13-15476-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

MICHAEL SMITH,

Defendant-Appellant

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

BRIEF OF THE UNITED STATES AS APPELLEE

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United States v. *Smith*, Case No. 13-15476-DD

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, appellee, the United States, files this Certificate of Interested Persons And Corporate Disclosure Statement certifying that the following persons may have an interest in the outcome of this case:

1. Adams, Jerusha T., Assistant United States Attorney, Middle District of Alabama;

2. Beck, George, United States Attorney, Middle District of Alabama;

3. Blanchard, William, Blanchard Law Offices, Attorney for Co-defendant Scottie Glenn;

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6. Freeman, Christine A., Executive Director, Middle District of Alabama Federal Defender Program, Inc.;

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11. Richard Jaffe, Jaffe & Drennan, P.C., Attorney for Co-defendant Matthew Davidson;

12. Kemp, Patricia, Research and Writing Attorney, Middle District of Alabama;

13. Martin, Laronda R., Assistant Federal Defender, Middle District of Alabama;

14. Moorer, Terry F., United States Magistrate Judge, Middle District of Alabama;

15. Moran, Molly J., United States Department of Justice, Counsel for United States;

16. Parkman, James, Parkman, Adams, and White, Attorney for Co-defendant Joseph Sanders;

17. Pitt, Charles, Jaffe & Drennan, P.C., Attorney for Matthew Davidson;

18. Smith, Michael, Defendant-Appellant;

20. Stark, Lisa J., United States Department of Justice, Civil Rights Division, Counsel for United States;

21. Sumner, Patricia A., United States Department of Justice, Civil Rights Division, Counsel for United States;

22. Tartt, Clayton, Parkman, Adams, and White, Attorney for Co-defendant Joseph Sanders;

23. Thompson, Myron H., United States District Judge, Middle District of Alabama;

24. Watkins, William Keith, United States Chief Judge, Middle District of Alabama;

25. Zerkin, Gerald, Capital Resource Counsel, Federal Defenders, Eastern District of Virginia.

s/ Lisa J. Stark
LISA J. STARK
Attorney

Date: February 26, 2015

STATEMENT REGARDING ORAL ARGUMENT

The United States has no objection to the appellant's request for oral argument in this case.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This appeal is from a judgment of conviction and sentence under the laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. On November 22, 2013, the court sentenced the defendant and entered final judgment.

Doc.572.[1] Five days later, the defendant filed a timely notice of appeal. Doc.574. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying the defendant's motion to suppress his statements without a *Kastigar* hearing.

2. Whether the district court correctly applied the sentencing guideline for second-degree murder, U.S.S.G. § 2A1.2, to calculate the defendant's base offense level.

STATEMENT OF THE CASE

1. Procedural History

This case arises out of the bludgeoning and stomping to death of Rocrast Mack, a 24-year-old inmate incarcerated for selling drugs. On March 8, 2012, a grand jury sitting in the Middle District of Alabama returned a 17-count indictment charging the defendant Michael Smith, a former Lieutenant at Ventress Correctional Facility in Clayton, Alabama, and two correctional officers with

[1] "Doc.__:__" refers to the record and page number of the document listed on the district court's docket sheet. "Br.__" refers to the brief and page number of the unredacted version of defendant's opening brief filed with this Court.

various civil rights, conspiracy, and obstruction of justice violations.[2] The indictment charged defendant Smith with eight offenses, including deprivation of civil rights under color of law resulting in bodily injury and death in violation of 18 U.S.C. 242 (Counts 1 and 3), obstruction of justice for persuading others to engage in misleading conduct in violation of 18 U.S.C. 1512(b)(3) (Count 5), conspiracy to obstruct justice in violation of 18 U.S.C. 1512(k) (Count 6), obstruction of justice for falsifying information in an incident and duty report in violation of 18 U.S.C. 1519 (Count 7), obstruction of justice for misleading the Department of Corrections (DOC) and the Alabama Bureau of Investigation (ABI) during interviews on August 5 and 9, 2010, respectively, in violation of 18 U.S.C. 1512(b)(3) (Counts 11 and 12), and making false statements to the Federal Bureau of Investigation (FBI) on October 17, 2011, in violation of 18 U.S.C. 1001 (Count 15). Doc.3. The defendant filed pre-trial motions for a *Kastigar*[3] hearing and to

[2] The two correctional officers are Matthew Davidson and Joseph Sanders. Officer Davidson pled guilty to two violations of deprivation of civil rights and conspiracy to obstruct justice, and Officer Sanders pled guilty to deprivation of civil rights, conspiracy to obstruct justice, and obstructing justice for falsifying a document. Officer Scottie Glenn, who testified at the defendant's trial, also pled guilty to conspiracy to obstruct justice and deprivation of civil rights.

[3] *Kastigar* v. *United States*, 406 U.S. 441, 92 S. Ct. 1653 (1972).

suppress five sets of statements he gave to law enforcement officials. Doc.110, 113. After a three-day suppression hearing, a United States magistrate issued a Report and Recommendation and a Supplemental Report and Recommendation. Doc.187, 281. The district court adopted both reports and denied both motions. Doc.300.

Following a six-day trial, a jury found the defendant guilty as charged. Doc.402.[4] The defendant was sentenced to 30 years' imprisonment, or 30 years on each of the two civil rights convictions, and 20 years on the conspiracy and each of the four obstruction of justice violations, all sentences to run concurrently. Doc.572.

2. Facts

a. Beating And Stomping Inmate Mack To Death

On August 4, 2010, at approximately 7:30 p.m., Officer Melissa Brown was conducting an inmate count in Dormitory-D at Ventress Correctional Facility. Doc.617:275; Doc.618:174-175. When she got to inmate Mack's bunk, Mack was under the covers "gunning" her, or masturbating. Doc.617:88; Doc.618:176.

[4] Prior to trial, the district court granted the government's motion to dismiss Count 15. Doc.303, 318.

Officer Brown hit inmate Mack. Doc.618:176, 191, 275, 278. Mack hit Brown in the face. Doc.618:239. A skirmish ensued and Brown radioed for assistance. Doc.618:177, 241-242, 247. Mack ran from the dormitory to the lobby and onto the front porch. Several officers, who responded to Brown's radio transmission, surrounded and hit Mack, who was not fighting back. Doc.617:13; Doc.618:178-179; Doc.619:62, 64-65. When Brown approached swinging her baton, the officers backed away to avoid getting hit. Doc.617:259-260. Mack jumped up, ran into the yard, and was chased by several officers. Doc.617:116; Doc.618:164-165; Doc.620:40, 131-132.

The defendant, a lieutenant and the highest ranking officer on the night shift, was in another part of the prison when he heard Officer Brown's radio transmission. Doc.617:90; Doc.619:70. He radioed, "[M]ake sure y'all kill that motherfucker." Doc.617:114; Doc.618:9, 31, 92; Doc.619:70; Doc.620:129. He radioed a second time and said, "[C]atch that motherfucker" and "bring him to me." Doc.618:34, 92. When the defendant got to dormitory-D and saw that Brown was not seriously injured but had blood on her face, he told her, "[D]on't worry about it, we're going to kill that motherfucker." Doc.619:68, 71, 126.

Mack stopped running in front of Dormitory-E, raised his arms over his head, and surrendered. Doc.617:118; Doc.618:83. Officer Davidson tackled and put Mack face-down on the ground and began to hit him. Doc.618:138; Doc.620:132; Doc.621:17-18. Officers Davidson and Glenn escorted Mack -- who was not resisting, had no visible injuries and was handcuffed -- to the lieutenant's office in Dormitory-F. Doc.617:118-119, 122, 138; Doc.618:82-83, 87, 138-139; Doc.620:132-133.

While waiting for the defendant, Glenn and Davidson hit Mack, who was not fighting, in the chest. Doc.617:138, 146. Glenn testified that he was certain that the defendant, whose nickname was "motherfucker," was going to beat inmate Mack when he got to his office. Doc.617:99; Doc.620:37, 64. Thus, Glenn told Davidson to remove Mack's handcuffs so that he would have his arms and hands free for self-protection. Doc.618:103; Doc.619:56, 213; Doc.620:37, 64. Davidson complied. Doc.617:123.

The defendant stopped at the shift office next to his office and grabbed a fiberglass baton. Doc.617:148. When the defendant entered his office, Mack was arguing with Officer Davidson, but was not being physically aggressive. Doc.617:304; Doc.618:87. The defendant began beating Mack with the baton

from "side to side" and "up and down" on his head, arms, and legs. Doc.617:149. He continued to beat him even after Mack, who did not fight back, fell to the floor. Doc.617:149.

At some point, Officer Sanders entered the defendant's office. Doc.617:150. The defendant, who was winded from beating inmate Mack so many times, handed Sanders the baton and directed him to "beat him," "beat his ass." Doc.617:35, 40; Doc.620:132-134, 246. Sanders complied and inflicted several blows. Doc.617:150; Doc.620:246. The defendant took back the baton and beat Mack several more times. Doc.617:151. The defendant raised the baton, struck Mack in the head, and the baton broke. Doc.617:151. Mack immediately closed he eyes and then "went out" on the floor. Doc.617:152.

Officer Glenn tried to pull the defendant away from Mack. Doc.617:151. The defendant grabbed Glenn by the face and said, "[D]o you see my officer down there? She got blood on her uniform, and this motherfucker gonna die." Doc.617:152. The defendant, who was wearing boots, started stomping on Mack. Doc. 617:152; Doc.618:84. He repeatedly stomped and kicked Mack in the stomach, arms, back, and legs, and while leaning on a file cabinet to raise his body,

pushed his foot into and stood on Mack's neck. Doc.617:153-154; Doc.618:84, 87. Afterwards, the defendant kicked Mack several more times. Doc.617:154.

While Mack moaned in pain on the floor, Davidson handcuffed him. Doc.617:145. Afterwards, while Mack was still lying on the floor, the defendant pepper sprayed him in the face at close range. Doc.618:156-157, 160, 169. Thereafter, an officer radioed for a nurse to come to Dormitory-F with a transport cart. Doc.618:143, 159; Doc.620:43. Officers Glenn and Davidson picked Mack up under each arm and carried him to the cart. Doc.617:163-164. He was unable to walk; was bleeding from the mouth, nose, and head; and had large welts on his head. Doc.620:43-44, 61, 139; Doc.621:89, 162. Mack was wheeled to the Health Care Unit (HCU), where he was carried to a bed, "out of it," incoherent, and drooling. Doc.620:43; see Doc.617:162-163; Doc.620:139, 215; Doc.621:89. Shortly thereafter, the defendant entered the HCU and said, "I'll take days off for one of my officers. I want this inmate gone." Doc.:620:253-254. In a loud and angry voice, the defendant told the nurses to get out, and closed the door behind them after they left. Doc.620:45-46, 139-140. In the presence of Officers Davidson and Glenn, the defendant pulled Mack, who was still handcuffed, off the bed onto the floor and stomped on his head several times. Doc.617:165-166. As

Glenn pulled the defendant back, the defendant said, "[T]rust me, I got this. * * * I'll take some days for my officers." Doc.617:166. The defendant then stomped on Mack's head again and left when Mack was "out" on the floor. Doc.617:166; Doc.618:88; 620:49. The nurses and other officers, who were right outside, immediately entered and found Mack lying unconscious on the floor. Doc.618:88; Doc.619:33; Doc.620:163-164; Doc.621:35-36, 91-92. After officers put Mack back on the bed, a nurse observed that Mack's eyes were fixed and dilated. Doc.621:92.

Mack was transported to a hospital and arrived in critical condition. Doc.617:58. He was nonresponsive and hemorrhaging on both sides of his skull. He also had severe brain swelling; multiple facial fractures; massive bruising over his face, head, neck, chest and abdomen; two teeth knocked out; boot marks on his torso; and a ruptured spleen. Doc.617:61; Doc.618:111-112; Doc.620:88-91, 114. Mack died the next morning from multiple blunt force trauma to the head. Doc.617:68; Doc. 620:87, 111.

b. The Cover-Up

Shortly after the incident, the defendant met with various officers. Doc.618:48; Doc.620:166-167; Doc.621:50-51. He told them to "get [their] stories

straight" and submit statements. Doc.620:167;Doc.621:50. The officers understood that to mean that they should write statements that justified any and all use of force against Mack. Doc.620:167. The defendant also told officers to "document everything" and to claim in their reports that Mack was not handcuffed and continuously fought from Dormitory-D into the HCU. Doc.617:176; Doc.618:30, 55, 82, 106.

Within hours, the defendant typed a duty report and part of an incident report and directed an officer, who arrived after 10 p.m. and had no idea what had happened, to assist him. Doc.619:214-215, 218-219, 223, 229-230. The incident report falsely stated that Mack fought on the porch of Dormitory-D and in the yard, that he was dragged to Dormitory-F, and that the defendant used pepper spray and pulled out his baton and struck Mack in the thigh and arms to stop him from fighting and to allow Officers Glenn, Davidson, and Saunders to cuff him. Doc. 619:223-226, 228. The report did not mention the defendant's use of force in the HCU, but said that Mack continued to fight and fell off the bed.

c. The Defendant's Statements And Trial Testimony

During the early morning hours of August 5, investigators from DOC's Investigative & Intelligence (I&I) Division interviewed numerous correctional

officers, including the defendant. Doc.619:244. The defendant told essentially the same false story that was in the incident report. Doc.619:258-259. A few days later, the ABI initiated a criminal investigation. Doc.620:31. On August 9, 2010, during an interview with Investigator Timothy Rodgers, the defendant waived his *Miranda* rights, repeated the same false account, and denied that he stomped on Mack. Doc.620:33-35.

The defendant ultimately gave five statements (in addition to the duty and incident reports) to various law enforcement authorities -- two to I&I, one to the ABI, one to Warden J.C. Giles, and one to the FBI. In each, with the exception of the one to Warden Giles, which was merely a general denial of wrongdoing, the defendant offered basically the same false account that was in the incident report. Doc.136:22-23; see also Doc.165:36, 79, 153; Doc.619:223, 226, 228-229, 257, 259.

At trial, the defendant testified consistent with his prior false statements. The defendant claimed that he never used excessive force against Mack. Doc.636:42-44. He insisted that in his office, he was "swinging the baton for dear life," even though Mack was a small guy, and he and the other three officers, two of whom were more than six feet tall, were all "big guys." Doc.636:27, 63-64.

The defendant maintained that he never stomped, kicked, or intentionally hit Mack in the head with the baton, but could have done the latter accidentally. Doc.636:27, 43. He denied that he used any force against Mack in the HCU, or directed the nurses to leave. Doc.636:72-73. He admitted, however, that he was "[t]ruly upset" and so angry at Mack in the HCU that he kicked over a metal tray table and said "ain't nobody going to fuck with my motherfucking officers" and "I'll take days for my officers." Doc.636:31-32, 49, 51, 72.

The defendant stated that the government witnesses' trial testimony "was a lot of crap." Doc.636:39. He admitted that his nickname was "the motherfucker" and that it helped him keep order in the prison. Doc.636:6, 12. The defendant insisted that he did not write the incident report, signed it without reading it, and told the truth in all his statements to law enforcement officers. Doc.636:38-40, 58, 60. He admitted that on October 1, 2010, he was fired from the DOC for giving false information during the investigation. Doc.636:41.

3. Pre-Trial Proceedings

In October 29, 2012, the defendant filed a motion to suppress five sets of statements to law enforcement officials: (1) the duty and incident reports; (2) his I&I statement on August 5, 2010; (3) his ABI statement on August 9, 2010; (4) his

I&I statement on August 20, 2010; and (5) his statement to Warden C.J. Giles at a pre-dismissal conference on September 29, 2010. Doc.113.[5] That same day, he also filed a motion for a *Kastigar* hearing. Doc.110. The defendant argued that all five statements were "compelled" and protected under *Garrity* v. *New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616 (1967), and should be suppressed because he did not knowingly and voluntarily waive his *Garrity* rights during a meeting with FBI agents on October 17, 2011. Doc.110, 113. The defendant also contended that even if he waived his rights, the government's investigation violated his Fifth Amendment rights because FBI agents reviewed or learned the substance of his privileged statements before he consented to their use on October 17, 2011. Doc.113.

The United States opposed the defendant's motions. Doc.136. First, the government argued that the defendant's statements were admissible without a *Kastigar* hearing because the defendant knowingly and voluntarily waived his *Garrity* rights and consented to their use at a meeting with FBI agents on October 17, 2011. *Ibid*. Second, the government maintained that even if the defendant had not waived his Fifth Amendment rights, a *Kastigar* hearing was unnecessary

[5] The statements to I&I and the ABI were taped and transcribed.

because defendant's only two arguably compelled statements were those to I&I, and his non-compelled statements provided the same account and thus were independent sources for what he told I&I. *Ibid.* The government further maintained that its investigation was not tainted because the federal government used a "*Garrity* taint team" to ensure that no federal agents or prosecutors investigating Mack's death were exposed to the defendant's I&I statements before he waived his rights in October 2011. *Ibid.*

In December 2012, a United States magistrate held a three-day suppression hearing. Doc.150. Special FBI Agents (SAs) Susan Hanson and Kelvin King both testified in detail about their meeting with the defendant on October 17, 2011. Doc.164. See Discussion, pp. 24-28, *infra*. Both explained that, together, they advised the defendant of his *Garrity* rights, reviewed a *Garrity* waiver/consent form with him and, after defendant acknowledged that he understood both, he consented orally and in writing to the government's use of "all" his prior statements during "any" criminal investigation or proceeding. Doc.164:27-29, 31, 33, 48, 53-56, 86.[6] The agents also testified that the defendant repeatedly

[6] At the suppression hearing, the government introduced the waiver/consent form that defendant executed during the October 17, 2011 meeting. Doc.164:36. That form provides that:

(continued…)

explained that he wanted them to review all his statements so they would see that he had always provided the same account of what happened to inmate Mack. Doc.164:29-30, 48, 53-54.

ABI Investigator Timothy Rodgers also testified that he never saw the defendant's I&I statements, asked about or discussed their substance with anyone

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(…continued)

> I, _____, fully understand that some or all of my prior statements regarding allegations of excessive use of force against Rocrast Mack on August 4, 2010, in the Ventress Correctional Facility could be considered as having been given under administrative compulsion and therefore could not be used against me in any criminal investigation or proceeding.
>
> Nevertheless, I believe that all pertinent information should be provided to United States law enforcement officials in their investigation concerning these allegations of excessive force. I therefore knowingly, intelligently and voluntarily waive my constitutional and statutory right not to have those statements used against me, and I voluntarily give my consent that all my prior statements be furnished to special agents of the Federal Bureau of Investigation, the Department of Justice, and the United States Attorney's Office, knowing that these prior statements may be used against me in any criminal investigation and proceeding regardless of whether I take the witness stand in any subsequent trial.

Doc.187:4.

including the defendant, and that the ABI file that he passed onto the FBI did not include any *Garrity* material. Doc.165:13-14, 47.

In response, the defendant called I&I Investigator Ron Cooper and Warden C.J. Giles and introduced 30 exhibits, including grand jury testimony and certain DOC disciplinary policies, in an attempt to show that all his statements were protected under *Garrity*. Doc.165:61-65. Cooper testified that consistent with SA Hanson's directive that the defendant's *Garrity* rights be protected, he never discussed the substance of defendant's I&I statements with ABI Investigator Rogers or anyone from the FBI. Doc.165:100, 103-104, 106-107, 113, 116, 125-126. Warden Giles stated that although he made his correctional officers available to be interviewed by the ABI, he did not recall directing the defendant to do so. Doc.165:144-145.

On January 16, 2013, the magistrate issued a Report and recommended that the defendant's motions be denied. Doc.187. The magistrate concluded that the defendant's statements were admissible without a *Kastigar* hearing because the defendant "made a knowing, intelligent[,] and voluntary waiver of his rights against self-incrimination and *Garrity*" when he met with SAs King and Hanson. Doc.187:5. The magistrate credited the agents' testimony and concluded that

"[n]othing in the character or conduct of the[ir] interview remotely compels a different result." Doc.187:5. The magistrate explained that the meeting was "strictly voluntary" since the defendant agreed to meet with the agents and was advised when he arrived at SA King's office that he was "free to go whenever he chose," "could decline to answer any and all questions" and was not under arrest. Doc.187:3-5. The magistrate also emphasized (Doc.187:4) that the defendant received and signed a *Garrity* waiver form, acknowledged that he understood his *Garrity* rights, and told the agents that he wanted them to have his prior statements so they could see that what he told them "was consistent with what he said in other reports " to other law enforcement officials.

The magistrate also rejected (Doc.187:5) the defendant's argument that all his prior statements were compelled and protected under *Garrity*. As to the duty and incident reports, the magistrate stated that the extent to which *Garrity* applies "may be somewhat academic" because the defendant is charged with providing false information in those reports. Doc.187:5; see Doc.187:7-8. The magistrate nonetheless found that the defendant completed both "routine" reports "without prodding." Doc.187:6. The magistrate also explained that because the defendant chose not to testify at the suppression hearing, there was no evidence as to his

"subjective belief," or whether he feared termination or other serious adverse employment consequences if he did not submit the reports. Doc.187:6. The magistrate also found that despite DOC's policy, which allows for progressive discipline when an employee fails to submit a required report, the defendant's motive for writing the duty and incident reports "was to deflect suspicion and avoid jail rather than * * * retain his employment." Doc.187:7.

The magistrate also concluded (Doc.187:11-12) that the defendant's statement to Warden Giles at his pre-dismissal conference was not compelled. The magistrate explained that a letter about the meeting from Warden Giles to the defendant dated September 20, 2010, "did not indicate that a statement was mandatory," but merely advised that the defendant "could submit information or not." Doc.187:11. In any event, the magistrate reasoned that the defendant's Fifth Amendment rights were not implicated because Warden Giles decided to terminate the defendant for misconduct prior to the conference, and not for a lack of response at the meeting. Doc.187:12.

The magistrate also recommended that the defendant's motions be denied because neither the ABI nor FBI investigations were "tainted" by the defendant's arguably compelled I&I statements. Doc.187:11. The magistrate found that ABI

Investigator Rodgers understood *Garrity* and the need to keep ABI's criminal inquiry separate from I&I investigation, and thus "took pains" to guarantee that happened. Doc.187:10. The magistrate emphasized that Investigator Rodgers did not "swap or discuss" with I&I Investigator Cooper the statements any witness gave to I&I, and ensured that the defendant did not say anything during his ABI interview about what he had told I&I. Doc.187:11. Consequently, the magistrate recommended that the district court deny both the defendant's motions. Doc.187:12.[7]

On May 22, 2013, the district court issued an order directing the magistrate "to be more explicit" about whether the duty and incident reports and the defendant's ABI statement were compelled and protected under *Garrity*. Doc.264. Two days later, the magistrate issued a Supplemental Report with findings that they were not. Doc.281.

The magistrate concluded that the duty and incident reports were not protected because the defendant waived his *Garrity* rights and consented to the government's use of "***all of [his] prior statements.***" Doc.281:2. The magistrate

[7] The parties filed objections to the Magistrate's initial report and recommendation. Doc.197, 199.

also ruled (Doc.281:2-4) that the defendant's ABI interview was not compelled because the defendant was advised of and waived his *Miranda* rights. The magistrate also reasoned that a contrary conclusion was not warranted merely because Warden Giles sent correctional officers to their ABI interviews. The magistrate explained that "Warden Giles['] making the employees available is not the same as coercing them to talk under penalty of an adverse employment action," and, in any event, Giles testified that he could not recall directing the defendant to appear. Doc.281:4.

On June 16, 2013, the district court adopted the Magistrate's Initial and Supplemental Reports and denied the defendant's motions. Doc.300.

SUMMARY OF THE ARUGMENT

The defendant contends (Br. 31-65) that the district court erred in denying his motion to suppress five sets of statements without a *Kastigar* hearing because they were compelled and he did not make a knowing and voluntary waiver of his *Garrity* rights. The defendant further argues that, even if he did, the government's investigation violated his Fifth Amendment rights because federal agents reviewed those statements before he consented to their use and the government never showed that it had an independent source for its evidence.

The defendant's claims fail. First, the district court correctly concluded (Doc.187:5) that the defendant "made a knowing, intelligent[,] and voluntary waiver" of his rights. Second, even without a waiver, the district court did not abuse its discretion in denying the defendant's request for a *Kastigar* hearing because his only two arguably compelled statements are the same in substance as his non-compelled statements, and are merely false, self-serving accounts that provided the government with no evidence or investigative leads. Third, the defendant's claim that the government's investigation was tainted is waived, unsupported by the record, and fails to suggest that the defendant's Fifth Amendment rights were violated. Finally, even if this Court were to disagree, any error was harmless, and the proper remedy, in any event, would be to remand the case to allow the district court to determine whether the government had an independent source for its evidence, rather than reverse the defendant's convictions or dismiss the indictment.

The defendant also argues that the district court erred in applying the sentencing guideline for second-degree murder, U.S.S.G. § 2A1.2, rather than the guideline for voluntary manslaughter, U.S.S.G. § 2A1.3. The defendant's claim is defeated by the district court's findings that are amply supported by the evidence.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS OR ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A *KASTIGAR* HEARING

A. Standard Of Review

A district court's denial of a motion to suppress is reviewed under a mixed standard: questions of law are reviewed *de novo* and findings of fact are reviewed for clear error. See *United States* v. *Barsoum*, 763 F.3d 1321, 1328 (11th Cir. 2014); *United States* v. *Mathis*, 767 F.3d 1264, 1274-1275 (11th Cir. 2014), cert. denied, 2015 WL 732182 (2015). The facts must be construed in the light most favorable to the district court's judgment, and this Court may affirm on any ground supported by the record. See *United States* v. *Watkins*, 760 F.3d 1271, 1282 (11th Cir. 2014); *United States* v. *Newsome*, 475 F.3d 1221, 1224 (11th Cir.), cert. denied, 552 U.S. 899, 128 S. Ct. 218 (2007). A district court's denial of a motion for a *Kastigar* hearing is reviewed for an abuse of discretion. See *Barsoum*, 763 F.3d at 1328; *United States* v. *Dynalectric Co.*, 859 F.2d 1559, 1580 (11th Cir. 1988), cert. denied, 490 U.S. 1006, 109 S. Ct.1641-1642 (1989).

B. The District Court Correctly Concluded That The Defendant Knowingly And Voluntarily Waived His Garrity *Rights*

1. The Fifth Amendment provides that "[n]o person" "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. It "only applies 'when the accused is compelled to make a * * * communication that is incriminating.'" *United States* v. *Garcia-Cordero*, 610 F.3d 613, 616 (11th Cir.), cert. denied, 131 S. Ct. 547 (2010) (quoting *Baltimore City Dep't of Soc. Servs.* v. *Bouknight*, 483 U.S. 549, 554, 110 S. Ct. 900, 904 (1990)). Like all privileges, it "must 'be strictly construed,'" *University of Pa.* v. *Equal Empl't Opportunity Comm'n*, 493 U.S. 182, 189, 110 S. Ct. 577, 582 (1990) (quoting *Trammel* v. *United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 912 (1980)), since its recognition is "in derogation of the search for the truth." *United States* v. *Nixon*, 418 U.S. 683, 710, 84 S. Ct. 3090, 3108 (1974).

In *Garrity* v. *New Jersey*, 385 U.S. 493, 496, 87 S. Ct. 616, 618 (1967), the Supreme Court held that the Fifth Amendment protects statements given during an internal investigation by a law enforcement official confronted with "[t]he choice * * * between self-incrimination or job forfeiture." The Court emphasized that the "option to lose [your] * * * livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent." *Id.* at

497, 87 S. Ct. at 618. Consequently, "absent a knowing and voluntary waiver," the government may not use a law enforcement officer's incriminating statements compelled under threat of termination for remaining silent against him in a criminal investigation or proceeding. *United States* v. *Brown*, 492 F. App'x 57, 60 (11th Cir. 2012); *United States* v. *Jones*, 489 F. App'x 364, 365 (11th Cir. 2012); *United States* v. *Veal*, 153 F.3d 1233, 1239 (11th Cir. 1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2024 (1999).

The inquiry whether a defendant has knowingly and voluntarily waived his rights has "two distinct dimensions." *Hall* v. *Thomas*, 611 F.3d 1259, 1285 (11th Cir. 2010) (quoting *Moran* v. *Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986)). To be voluntary, it must be a "product of a free and deliberate choice rather than intimidation, coercion or deception." *Ibid* (citation omitted). To be knowing, a waiver must be given "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Ibid.* (citation omitted).

A "totality of circumstances" is used to determine whether a waiver is knowing and voluntary. *Hall*, 611 F.3d at 1285. That test includes consideration of the nature and duration of a defendant's meeting with law enforcement, whether

a defendant was advised of his rights, a defendant's knowledge and experience, and law enforcement's conduct during the meeting. *Ibid*.; see, *e.g.*, *United States* v. *Bernal-Benitez*, 594 F.3d 1303, 1319 (11th Cir.) (applying various factors), cert. denied, 559 U.S. 1080, 130 S. Ct. 2121, and 131 S. Ct. 314 (2010). While a written waiver is not necessary for a defendant to knowingly and voluntarily waive his rights, it "is usually strong proof of [its] validity." *United States* v. *Beckles*, 565 F.3d 832, 840 (11th Cir. 2009) (quoting *North Carolina* v. *Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 1757 (1979)).

2. The district court did not err in denying the defendant's motion to suppress his statements without a *Kastigar* hearing because it correctly concluded that the defendant made a "knowing, intelligent[,] and voluntary wavier of his rights against self-incrimination and [under] *Garrity*." Doc.187:5. There is ample evidence, particularly when viewed in the light most favorable to the district court's ruling, as required, to support that conclusion.

First, the district court correctly found (Doc.187:3) that the defendant's meeting with SAs Hanson and King was "strictly voluntary." SA Hanson called the defendant's home, left a message, and asked whether the defendant was willing to be interviewed about Mack's death. Doc.164:30, 47, 52. The defendant

promptly returned the call, agreed to be interviewed, and arrived at SA King's office in Auburn, Alabama on his own accord within 15 minutes of speaking with SA Hanson. Doc.164: 30, 47. Upon arrival, the defendant was advised that he was not under arrest, "free not to answer any questions," and "free to leave at any point." Doc.164:26-27; see Doc.164:47, 53. Indeed after the interview was over, the defendant was not arrested and left. Thus, the meeting was voluntary and noncustodial. See, *e.g.*, *United States* v. *Jonas*, 786 F.2d 1019, 1022 (11th Cir. 1986) (interview at FBI office was noncustodial since defendant appeared voluntarily in response to agent's request, was unrestrained, and free to terminate interview).

Second, the district court correctly found (Doc.187:3, 5) that the defendant was "eager" to tell the agents what happened to Mack. See Doc.164:30, 53. Throughout the entire interview, which lasted less than two hours, the defendant was "very relaxed," never expressed reluctance to answer any question, and said that he "welcomed" the opportunity to "set the record straight." Doc.164:27, 30, 48, 54. The defendant also "volunteered" that he had given prior statements to law enforcement officials and had "no problem" with the agents reviewing them. Doc.164:30, 32, 48. See, *e.g.*, *Owen* v. *Florida Dep't of Corr.*, 686 F.3d 1181,

1195 (11th Cir.) (suspect's desire to speak with police showed that meeting was voluntary), cert. denied, 133 S. Ct. 2049 (2013).

Third, consistent with the written waiver form, and the agents' testimony, which the district court credited (Doc.187:5), the record easily supports the conclusion that the defendant was fully advised of his *Garrity* rights and the consequences of waiving them. Doc.164:27-30, 39, 55-56. Approximately half-way through the interview, Hanson received a faxed *Garrity* waiver form, which she had requested from the United States Attorney's Office, and gave it to the defendant to read. Doc.164:28-29, 36, 54-56. Afterwards, she read it out loud to him and then, along with SA King, explained his *Garrity* rights. Doc.164:29, 54-55. Hanson emphasized to the defendant that some of his prior statements to law enforcement officers were likely compelled, protected under *Garrity*, and thus could not be viewed or used against him unless he expressly consented and waived his rights. Doc.164:54-55. SA King elaborated and analogized that just as statements that he might be required to make during an internal FBI investigation would likely be viewed as compelled and not usable in a subsequent criminal investigation if he were a suspect, some of the defendant's statements were likely protected under *Garrity*. Doc.164:29-30, 56. Thus, there is ample evidence that

the defendant was fully advised of his *Garrity* rights. See, *e.g.*, *United States* v. *Farley*, 607 F.3d 1294, 1328 (11th Cir.) (defendant advised of the nature of and consequences of waiving his *Miranda* rights when he read the advice form and it was read out loud to him), cert. denied, 131 S. Ct. 369 (2010).

The district court correctly found (Doc.187:4-5) that the defendant understood his rights and knowingly consented to relinquish them. The defendant orally related that he understood his *Garrity* rights and the content of the waiver form. Doc.164:29, 31, 33, 55. The defendant wrote his name on, signed, and dated the consent form, which expressly provides that he "fully understand[s]" the protection afforded his prior statements and that he "knowingly [and] intelligently" agrees to waive his rights not to have them used against him. See pp. 13-14, n.6, *supra*. Thus, given that the defendant was an experienced law enforcement officer familiar with procedures and protocol, there is ample support for the district court's conclusion (Doc.187:5) that the defendant "made a knowing, intelligent, and voluntary waiver of his [*Garrity*] rights." See *Veal*, 165 F.3d at 1244. See, *e.g.*, *United States* v. *Ransfer*, 749 F.3d 914, 935 (11th Cir.) ("youth[ful]" defendants, who were held for more than 24 hours and signed written waiver form after

reviewing it with police, "understood" and "agreed" to waive their Fifth Amendment rights), cert. denied, 135 S. Ct. 392 (2014).

Finally, the defendant's waiver of his *Garrity* rights was clearly deliberate and purposeful since he told the agents the reason for his decision. The defendant explained to the agents that "people [are] telling lies" about what happened, and that their review of his statements would show that "he had told the truth every step along the way," and that he said "the same thing" to them as he related in his "previous statement[s]." Doc.164:33, 48, 55. Consequently, the district court correctly concluded (Doc.187:5) that the defendant made a deliberate, "independent, voluntary choice[]" to waive his *Garrity* rights and that "[n]othing in the character or conduct of the interview remotely compels a different result."

3. The defendant nonetheless argues (Br. 29, 40-43) that his waiver was not "knowing and voluntary" because: (1) he was unfamiliar with *Garrity* rights during an August 20, 2010, interview with IA, as was Warden Giles, his supervisor, at the suppression hearing; (2) the written waiver form "did not mention *Garrity*;" and (3) he was not given the waiver form until midway through the interview after he had already told the agents what happened to inmate Mack. Defendant's claims fail for multiple reasons.

First, the defendant's knowledge of his *Garrity* rights on August 20, 2010, does not suggest that the defendant failed to fully comprehend the nature and consequences of relinquishing them on October 17, 2011, particularly after he was repeatedly advised and stated that he understood what he was doing. The record, in addition, does not even support the defendant's suggestion that he did not understand his *Garrity* rights on August 20, 2010. I&I Investigator Cooper testified (Doc.165:88), consistent with the interview transcript of that date (Doc.165:79; Doc.199:19) that he explained *Garrity* rights to the defendant immediately after he asserted that he was unfamiliar with them.

Moreover, while not required, the record contradicts the defendant's suggestion that he did not know the name of the rights he was relinquishing merely because the waiver form did not mention the word "*Garrity*." SAs King and Hanson both testified that they asked defendant whether he was familiar with the term "G*arrity*," and he responded affirmatively. Doc.164:28-29. King also stated that he told the defendant that some of his prior statements were protected under *Garrity*. Doc.164:33.

The defendant has not cited any authority that suggests that a consent form must label the right being waived for a defendant's relinquishment of it to be

knowing and precedent is to the contrary. It is well-settled that a defendant need not "be informed of all information useful in making his decision" to waive his rights. *Colorado* v. *Spring*, 479 U.S. 564, 576, 107 S. Ct. 851, 859 (1987) (internal quotation marks omitted). In addition, since an oral statement "is usually strong proof" as to the validity of a waiver, see *Beckles*, 562 F.3d at 840 (citation omitted), a defendant can knowingly waive his rights without being given any form, much less one that identifies a right by name.

The fact that defendant was not given a waiver form and advised of his *Garrity* rights until midway through the interview is also of no consequence. SAs Hanson and King were not obligated to advise the defendant of any rights during the meeting since it was voluntary and noncustodial. See *United States* v. *Small*, 342 F. App'x 505, 509 (11th Cir. 2009) (*Miranda* warnings required only when defendant is subjected to custodial interrogation), cert. denied, 558 U.S. 1128, 130 S. Ct. 1094 (2010). See, *e.g.*, *United States* v. *Maldonado*, 562 F. App'x 859 (11th Cir. 2014) (statements made during noncustodial interrogation admissible despite absence of *Miranda* warnings). Nonetheless, Hanson and King told the defendant, as discussed, p. 26, *supra*, that he was not under arrest, did not have to answer questions, and was free to leave at any time.

Contrary to defendant's suggestion, the agents' advice and Mack's waiver of his *Garrity* rights were timely. Hanson testified that she and King never discussed or asked the defendant anything about his prior statements to other law enforcement officers until they received the waiver form that was faxed from the United Attorney's Office midway through the interview, when the defendant was still describing what happened to Mack on August 4, 2010. Doc.164:27-28, 31-32, 56-57, 70. The defendant does not disagree and concedes (Br. 40 (quoting Doc.164:32)) that initially during the interview with the agents he "did not say * * * what [he] told I&I," but instead "merely recounted 'what occurred with Mack at Ventress.'" And the substance of his prior statements was not mentioned until *after* he was fully advised and knowingly waived his Fifth Amendment rights. Accordingly, because the district court correctly concluded (Doc.187:5) that the defendant "made a knowing, intelligent[,] and voluntary waiver of his rights," it properly denied defendant's motion to suppress without a *Kastigar* hearing.

C. Even If Defendant Had Not Waived His Rights, The District Court Would Not Have Abused Its Discretion In Denying His Motion For A Kastigar *Hearing*

The district court would not have abused its discretion in denying the defendant's motion for a *Kastigar* hearing, even if the defendant had not waived his rights.

That is because the defendant's only two arguably compelled statements are the same in substance as his voluntary, non-compelled statements, and are merely false, self-serving accounts that provided the government with no evidence or investigative leads.[8]

1. Legal Standard

To be entitled to a *Kastigar* hearing, a defendant must first demonstrate that his communications are privileged and thereby entitled to Fifth Amendment protection. See *Kastigar*, 406 U.S. at 460-461, 92 S. Ct. at 1665. As a result, a defendant must show that his statements were compelled. See, *e.g.*, *United States* v. *Quintanilla*, 2 F.3d 1469, 1482-1483 (7th Cir. 1993) (*Kastigar* hearing not required since defendant failed to show that his statements were compelled). Even when that threshold is met, an evidentiary hearing is "clearly * * * not mandated for all *Kastigar* motions." *Dynalectric Co.*, 859 F.2d at 1580. Rather, its necessity "depends on the particular facts of the case," and is only required when essential "to properly resolve a *Kastigar* claim." *Ibid*. See, *e.g.*, *United States* v. *Byrd*, 765 F.2d. 1524, 1532-1533 (11th Cir. 1985).

[8] On appeal, the government does not dispute that, consistent with its concession in the district court (Doc.136:3), the defendant's I&I statements on August 5 and August 20, 2010, were arguably compelled and thus protected under *Garrity*.

This Court has repeatedly recognized that there is "no reason" for a *Kastigar* hearing when the "Government's documents conclusively demonstrate" that it has an independent source for all information contained in a defendant's privileged statements. *Dynalectric Co.*, 859 F.2d at 1580 (quoting *United States* v. *Provenzano*, 620 F.2d 985, 1006 (3d Cir.), cert. denied, 499 U.S. 899, 101 S. Ct. 267 (1980)). See *Byrd*, 765 F.2d at 1533 (citing cases). For example, when a defendant's compelled statements are essentially the same in substance as, or a mere repetition of, the information in a defendant's non-compelled, or voluntary statements, the latter can serve as an independent source for the content in a defendant's privileged communications, thereby negating any need for an evidentiary hearing. See *Dynalectric Co.*, 859 F.2d at 1580 (citing *United States* v. *Lipkis*, 770 F.2d 1447, 1451-1452 (9th Cir. 1985)). See, *e.g.*, *United States* v. *Allmon*, 594 F.3d 981, 985 (8th Cir.) (no Fifth Amendment privilege when witness had already provided the same testimony at a different trial), cert. denied, 131 S. Ct. 413 (2010); and *Taylor* v. *Singletary*, 148 F.3d 1276, 1280-1282 (11th Cir. 1998) (defendant's testimony from another trial admissible without a *Kastigar* hearing), cert. denied, 525 U.S. 1109, 119 S. Ct. 881 (1999).

For instance, in *Lipkis*, 770 F.2d at 1451, the Ninth Circuit affirmed a defendant's convictions, refused to dismiss the indictment, and held that a *Kastigar* hearing was unnecessary even though the government's "primary witness," an FBI agent, reviewed a defendant's immunized grand jury testimony. The court of appeals explained that since the defendant stipulated that there were "only minimal differences" between his non-immunized and immunized statements, a *Kastigar* hearing "would have served no purpose" because the government's evidence "reasonably could have been derived" from the defendant's voluntary statements. *Ibid.*; see *United States* v. *Koon*, 34 F.3d 1416, 1431 (9th Cir. 9th Cir. 1994), rev'd on other grounds, 518 U.S. 81, 116 S. Ct. 2035 (1996) (explaining that a *Kastigar* hearing is not required where privileged and unprivileged communications are the "same" in all "material respects").[9]

[9] A *Kastigar* hearing is also appropriate to determine whether a defendant's Fifth Amendment rights have been violated when the government has in fact used privileged material to indict or convict. For example, the Sixth, Eighth, Ninth, and D.C. Circuits have all held that the same grand jury that heard a defendant's immunized grand jury testimony may return an indictment against him so long as the government shows at a *Kastigar* hearing that all its evidence was derived from an independent source. See, *e.g.*, *United States* v. *Bartel*, 19 F.3d 1105 (6th Cir.), cert. denied, 513 U.S. 835, 113 S. Ct. 113 (1994); *United States* v. *McGuire*, 45 F.3d 1177 (8th Cir.), cert. denied, 515 U.S. 1132, 115 S. Ct. 2558 (1995); *United States* v. *Zielezinski*, 740 F.2d 727 (9th Cir. 1984); *United States* v. *North*, 910 F.2d 843, 870 (D.C. Cir.), vacated in part, 920 F.2d 940 (1990), cert. denied, 500 U.S.

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This Court has also rejected the notion that "the self-exonerating nature of immunized testimony is irrelevant to a *Kastigar* claim." *Dynalectric Co.*, 859 F.2d. at 1579. In *Dynalectric Co.*, 859 F.2d at 1579-1580, this Court held that a *Kastigar* hearing was unnecessary following a district court's *in camera* inspection of relevant documents when a defendant's "immunized [grand jury] testimony was self-serving" and provided the government with "no direct evidence or investigatory leads." Indeed, it emphasized that its conclusion was "even stronger" because the defendant had been convicted of perjury and obstruction of justice based on his privileged statements. *Id.* at 1579 n.28 (citation omitted).[10] In a case

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(…continued)
941, 111S. Ct. 2235, (1991). Thus, even when the government has admittedly used privileged material, a defendant is entitled to relief only if the government fails to make the proper showing of an independent source.

[10] Several courts of appeals have likewise held that an investigation is not "tainted" in violation of a defendant's Fifth Amendment rights when government personnel is exposed to false, self-serving compelled/immunized statements that provide no helpful information or investigative leads. See, *e.g.*, *United States* v. *Daniels*, 281 F.3d 168, 181 (5th Cir.) (exposure to prison guard's immunized statements relating to civil rights violation did not require dismissal of indictment or disqualification or prosecution team since statements "contained no relevant information that was not readily available from legitimate independent sources"), cert. denied, 535 U.S. 1105, 122 S. Ct. 2313 (2002); *United States* v. *Bartel*, 19 F.3d 1105, 1112 (6th Cir. 1992) (indictment by same grand jury that heard immunized testimony did not offend Fifth Amendment rights because

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factually similar to the current one, but for the seriousness of the defendant's conduct, the District of Columbia Court of Appeals reversed a pretrial order suppressing a police officer's *Garrity* statements given during an internal affairs investigation relating to whether he had assaulted an arrestee and obstructed justice. See *United States* v. *Anderson*, 450 A.2d 446 (1982). The court of appeals held that the district court was "plainly wrong" that the government had failed to show at a suppression hearing that its investigation was not "tainted" by, and "derived from a legitimate source wholly independent of [the officer's] compelled [immunized] testimony," once it demonstrated that the compelled testimony was false and exculpatory. *Id.* at 450-451, 457 (citation omitted). The court of appeals explained that because the police officer's false testimony "gave no new information to the investigators, [and] * * * no leads could have been developed

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(…continued)
"exculpatory, non-incriminating testimony" "could not have provided any investigatory leads or new information" or "contributed to grand jury's decision to indict"); *United States* v. *Bolton*, 977 F.2d 1196, 1199 (7th Cir. 1992) (exposure to immunized testimony did not constitute "impermissible 'use'" because testimony "consisted entirely of denials of wrongdoing and assertions that [others] * * * had lied," which could not "have been much help to the prosecution") (citation omitted).

from his testimony," the compelled testimony was not used in violation of his Fifth Amendment rights. *Id.* at 451-452.

Applying precedent, the district court here did not abuse its discretion in denying the defendant's motion to suppress without holding a pretrial *Kastigar* hearing. As discussed, pp. 38-44, *infra*, only two of the defendant's statements – the ones to I&I -- were arguably compelled, and they are the same in substance as the defendant's other non-compelled statements, and are merely false, self-serving accounts about what happened. Consequently, because the defendant's voluntary non-compelled statements serve as an independent source for the defendant's arguably compelled statements, and there is no possibility that the latter provided the government with evidence or investigative leads in violation of the defendant's rights, a *Kastigar* hearing was unnecessary.

2. The Duty And Incident Reports, As Well As The Defendant's Statements To The ABI, At His Pre-dismissal Conference, And To The FBI Were Not Compelled And Thus Are Not Protected Under Garrity

a. To show that a statement is "compelled" and protected under *Garrity*, a defendant must establish that: (1) he "subjectively believed that he was compelled to give a statement upon threat of loss of a job"; and (2) "his belief [was] *objectively* reasonable." *United States* v. *Vangates*, 287 F.3d 1315, 1322 (11th Cir.

2002). Thus, when a defendant is expressly advised that he need not speak, voluntarily chooses to speak, or is not simultaneously forced to speak and waive his Fifth Amendment privilege, his statement is not entitled to *Garrity* protection. See *Harrison* v. *Wille*, 132 F.3d 679, 681 (11th Cir. 1998).

This Court has explained that a "general obligation to appear and answer questions truthfully [does] not in itself convert otherwise voluntary statements into compelled ones." *Vangates*, 287 F.3d at 1323 (quoting *Minnesota* v. *Murphy*, 465 U.S. 420, 427, 104 S. Ct. 1136, 1142 (1984)). See, *e.g.*, *Benjamin* v. *City of Montgomery*, 785 F.2d 959, 962 (11th Cir.) ("general expectation" that police officer will testify in court when subpoenaed "does not rise to the level of coercion"), cert. denied, 479 U.S. 984, 107 S. Ct. 571 (1986). In fact, a public official can be required to provide a statement "relating to the performance of [his] official duties on pain of dismissal" so long as he is not compelled to "relinquish[] * * * the benefits of the constitutional privilege * * * against self-incrimination." *Uniformed Sanitation Men Assoc., Inc.* v. *Commission of Sanitation*, 392 U.S. 280, 284-285, 88 S. Ct. 1917, 1920 (1968); *United States* v. *Waldon*, 363 F.3d 1103, 1112 (11th Cir.), cert. denied, 125 S. Ct. 208 (2004). See *Gardner* v. *Broderick*, 392 U.S. 273, 278, 88 S. Ct. 913, 916 (1968). See, *e.g.*,

Hester v. *City of Milledgville*, 777 F.2d 1492 (11th Cir. 1985) (requirement that firefighters submit to polygraph examination or be disciplined did not offend Fifth Amendment so long as there was no compulsion to waive privilege against self-incrimination).

Applying precedent, the district court, consistent with the record evidence, correctly concluded that the duty and incident reports, the defendant's ABI statement on August 9, 2010, and his statement at a pre-dismissal conference on September 29, 2010, were not compelled and thus are not protected under *Garrity*.[11] First, as the district court noted (Doc.187:6), the record is devoid of evidence as to the defendant's subjective belief, or more specifically, whether he feared any adverse employment consequence, much less termination, if he exercised his Fifth Amendment privilege and decided not to speak. After all, the defendant chose not to testify at the suppression hearing and never claimed at trial that he felt compelled to provide any of the aforementioned statements. Thus,

[11] The defendant's statement to the FBI on October 17, 2011, given *prior* to his waiving his rights, was also not compelled and the defendant apparently does not claim otherwise on appeal. Even if he did, that claim would fail because he was dismissed from DOC on October 1, 2010, or more than a year before he met with the FBI, and no one from DOC played a part in arranging that interview. Thus, the defendant could not have had either a subjective or objectively reasonable belief that he was forced to speak to the FBI under threat of termination, or other adverse employment consequence from the DOC.

because the defendant failed to demonstrate that he subjectively believed that he was forced under threat of job loss or some other adverse employment consequence to waive his privilege against self-incrimination and speak, his statements are not compelled.

Even if there were evidence that defendant believed that he would be fired if he remained silent, his belief would not have been reasonable. In *Waldon*, 363 F.3d at 1112, this Court affirmed a defendant's conviction for felony murder and rejected a defendant's argument that his grand jury testimony should have been suppressed because it was compelled in violation of *Garrity*. This Court explained that because *Garrity* "does not protect false testimony" and the defendant "undisputedly lied to the grand jury," "'even if the defendant subjectively believed that he was required to testify, his belief was not objectively reasonable." *Ibid*. Consequently, because all the defendants' prior statements, as in *Waldon*, are false, even if the defendant had testified that he subjectively believed that he was compelled to waive his Fifth Amendment privilege, that belief would not be objectively reasonable since he chose to give false information. Accordingly, none of the defendant's aforementioned statements were compelled and thus protected under *Garrity*.

b. All the defendant's prior statements (with the exception of the two to I&I) are not privileged for several additional reasons specific to the particular communication. First, the defendant's trial testimony defeats any claim that the duty and incident reports are entitled to Fifth Amendment protection. After all, the defendant testified at trial that he did not write the incident report and the Fifth Amendment proscribes only "compelled self-incrimination." *Security & Exchange Comm'n* v. *Jerry T. O'Brien, Inc.*, 456 U.S. 735, 742, 104 S. Ct. 2720, 2725 (1982). In addition, since the defendant obviously believed that he did not have to personally write the incident report, he clearly did not feel "compelled" to write either the duty or incident reports under threat of termination or some other adverse employment action.

Even without the defendant's trial testimony, the record demonstrates that neither report is protected under *Garrity*. The district court correctly found (Doc.187:6-7) that the defendant promptly filed the "routine" reports in the regular course of business without "prodding" or hesitation *and* his "motive" for doing so "was to deflect suspicion and avoid jail rather than * * * to retain his employment." The jury's verdict easily supports these findings. Indeed, within hours of the incident, the defendant not only sought to ensure that the authorities

had his false, self-serving account of what happened, but conspired with several officers to ensure that their statements confirmed his concocted story.

Accordingly, because the record demonstrates that the defendant never intended to invoke his Fifth Amendment privilege, much less was forced to waive it under threat of termination, the reports were not compelled, and are not entitled to *Garrity* protection. See *Erwin* v. *Price*, 778 F.2d 668, 669 (11th Cir. 1985); see, *e.g*., *Devine* v. *Goodstein*, 680 F.2d 243, 247 (D.C. Cir. 1982); *United States* v. *Ruiz*, 579 F.2d 670, 675-676 (1st Cir. 1978).

Moreover, the district court correctly concluded (Doc.187:6) that DOC's policy of progressive discipline, which allows for a warning or written reprimand for an initial failure to "complete [a] report" and steeper penalties for repeat infractions, does not dictate a contrary conclusion. This Court held in *Waldon*, 363 F.3d at 1112, that regulations that created "a general expectation that police officers will cooperate and testify" and reserved a "right to discipline employees exercising their Fifth Amendment" were insufficient to establish an objectively reasonable belief that a defendant was compelled testify under threat of

termination.[12] In any event, since "there is no indication" that defendant was even "aware of [DOC's] regulation" or "presented" with it when he submitted either report, the regulation's existence does not establish compulsion. *United States* v. *Palmquist*, 712 F.3d 640, 647 (1st Cir. 2013). Consequently, the incident and duty reports are not entitled to Fifth Amendment protection.

The district court also correctly concluded that the defendant's ABI statement on August 9, 2010, was not compelled. After all, the defendant could not have believed that he was required to waive his Fifth Amendment privilege since Investigator Rodgers, as the district court found (Doc.187:10; Doc.281:2) advised him that he had a right to remain silent and that anything that he said could be used against him. Doc.620:34-35. In addition, contrary to defendant's suggestion (Br. 33-34), the fact that Warden Giles directed several officers "to speak with ABI agents" does not dictate a contrary conclusion. Warden Giles testified (Doc.165:145) that he did not know whether the defendant "was one [of those officers] or not," and the district court correctly concluded (Doc.281:3-4) that

[12] See, *e.g.*, *United States* v. *Roberts*, 660 F.3d 149, 156 (2d Cir. 2011) (no coercion when employer would not "necessarily fire" defendant), cert. denied, 132 S. Ct. 1640 (2012); *United States* v. *Indorato*, 628 F.2d 711, 716 (1st Cir. 1980) (police officer's incriminating statement not compelled because "dismissal or other disciplinary action" was not "automatic[]" effect of department's disciplinary rules).

Warden Giles' "merely ma[king] his employees available" is "not the same as coercing them to talk under penalty of adverse employment action." Consequently, the defendant could not have subjectively or reasonably believed that he was compelled to waive his Fifth Amendment privilege when interviewed by the ABI.

The defendant was also not compelled to make a statement at his pre-dismissal conference on September 29, 2010. As the district court found (Doc.187:11), the defendant was never told that he was required to make a statement, or that his failure to do so would result in termination, or any other adverse employment consequence. Instead, he was merely advised that he would have the opportunity to "tell his side of the story" and "could submit information *or not*." Doc.165:146. Thus, the defendant could not have had a subjective belief that he was either compelled to speak under penalty of dismissal, or forced to waive his Fifth Amendment right against self-incrimination. See *Harrison*, 132 F.3d at 683 (deputy, who was offered opportunity to respond to civil rights charges at pre-disciplinary conference, was "not faced with the choice to make a statement or to be fired").

In any event, any belief by the defendant that he was compelled to speak or lose his job would not have been objectively reasonable. The notification letter for the conference clearly stated that any adverse employment consequence would be based on the defendant's prior misconduct relating to inmate Mack. It emphasized that "[g]iving false information or verbal/written statement in connection with employment, an investigation or injury * * * calls for Dismissal" for the first offense. Doc. 165:146. Consequently, "there simply is no basis upon which [the defendant] could have formed an objectively reasonable belief that [the State] compelled [him] to forego [his] Fifth Amendment rights" when he met with Warden Giles. *Vangates*, 287 F.3d at 1324. Accordingly, the incident and duty reports, defendant's ABI statement, his statement at his pre-dismissal conference, as well as his statement to the FBI, were not compelled and thus are not protected under *Garrity*.

3. The District Court Did Not Abuse Its Discretion In Denying The Defendant's Pretrial Motion For A Kastigar Hearing Because It Would Have Served No Purpose

The district did not abuse its discretion in denying the defendant's motion for a *Kastigar* hearing because the defendant's only two arguably compelled statements to I&I are the same in substance as his voluntary, non-compelled

statements and provided the government with no useful information. All of the defendant's statements, with the exception of his statement at the pre-dismissal conference (which was merely a general denial of wrongdoing), are consistent in their essential details. Significantly, they all state that the defendant did not use excessive force against inmate Mack because: (1) inmate Mack continually fought and was violent while in the defendant's office; (2) the defendant only pepper sprayed and struck inmate Mack in the arms and legs with his baton when the other officers were unable to handcuff him; and (3) the defendant did not use any force against inmate Mack in the HCU.

In addition, the defendant has always claimed that all his statements are consistent. When he waived his *Garrity* rights during the October 2011 meeting with the FBI, he insisted that the agents review all his prior statements so they could see that he had always told the same story about what had occurred. Accordingly, because the defendant's non-compelled statements are essentially the same in substance as his arguably compelled statements to I&I, there was no need for a *Kastigar* hearing since the former serve as an independent source for the latter.

The district court also did not abuse its discretion in denying the defendant's motion for a *Kastigar* hearing because the defendant's I&I statements were of no value to the government when investigating inmate Mack's death. They are merely false, self-serving accounts that provided no evidence, investigative leads, or new information that was not already included in the defendant's voluntary statements. Consequently, because the defendant's non-compelled statements easily establish an independent source for the information in the defendant's I&I statements and the latter provided no helpful information or evidence, the district court did not abuse its discretion in refusing to hold a *Kastigar* hearing.

Contrary to the defendant's contention (Br. 54-56, 59-64), *United States* v. *Schmidgall*, 25 F.3d 1523 (11th Cir. 1994) (*Schmidgall I*), *United States* v. *Hill*, 643 F.3d 807 (11th Cir. 2011), cert. denied 132 S. Ct. 1988 (2012), and *United States* v. *Hampton*, 755 F.2d 1479 (11th Cir. 1985), do not dictate a contrary conclusion. In those cases, this Court held that the government failed to meet its burden of showing that it had a source independent of a defendant's privileged statements for all its evidence. In none of those cases, however, were the defendant's privileged statements, as here, the same in substance as the defendant's voluntary statements and merely self-serving, exculpatory accounts that provided

the government with no evidence or investigative leads. Consequently, the cases that the defendant cites are easily distinguishable on their facts.

Further, the fact that the government must show an independent source for all its evidence, see *Hill*, 643 F.3d at 877, does not suggest, as the defendant claims (Br. 63), that a *Kastigar* hearing was necessary. The defendant's only two arguably compelled statements, unlike in *Hill*, are self-serving, false accounts. After all, since the defendant, here, was convicted of obstruction of justice for providing falsified documents (Count 7) and misleading information (Counts 11 and 12), the government's evidence that he willfully used excessive force clearly comes from a source independent of his two compelled statements. *Dynalectric Co.*, 859 F.2d at 1579 n.28. In any event, because the defendant, here, unlike in *Hill*, waived his Fifth Amendment rights and consented to the use of all his prior statements (see pp. 25-29, *supra*,), the government was not required to show an independent source for *any* of its evidence. Accordingly, the district court did not abuse its discretion in denying the defendant's motion for a *Kastigar* hearing.

D. The Defendant's Claim That The Government's Investigation Was Tainted In Violation Of His Fifth Amendment Rights When FBI Agents Reviewed His Privileged Statements Before He Consented To Their Use Is Waived, Unsupported By The Record, And Of No Legal Consequence

The defendant also contends (Br. 50) that the government's investigation was "tainted" in violation of his Fifth Amendment rights because SAs Hanson and King reviewed his privileged statements before he consented to their use in October 2011. That claim is waived, unfounded, and does not suggest that the defendant's Fifth Amendment rights were violated.

First, the defendant waived any and all Fifth Amendment claims when he waived his *Garrity* rights and consented to the use of all his statements during the meeting with the FBI in October 2011. The waiver form that he signed is broadly worded, unrestricted in its coverage, and provides that "*all*" the defendant's prior statements may be "used against" him in "*any*" criminal investigation or prosecution conducted by federal authorities, including the FBI. See note 6, *supra*. (emphasis added). Accordingly, the defendant unequivocally waived his claim that his Fifth Amendment rights were violated when FBI agents allegedly reviewed his prior statements before the October 2011 meeting when investigating Mack's death. *United States* v. *Schwartz*, 541 F.3d 1331, 1355, 1357 (11th Cir. 2008) (Fifth Amendment privilege waived even though district court found that

agreement was "ambiguous" and the government "violated it by making direct use" of defendant's privileged statements before the grand jury), cert. denied, 556 U.S. 1130, 129 S. Ct. 1655, and 556 U.S. 1174, 120 S. Ct. 1929 (2009); *United States* v. *Pielago* 135 F.3d 703, 710 (11th Cir. 1998) (no Fifth Amendment violation because agreement "explicitly allowed" government to make derivative use of defendant's immunized statements).

Even if the defendant's claim is not waived, the record contradicts his contention that the FBI agents were exposed to his I&I statements before the October 2011 interview at which he waived his rights. At the suppression hearing, SA King testified that he was not involved in the investigation of inmate Mack's death before he interviewed the defendant. Doc.164:26. King said that he knew only that there had been a death at Ventress, that the defendant was present, and that inmate Mack was dead. Doc.164:26, 28. SA Hanson testified that prior to the October meeting, she reviewed only the defendant's ABI statement, which was not compelled or protected under *Garrity*. Doc.164:52, 57. See Discussion, pp.43-44, *supra*.

In addition, the district court credited the testimony of both agents (Doc.187:5), which was corroborated by Investigators Cooper and Rodgers. At the

suppression hearing, I&I Investigator Cooper testified that consistent with explicit instructions from the FBI to protect the defendant's *Garrity* rights, he did not discuss the substance of defendant's I&I statements with anyone from the ABI or the FBI, including ABI Investigator Rodgers. Doc.165:86,100, 103, 106-107, 113, 116, 125. Investigator Rodgers, who interviewed the defendant on August 9, 2010, also testified that he told the defendant not to disclose what he had said to I&I, and that ABI's investigative file that he passed on to the FBI did not contain any *Garrity* material. Doc.165:13-14, 47. Thus, the district court correctly concluded (Doc.187:11) that neither the ABI nor FBI's investigation was "tainted" by defendant's only two arguably compelled statements to I&I.

Even if FBI agents had reviewed the defendant's I&I statements before the October 2011 meeting (a point with which we strongly disagree) that would not have tainted the government's investigation in violation of the defendant's Fifth Amendment rights.[13] The agents' alleged exposure to the defendant's statements

[13] In pleadings and orally at the suppression hearing, the government accurately represented that the United States used a *Garrity* taint team to ensure that no federal agent or prosecutor investigating inmate Mack's death was exposed to defendant's two I&I statements, before the defendant waived his Fifth Amendment rights in October 2011. Once the government demonstrated at the suppression hearing that defendant voluntarily waived his *Garrity* rights, there was

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did not vitiate the voluntariness of the defendant's waiver. After all, the defendant has never claimed, and there is no evidence that he knew that the agents had seen any of his privileged statements before he waived his *Garrity* rights. Thus, any review of the defendant's privileged statements by the agents prior to the October interview did not undermine the validity of the defendant's consent. See, *e.g.*, *United States* v. *Rico Beltran*, 409 F. App'x 441 (2d Cir. 2011) (voluntariness of consent not vitiated by police misconduct that is unknown to individual who consents); *United States* v. *Edgerson*, 243 F. App'x 974 (6th Cir.), cert. denied, 552 U.S. 1083, 128 S. Ct. 820 (2007); (same); *United States* v. *Furrow*, 229 F.3d 805 (9th Cir. 2000) (same), overruled on other grounds, 256 F.3d 895 (2001).

In any event, this Court has explicitly rejected the argument that an "investigator exposed to immunized/[compelled] information is *per se* tainted" and has repeatedly emphasized that "the focus of the inquiry under *Kastigar*, * * * is not whether [the government] was aware of the contents of [defendant's] immunized/[compelled] testimony, but whether [it] used the testimony in any way to build a case against the defendant." *United States* v. *Schmidgall*, 25 F.3d 1533,

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(…continued)
no need to put on evidence about its use of a *Garrity* taint team because the defendant's statements were admissible without a *Kastigar* hearing.

1537 (11th Cir. 1994) (*Schmidgall II)*, cert. denied, 513 U.S. 1128, 115 S. Ct. 938 (1995); *United States* v. *Caporale*, 806 F.2d 1487, 1519 (11th Cir. 1986), cert. denied, 492 U.S. 917, 107 S. Ct. 3191, and 483 U.S. 1021, 107 S. Ct. 3625 (1987). See *Schmidgall I*, 25 F.3d at 1529; *Byrd*, 765 F.2d at 1529. And, in this case, as discussed, *supra*, the defendant's only two arguably compelled statements are the same in substance as his voluntary, non-compelled statements, and are merely false, self-serving, exculpatory accounts that provided the government with no investigative leads or evidence. Thus, even if FBI agents reviewed the defendant's two arguably compelled statements prior to the October 2011 interview, doing so would not have violated the defendant's Fifth Amendment rights.

Further, even if the agents' review of the defendant's I&I statements violated the defendant's Fifth Amendment rights, any taint was "attenuated" because the defendant voluntarily waived his *Garrity* rights, initiated conversation about his prior statements, and deliberately chose to provide all his prior statements to federal authorities. See discussion at pp. 25-29, *supra*. See, *e.g.*, *United States* v. *Cooke*, 674 F.3d 491, 495 (5th Cir.) (police officers' unlawful entry onto property was "attenuated" by "voluntary consent, which broke the chain of causation between the alleged violation and discovery of the evidence"), cert.

denied, 1133 S. Ct. 756 (2012); *United States* v. *Lopez-Garcia*, 565 F.3d 1306, 1318-1319 (11th Cir.) (confession given without *Miranda* warnings did not "taint[]" second *Mirandized* confession that was "knowing and voluntar[]y"), cert. denied, 558 U.S. 1092, 130 S. Ct. 1012 (2009); *Lawhorn* v. *Allen*, 519 F.3d 1272, 1291-1292 (11th Cir. 2008) (taint from defendant's illegally being held in custody for five days without a lawyer and giving two exculpatory statements was "dissipated" when defendant "volunteered * * * to talk to law enforcement officials," received and acknowledged his *Miranda* rights, and voluntarily confessed) (citation omitted), cert. denied, 131 S. Ct. 252 (2010); *Bradley* v. *Nagle*, 212 F.3d 559, 565-566 (11th Cir. 2000) (voluntary confession "purged * * * the taint" of illegal arrest), cert. denied, 531 U.S. 1128, 121 S. Ct. 886 (2001).

Even if this Court disagrees, any violation of the defendant's Fifth Amendment rights was clearly harmless beyond any doubt. *Schmidgall I*, 25 F.3d at 1529; *Byrd*, 765 F.2d at 1529 n.8; see *United States* v. *Mechanik*, 475 U.S. 66, 106 S. Ct. 938 (1986). The defendant's only two arguably compelled statements to I&I, as previously discussed, were of no use to the government during its investigation of inmate Mack's death. The evidence of the defendant's willful use of excessive use of force was also overwhelming and included eyewitness

testimony, the defendant's own words that he intended to kill inmate Mack, and evidence that the defendant brutalized inmate Mack in two different venues, even when he posed no threat, was handcuffed, and was already severely injured.

Finally, should this Court disagree, the proper remedy is not to reverse the defendant's convictions or dismiss the indictment, but to remand the case for the district court to make specific findings as to whether the government had a source independent of the defendant's I&I statements for its evidence. As this Court has explained, "[o]f all the *Kastigar* cases in courts of appeals, only a handful are outright reversals with directions to dismiss the indictment or reverse the conviction without allowing further proceedings." *Schmidgall I*, 25 F.3d at 1531, n.10. Consequently, while we believe that it is unnecessary for the government to offer testimony on remand to show that its use of a *Garrity* taint team prevented exposure to the defendant's I&I statements until after the defendant knowingly and voluntarily waived his rights in October 2011, it could do so if required.

II

THE DISTRICT COURT CORRECTLY APPLIED THE SENTENCING GUIDELINES

A. Standard Of Review

This Court reviews a district court's application of the United States Sentencing Guidelines *de novo* and all factual findings for clear error. See *United States* v. *Kinard*, 472 F.3d 1294, 1297 n.3 (11th Cir. 2006).

B. The District Court Correctly Applied The Sentencing Guideline For Second-Degree Murder When Calculating The Defendant's Base Offense Level

The defendant argues (Br. 65-69) that the district court erred in applying the sentencing guideline for second-degree murder, U.S.S.G. § 2A1.2, rather than the guideline for voluntary manslaughter, U.S.S.G § 2A1.3, to calculate his base offense level. That claim is defeated by the district court's findings and the evidence.[14]

To determine a defendant's base offense level for a crime involving individual rights, a district court applies the offense level for the applicable

[14] The Probation Department recommended that the district court apply the premeditated murder guideline. While the defendant's comments and conduct demonstrate that he intended to kill Mack, the United States in pleadings and at the defendant's sentencing, nonetheless recommended that the district court apply the second-degree murder guideline.

underlying offense. See U.S.S.G. § 2H1.1(a). Under federal law, the distinction between second-degree murder and voluntary manslaughter turns on whether the defendant committed the killing with "malice," rather than a reduced level of culpability. See *United States* v. *Sharma*, 394 F. App'x 591(11th Cir. 2010), cert. denied, 131 S. Ct. 1708 (2011); *United States* v. *Hicks*, 389 F.3d 514, 530 (5th Cir. 2004), cert. denied, 126 S. Ct. 1022 (2006). See also 18 U.S.C. 1111(a) (2000) (defining second degree murder as "the unlawful killing of a human being with malice aforethought"). To act with malice, a defendant must have an "(1) intent to kill; (2) intent to do serious bodily injury; or (3) extreme recklessness and wanton disregard of human life ('depraved heart')." *Hicks*, 389 F.3d at 530 (quoting *Lara* v. *United States Parole Comm'n*, 990 F.2d 839, 841 (5th Cir. 1993)). See also *Sharma*, 394 F. App'x at 597 (second degree murder requires that a defendant "intend[] to kill the victim or willfully [do] acts with callous and wanton disregard for * * * the serious bodily harm to the victim").

The district court correctly applied the second-degree murder guideline because consistent with the evidence, the district court found that the defendant had an "intent to kill, [an] intent to commit serious bodily injury, and * * * a depraved heart" when he repeatedly stomped on inmate Mack's head in the HCU.

Doc.597:16. The evidence overwhelmingly supports the district court's finding that the defendant had a "depraved heart" and acted with "the specific purpose of torturing Mack" when he sadistically brutalized Mack in the HCU despite Mack's being handcuffed and "already * * * beaten to a pulp." Doc.595:157; 597:16-17.

By the time Mack arrived at the HCU, the defendant had already brutally beaten and severely injured him. As part of defendant's training, the defendant had been specifically instructed that kicking or stomping on a person's head at *any* time constitutes deadly force and endangers life. Doc.619:55, 187, 190, 206; Doc.636:43-45. Thus, there is no doubt that the defendant knew that his repeatedly stomping on Mack's head when he was already in a medically compromised state placed Mack at further risk of serious bodily injury or death. See, *e.g.*, *Sharma*, 394 F. App'x at 597 (placement of inmate, who was beaten to death, in a cell with inmate who had a reputation for assaulting other inmates sufficient to show risk of injury sufficient to support application of second-degree murder guideline).

In addition, the defendant's own words suport the district court's conclusion that the second-degree murder guideline applies. Minutes before the attack, the defendant had repeatedly stated that Mack was going to die and that he intended to

kill him. Not satisfied with the extreme injuries that he had already inflicted in his office, the defendant chose to brutally attack Mack once again in the HCU until he was unconscious and nonresponsive. Thus, the defendant's comments and conduct demonstrate that, consistent with the district court's finding, defendant's purpose in stomping on Mack in the HCU, even after he was severely injured, was to kill him. See, *e.g.*, *United States* v. *Visinaiz*, 428 F.3d 1300, 1308 (10th Cir. 2005) (defendant's repeatedly hitting victim in the head with a blunt object sufficient to show malice to support second-degree murder conviction), cert. denied, 546 U.S. 1123, 126 S. Ct. 1101 (2006).

The defendant nonetheless argues (Br. 66-67) that the district court should have applied the guideline for voluntary manslaughter because Dr. Kenneth Benedict testified at the sentencing hearing that the defendant suffered from "untreated mental disorders early in life" that caused him to be "out of control" and unable to "form an intent to kill." Defendant's claim fails.

The district court explicitly rejected the defendant's argument that any mental disorder caused or justified his conduct. The district court explained that the defendant's "mental health and social history * * * do[] not explain what

happened" at the HCU because "[t]he torture in the [HCU] reflects one thing and one thing alone, second degree murder." Doc.597:17.

Moreover, the district court correctly found (Doc.597:17) that the defendant's "torture" of Mack after he was "already beaten to a pulp" "is not consistent with heat of passion or adequate provocation" that is required for voluntary manslaughter. Doc.595:157; Doc.597:17. Voluntary manslaughter is "an unlawful, intentional killing committed without malice aforethought, while in a sudden heat of passion due to adequate provocation." *United States* v. *McRae*, 593 F.2d 700, 705 (5th Cir. 1978) (citation omitted), cert. denied, 444 U.S. 862, 100 S. Ct. 128 (1979). See *United States* v. *Guyon*, 717 F.2d 1536, 1546 (6th Cir. 1983), cert. denied, 465 U.S. 1062, 104 S. Ct. 1419 (1984). "Heat of passion" generally requires a defendant to act suddenly on the heels of the precipitating event and is "normally unavailable" when there is an "interval of time [and] a []lapse[] between the provocation and response." See *United States* v. *Velazquez*, 246 F.3d 204, 213 (2d Cir. 2001). A defendant's anger at a victim is not sufficient to establish heat of passion without an element of "*sudden* provocation" nor is a "continuing dispute without any indication of some sort of instant incitement." *United States* v. *Bordeaux*, 980 F.2d 534, 537 (8th Cir. 1992) (citation omitted). Moreover, for

provocation to be adequate, "it must be the type which would naturally cause a reasonable person to act upon that impulse and without reflection or to temporarily lose self control." *Ibid.* (quoting Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instructions § 38A.08 (1992 Supp.)).

Contrary to the defendant's suggestion, Officer Brown's initial confrontation with Mack in Dormitory-D fails to demonstrate that the defendant acted "in a sudden heat of passion" or with "adequate provocation" when he stomped on inmate Mack's head in the HCU. Nearly 20 minutes elapsed between the incident in Dormitory-D and the defendant's vicious attack on inmate Mack in the HCU. In between the two events, the defendant had a conversation with Officer Brown, walked from dormitory-D through the yard to Dormitory-F, retrieved a baton from the shift office, repeatedly beat Mack with a metal baton, left his office, walked to the HCU, and ordered the nurses to leave. Consequently, the defendant clearly did not act in the sudden "heat of passion," with regard to the incident in Dormitory-D. See, *e.g.*, *Velazquez*, 246 F.3d at 213.

In any event, the confrontation between Officer Brown and inmate Mack did not provide adequate provocation for defendant's brutally stomping inmate Mack to death. The initial confrontation in Dormitory-D did not involve and was not

witnessed by the defendant, and did not result in any serious injuries. The defendant clearly knew that an established system of discipline existed to address and punish any inmate, like Mack, who misbehaves. Doc.619:211. Consequently, because the district court correctly found that the defendant was not acting in the sudden heat of passion or with adequate provocation when he sadistically stomped Mack to death after he had already beaten and seriously injured him, the court properly refused to apply the voluntary manslaughter guideline.

C. The District Court Correctly Concluded That The Vulnerable Victim Enhancement And The Adjustment For Restraint Of Victim Should Apply If This Court Holds That The Second-Degree Murder Guideline Does Not Apply

The defendant contends (Br. 69-70) that the district court should not have applied adjustments for vulnerable victim, see U.S.S.C. § 3A1.1(b)(1), and physical restraint, see U.S.S.G. § 3A1.3. This Court need not consider either claim should this Court affirm the district court's application of the second-degree murder guideline since the defendant's total offense level was 48 (38 for second-degree murder, plus 6 for color of law, see U.S.S.G. § 2H1.1(b)(1)(B), plus 2 for obstruction of justice, see U.S.S.G. § 3C1.1, and plus 2 for aggravating role, see U.S.S.G. § 3B1.1(c)) and 43 allows for life imprisonment. See Doc.595:181 (defendant conceding the point). In any event, the district court correctly found

(Doc.595:157, 161) that the evidence was sufficient to support both enhancements because inmate Mack was a "vulnerable victim," having already "been beaten to a pulp," and "restrained" since he was handcuffed when the defendant pulled him off the bed and attacked him in the HCU. See, *e.g.*, *United States* v. *Kennedy*, 441 F. App'x 647 (11th Cir. 2011) (upholding "vulnerable victim" enhancement for inmate beating); *United States* v. *Tapia*, 59 F.3d 1137 (11th Cir.) (same), cert. denied, 516 U.S. 953, 116 S. Ct. 401, and 516 U.S. 1001, 116 S. Ct. 546 (1995); *United States* v. *Clayton*, 172 F.3d 347, 353 (5th Cir. 1999) (upholding adjustment for restraint of victim when police officer convicted of excessive force against handcuffed victim).

CONCLUSION

For the foregoing reasons, the judgment of conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF OF THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32 (a)(7)(B) because it contains 13, 267 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word, in 14-point Times New Roman font.

s/ Lisa J. Stark
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Dated: February 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2015, I electronically filed the foregoing BRIEF OF UNITED STATES OF AMERICA AS APPELLEE with the Clerk of the Court for the United States Court of Appeal for the Eleventh Circuit by using the appellate CM/ECF system and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid.

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