant portion of the Britt cross examination actually begins at Trl. Tr. at 1086 (LII). Verbickas's counsel asked several questions regarding Britt's knowledge of Lane's history of violence, including that he is serving a life sentence for murder, Trl. Tr. at 1091 (LII), that he was one of the inmates whose pictures were kept in a file identifying dangerous inmates, Trl. Tr. 1096 (LII), that he had been sent to segregation for threatening someone, for making sexual advances, for having a weapon, Trl. Tr. at 1100-1101 (LII), and that he was declared a high risk to others, Trl. Tr. 1101 (LII). Britt stated that he then — that is, in 2003 — did not remember those things, but he did state that when he had contact with inmates, he would read their files and become familiar with their history. Trl. Tr. at 1094-1095 (LII). Britt stated that if, in 1996, (when the assault on Lane took place) Lane had been in the file of violent inmates and had been convicted of first degree murder, Britt would have known that. Trl. Tr. at 1096-1097 (LII).

When the government objected to Verbickas's counsel continuing to in effect testify by asking lengthy detailed questions about whether Britt knew

certain things, the district court sustained in part the government's objection. The court ruled that Verbickas's counsel could not testify about why Lane had been sent to a medical facility. Trl. Tr. at 1102-1103 (LII). The court permitted Verbickas's counsel to ask foundational questions regarding Britt's knowledge. Trl Tr. at 1103 (LII) ("I'll allow you to ask the witness if he has any knowledge about why Lane was at Springfield, without your question revealing why he was there."); see also Trl. Tr. at 1104 (LII) ("Unless the witness indicates he has some knowledge about why Mr. Lane was at Springfield, because what you really are doing is testifying."). Verbickas does not attempt to show how this limit was error or in any way prejudicial.

After Verbickas's counsel made an offer of proof regarding facts about which he wanted to question Britt, facts he stated were supported by documents, the court did not rule out his presenting that evidence in some appropriate manner. Trl. Tr. at 1106 (LII) ("I'm not foreclosing this evidence, but I'm foreclosing it through a witness that doesn't know anything about it."). There is no indication that Verbickas took further steps to present the evidence.

4. Verbickas Has Failed To Show Any Error Regarding The Testimony Of Defense Witnesses

Verbickas also asserts numerous errors regarding defense witnesses. None is meritorious.

a. Lieutenant Mark Mooneyham

Verbickas first argues (Verbickas Br. at 53-54) that he should have been allowed to have Lieutenant Mark Mooneyham testify regarding conversations he had with Charlotte Gutierrez, that would reveal prior inconsistent statements of Gutierrez. Verbickas does not make any argument regarding this testimony, nor does he cite any authority for his conclusory assertion that the district court's ruling was error. He merely directs this Court to 38 pages of the transcript in which this issue was thoroughly argued to the district court. Verbickas Br. at 54 (citing Trl. Tr. at 5373-5411 (LXXI)).

Moreover, Verbickas misrepresents the record. After hearing, outside the presence of the jury, what Mooneyham would have testified, the district court found in the transcript where Gutierrez had been asked about the conversations with Mooneyham and had given answers consistent with Mooneyham's proffered testimony. Trl. Tr. at 5402 (LXXI). The court therefore ruled that the statements were consistent and could not be admitted as prior inconsistent statements for impeachment. Trl. Tr. at 5411 (LXXI). Verbickas does not attempt to show how this ruling was error.

b. Lieutenant Lorna King And Captain Terry Hines

Verbickas complains (Verbickas Br. at 54) that the government's cross examination of Lieutenant Lorna King was improper. He cites three supposedly improper questions. Verbickas similarly complains (Verbickas Br. at 56-57) about numerous questions that were asked of Captain Terry Hines on cross examination.

Verbickas offers no citation to any authority or any argument whatsoever that any of these rulings were error.

IV

THE DISTRICT COURT DID NOT PLAINLY ERR BY SUMMARILY DENYING THE DEFENDANTS' UNTIMELY AND UNSUPPORTED MOTION TO DISQUALIFY A BOP ATTORNEY

Verbickas argues that the participation in the prosecution of Jenifer Grundy, an attorney for BOP who had worked at USP-Florence, created a conflict of interest because of her prior participation in civil suits filed against some of the defendants in this case. Although government attorneys represented some of the defendants in civil suits, Verbickas has failed to adequately allege, much less prove, that Ms. Grundy or any other person working on the prosecution ever represented any defendant in a matter related to this case.

Moreover, the district court correctly ruled that the defendants' motion for disqualification was untimely. Verbickas's argument gives an incomplete account of the proceedings in the district court. He treats allegations as proven fact even where they were rejected by the district court. Verbickas does not mention that the district court in fact held a hearing on Ms. Grundy's role in the prosecution two years before trial began. At that time, no defendant sought to have Ms. Grundy disqualified. Instead, the defendants waited until three weeks into trial to raise the issue.

A. Standard Of Review

In a criminal case, the denial of a defendant's untimely motion to disqualify counsel is reviewed only for plain error. See *United States* v. *Stiger*, 371 F.3d 732, 740 n.4 (10th Cir. 2004). This Court reviews the district court's factual findings for clear error, and its interpretation of particular ethical rules *de novo*. *United States* v. *Bolden*, 353 F.3d 870, 878 (10th Cir. 2003); see also *United States* v. *Bailey*, 327 F.3d 1131, 1138 (10th Cir. 2003).

B. A Government Attorney Does Not Generally Have An Attorney-Client Relationship With Government Employees

The Attorney General has created a regulatory mechanism by which federal employees who are sued in their individual capacities can obtain government counsel to represent them as individuals. See 28 C.F.R. 50.15(a). The actions of the employee at issue must reasonably appear to have been performed within the scope of his employment and "the Attorney General or his designee [must] determine[] that providing representation would otherwise be in the interest of the United States." *Ibid*. The employee who seeks representation must submit a request in writing to his employing agency; unless the employing agency concludes representation is "clearly unwarranted," it must forward the request to the appropriate litigating division within the Department of Justice, in this case the Civil Division. 28 C.F.R. 50.15(a)(1). By regulation, government attorneys who participate in the process of obtaining individual representation for an employee and government attorneys who represent such employees have an attorney-client

relationship with that employee for that case. 28 C.F.R. 50.15(a)(3). Adverse information communicated to such attorney by the employee-client may not be divulged. *Ibid.* Although the regulation establishes an attorney-client relationship between government counsel and the employee, the government may withdraw representation whenever it determines it is in the interest of the United States to do so. 28 C.F.R. 50.15(a)(12). Representation is not permitted if the employee is the subject of a federal criminal investigation relating to the same matter. 28 C.F.R. 50.15(a)(7). There is no conflict between representing a federal employee on one matter and prosecuting the employee on a different matter.

C. The Proceedings In The District Court

In July 2001, defendant Pruyne filed a motion to suppress a statement he had given to the FBI agents and prosecutors in 1997. R. 214 (Supp. I). That motion argued that Ms. Grundy's role in getting him to make the statement rendered it involuntary. At the hearing on a different motion, Pruyne's counsel asserted that Ms. Grundy and three other DOJ attorneys had represented Pruyne in a civil suit by an inmate. R. 231, 7/11/01 Hr'g at 70 (IX). In response to the defendants' discovery requests, the district court ordered the government to provide statements made by the defendants to government attorneys representing them in civil suits. The court ordered the defendants to identify the relevant lawsuits. *Id.* at 90-93.

In July 2001, defendant Gall filed a motion to suppress a statement similar to Pruyne's, based on Ms. Grundy's supposed role in requiring him to give the

statement. R. 247 (I). The district court held a hearing in September 2001 on the motions to suppress. Ms. Grundy testified that in March 1999, when Gall gave his statement, she was a supervisory attorney with responsibility to provide legal services at BOP facilities in Florence. R. 361, 9/25/01 Hr'g at 93 (X). She explained the procedures used to process an employee's request for representation under 28 CFR 50.15. *Id.* at 93-94. She also related her recollection of her conversations with Gall regarding the March 25, 1999, interview. *Id.* at 103 & *ff.* She stated to him that "he was free to refuse to speak to these individuals," but that if he did not wish to speak to them, he had to communicate that to them himself. *Id.* at 104. She also told him that she "could not provide him with any representation during this interview" although he was free to have someone else present with him. *Ibid.*; see also *id.* at 112 ("I told him I can't help you in this matter."). She informed Gall that the interview involved a civil rights investigation regarding allegations of inmate abuse at USP-Florence. *Id.* at 105.

Ms. Grundy stated that she had only provided representation to Gall in one civil matter that had been "several years prior to March 1999." R. 361, 9/25/01 Hr'g at 111 (X). She did not recall any specifics regarding that matter, except that Gall was one of several defendants named and that the matter had been disposed of on a motion. *Id.* at 111-112. She recalled that she may have assisted Gall in requesting representation and that she might have assisted the U.S. Attorney's office regarding the case. *Id.* at 112. The court inquired of Pruyne's counsel whether he needed to question Ms. Grundy regarding Pruyne's suppression

motion. Counsel stated: "I'm withdrawing that motion." *Id.* at 142. The district court denied Pruyne's motion as moot. *Ibid.* The district court issued an order denying Gall's motion to suppress, finding his statement was not made involuntarily. The court noted that there was no evidence to support Gall's argument that he misunderstood Ms. Grundy's role. R. 363, 9/27/01 Order at 5-6 (II).

Despite this focus on Ms. Grundy's role in representing the defendants, no motion was made to disqualify Ms. Grundy from assisting the prosecution in this case. Not until April 21, 2003, three weeks into the trial, did the defendants do so, asserting a conflict of interest under the Colorado Rules of Professional Conduct. R. 1080, 4/21/03 Motion (V). The motion acknowledged that Ms. Grundy's conflict had been raised in 2001 in Gall's and Pruyne's motions to suppress, but offered no explanation for their failure to file a disqualification motion at that time. The motion listed ten civil actions that it asserted involved defendants LaVallee, Shultz, Bond, Pruyne, and Shatto. *Id.* ¶ 5. The motion asserted that Ms. Grundy "was legal counsel to these Defendants as a result of their employment at USP Florence during this time period. As part of her representation of them Defendants provided statements regarding their alleged involvement in the allegations of inmate abuse [in those civil actions]." *Id.* ¶ 7.

The motion to disqualify also asserted that, based on Gall's and Pruyne's motions to suppress, Ms. Grundy had "provided legal counsel" to those defendants regarding their interviews in this case, a statement clearly contrary to the district

court's earlier findings. R. 1080, 4/21/03 Motion ¶ 7 (V). The motion asserted that Ms. Grundy now represented the United States in this matter and that "[n]one of her former clients consent to her current representation of the United States of America in this prosecution against them." *Id.* ¶ 11. The motion then concluded that, under the Colorado Rules of Professional Conduct, Ms. Grundy had a conflict of interest and she had to be disqualified.

On April 21, 2003, during a break in the testimony, the court addressed the motion to disqualify Ms. Grundy:

> We're now on our third week of trial. Jenifer Grundy has been involved in this case for a while. She has not asked one question in this case, and for the life of me, I don't understand this motion to disqualify Jenifer Grundy that was filed today.
>
> So would somebody explain to me why this is being filed and why I shouldn't just summarily deny it as late and not something that's seeking to advance a legal issue that I need to waste any time on.
>
> So somebody on behalf of defendants, tell me why you're filing this and why you're filing it now.

Trl. Tr. at 2194-2195 (LVI).

Counsel for Verbickas explained that "none of [the defendants] have consented under the rule to her appearing in a case in which she has an adverse interest to them," and that some of the defendants asserted they had provided information to Ms. Grundy or had discussions with her regarding civil litigation that was "incorporated into the indictment, specifically the Turner case." Trl. Tr. at 2195 (LVI).

The court asked counsel for the government what was Ms. Grundy's role in the case, and counsel stated:

> [S]he has been assigned by the federal Bureau of Prisons to assist and manage witnesses and just general management of the trial and act as liaison to the prosecution team in order to make sure we get people in and out at the right times and assist with travel and documents and basically logistics for the most part. She is not hired by the U.S. attorney's office. She is not a special assistant U.S. attorney. She is not active — but not in this case, Mr. Mydans corrects me; and, Your Honor, she doesn't represent the defendants. She was a general counsel or assistant general counsel for the Bureau of Prisons.

Trl. Tr. at 2195-2196 (LVI). The court noted it was tempted to deny the motion summarily "as late," but directed the government to respond within a week. Trl. Tr. at 2196 (LVI). The government response was filed April 28, 2003. R. 1120 (V). That day, the court denied the motion to disqualify Ms. Grundy as "utterly without merit." Trl. Tr. at 3212 (LX).

D. The District Court Did Not Plainly Err In Summarily Denying The Motion To Disqualify

Verbickas argues (Verbickas Br. at 37) that under Colorado Rule of Professional Conduct 1.9, Ms. Grundy's work on the prosecution team represented an actual conflict of interest requiring her disqualification.[18] He argues that the

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[18] That rule provides in relevant part:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> * * * * *

(continued...)

district court should have held a hearing and disqualified Ms. Grundy.

This Court has held, when addressing virtually identical language in another state's rules of professional conduct, that a movant seeking to disqualify opposing counsel must show three things:

> (1) an actual attorney-client relationship existed between the moving party and the opposing counsel;
>
> (2) the present litigation involves a matter that is "substantially related" to the subject of the movant's prior representation; and
>
> (3) the interests of the opposing counsel's present client are materially adverse to the movant's.

Cole v. *Ruidoso Mun. Schs.*, 43 F.3d 1373, 1384 (10th Cir. 1994) (New Mexico rule).

The defendants' motion to disqualify was untimely. The record shows that by July 2001 the defendants had made some allegations regarding Grundy's representing them. To the extent those assertions were tested at the September 25, 2001, hearing, they were refuted. No defendant filed a motion alleging an actual conflict or seeking disqualification until three weeks into trial, and no defendant

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[18](...continued)

> (c) A lawyer who has formerly represented a client in a matter * * * shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except [as permitted under other rules] or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as permitted under other rules.

requested a hearing on those issues.[19]

The district court correctly rejected the disqualification motion as untimely. This Court has held that where a motion to disqualify was filed on the Friday before a Monday trial, when the facts supporting it were known months in advance, "[t]he late filing fully justified the summary rejection of the motion," *Redd* v. *Shell Oil Co*., 518 F.2d 311, 315 (10th Cir. 1975), even where, unlike this case, the motion was sufficiently substantive that "if [counsel] had filed the motion some months prior to the date of trial it would have merited serious attention and consideration," *ibid*. Rather than the few months delay in *Redd*, here the defendants waited for more than two years before filing their motion for disqualification. And rather than filing it on the eve of trial, they filed it three weeks into trial.

Even had the defendants timely moved to disqualify Ms. Grundy, the district court could have properly rejected the motion as meritless, and that would not have been an abuse of the district court's discretion. Verbickas's argument is based on his assertion (Verbickas Br. at 28) that the various pleadings filed in the district court "presented the factual record of Grundy's attorney-client relationship with Defendants, as BOP counsel at USP Florence." But the record reveals no evidence of a conflict of interest. Schultz's 2001 notification of civil litigation

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[19] Verbickas complains (Verbickas Br. at 29) that "[a]lthough the trial judge knew these facts, he failed to conduct a hearing." On the contrary, the district court held hearings on the motions that were filed regarding these matters — one for Pruyne's motion for discovery and one regarding Gall's and Pruyne's motions to suppress, at which Ms. Grundy testified.

asserted "*[u]pon information and belief* statements were given to Ms. Jennifer [*sic*] Grundy *and or* a representative of the U.S. Government in a representative capacity" concerning six civil suits, including *Turner* v. *Schultz*, No. 99-CV-2232, which involved a victim named in Count I and Count IX of the indictment. R. 235, 7/16/01 Notice of Civil Litigation ¶ 1 (Supp. I) (emphasis added). The record does not disclose any facts about the Turner civil suit. The statement that Schultz was represented by some government counsel hardly makes out a conflict in this case.

The record in the district court showed only that Ms. Grundy had represented one defendant (Gall) in an unrelated case several years prior to her involvement in this investigation. That evidence is wholly insufficient to justify Ms. Grundy's disqualification. See *United States* v. *Bolton*, 905 F.2d 319, 321-322 (10th Cir. 1990) (no abuse in denying motion where AUSA had represented criminal defendant 5 years prior to trial as public defender in an unrelated prosecution and "there [was not] the slightest indication that [the prosecutor] had obtained sensitive information during his earlier representation of [defendant] which could have been used against him in the instant proceeding."), cert. denied, 498 U.S. 1029 (1991); cf. *Stiger*, 371 F.3d at 739-742 (defendant made non-frivolous claim for disqualification that had to be addressed where counsel for codefendant who pleaded guilty and testified against defendant had prior to trial visited defendant several times about representing defendant in that case). The district court clearly did not abuse its discretion in denying the motion.

V

THE DENIAL OF SCHULTZ'S MOTIONS FOR A NEW TRIAL ARE NOT BEFORE THIS COURT IN THESE APPEALS

Schultz asserts (Schultz Br. at 35-42) that his due process rights were violated under *Brady* v. *Maryland*, 373 U.S. 83 (1969), because the government did not produce to him until September 9, 2004, a videotape depicting Pedro Castillo on April 6, 1996. (As noted above, Schultz was convicted of violating 18 U.S.C. 242 for beating Castillo on April 5, 1996.) Schultz's *Brady* claim regarding the April 6 tape was the subject of one of his motions for a new trial that was denied by the district court on December 6, 2004, after Schultz filed his brief in this Court. Schultz has appealed the district court's denial of his motions, and that appeal is now pending before this Court. *United States* v. *Schultz*, No. 04-1540. LaVallee's appeal from that order is also pending before this Court. *United States* v. *LaVallee*, No. 04-1538.

VI

THIS COURT SHOULD REMAND FOR RESENTENCING UNDER A CORRECT APPLICATION OF THE GUIDELINES, OR, IN THE ALTERNATIVE, AFFIRM THE SENTENCES

The defendants do not challenge the district court's application of the Sentencing Guidelines to them. Rather, they argue that under *United States* v. *Booker*, 125 S.Ct. 738 (2005), they are entitled to a remand for resentencing because the district court sentenced the defendants under the mandatory Guidelines. The defendants did not preserve any Sixth Amendment objection to

their sentences, however, so they must satisfy the demanding plain-error standard to be entitled to a remand.

In contrast, the government preserved its objections to the district court's application of the Guidelines. Because, even after *Booker*, the district court is required to determine the appropriate Guideline range for a defendant, the district court's application of the Guidelines here is error, and that error is not harmless. Thus, if this Court agrees with the government that the case must be remanded for resentencing based on an appropriate, higher Guideline range, the defendants' arguments on appeal that they are entitled to a remand under the plain-error standard will be moot. But if this Court rejects the government's arguments on cross-appeal, this Court should affirm their sentences because the defendants have not shown that they can satisfy the plain-error standard.

A. The Defendants' Sentences

Schultz and LaVallee were each sentenced to 41 months' imprisonment. Verbickas was sentenced to 30 months' imprisonment.

Verbickas was convicted of one count of violating 18 U.S.C. 242 causing bodily injury, which is a felony punishable by up to ten years' imprisonment. The corresponding Guideline for 18 U.S.C. 242 is Sentencing Guidelines § 2H1.1. Verbickas's offense conduct involved two or more participants, making the base offense level 12. Sentencing Guidelines § 2H1.1(a)(2). Because the offense was committed under color of law, the base offense level was increased by six to 18. Sentencing Guidelines § 2H1.1(b)(1). The district court also increased the base

offense level by two under the vulnerable victim enhancement (Sentencing Guidelines § 3A1.1(b)(1)) and an additional two levels under the restrained victim enhancement (Sentencing Guidelines § 3A1.3), for a total offense level of 22. Under Criminal History Category I, an offense level of 22 resulted in a sentencing range of 41 to 51 months.[20] The district court declined to increase the range under the enhancement for obstruction of justice (Sentencing Guidelines § 3C1.1). The district court granted Verbickas downward departures totaling four levels — for susceptibility to abuse in prison, victim misconduct, and aberrant behavior — to level 18, for which the sentencing range was 27 to 33 months. Verbickas was sentenced to 30 months' imprisonment.

LaVallee and Schultz were both convicted of one count of violating 18 U.S.C. 241, for which the maximum penalty is ten years' imprisonment, and one count of violating 18 U.S.C. 242 causing bodily injury. As with Verbickas, the base offense level for Schultz and LaVallee was 12 under Section 2H1.1(a)(2) because the offense involved two or more participants. And as with Verbickas, six levels were added under Section 2H1.1(b)(1) because the offenses were committed

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[20] At sentencing, Verbickas's counsel conceded that the evidence showed that the restrained-victim enhancement applied because the evidence "shows [Lane] was handcuffed." Sent. Tr. at 24. Verbickas contested the vulnerable victim enhancement because Lane had a history of violence (including murder and rape) and argued that the vulnerable victim enhancement and the restrained victim enhancement could not both be applied to him. The district court rejected those arguments. Verbickas has not challenged on appeal the district court's legal conclusions regarding the scope of the vulnerable victim enhancement and the applicability of both that enhancement and the enhancement for restrained victim. Verbickas did not challenge the court's assessment of the evidence of Lane's vulnerability to Verbickas's assault.

"under color of law," resulting in an offense level of 18. Schultz and LaVallee also received two-level enhancements for both vulnerable victim and restrained victim, resulting in an offense level of 22 for each count. The court applied a multiple count enhancement of two levels,[21] making the final offense level 24. With a Criminal History Category I, the sentencing range was 51 to 63 months.[22] As with Verbickas, the district court declined to apply the two-level enhancement under Section 3C1.1 for obstruction of justice. The district court granted Schultz and LaVallee a downward departure of two levels — for susceptibility to abuse — to level 22. At that level, the sentencing range was 41-51 months. Each was sentenced to 41 months.

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[21] The district court found that under the grouping rules (Sentencing Guidelines § 3D1.2), these two counts could not be grouped together, and, thus, the defendants were subject to the multiple count enhancement (Sentencing Guidelines § 3D1.4). The final Guideline range for each count was the same because Section 2H1.1 is the appropriate Guideline for both 18 U.S.C. 241 and 18 U.S.C. 242. Because there were two groups of equally serious counts, under Sentencing Guidelines § 3D1.4(a), there was an additional two-level increase.

[22] In the district court, neither Schultz nor LaVallee challenged the factual basis of the restrained victim and vulnerable victim enhancements. LaVallee argued that the district court should exercise its discretion to apply only one of the enhancements to avoid "double counting." Sent. Tr. at 30-31. Schultz argued that applying the enhancements would be double counting because the conduct was incorporated in the indictment. Sent. Tr. at 31. As for the grouping rules under Sentencing Guidelines §§ 3D1.2 and 3D1.4, both argued that the sole object of the conspiracy found by the jury was the beating of Castillo. See Sent. Tr. at 36 (Schultz) & 37 (LaVallee). The district court rejected that argument. Sent. Tr. at 52. Neither defendant challenges these findings or conclusions on appeal.

B. United States *v.* Booker

In *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), the Supreme Court applied the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to invalidate a sentencing enhancement, imposed pursuant to state law, that increased the sentence beyond the range authorized by Washington state's statutory sentencing scheme. The Court explained that, because the facts supporting the enhancement were "neither admitted by [the defendant] nor found by a jury," the sentence violated the Sixth Amendment right to trial by jury. 124 S. Ct. at 2537.

In *United States* v. *Booker*, the Court applied the rule of *Blakely* to the Federal Sentencing Guidelines. The Court's decision came in two parts. First, in the opinion authored by Justice Stevens, the Court held that because the Sentencing Reform Act made the Federal Sentencing Guidelines mandatory, a Guidelines sentence enhanced by judge-found facts violates the Sixth Amendment right to trial by jury. 125 S. Ct. at 749-756; see *id*. at 749-750 ("This conclusion rests on the premise * * * that the [Guidelines] are mandatory and impose binding requirements" on judges.).

Second, in an opinion authored by Justice Breyer, to remedy the Guidelines' constitutional defect, the Court invalidated those provisions of the Sentencing Reform Act that make the Guidelines mandatory. See 124 S. Ct. at 756-757 (excising 18 U.S.C. 3553(b)(1) and 3742(e)). So modified, the Act still requires a court to consider the Guidelines, see 18 U.S.C. 3553(a)(4), but makes them "effectively advisory." *Id.* at 757. (Courts may also tailor sentences in light of

other concerns in Section 3553(a)). The Court further held that the Guidelines would be advisory in all cases — even where they can be applied without judicial fact-finding. *Id*. at 768; *United States* v. *Labastida-Segura*, 396 F.3d 1140, 1142 (10th Cir. 2005) (*Booker*'s remedial holding applies to sentences not involving Sixth Amendment violations).

This Court in *Labastida-Segura* remanded for resentencing where the defendant had preserved his challenge to the district court's application of the Guidelines as mandatory. Because the challenge was preserved, this Court applied the harmless error standard under Federal Rule of Criminal Procedure 52(a), holding that "once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed." 396 F. 3d at 1143 (quoting *United States* v. *Williams*, 503 U.S. 193, 203 (1992)).

The Sixth Circuit also concluded that after *Booker*, where there has been a non-harmless error in the application of the Guidelines, a remand is necessary to allow the district court to resentence under the correct interpretation of the Guidelines. The court stated:

> [T]he Supreme Court [in *Booker*] was very clear: "The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." * * * [I]nsofar as [the defendant] is challenging the application of the Guidelines to his case, *Booker* does not affect the analysis of whether the district court erred in this case. Since, regardless of whether the Guidelines are mandatory or merely advisory, district courts are

> *required by statute* to consult them, and since a district court's misinterpretation of the Guidelines effectively means that it has not properly consulted the Guidelines, we hold that it was error for the district court to apply [the erroneous] enhancement in this case.

United States v. *Hazelwood*, 398 F.3d 792, 800-801 (6th Cir. 2005). The Sixth Circuit went on to apply the harmless error analysis before concluding that a remand for resentencing was warranted.

C. The District Court's Application Of The Guidelines Was Error, And The Error Was Not Harmless

The district court's application of the Guidelines to the defendants was erroneous for two reasons. First, the district court erred in failing to apply to each defendant the obstruction of justice enhancement under Section 3C1.1. Second, the reasons upon which the district court relied in granting the defendants downward departures were insufficient. Each of these errors individually warrants vacating the defendants' sentences because it cannot be shown that these errors were harmless — that is, that they would not have affected the defendants' sentences.

1. The District Court Erred By Refusing To Applying The Guideline Enhancement For Obstruction Of Justice.

The district court refused to apply to any of the defendants the two-level enhancement for obstruction of justice under Sentencing Guidelines § 3C1.1. That Guideline provides for an enhancement

> [i]f (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the

> defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense.

The government argued that the defendants' falsifying reports of their conduct about beating the inmates, as well as falsifying injuries to themselves to justify those beatings, made this enhancement appropriate.

The district court declined to apply this enhancement because the conduct took place close in time to the offense. R. 1481 (Verbickas Br. at Att. B) (Verbickas Judgment); R. 1485 (Lavallee Br. at Att. A) (LaVallee Judgment); R. 1484 (Schultz Br. at Att. A) (Schultz Judgment). Application Note 4 provides a "non-exhaustive list of examples of the types of conduct to which" Section 3C1.1 applies. Application Note 4(d) covers "destroying or concealing * * * evidence that is material to an official investigation" but also states that "if such conduct occurred contemporaneously *with arrest* * * * it shall not, standing alone, be sufficient to warrant an adjustment for obstruction." (emphasis added). For example, in *United States* v. *Norman*, 129 F.3d 1393 (10th Cir. 1997), a case the district court discussed at the sentencing hearing, see, *e.g.*, Sent. Tr. at 79, this Court concluded that Application Note 4(d) precluded applying the enhancement to a defendant's attempt to bury drugs while waiting for the police to arrive at the scene of an accident, because the conduct was contemporaneous with his arrest. 129 F.3d at 1399. In this case, the defendants' false memoranda and false injuries concealed their beatings of Lane and Castillo in 1996; they were not charged with those crimes until 2000. Thus, the general exception under Application Note 4(d)

has no relevance to the defendants' obstructive conduct. Moreover, the government did not rely on the defendants' destruction of evidence to support the enhancement. Instead, it based its argument on the falsification of documents, an example of conduct identified in Application Note 4(c) as subject to the obstruction of justice enhancement.

This Court has held that Sentencing Guidelines § 3C1.1 creates a "nexus requirement":

> the obstructive conduct, which must relate to the offense of conviction, must be undertaken during the investigation, prosecution, or sentencing. Obstructive conduct undertaken prior to an investigation, prosecution or sentencing; *prior to any indication of an impending investigation, prosecution, or sentencing*; or as regards a completely unrelated offense, does not fulfill this nexus requirement.

United States v. *Gacnik*, 50 F.3d 848, 852 (10th Cir. 1995) (emphasis added).

In *United States* v. *Mills*, 194 F.3d 1108 (10th Cir. 1999), a case involving a former corrections officer at USP-Florence, this Court found that the nexus requirement was met when the corrections officer destroyed a video recording of himself beating an inmate prior to the actual instigation of any investigation. This Court held:

> In this case, the very purpose of taping was to assist the warden in his official program to curtail unlawful beatings. Clearly, Mills knew that an investigation would be conducted, and he understood the importance of the tape in that investigation. We have previously held such awareness of an impending investigation is sufficient to satisfy the nexus requirement so as to warrant enhancement.

Id. at 1115 (citing *Norman*, 129 F.3d at 1393).

The district court expressed its concern that *Mills* was limited to its facts

because in that case there had been an official policy of taping to curtail unlawful beatings. Sent. Tr. at 74-75. The court distinguished the erasing of the tape in *Mills* from the falsified memos and injuries in this case on the ground that "the real purpose of the defendants' falsification [of] memos [was] to thwart an investigation. * * * [W]ouldn't the purpose of that false memo be to avoid the very investigation that the government undertook in this case." Sent. Tr. at 83. The district court noted that the evidence showed that the defendants "wrote these memos to cover up their conduct so they wouldn't be caught." Sent. Tr. at 84.

The district court ultimately concluded that the facts of this case were not within the obstruction of justice enhancement:

> [I]t's clear to me that the Mills case turned on the statement in the case that, quote, Clearly Mills knew that an investigation would be conducted and he understood the importance of the tape in that investigation.
>
> At best, what we have here is a situation that the defendants knew that by writing these memos, that somebody might review them. They didn't really know that there would be an investigation within the meaning of 3C1.1. So I think on the record before me, and based on the Tenth Circuit cases noted, that coupled with the actual language of 3C1.1, that we don't have the appropriate nexus established.

Sent. Tr. at 92-93.

The district court acknowledged the evidence showed the defendants knew or should have known that the officials at the institution would review the memos. Sent. Tr. at 57-58. That is consistent with the testimony of the witnesses at trial. See, *e.g.*, Trl. Tr. at 2968-2985 (LIX) (Warden Holt's testimony regarding use-of-

force and BOP review procedures); Trl. Tr. at 1443 (LIII) (Gutierrez explaining that reports had to be filed where an inmate was injured or complained). Under this Court's prior decisions, that knowledge is sufficient to show knowledge of an impending investigation for purposes of Section 3C1.1, even if, as the district court concluded, the defendants could not have anticipated the scale of the investigation.

The district court relied on this Court's decisions in *United States* v. *Norman* and *United States* v. *Gacnik* for its conclusion that *Mills* was limited to its facts and that under the facts of this case the enhancement does not apply. But *Norman* was the case upon which this Court based its decision in *Mills*, and it strongly supports the application of the enhancement here. *Gacnik*, on the other hand, involves facts clearly different from those in this case.

In *Gacnik*, the police arrested the defendant's boyfriend for firing a pistol during an altercation. The defendant then hid illegal explosives that she and her boyfriend manufactured and sold. The police returned with the boyfriend after receiving an anonymous tip regarding the explosives. This Court held that there was no nexus because "[t]here is simply no evidence that Ms. Gacnik undertook to hide the explosive materials with any knowledge of an impending investigation or during any investigation *of the conspiracy [to manufacture explosives] for which she was ultimately convicted.* * * * [K]nowledge of police interest in a completely unrelated offense, not involving her, simply does not meet the requirements of § 3C1.1." 50 F.3d at 853. That case, therefore, is clearly different

from this one.

In *Norman*, this Court found the nexus requirement met where the defendant, after he caused a serious automobile accident, tried to bury illegal methamphetamine before the police arrived. This Court concluded that, unlike the defendant in *Gacnik*, Norman would have been aware that the impending investigation for the accident would involve looking for the contraband: "Norman was aware of an impending investigation, the scope of which necessarily entailed questions about, and the likely discovery of, controlled substances, so that his actions in attempting to conceal the methamphetamine were sufficiently related to the offense for which he was ultimately convicted." 129 F.3d at 1399.

The defendants in this case were in the same situation as the defendants in *Norman* and *Mills*: They knew that the officials at the institution would review the beatings of Castillo and Lane because both were taken for medical care after they were beaten. They knew that, in the course of that review, their memos would be critical to the reviewing officer's determination of the propriety of their use of force. As the district court recognized, the defendants falsified the memos and falsified injuries to themselves so that reviewing officials would believe their conduct was appropriate — as the district court described it, to "thwart the investigation." Under *Mills* and *Norman*, this conduct constitutes obstruction of an investigation within the meaning of Section 3C1.1. The district court's contrary conclusion was error.

2. The District Court's Reasons For Granting The Downward Departures Are Insufficient Under The Guidelines

The district court awarded Schultz and LaVallee a two-level downward departure and awarded Verbickas a four-level downward departure. There is considerable ambiguity in the district court's explanations for the departures, and the explanations at the sentencing hearing differ somewhat from the written explanations in the judgments of conviction. At the sentencing hearing, the court indicated it was awarding each defendant a two-level downward departure based on susceptibility to abuse in prison. Sent. Tr. at 226-227. The court indicated that it was awarding Verbickas an additional two-level departure. Although the court's explanation is not entirely clear, the court seemed to say that the additional departure was based on a combination of victim misconduct and aberrant behavior. Sent. Tr. at 223. The written judgments for Schultz and LaVallee state that their two-level departure is based on a "combination of factors" without further explanation. R. 1484 (VI); R. 1485 (VI). The judgment for Verbickas indicates one two-level departure is for the combination of susceptibility to abuse in prison and victim misconduct, while the other is solely for aberrant behavior. R. 1481 (VI).

The district court was required to state its reasons for departure in writing. 18 U.S.C. 3553(c)(2) (amended April 30, 2003). Although the district court's statements at the sentencing hearing and its judgments imply that there are other factors beyond susceptibility to abuse in prison justifying the two-level downward

departure for Schultz and LaVallee, that is the only factor it identified. In any event, all of the factors upon which the district court relied were misapplied and, therefore, the particular combination of factors is not material.

a. Potential For Abuse In Prison

The district court awarded each defendant a downward departure based on susceptibility to abuse in prison. The court relied on *Koon* v. *United States*, 518 U.S. 81 (1996), the case involving the police officers who beat Rodney King, and Sentencing Guidelines § 5K2.0, the general policy statement regarding departures. Sent. Tr. at 226.[23]

In *Koon*, the district court had found that the defendants were "*particularly* likely to be targets of abuse during their incarceration," 518 U.S. at 112 (emphasis added), and based a downward departure, in part, on that finding. The Supreme Court upheld the district court's consideration of susceptibility to abuse in prison in the circumstances of that case. The Court noted that the "extraordinary notoriety and national media coverage" of the case made the defendants "*unusually* susceptible to prison abuse." *Ibid.* (emphasis added).

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[23] Policy Statement 5K2.0 governed departures permitted by 18 U.S.C. 3553(b)(1) where there existed "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." That statutory provision, however, was excised in its entirety by the Supreme Court in *Booker*. Thus, the extent to which Policy Statement 5K2.0 continues to be valid is open to some question. But the Commission, in Policy Statement 5K2.0, recognized that there are some factors that might not have been considered by the Commission, or if they were considered, might be present to a degree that was not considered. Certainly that concern would remain, even without the specific statutory language from Section 3553(b)(1).

In *Koon*, however, the unusual susceptibility of those defendants to abuse in prison was only one of four factors that the district court considered, in combination, to justify a three-level downward departure. Because the Supreme Court held that two of the factors were not valid bases for departure, and the district court had concluded that no factor individually would support the three-level departure, the Supreme Court remanded for resentencing. None of the district court's findings in this case justify a two-level departure under the reasoning of *Koon*.

The district court found that this case was outside the "heartland" of the Guidelines because the case was "one of the largest investigations and prosecutions ever brought by the government involving alleged abuse of inmates by correctional officers" and, unlike the defendant in *Mills*, who was charged with only a single incident of beating an inmate, "the defendants who are on trial were charged with this vast conspiracy * * * as well as with the abuse of inmates as it relates to specific counts." Sent. Tr. at 219. The court further noted that, at the time of sentencing, the defendants were under 23 hour-per-day lockdown in the county jail, and that there was knowledge among the inmates in the Bureau of Prisons of these defendants and the nature of their convictions. Sent. Tr. at 226. The district court did not find that these defendants were *unusually* susceptible to being abused in prison. Cf. *Koon*, 518 U.S. at 112. It found only that there was some notoriety to this case and there was a possibility that these defendants could not be kept safe either in a BOP facility or in a state facility without being placed

in lockdown. But that finding of a *possibility* in no way makes these defendants different from other law enforcement officers, particularly former prison guards, who would always be subject to *possible* victimization. At the sentencing hearing, a BOP official testified regarding the efforts that BOP takes to ensure the safety of former law enforcement officials and former BOP employees who are held in BOP facilities. See Sent. Tr. at 129-145 (direct testimony).

Other courts of appeals, in similar cases, have reversed downward departures based on the supposed susceptibility of the defendant to abuse in prison where the district court did not find exceptional facts making the defendant *unusually* susceptible. See *United States* v. *Thames*, 214 F.3d 608, 614 (5th Cir. 2000) (because there was no unusual media attention such as in the Rodney King case, former police officer failed to show entitlement to *Koon* departure); see also *ibid*. ("a defendant's status as a law enforcement officer is often times more akin to an aggravating as opposed to a mitigating sentencing factor"). In *United States* v. *Winters*, 174 F.3d 478, 486 (5th Cir.), cert. denied, 174 F.3d 478 (1999), the court reversed the district court's downward departure based on *Koon* for a former corrections officer where "the district court offered no compelling reasons why Winters is any more susceptible to abuse in prison than any other corrections officer sentenced to prison." See also *United States* v. *Rybicki*, 96 F.3d 754, 759 (4th Cir. 1996) (rejecting downward departure based on status as law enforcement officer because that rule suggests that "law enforcement officers, as a class, are entitled to more favorable treatment under the Sentencing Guidelines").

The defendant's sentences were enhanced by six levels, under Section 2H1.1(b), because they were acting under color of law. Thus, the Sentencing Commission has already taken into account that persons such as police officers and prison guards would be sentenced under this Guideline, and concluded that sentences for such defendants warrant substantial enhancement, not downward departure. Unless, as in *Koon*, there are extraordinary circumstances that make a defendant *unusually* susceptible to abuse in prison, the mere fact that they are police officers or prison guards does not take their case outside the heartland of Section 242 convictions. Because there was no such finding here, the district court erred in holding that these circumstances justified a two-level departure.

B. Victim Misconduct And Aberrant Behavior

The district court awarded Verbickas an additional downward departure of two levels based on a combination of aberrant behavior, under Sentencing Guidelines § 5K2.20, and victim misconduct, under Section 5K2.10. Neither ground for departure is supportable here. Verbickas was convicted under 18 U.S.C. 242 for beating inmate Howard Lane. Sometime prior to the beating, Lane had written a note making sexual advances to a female staff member. Captain Hines told Verbickas and Britt to take Lane into the SHU to be physically punished for this misconduct. While they moved Lane to the SHU (where he was to be assaulted by Verbickas and Gutierrez), Lane verbally threatened and abused Verbickas and Britt.

i. Victim Misconduct

Under Sentencing Guidelines § 5K2.10, p.s., a court may reduce a defendant's sentence below the guideline range if the victim's wrongful conduct "contributed *significantly* to provoking the offense behavior." (emphasis added). The victim misconduct departure generally has been found to apply where the victim's conduct would have been reasonably perceived as placing the defendant in physical danger, although that is not a necessary prerequisite. See *United States* v. *Mussayek*, 338 F.3d 245, 254 (3d Cir.) (discussing cases), cert. denied, 540 U.S. 1082 (2003). Most courts have required that the response to the provocation be proportional. See *ibid.*; see also *United States* v. *Tsosie*, 14 F.3d 1438, 1442 (10th Cir. 1994) (discussing victim misconduct downward departure), receded from on other grounds, *United States* v. *Benally*, 215 F.3d 1068 (10th Cir. 2000) (addressing aberrant behavior analysis).

The district court's "finding" regarding Lane's misconduct does not support a downward departure under Section 5K2.10. The district court noted that Lane had been "surly" and stated that Lane's "conduct *could* in fact have contributed to what happened to him." Sent. Tr. at 223 (emphasis added). Thus, the district court did not even find that Lane's misbehavior actually contributed to his being beaten, much less that his conduct *significantly* provoked the beating. In addition, it is unclear to what conduct the district court referred when he noted that Lane was "surly." If Lane's being surly was his verbal abuse of Britt and Verbickas, that occurred after Captain Hines had told the officers to take Lane away to beat

him. It was not the cause of the beating. The district court's application of this Guideline was clearly error.

ii. Aberrant Behavior

Under Section 5K2.20, a court may reduce a defendant's sentence below the guideline range if, in an "extraordinary case," the defendant's criminal conduct constituted aberrant behavior. The Guideline does not define "extraordinary," but does explain that aberrant behavior requires "a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation from an otherwise law-abiding life." Sentencing Guidelines § 5K2.20(b), p.s. Such a departure is not appropriate merely because a defendant has never before been convicted of a crime. See *United States* v. *McClatchey*, 316 F.3d 1122, 1134 (10th Cir. 2003) ("[a]lthough [defendant's] prior law-abiding life is a prerequisite for granting an aberrant-behavior departure, it does not in itself distinguish him from other first offenders"). The district court stated that Verbickas satisfied the aberrant behavior standard because (1) Verbickas had an exemplary record; (2) "he was exposed to stresses at Florence * * * and that being a correctional officer at Florence in the time period * * * was a challenging job"; and (3) "Verbickas was not found guilty of the conspiracy count." Sent. Tr. at 220. Those reasons do not justify a departure under Section 5K2.20.

Awarding Verbickas a downward departure because he was acquitted of the conspiracy charge is a wholly unjustified windfall. Had Verbickas been convicted

of the conspiracy, as Schultz and LaVallee were, his offense level, like theirs, would have been two levels higher. That acquittal was thus already taken into consideration in arriving at his lower offense level.

In addition, the beating of inmate Lane required more than minimal planning. Verbickas and Britt transported Lane to a holding cell in the SHU so they could administer physical punishment for his misconduct, and Gutierrez and Verbickas both participated in the beating. Such misconduct is not aberrant. See *United States* v. *Constantine*, 263 F.3d 1122, 1127 (10th Cir. 2001) (aberrant behavior departure unavailable where defendant's offense involved planning and he enlisted the assistance of another). And after the beating, all three officers falsified reports to conceal the crime. Such a "calculated response [is] inconsistent with a finding of aberrant behavior." *United States* v. *Bayles*, 310 F.3d 1302, 1314 (10th Cir. 2002) (defendant moved illegally possessed firearms to conceal his possession of them).

The district court's finding that Verbickas's behavior was aberrant was error.

3. The District Court's Erroneous Application Of The Guidelines Was Not Harmless

Although the district court's application of the Guidelines was error, remand for resentencing is only appropriate if the error was not harmless. *Labastida-Segura*, 396 F.3d at 1142; *United States* v. *Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005). If the district court had not granted the downward departures and had

not refused to apply the obstruction of justice enhancement, Verbickas's total offense level would have been 24, resulting in a range of 51 to 63 months, and Schultz's and LaVallee's total offense levels would have been 26, resulting in a range of 63 to 78 months. The district court arrived at the sentences it imposed under the mistaken belief that the correct ranges were 27 to 33 months and 41 to 51 months, respectively. In *Labistada-Segura*, this Court found that it would have been "speculation and conjecture" to conclude that the district court "would have imposed the same sentence given the new legal landscape." 396 F.3d at 1143. In this case it would also be speculation and conjecture to suppose the district court would have given the same sentences if it had correctly found the bottom of the appropriate sentencing ranges to be 21 months more than the sentence imposed on Verbickas, and 22 months more than the sentences imposed on Schultz and LaVallee. In *Hazelwood*, the Sixth Circuit concluded the erroneous application of the Guidelines was not harmless because "it is at least possible, even under a non-mandatory system, that the judge, considering the proper Guideline range, would have sentenced [defendant] to a sentence below that which he actually received." 398 F.3d at 801. So too here. It is more than just possible that had the district court concluded that the correct Guideline ranges were substantially higher, it would not have imposed the same sentences. The errors, therefore, are not harmless.

D. The Defendants Cannot Satisfy The Plain Error Standard

1. Introduction

LaVallee and Verbickas, pursuant to orders of this Court, submitted supplemental briefs addressing the impact of *Booker* on their appeals.[24] Both defendants argue that they are entitled to a remand under the exacting plain error standard. The Circuits have divided widely on the appropriate analysis for plain error review of a claim of error under *United States* v. *Booker*. That issue is before the Court en banc in *United States* v. *Gonzales-Huerta*, No. 04-2045 (10th Cir. argued Mar. 7, 2005), and *United States* v. *Yazzie*, No. 04-2152 (10th Cir. argued Mar. 10, 2005).

The defendants' arguments regarding *Booker* have been adapted from the arguments made by the Federal Public Defender in *Yazzie* and *Gonzalez-Huerta.* Verbickas Supp. Br. at 3. The government's position on the application of *Booker* is the same as that taken in those cases. Thus, the government will not in this brief repeat the detailed discussion of the various circuit decisions and our arguments regarding them that were made in those cases to the en banc Court. The decisions in those cases, of course, will bind the panel in this case. The government's argument here, however, shows that even if the en banc Court adopts the position argued for by the defendants, they cannot show that the plain error standard is met.

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[24] Schultz has made no argument attacking his sentence other than one based on *Blakely* v. *Washington*, which has been expressly rejected by the Supreme Court in *Booker*. Thus, if this Court rejects the government's cross-appeal, Schultz has offered no basis on which to remand his sentence.

2. Verbickas And LaVallee Have Not Shown That They Satisfy The Plain Error Standard

Although LaVallee and Verbickas objected in the district court to the application of upward adjustments under the Sentencing Guidelines, they did not claim that their sentences were imposed in violation of the Sixth Amendment. Accordingly, their claims of error under *Booker* may be reviewed in this Court only for plain error. *United States* v. *Lott*, 310 F.3d 1231, 1240-1241 (10th Cir. 2002) (defendant's objection to drug quantity calculation at sentencing did not preserve constitutional objection under *Apprendi*), cert. denied, 538 U.S. 936 (2003); see Fed. R. Crim. P. 52(b); *Booker*, 125 S. Ct. at 769 (courts reviewing claims under *Booker* must determine "whether the issue was raised below and whether it fails the 'plain-error' test").

To satisfy the plain-error standard, "the error must (1) be an actual error that was forfeited; (2) be plain or obvious; and (3) affect substantial rights, in other words, in most cases the error must be prejudicial, i.e., it must have affected the outcome of the trial." *United States* v. *Haney*, 318 F.3d 1161, 1166-1167 (10th Cir. 2003) (en banc). "Even if these requirements are met," this Court may correct the error only "in those comparatively rare instances where the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 1166-1167 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). LaVallee and Verbickas bear the burden of showing the plain error standard has been met. *Olano*, 507 U.S. at 734; *United States* v. *McHorse*, 179 F.3d 889, 903 (10th Cir.),

cert. denied, 528 U.S. 944 (1999).

The first two prongs of the plain-error test are satisfied here. The district court erred in sentencing Verbickas and LaVallee under the then-mandatory Guidelines system, and that error was also "clear" or "obvious." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997) (error is plain so long as error is clear under legal rule established while case is on direct appeal). Verbickas and LaVallee argue that their sentences in this case violated the Sixth Amendment because there were enhancements based on judicial fact-finding. But because of the district court's downward departures, they received sentences that would have been authorized by the Guidelines based solely on facts found by the jury or admitted by the defendants. There was thus no Sixth Amendment violation here.

Contrary to his assertion in his supplemental brief, Verbickas did not challenge the factual basis of the vulnerable victim enhancement — in fact his counsel conceded that Lane had been handcuffed — nor did Verbickas challenge, factually or otherwise, the conclusion that the offense involved two or more persons. Rather, as discussed above, the trial evidence clearly indicated that Verbickas and Gutierrez participated in the beating and that Britt participated in the cover-up. Thus, at a minimum, the offense level supported by the jury verdict and Verbickas's concessions was 20, for which the sentencing range is 33 to 41 months. Verbickas received a sentence below this range. Similarly, LaVallee did not contest the factual basis of the vulnerable victim enhancement. Again, at a minimum, the offense level supported by the jury's verdict and his concessions is

20, and his sentence of 41 months' imprisonment is in that range. Thus, the only error under *Booker* in this case is the district court's understanding — correct at the time — that the Guidelines were mandatory.

Even though there was error and it was plain, the defendants cannot show the third prong in this case is satisfied. To meet their burden of showing this prong is met, that is, that the error affected their substantial rights, Verbickas and LaVallee argue that an error under *United States* v. *Booker* is "structural," because a structural error necessarily satisfies the third prong. *Johnson*, 520 U.S. at 468-469.[25] Structural errors are those that "*necessarily* render a trial [or sentencing proceeding] fundamentally unfair" and which so infect the process that "no criminal punishment may be regarded as fundamentally fair." *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999).

The Court's decision in *Booker* itself precludes the argument that a Booker error is structural. While *Booker* applies to "all cases on direct review," the Court made clear that not "every appeal will lead to a new sentencing hearing." 125 S. Ct. at 769. In particular, "reviewing courts [are] to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Ibid*. Indeed, in *Labastida-Segura*, this Court applied harmless-error review to a nonconstitutional error under *Booker*. 396 F.3d at 1142. In contrast, a "structural" error cannot be reviewed for

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[25] Even structural errors are subject to review under the fourth prong. *Johnson*, 520 U.S. at 466.

harmlessness. *Neder*, 527 U.S. at 7. As this Court has noted, "the universe of [structural] errors is extremely small." *United States* v. *Garcia*, 78 F.3d 1457, 1464 n.10 (10th Cir.), cert. denied, 517 U.S. 1239 (1996). The First Circuit recently recognized that an error under *Booker* is not one of the rare structural errors. *United States* v. *Antonakopoulos*, 399 F.3d 68, 80 n.11 (1st Cir. 2005) (rejecting rule of automatic reversal because *Booker* error is not structural).

For an error to affect "substantial rights," it must have been prejudicial, that is, "[i]t must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. Again, the defendant bears the burden of making this showing. *Ibid.*; see also *United States* v. *Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004) (because the purpose of Rule 52(b) is to "encourage timely objections and reduce wasteful reversals," defendant's burden "should not be too easy").

Here, LaVallee and Verbickas must show that the error adversely affected their sentences, that is, that "there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge." *United States* v. *Rodriguez*, 398 F.3d 1291, 1300 (11th Cir. 2005), petition for cert. pending, No. 04-1148 (filed Feb. 23, 2005); see also *Antonakopoulos*, 399 F.3d at 75 (defendant "must point to circumstances" creating reasonable probability that district court would impose more favorable sentence under advisory Guidelines); *United States* v. *Mares*, No. 03-21035, 2005 WL 503715, at *8-9 (5th Cir. Mar. 4, 2005) (same).

The Circuits are divided on the application of the plain error analysis when

the prejudicial effect of an error is unclear, that is, when the record does not indicate whether the district court would have given the defendant a lower sentence under an advisory Guidelines regime. In *Yazzie* and *Gonzalez-Huerta*, the United States has urged the en banc Court to adopt the standards announced by the Eleventh, First, and now Fifth Circuits: consistent with Supreme Court precedent, when the record leaves the court of appeals unable to do other than speculate as to what would have happened, the defendant simply has not met his burden of proof. Cf. *Jones* v. *United States*, 527 U.S. 373, 395 (1990) (where the effect of an error is "uncertain," "indeterminate," or leaves a court only to speculate, "a defendant cannot meet his burden of showing that the error actually affected his substantial rights."); *Rodriguez*, 398 F.3d at 1301-1303; see also *Antonakopoulos*, 399 F.3d at 80 ("reasonable probability" test under third prong "is not met by the mere assertion that the court might have given the defendant a more favorable sentence"); *Mares*, 2005 WL 503715, at *8-9. The defendants here, adopting the arguments made in *Yazzie* and *Gonzales-Huerta*, argue that the correct analysis is that of the Sixth Circuit in *United States* v. *Barnett*, 398 F.3d 516, 526-528 (6th Cir. 2005), in which the court held that a *Booker* error is presumptively prejudicial.

Even if the en banc Court rejects the government's arguments and adopts an analysis similar to that of *Barnett*, the presumption that a *Booker* error affected the defendants' sentences would be overcome in this case. Here, the district court did not give the defendants sentences within the prescribed Guidelines range, but, in

an exercise of discretion, departed downward. The Seventh Circuit, which has rejected the government's analysis, recently made clear that where the record does not leave the court in doubt as to what would have occurred under an advisory regime, remand is unwarranted. *United States* v. *Lee*, 399 F.3d 864, 866 (7th Cir. 2005) ("remand is necessary only when uncertainty otherwise would leave this court in a fog about what the district judge would have done with additional discretion"). The Seventh Circuit noted that downward departures can be an indication that even if given additional discretion it would have imposed the same sentence. *Id.* at 866-867. That is the situation in this case: The district court exercised its discretion to depart downward. While the government has challenged those departures on appeal, the defendants cannot show that the Guidelines constrained the district court to sentence them within the prescribed range. Thus, even if this Court recognizes a presumption that the mandatory nature of the Guidelines affects a defendant's sentence, that presumption is rebutted by the record in this case.

Moreover, the district court in this case — albeit not in the record before this Court — has already rejected Verbickas's argument that if the case were remanded the district court would give him a lower sentence. In ruling on Verbickas's motion for bail pending appeal, see Verbickas Supp. Br. at 11 & Attachment D, on March 10, 2005, the district court rejected Verbickas's arguments, concluding that if the case were remanded it would not impose a lower sentence.

But even if the defendants can satisfy the third prong, they still would not be entitled to remand unless they could satisfy their burden under the fourth prong. "[B]ecause relief on plain-error review is in the discretion of the reviewing court, a defendant has the further burden to persuade the court that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Vonn*, 535 U.S. 55, 63 (2002) (quoting *Olano*, 507 U.S. at 736); see also *United States* v. *Brown*, 316 F.3d 1151, 1161 (10th Cir. 2003) (only "particularly egregious" errors justify invocation of plain-error rule).

As discussed above, the sentences the defendants received in this case were within the range supported by the jury's verdicts and the facts they conceded. There was thus no constitutional error here. The defendants were sentenced under the same system that the federal courts have been using for almost two decades to sentence thousands of offenders. Imposition of a sentence under that system does not give rise to concerns about the fairness, integrity, and public reputation of judicial proceedings. Absent the Guidelines, the defendants were subject to a sentence of imprisonment of up to ten years. The defendants were subject to substantially longer sentences than were actually imposed. Whatever non-constitutional error occurred in the process that produced such low sentences simply cannot be said to be so "particularly egregious" that it seriously calls into question the fairness, integrity, or public reputation of judicial proceedings. The defendants cannot satisfy the fourth prong of the plain error test.

CONCLUSION

This Court should affirm the defendants' convictions. It should also vacate the defendants' sentences and remand for resentencing based on the appropriate, higher Guideline ranges.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument could assist this Court in deciding these appeals and cross-appeals.

CERTIFCATE 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. The brief contains 28,944 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). I relied on my word processor to count the words and it is WordPerfect 9 software.

A Motion To File Oversize Opening Brief has been submitted herewith.

/s/ Karl N. Gellert
KARL N. GELLERT
Attorney

DATED: April 7, 2005

CERTIFICATION OF DIGITAL SUBMISSION

I hereby certify that the digital version of the foregoing is an exact copy of what has been submitted to the court in written form. I further certify that this digital submission has been scanned with the most recent version of McAffee VirusScan Enterprise (ver. 8.0i) and is virus-free.

/s/ Karl N. Gellert
KARL N. GELLERT
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DATED: April 7, 2005

CERTIFICATE OF SERVICE

On April 7, 2005, I served the foregoing OPENING BRIEF OF THE UNITED STATES AS APPELLEE/CROSS-APPELLANT by Federal Express next day delivery, as well as an electronic copy of the same, on:

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