Nos. 06-5694; 06-5946

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TOMMY SHANE CONATSER,

Defendant-Appellant

PATRICK MARLOWE,

Defendant-Appellant

---

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

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# PROOF BRIEF FOR THE UNITED STATES AS APPELLEE

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## STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose Appellants' requests for oral argument.

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## JURISDICTIONAL STATEMENT

Appellants' jurisdictional statements (Conatser Br. 1; Marlowe Br. 1) are correct.[1]

## GOVERNMENT'S RE-STATEMENT OF THE

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[1] Citations to "R. __" refer to documents in the district court record. Citations to "Conatser Br. __" refer to pages in defendant Conatser's opening brief. Citations to "Marlowe Br. __" refer to pages in defendant Marlowe's opening brief. Citations to "GX __" identify by number the government's trial exhibits.

## ISSUES PRESENTED FOR REVIEW

1. Whether sufficient evidence supports defendant Conatser's conviction.

2. Whether defendant Marlowe's sentence is constitutional.

3. Whether the district court erred in applying the second degree murder guideline when calculating defendant Marlowe's advisory Sentencing Guidelines range.

4. Whether defendants' sentences are reasonable.

## STATEMENT OF THE CASE

On July 23, 2004, a federal grand jury returned an eight-count indictment against Tommy Conatser, Patrick Marlowe, Gary Hale, Robert Ferrell and Robert Locke, all of whom were, at relevant times, employed as correctional officers by the Wilson County Sheriff's Department. (R. 1, Apx. __). Count I alleged that Conatser, Marlowe, Hale, Ferrell, Locke, and others violated 18 U.S.C. 241 by conspiring to deprive pre-trial detainees and convicted prisoners at the Wilson County Jail of their Fourteenth Amendment rights not to be deprived of liberty without due process of law and their Eighth Amendment rights to be free from cruel and unusual punishment, respectively, while in official custody and detention. (R. 1 at 1-4, Apx. __). The indictment alleged 19 overt acts of the conspiracy, seven of which were also charged in separate counts. (R.1 at 1-4, Apx. __). Two of these seven separately charged counts (Counts II and III) related to

the beating and resulting death of a pre-trial detainee, Walter Kuntz: Count II alleged that Marlowe and Hale violated 18 U.S.C. 242 and 2 by assaulting Walter Kuntz, a pretrial detainee, resulting in his bodily injury and death (R. 1 at 5, Apx. __); Count III alleged that Marlowe and Hale violated 18 U.S.C. 242 and 2 by failing to provide necessary and appropriate medical care to Kuntz, resulting in his bodily injury and death (R. 1 at 5, Apx. __). Count IV alleged that Marlowe, Conatser, and another violated 18 U.S.C. 242 and 2 by assaulting detainee Paul Armes, resulting in his bodily injury. (R. 1 at 6, Apx. __). Count V alleged that Marlowe and others violated 18 U.S.C. 242 and 2 by assaulting detainee Sergio Martinez, resulting in his bodily injury. (R. 1 at 6, Apx. __). Count VI alleged that Marlowe, Conatser, and another violated 18 U.S.C. 242 and 2 by assaulting detainee Kenneth McIntyre, resulting in his bodily injury. (R. 1 at 7, Apx. __). Count VII alleged that Marlowe, Hale, Ferrell, and Locke violated 18 U.S.C. 242 and 2 by assaulting prisoner Dartanian McGee, resulting in his bodily injury. (R. 1 at 7, Apx. __). Count VIII alleged that Marlowe, Ferrell, and others violated 18 U.S.C. 242 and 2 by assaulting detainee Larry Clark, resulting in his bodily injury. (R. 1 at 8, Apx. __).[2]

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[2] Gary Hale entered a plea of guilty to Count I, alleging a violation of 18 U.S.C. 241 (conspiracy against rights), and was sentenced to 108 months' imprisonment. (R. 140, Apx. __; R. 269, Apx. __). The government thereafter dismissed Counts

The trial of Conatser, Marlowe and Locke began on January 11, 2006. (R. 164, Apx. __). Following the close of the government's case and at the end of trial, all three defendants moved for judgments of acquittal on the ground that there was insufficient proof to support convictions under the charged counts. (R. 252 Tr. 1266-1274, Apx. __; R. 286 Tr. 1901-1902, Apx. __). The district court denied their motions. (R. 252 Tr. 1279-1281, Apx. __; R. 286 Tr. 1901-1902, Apx. __). The jury convicted Conatser on Count I and acquitted him on Counts IV and VI. (R. 187, Apx. __). Marlowe was convicted on Counts I through VII, and was acquitted on Count VIII. (R. 185, Apx. __). Using a special verdict form, the jury found that Kuntz's death resulted from Marlowe's acts as charged in Count III, but that bodily injury, and not death, resulted from Marlowe's acts as charged in Count II. (R. 185 at 2-3, Apx. __). Locke was acquitted of all charges. (R. 189, Apx. __). Conatser and Marlowe moved for new trials. (R. 197, Apx. __; R. 200, Apx. __; see Fed. R. Crim. P. 33). The district court denied both motions. (R. 253, Apx. __; Conatser Sentencing, Tr. 72-73, Apx. __; R. 281, Apx. __).

The district court sentenced Conatser to 70 months' imprisonment (R. 254,

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II, III, and VII against Hale. (R. 269, Apx. __). Robert Ferrell entered a plea of guilty to Count VII, alleging a violation of 18 U.S.C. 242 resulting in bodily injury (deprivation of rights under color of law), and was sentenced to 12 months' imprisonment. (R. 143, Apx. __; R. 223, Apx. __). The government thereafter dismissed Counts I and VIII against Ferrell. (R. 223, Apx. __).

Apx. __), and Marlowe to life imprisonment (R. 282, Apx. __). These appeals followed.

## STATEMENT OF FACTS

*1. General Background Of The Conspiracy*

At various times between 2001-2003, defendants Patrick Marlowe and Tommy Conatser, along with Travis Bradley, Robert Ferrell, Gary Hale, Robert Locke, Christopher McCathern, John McKinney, and William Westmoreland,[3] worked together as a tight-knit group of correctional officers on the second shift at the Wilson County Jail in Lebanon, Tennessee. (See, *e.g.*, Crook, Tr. 264-267, Apx. __; Bradley, Tr. 346-351, Apx. __; Winfree, 469-472, Apx. __; Finley, Tr. 893-894, Apx. __). Other officers (*e.g.*, Scott Crook, Christopher Finley, Sue Ellis, Donald Willis, and Ron Winfree) also worked on the second shift between 2001-

[3] Some of these officers pleaded guilty to charges set forth in separate indictments arising from their participation in the conspiracy charged here. Travis Bradley pleaded guilty to violating 18 U.S.C. 1001 for lying about the incident charged in Count IV of this indictment. *United States* v. *Bradley*, No. 3:03-00193 (M.D. Tenn. Oct. 9, 2003). Christopher McCathern pleaded guilty to violating 18 U.S.C. 242 by participating with defendant Marlowe in an assault alleged as an overt act of this conspiracy. *United States* v. *McCathern*, No. 3:04-00103 (M.D. Tenn. June 3, 2004). John McKinney pleaded guilty to one count of violating 18 U.S.C. 4 (misprision) for filing a false report about the incident charged in Count VIII of this indictment. *United States* v. *McKinney*, 3:04-00048 (M.D. Tenn. Mar. 30, 2004). William Westmoreland pleaded guilty to violating 18 U.S.C. 242 by participating in the incident charged in Count VI of this indictment. *United States* v. *Westmoreland*, No. 3:03-00209 (M.D. Tenn. Nov. 4, 2003).

2003, but they were not considered part of the second shift's inner circle. (See, *e.g.*, Crook, Tr. 264-267, Apx. __; Bradley, Tr. 346-351, Apx. __; Winfree, Tr. 469-472, Apx. __; Finley, Tr. 893-894, Apx. __).

Marlowe was the supervisor on the second shift, which runs from 4 pm to midnight. (Westmoreland, Tr. 159, Apx. __; Winfree, Tr. 469, Apx. __). As the supervisor, Marlowe set the tone for the way the officers on the second shift acted. (See, *e.g.*, Bradley, Tr. 343-344, Apx. __ (testifying that shortly after he arrived on the second shift, Marlowe beat up a non-aggressive inmate and explained to Bradley that "[t]his is second shift"; "Welcome to second")). In fact, under the example Marlowe set, Marlowe, Conatser, and their co-conspirators routinely assaulted inmates[4], bragged about their assaults, and covered them up by filing false reports and denying inmates medical care. Hale, for example, testified that Marlowe would "whip the[] ass" of inmates who were loud or obnoxious in the drunk tank or who were uncooperative during the booking process. (Hale, Tr. 722, Apx. __). Westmoreland recounted 20 to 25 incidents where Marlowe punched or kicked an inmate without justification. (Westmoreland, Tr. 193-194, Apx. __). Other officers on the shift also described how Marlowe would routinely strike non-

[4] "Inmates" is used throughout this brief as a term of convenience to refer to both pre-trial detainees and convicted prisoners housed in the jail.

aggressive, non-threatening inmates. (Ferrell, Tr. 556-557, Apx. __; see also Bradley, Tr. 358-360, Apx. __; Winfree, Tr. 478-482, Apx. __).

Marlowe, however, was not the only officer to assault inmates. Marlowe's co-conspirators participated both directly and indirectly in the routine assaults that occurred at the jail. For example, Hale, Westmoreland and Ferrell each testified that they and other members of the conspiracy unlawfully assaulted inmates, and each witness pleaded guilty to felony violations arising from these assaults. (Westmoreland, Tr. 170-171, Apx. __; Ferrell, Tr. 566-573, Apx. __; Hale, Tr. 722-724, 765, Apx. __; see also Hale, Tr. 722, 800, Apx. __ (Hale testifying that he, Marlowe, Conatser, Locke, Ferrell, McKinney, Westmoreland, Bradley and McCathern would assault inmates); see also specific incidents of assaults, *infra*). These same officers often accompanied Marlowe into an inmate's cell when Marlowe assaulted inmates; other times, they stood outside the cell door while Marlowe was inside. (Bradley, Tr. 363-364, Apx. __; Westmoreland, Tr. 193-194, Apx. __; cf. Bradley, Tr. 366-367 Apx. __). On the occasions when these officers were not present with Marlowe in an inmate's cell during a beating, they could nonetheless hear "blows being struck" inside the cell. (Bradley, Tr. 365-366, Apx. __). In fact, Bradley testified that he could hear blows being struck in the jail's detox cell while sitting 20 feet away at the booking desk because blows have a

"distinctive sound" and the "sound travels pretty easily." (Bradley, Tr. 366, Apx. __; Swallows, Tr. 104, Apx. __).

Marlowe, Conatser and their co-conspirators openly discussed their assaults on inmates. Marlowe went so far as to instruct Hale to hit inmates in the temple because that was a "knock-out point." (Hale, Tr. 724-725, Apx. __). In fact, Marlowe compiled a "knock-out list" that included the names of inmates he had beaten and rendered unconscious. (Bradley, Tr. 351, Apx. __; Westmoreland, Tr. 190-191, Apx. __; Hale, Tr. 736, Apx. __). No less than 21 people were on this list. (Hale, Tr. 736, Apx. __). Marlowe, Conatser, and their co-conspirators would recite the names from this list and re-enact their physical assaults upon inmates – complete with sound effects. (Westmoreland, Tr. 190-192, Apx. __; Bradley, Tr. 353-354, Apx. __; Hale, Tr. 736, Apx. __; Winfree, Tr. 489-490, 503-504, Apx. __). When the co-conspirators discussed Marlowe's list or their own assaults on inmates, they appeared to be laughing and bragging. (Westmoreland, Tr. 192, Apx. __; Bradley, Tr. 353, Apx. __; Winfree, Tr. 490, Apx. __; Hale, Tr. 736-737, Apx. __). Indeed, Conatser once mentioned to Bradley that "you missed it; [Marlowe] beat the crap out of [an inmate]" after an assault occurred when Bradley was not there. (Bradley, Tr. 403-404, Apx. __).

Marlowe, Conatser and their co-conspirators covered up the extent and

frequency of these assaults by writing false reports or failing to write a report when force was used. (See generally Hale, Tr. 737-738, Apx. __). Whenever officers used force against an inmate, or whenever they witnessed another officer use force, the officers were supposed to write an incident report detailing the use of force. (Westmoreland, Tr. 194-195, Apx. __). Under Marlowe's direction, however, "[n]obody [wrote] an incident report without coming through [Marlowe] first." (Finley, Tr. 932, Apx. __). In fact, before Finley moved to the second shift, Marlowe told him that "second shift was a different kind of shift" and that "no reports were done" and no one "talk[ed] to higher up individuals unless everything went through [Marlowe]." (Finley, Tr. 893, Apx. __; see also Westmoreland, Tr. 211, Apx. __).

Marlowe at times instructed officers *not* to write reports when they, or other officers, had used unnecessary force against an inmate. (See, *e.g.*, Westmoreland, Tr. 196, Apx. __; Finley, Tr. 932-933, Apx. __; Locke, Tr. 1878, Apx. __). When officers *did* write reports, Marlowe often dictated the content. For example, Hale testified that Marlowe would write a report first, and then the other officers would read his report and then "make up a report that says the same thing but in" different words. (Hale, Tr. 737, Apx. __). Westmoreland testified that the officers would often look at each other's reports so that they were "consistent" and "coincide[d]

with each other." (Westmoreland, Tr. 212, Apx. __; see also Bradley, Tr. 389-391, Apx. __). These reports were then turned in to Marlowe for him to sign. (Westmoreland, Tr. 195, Apx. __). Marlowe also directed officers to include key phrases in their reports (*e.g.*, an inmate "charged" an officer or "hit[] his head" on the cell door) to justify the use of force against the inmate or to cover up a beating. (Hale, Tr. 737, Apx. __; see, *e.g.*, GX 9B, Tr. 125, Apx. __; see also, *e.g.*, Westmoreland, Tr. 204-206, 212-213, Apx. __; Bradley, Tr. 390, Apx. __; Hale, Tr. 738, Apx. __). Westmoreland estimated that only ten percent of the reports documenting the use of force on inmates during the second shift were accurate. (Westmoreland, Tr. 196, 212, Apx. __; see also, *e.g.*, Westmoreland, Tr. 197-210, Apx. __).

*2. Specific Incidents*[5]

*a. Kenneth McIntyre*

In the summer of 2001, inmate Kenneth McIntyre was in the jail's booking area using the telephone. (Conatser, Tr. 1719-1720, Apx. ___). When Westmoreland arrived to begin his shift, McIntyre became agitated and spat at him – hitting Marlowe instead. (Westmoreland, Tr. 213-214, Apx. __). Before Westmoreland could even respond, Marlowe, McKinney and Conatser took McIntyre into a holding cell. (Westmoreland, Tr. 215, Apx. __; Bradley, Tr. 403, Apx. __; Conatser, Tr. 1720, Apx. __).

When Westmoreland reached the cell, the other officers "were hitting [McIntyre] in the rib area just wherever they could get." (Westmoreland, Tr. 215, Apx. __). Westmoreland hit McIntyre in the head because it was "the only thing left to hit" given the presence of the other officers. (Westmoreland, Tr. 215, Apx. __). Marlowe continued to hit and knee McIntyre in the ribs and in the back. (Westmoreland, Tr. 216, Apx. __; Bradley, Tr. 403, Apx. __). When the altercation ended, McIntyre's face was red and swollen, and he had a cut over his eye. (Westmoreland, Tr. 216, Apx. __). None of the officers wrote a report

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[5] The following incidents highlight some, but not all, of the incidents charged as substantive civil rights violations or overt acts of the conspiracy.

documenting the use of force against McIntyre. (Swallows, Tr. 1238, Apx. __).

*b. Sergio Martinez*

In October of 2001, Sergio Martinez was arrested for suspected DUI. (Brownlee, Tr. 138, Apx. __). Following his arrest, Martinez was "mouthy," but he was not physically aggressive or threatening. (Brownlee, Tr. 139, Apx. __). He remained "mouthy" during the initial booking process, but was still neither aggressive nor threatening. (Brownlee, Tr. 144-145, Apx. __). Later, however, Martinez became uncooperative and refused to answer questions. (Bradley, Tr. 371, Apx. __). Marlowe began yelling at Martinez, and thereafter, the two entered into a "cussing, cursing match." (Westmoreland, Tr. 177, Apx. __; see also Bradley, Tr. 372, Apx. __). As other officers attempted to finish the booking process, Marlowe put on a pair of black leather gloves, which signaled to Westmoreland that Martinez "was probably going to get beat." (Westmoreland, Tr. 180, Apx. __).

After Martinez was booked, Marlowe and Westmoreland grabbed Martinez and took him to a detox cell. (Westmoreland, Tr. 180, Apx. __). Conatser followed behind them. (Westmoreland, Tr. 180, Apx. __; Bradley, Tr. 375, Apx. __). Westmoreland and Marlowe entered the cell and closed the door; Conatser remained outside. (Westmoreland, Tr. 188, Apx. __; Bradley, Tr. 376, Apx. __).

Inside the cell, Marlowe punched Martinez in the jaw with his left hand – hard enough to drop Martinez to the floor and render him unconscious for five to seven seconds. (Westmoreland, Tr. 184-185, Apx. __). To Westmoreland, the punch was so loud it sounded like a rifle shot. (Westmoreland, Tr. 187, Apx. __). Marlowe told Westmoreland he was surprised he "knocked that bitch out with [his] left hand." (Westmoreland, Tr. 187, Apx. __).

When Martinez regained consciousness, Marlowe and Westmoreland began punching him in the ribs with "all [they] had." (Westmoreland, Tr. 186-187, Apx. __). Westmoreland struck Martinez five to seven times; Marlowe struck Martinez so many times that Westmoreland "couldn't even keep count." (Westmoreland, Tr. 187, Apx. __). Outside the cell, Bradley – who was sitting 20 feet away behind the booking counter – heard Marlowe screaming at Martinez and "blows being struck." (Bradley, Tr. 376, Apx. __). Marlowe and Westmoreland stopped hitting Martinez after he "collapsed on the floor." (Westmoreland, Tr. 188, Apx. __). Marlowe, however, kicked Martinez once or twice when he was on the floor. (Westmoreland, Tr. 188, Apx. __).

When Marlowe and Westmoreland exited the detox cell, Conatser was outside the door. (Westmoreland, Tr. 188, Apx. __). As Marlowe, Westmoreland and Conatser were walking back toward the booking area, Marlowe again

expressed surprise that he knocked out Martinez with his left hand. (Westmoreland, Tr. 189, 209-210, Apx. __). Later that night, Marlowe, Conatser, Westmoreland and other officers from the second shift talked about the incident in the parking lot. (Westmoreland, Tr. 189-190, Apx. __). While Marlowe was talking about knocking Martinez out with his left hand, Marlowe and Westmoreland figured out that Martinez was number 11 on Marlowe's "knockout list." (Westmoreland, Tr. 190, Apx. __).

Marlowe wrote two reports following the incident and Conatser wrote one, (GXs 9A, 9B, 10, Tr. 125, Apx. __); Westmoreland did not write a report because Marlowe directed him not to (Westmoreland, Tr. 196, Apx. __; GX 9A, Tr. 125, Apx. __). Marlowe's first report contained false information about what transpired inside the detox cell. (Westmoreland, Tr. 197-199, Apx. __; GX 9B, Tr. 125, Apx. __). His second report, written the next day and after his supervisor requested a more detailed report (Marlowe, Tr. 1531-1532, Apx. ___), falsely stated that (1) Martinez was physically aggressive inside the cell, (2) Conatser threatened Martinez with a chemical agent if he refused to stop hitting the door, and (3) Martinez was provided basic medical care. (GX 9B, Tr. 125, Apx. __; Westmoreland, Tr. 203-206). Conatser's report falsely stated that Martinez head butted the door of the cell and was threatened with a chemical agent if he did not

stop. (GX 10, Tr. 125, Apx. __; Westmoreland, Tr. 209, Apx. __). Conatser's report does not indicate that a physical altercation took place inside the cell, nor does it mention the comments Marlowe made after exiting the cell. (See GX 10, Tr. 125, Apx. __).

Martinez went to a doctor on October 8, 2001, complaining of pain in his jaw. (Cox, Tr. 302, Apx. __). The doctor determined that Martinez's right jaw was broken, most likely by "a blow of some sort to the lower jaw" that was made with "substantial force." (Cox, Tr. 302-303, 306, Apx. __). Based on the nature of Martinez's injury, the doctor ruled out a fall, running into a door or wall, or banging one's head against a door or wall as a cause of the injury. (Cox, Tr. 305-306, Apx. __).

*c. Paul Armes*

On April 30, 2002, Marlowe, while in his car off duty, was run off the road by Paul Armes. (Marlowe, Tr. 1481-1482, Apx. __). Marlowe followed Armes to a gas station, notified authorities, and remained on the scene until authorities arrived (Marlowe, Tr. 1482, Apx. __); Armes was eventually arrested on a suspected DUI charge and taken to the jail (Dowell, Tr. 315-316, Apx. __).

Armes became upset during the booking process, so Bradley and Conatser took him to the detox cell. (Dowell, Tr. 319-323, Apx. __; Bradley, Tr. 378, Apx.

__). Armes continued to show signs of intoxication, but was not aggressive. (Bradley, Tr. 324-325, Apx. __). Inside the cell, Armes was "very unsteady on his feet" and "staggered" towards the officers. (Bradley, Tr. 380-381, Apx. __). Bradley did not feel threatened by Armes. (Bradley, Tr. 381-382, Apx. __). Conatser, however, hit Armes in the face with his fist. (Bradley, Tr. 381, Apx. __). Bradley gained control of Armes, who was compliant and did not resist. (Bradley, Tr. 381, Apx. __). After Bradley and Conatser left the cell, Conatser noticed that his knuckle was injured. (Bradley, Tr. 382, Apx. __).

At some point that evening, Marlowe arrived at the jail and appeared "fairly angry." (Bradley, Tr. 383, Apx. __). Marlowe spoke with Conatser, became more upset, and entered the detox cell. (Bradley, Tr. 383-384, Apx. __). Bradley, who remained in the booking area, heard Marlowe screaming and the sound of "blows." (Bradley, Tr. 385, Apx. __). He also heard Armes "grunting and groaning." (Bradley, Tr. 385, Apx. __). Marlowe exited the cell and went outside to "cool[] off." (Bradley, Tr. 385, Apx. __). He soon came back inside and he, Conatser and Corporal McCathern returned to the cell. (Bradley, Tr. 385-386, Apx. __; Conatser, Tr. 1729-1730, Apx. __). Bradley again heard yelling and the sound of blows. (Bradley, Tr. 386, Apx. __). Bradley eventually entered the cell and sprayed Armes with a chemical agent. (Bradley, Tr. 386, Apx. __).

Bradley, Conatser and Marlowe later wrote reports about the incident. (GX 16, 21, 22, Tr. 125, Apx. __). Bradley falsely wrote that Armes lunged at Conatser and that he and Conatser restrained Armes out of concern for their safety. (GX 17, Tr. 125, Apx. __; Bradley, Tr. 391-392, Apx. __). Bradley's report omits the fact that Conatser hit Armes. (GX 17, Tr. 125, Apx. __; Bradley, Tr. 392, Apx. __). Conatser falsely wrote that he avoided an initial punch from Armes and struck him after he continued to "fight and resist." (GX 22 at 1, Tr. 125, Apx. __). Conatser's report does not mention the use of any force when he, Marlowe and McCathern returned to Armes's cell. (GX 22 at 1, Tr. 125, Apx. __). Marlowe's report does not mention the use of any force whatsoever. (GX 21, Tr. 125, Apx. __). None of the reports indicates that Armes was provided medical treatment for his injuries.

Marlowe later told Westmoreland, who was not working the night Armes was booked, that he "beat the shit out of [Armes] for running him * * * off the road." (Westmoreland, Tr. 216-218, Apx. __). Marlowe later told Hale, who was also not working that night, that he called the jail before he arrived and told the officers on duty to "handle it" until he got there. (Hale, Tr. 732-733, Apx. __). Hale took that to mean that Marlowe wanted the officers to "whip [Armes]" if he "acted up." (Hale, Tr. 733, Apx. __). Marlowe also told Hale that he was "mad" about Conatser's injury, and that he hit Armes in the face two or three times.

(Hale, Tr. 734, Apx. __). Marlowe told Hale that after the second or third blow, he felt Armes's face "crush," and that it "felt like mush." (Hale, 734, Apx. __).

A private surgeon determined that Armes's cheekbone was broken in three places and one of his facial nerves was damaged. (Street, Tr. 454, Apx. __). Armes underwent surgery to have two metal plates inserted into his orbital socket to treat his fractures. (Street, Tr. 459-460, Apx. __).

*d. Walter Kuntz*

On January 12, 2003, Walter Kuntz was involved in a minor traffic accident that caused minimal damage to his and the other person's car. (Stacey, Tr. 1379-1383, Apx. __). Kuntz left the scene of the accident (Stacey, Tr. 1381, Apx. __), and was eventually arrested at a nearby convenience store (Luna, Tr. 647, Apx. __). Witnesses' accounts of the arrest differ somewhat from videotaped footage, but it is undisputed that there were two brief struggles between the officers and Kuntz: once when the officers arrested Kuntz and once after they placed him in a police vehicle. During his transport to the jail, Kuntz apparently complained of an injury to his lip. (Levy, Tr. 1151-1152, Apx. __). Kuntz was brought to the jail around 3:30 p.m. and was booked without incident (Luna, Tr. 654, Apx. __; Benford, Tr. 668-669, Apx. __; GX 41, Tr. 125, Apx. __); the only injuries the booking officers noticed were discoloration of his lips and an abrasion on his

forehead (Benford, Tr. 670, Apx. __; Lawson, Tr. 711-712, Apx. __).

A short while after being booked, Kuntz began screaming and banging on the door of the detox cell. (Finley, Tr. 901, Apx. __). Marlowe told Kuntz to quiet down; when Kuntz did not, Marlowe became "agitated." (Finley, Tr. 902, Apx. __; Willis, Tr. 846, Apx. __). When Marlowe and Finley entered Kuntz's cell, Kuntz threw a roll of toilet paper at Marlowe. (Finley, Tr. 903-904, Apx. __). Marlowe responded by punching Kuntz in the left side of his head, causing it to bleed. (Finley, Tr. 905, Apx. __). Marlowe then threw Kuntz toward the wall of the cell; Kuntz landed on all fours, and Marlowe proceeded to kick, punch and knee Kuntz repeatedly in his right rib area. (Finley, Tr. 906-907, Apx. __). Just before Marlowe and Finley left the detox cell, Kuntz was laying on the floor, screaming. (Finley, Tr. 907, Apx. __). Other than throwing the roll of toilet paper, Kuntz had not been threatening or aggressive toward Marlowe. (Finley, Tr. 907-908, Apx. __).

Following this initial beating, Kuntz was quiet for approximately 30 minutes, but then resumed banging on the cell door. (Finley, Tr. 910, Apx. __). Marlowe "got even more agitated" (Finley, Tr. 910, Apx. __), and headed back to the detox cell with Finley and Willis (Finley, Tr. 911, Apx. __). Kuntz was standing up in the cell, but was not aggressive. (Finley, Tr. 911, Apx. __).

Marlowe hit him in the left temple, causing Kuntz to fall straight to the ground. (Finley, Tr. 912, Apx. __). Marlowe then punched Kuntz in the "face-chest area" and kicked him a few times in the ribs. (Willis, Tr. 851-853, Apx. __). As the officers were leaving the cell, Willis sprayed Kuntz with a chemical agent. (Willis, Tr. 853-854, Apx. __; Finley, Tr. 912, Apx. __).

Kuntz was again quiet for a short period of time, then resumed screaming and kicking on the cell door. (Finley, Tr. 913-914, Apx. __). Around 5 p.m., Marlowe approached Hale, explained that he had already hit Kuntz two or three times on the side of the head, and instructed Hale to take care of the situation. (Hale, Tr. 747-749, Apx. __; see also Finley, Tr. 914, Apx. __). Hale took this to mean "make [Kuntz] quit beating the door, whip his ass, do whatever it takes to make him quit beating on the door." (Hale, Tr. 748, Apx. __).

Hale, Finley and Willis went to the detox cell. (Hale, Tr. 748, Apx. __; Finley, Tr. 915, Apx. __). Kuntz, who was standing up in the cell, backed away from Hale when he entered. (Hale, Tr. 748-749, Apx. __). Hale pushed Kuntz down onto the bench. (Hale, Tr. 748, Apx. __). Given the way Kuntz was sitting on the bench, the right side of his head was facing Hale and the left side of his head was four or five inches from the cell wall. (Hale, Tr. 750, Apx. __; Willis, Tr. 856, Apx. __). Hale then punched Kuntz three or four times in the right side of his head

with a closed fist. (Hale, Tr. 750, Apx. __; Willis, Tr. 856, Apx. __; Finley, Tr. 915, Apx. __). Hale used "pretty good force" and delivered "full power punches." (Hale, Tr. 750, Apx. __; Finley, Tr. 915, Apx. __). Each time Hale punched Kuntz, the left side of Kuntz's head "bounced off the [concrete] wall" and made a "cracking sound." (Hale, Tr. 750, Apx. __; Finley, Tr. 915, Apx. __). When the officers left the detox cell, Kuntz was conscious, laying down on the bench, holding his head, and moaning. (Willis, Tr. 856, Apx. __). Hale later told Marlowe he had "taken care of it." (Hale, Tr. 751, Apx. __).

After this beating, Willis received a phone call from Kuntz's mother. (Willis, Tr. 869, Apx. __). She explained that Kuntz had undergone brain surgery a year or two earlier. (Willis, Tr. 869, Apx. __). Willis immediately informed Hale, who "had a look of worry on his face." (Willis, Tr. 869, Apx. __). Officer Willis also relayed the call to Marlowe. (Finley, Tr. 924, Apx. __).

Hale returned to Kuntz's cell around 6 p.m.; at that time Kuntz was "conscious" and "laying on the floor," but did not respond when Hale spoke to him. (Hale, Tr. 751-752, Apx. __). By 7 p.m., however, Kuntz was unconscious and unresponsive. (Marlowe, Tr. 1494, Apx. __; Holladay, Tr. 1572-1573, Apx. __). Around that time, Hale returned to Kuntz's cell and found him laying on the bench, "passed out." (Hale, Tr. 752, Apx. __). He had vomited on himself. (Hale,

Tr. 752, Apx. __). Hale told Marlowe about Kuntz's condition, but Marlowe did not order any medical attention for Kuntz. (Hale, Tr. 752-753, Apx. __). Marlowe was present while Hale and a trustee cleaned Kuntz and turned him on his side. (Hale, Tr. 753-754, Apx. __). At no time did Kuntz show any signs of consciousness. (Hale, Tr. 753, Apx. __). Marlowe did not order any medical attention for Kuntz. (Hale, Tr. 753, Apx. __).

Somewhere between 8:45 p.m. and 9 p.m., Hale again entered Kuntz's cell. (Hale, Tr. 754, Apx. __). Kuntz was still on his side, but had vomited again. (Hale, Tr. 754, Apx. __). Hale and Marlowe cleaned up Kuntz and attempted to revive him by patting him on the back, shaking him, and pouring a bucket of ice water over his head and body. (Hale, Tr. 754-755, Apx. __). Kuntz did not move, nor did he show any signs of consciousness. (Hale, Tr. 755, Apx. __). Hale and Marlowe next placed smelling salts under Kuntz's nose, which had no effect other than causing Kuntz to stop breathing until the salts were taken away. (Hale, Tr. 756, Apx. __). Marlowe did not order any medical attention for Kuntz. (Hale, Tr. 756, Apx. __).

Later in the evening, Willis went into Kuntz's cell to check on him. (Willis, Tr. 857, Apx. __). Kuntz was lying on his side with his eyes open, "but he wasn't really doing anything." (Willis, Tr. 858, Apx. __). Willis shook him and shined a

flashlight into Kuntz's eyes, but got no response. (Willis, Tr. 858, Apx. __). Willis immediately alerted Marlowe. (Willis, Tr. 858, Apx. __). Marlowe did not order any medical attention for Kuntz. (Willis, Tr. 858, Apx. __).

Sometime near the end of the shift, Hale again checked on Kuntz. (Hale, Tr. 757, Apx. __). Hale then recommended to Marlowe that they call his [Hale's] father, who was a judicial commissioner[6] and had EMT experience. (Hale, Tr. 757, Apx. __; Finley, Tr. 926, Apx. __). Hale made the call, and his father arrived at the jail sometime around 11 p.m. (Hale, Tr. 757-758, Apx. __; Willis, Tr. 858, Apx. __; Finley, Tr. 928, Apx. __). Neither Hale nor Marlowe told Hale's father that they had repeatedly beaten Kuntz. (Hale, Tr. 757-758, Apx. __). Hale's father recommended calling for an ambulance, which Hale did. (Hale, Tr. 758, Apx. __). Right before the ambulance arrived, Hale told Finley not to worry about writing a report because Hale and Marlowe would take care of it. (Finley, Tr. 928, Apx. __).

The ambulance arrived at 11:33 p.m. (Crowder, Tr. 957, Apx. __). The EMTs determined that Kuntz scored a three on their level of consciousness scale, which is the same score a deceased person would receive. (Crowder, Tr. 963-964, Apx. __). Neither Hale nor Marlowe told the EMTs that they had repeatedly

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[6] Judicial commissioners sign warrants, set bail, and perform other administrative tasks. (Swallows, Tr. 92, Apx. __).

beaten Kuntz. (Hale, Tr. 758-759, Apx. __; Crowder, Tr. 962-963, Apx. __). One of the EMTs testified that they were dispatched to the jail for a case of "possible alcohol * * * poisoning." (Crowder, Tr. 954, Apx. __). Had the EMTs known that Kuntz had a possible head injury, they would have made arrangements to fly Kuntz to a trauma center. (Crowder, Tr. 954, Apx. __). Instead, the EMTs transported Kuntz to a local medical center. (Crowder, Tr. 955, 967-968, Apx. __). Kuntz was evaluated by the medical staff and received a three on the Glasgow coma scale, which means he had "no response to anything at all." (Dyer, Tr. 1006, Apx. __). In fact, a person scores a three "for showing up." (Dyer, Tr. 1006, Apx. __). His body was wet and cold, and his temperature was ten degrees below normal. (Dyer, Tr. 1006-1007, Apx. __). Because of the results of his brain scan, he was airlifted to a trauma center. (Crowder, Tr. 970-971, Apx. __; Dyer, 1007, Apx. __).

Kuntz was evaluated by a neurosurgeon at the trauma center. (Hubbard, Tr. 1012-1020, Apx. __). Kuntz was "completely unresponsive" and had "[n]o brain stem reflexes." (Hubbard, Tr. 1013, Apx. __). He was breathing with the aid of a ventilator. (Hubbard, Tr. 1013, Apx. __). According to the doctor, Kuntz's condition was "consistent with brain death." (Hubbard, Tr. 1016, Apx. __). The doctor determined that Kuntz was suffering from a "very large" sub-dural hematoma, or blood clot, that had caused irreversible brain damage. (Hubbard, Tr.

1013-1016, Apx. __). Specifically, the swelling in Kuntz's brain caused "irreparable damage" to the part of the brain that controls basic metabolic functions such as heartbeat, respiration and level of consciousness. (Levy, Tr. 1054, 1070-1071, Apx. __). The doctor thus determined that surgery to remove the clot would be futile because "[o]nce [that part of] the brain is damaged, there is no bringing it back." (Hubbard, Tr. 1015-1016, Apx. __). The doctor also determined that Kuntz's condition had been exacerbated by his low body temperature, which interfered with normal blood clotting. (Hubbard, Tr. 1014-1015, Apx. __). Two days later, Kuntz's family removed him from the ventilator and he died.[7] (Hubbard, Tr. 1020, Apx. __).

Three doctors testified that Kuntz's head injuries were consistent with blunt force trauma. (Hubbard, Tr. 1018, Apx. __; Levy, Tr. 1051, Apx. __; H. Smith, Tr. 1660-1661, Apx. __). These same doctors testified that generally a person with a sub-dural hematoma like Kuntz's would start to experience a progression of symptoms such as dizziness, headaches, nausea, vomiting, sleepiness, lethargy, and, eventually, unresponsiveness, within an hour of being injured. (Hubbard, Tr.

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[7] An autopsy determined that, in addition to his fatal head injuries, Kuntz suffered numerous non-fatal injuries. For example, Kuntz had three broken ribs, abrasions and contusions to his abdomen and back, and a bruised scrotum. (Levy, Tr. 1088, 1094, Apx. __).

1017-1018, Apx. __; Levy, Tr. 1081-1083, Apx. __; H. Smith, Tr. 1678-1679). All agreed that Kuntz's injuries were treatable. (Hubbard, Tr. 1019, Apx. __; Levy, Tr. 1085, Apx. __; H. Smith, Tr. 1683-1684, Apx. __). Indeed, the neurosurgeon testified that had someone in Kuntz's condition been brought in for medical treatment within the first hours after the brain injury, that person could, following successful treatment, be "perfectly normal" with "no brain damage." (Hubbard, Tr. 1019, Apx. __).

3. *Conatser's Sentence*

The Presentence Report (PSR), based on the 2005 edition of the Sentencing Guidelines, calculated Conatser's adjusted offense level at 29.[8] (R. 264, Apx. __).[9] Given his criminal history category of I, Conatser's advisory sentence was between 87 and 108 months' imprisonment. Conatser objected to the PSR, arguing that (1)

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[8] The guideline for a violation of 18 U.S.C. 241 is U.S.S.G. 2H1.1, which applies the greatest level from a list of options (one being the offense level from the offense guideline applicable to any underlying offense). Using the assault on Sergio Martinez as the underlying offense, the PSR used the guideline applicable to Aggravated Assault, U.S.S.G. 2A2.2, which corresponds to a base offense level of 14. Five levels were then added because the victim sustained serious bodily injury. U.S.S.G. 2A2.2(b)(3)(B). The PSR then added six levels because the offense was committed under color of law, U.S.S.G. 2H1.1(b)(1)(B), two levels because the victim was restrained, U.S.S.G. 3A1.3, and two levels because Conatser obstructed justice, U.S.S.G. 3C1.1.

[9] Under seal.

it was error to calculate the offense level based on the Martinez incident because he was acquitted on Count V, (2) Conatser did not restrain Martinez, and (3) the obstruction of justice enhancement should not apply because Conatser cooperated with the FBI. (R. 242, Apx. __). Conatser moved for a sentence outside the Sentencing Guidelines range. (R. 240, Apx. __). Conatser based his argument on (1) the nature of his offense, (2) his personal characteristics, (3) the advisory sentence is longer than necessary, (4) his actions were atypical, and (5) his minimal role in the events leading to prosecution. (R. 241 at 2-8, Apx. __).

The district court held a sentencing hearing on May 12, 2006. (R. 279, Apx. __). The court granted Conatser's objection to the obstruction of justice enhancement, but denied all other objections (Conatser Sentencing, Tr. 52-54, Apx. __), thus bringing Conatser's total offense level to 27, with a corresponding Guidelines range of 70-87 months' imprisonment (Conatser Sentencing, Tr. 54, Apx. __). The district court denied Conatser's motion for a sentence below the Guidelines range and sentenced him to 70 months' imprisonment. (Conatser Sentencing, Tr. 66-67, Apx. __). The district court explained that it had considered all of the factors in 18 U.S.C. 3553(a) in reaching its sentence, and reasoned that imposing a sentence below the Guidelines range would fail to reflect the seriousness of his offense and would not afford adequate deterrence. (Conatser

Sentencing, Tr. 66-67, 69-70, Apx. __).

*4. Marlowe's Sentence*

The PSR, based on the 2002 edition of the Guidelines Manual "in light of ex post facto considerations," calculated Marlowe's highest adjusted offense level at 47.[10] (R. 285, Apx. __).[11] Given his criminal history category of I, Marlowe's advisory sentence was life imprisonment. Marlowe made several objections to the PSR. He argued that the underlying offense for Count III should have been involuntary manslaughter rather than second degree murder. (R. 272 at 1-6, Apx. __). He also objected to the enhancements for obstruction of justice, restraint of victim and role in the offense. (R. 272 at 6-7, Apx. __). Marlowe moved for a sentence outside the Sentencing Guidelines based on a variety of factors, including the conditions that existed at the jail, Marlowe's personal history and

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[10] Using the assault on Walter Kuntz as the underlying offense for Counts I, II and III (grouped per U.S.S.G. 3D1.2, 3D1.3), the PSR used the guideline applicable to second degree murder, U.S.S.G. 2A1.2, which corresponds to a base offense level of 33. Six levels were then added because the offense was committed under color of law, U.S.S.G. 2H1.1(b)(1)(B), two levels because the victim was restrained, U.S.S.G. 3A1.3, four levels because Marlowe took a leadership role in the offense, U.S.S.G. 3B1.1(a), and two levels because Marlowe's actions following Kuntz's death obstructed justice, U.S.S.G. 3C1.1. The PSR also calculated offense levels for Marlowe's other Counts of conviction, which were less than that for Counts I, II, and III.

[11] Under seal.

characteristics, and the severity of the recommended sentence. (R. 275, Apx. __). Marlowe also challenged the constitutionality of the Guidelines, arguing that under the Fifth and Sixth Amendments, the jury should have determined whether Marlowe's actions amounted to second degree murder or involuntary manslaughter. (R. 275 at 5-7, Apx. __).

The district court held a sentencing hearing on July 6, 2006. (R. 280, Apx. __). The court denied all objections to Marlowe's PSR and adopted the calculated offense level of 47 for Counts I, II and III. (Marlowe Sentencing, Tr. 117-119, Apx. __). The district court also denied Marlowe's motion for a sentence below the Guidelines range and sentenced him to life imprisonment.[12] (Marlowe Sentencing, Tr. 120-124, Apx. __). The district court explained that "most of the heart-wrenching aspects of this case are not appropriate reasons to go outside the guideline range." (Marlowe Sentencing, Tr. 122, Apx. __). The district court gave thorough consideration to the concern over a disparity in sentence between Marlowe and Hale, but ultimately concluded that Marlowe and Hale were "not really similarly situated" because Hale pleaded guilty to Count I (which carried a statutory maximum of ten years' imprisonment), Marlowe played a leadership role,

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[12] The district court also sentenced Marlowe to ten years' imprisonment each on Counts I, II, IV, V, VI and VII to run concurrently with his sentence on Count III. (Marlowe Sentencing, Tr. 124-125, Apx. __; R. 282, Apx. __).

and he was convicted on seven other counts. (Marlowe Sentencing, Tr. 124, Apx. __). The court concluded that "on balance the guideline sentence of life is the appropriate sentence considering [18 U.S.C.] 3553 and the guidelines." (Marlowe Sentencing, Tr. 124, Apx. __).

## SUMMARY OF ARGUMENT

1. The evidence was more than sufficient to support Conatser's conviction. The record contains more than sufficient evidence upon which a reasonable jury could conclude that Conatser joined and participated in a long-standing conspiracy to deprive inmates at the Wilson County Jail of their civil rights by assaulting inmates as a means of either intimidation or punishment, encouraging assaults by other correctional officers, and covering up the assaults by filing false reports, failing to file any reports, or failing to provide necessary medical treatment. Multiple witnesses who participated in the conspiracy testified about the nature of the conspiracy and Conatser's participation in it.

2. Defendant Marlowe's sentence is constitutional. Both the Supreme Court and this Court have held that, given the now-advisory nature of the Federal Sentencing Guidelines, a sentence based on facts found by a judge by a preponderance of the evidence does not violate either the Fifth or Sixth Amendments. Here, it was the jury's factual determinations that Marlowe violated

18 U.S.C. 242 and that death resulted from his actions that subjected him to a sentence of up to life imprisonment. The judge's determination of what sentencing guideline to apply based on the jury's verdict does not raise any constitutional concerns. Moreover, affording a rebuttable presumption of reasonableness on review to a sentence within the advisory Guidelines range does not violate the Constitution, provided the district court complied with the procedural requirements set forth in *United States* v. *Booker*, 543 U.S. 220 (2005).

3. In this case, the base offense level for a civil rights violation, determined pursuant to U.S.S.G. 2H1.1, depends upon the base offense level for the underlying conduct. When calculating Marlowe's offense level, the district court did not err in finding that the underlying conduct which resulted in Kuntz's death was second degree murder. The facts overwhelmingly support the district court's finding that Marlowe's actions – and inactions – demonstrated malice aforethought. Marlowe denied medical care to Kuntz over a period of at least four hours as Kuntz slipped into unconsciousness and became completely unresponsive. When medical personnel were finally called, Marlowe withheld crucial information necessary for medical personnel to provide Kuntz with proper care. Moreover, Marlowe ordered the beating that led to Kuntz's death. Such actions demonstrate a wanton disregard for a serious risk of death or serious bodily harm to Kuntz.

4. Both of the defendants' sentences are reasonable. The district court correctly calculated each of the defendants' advisory Guidelines range, considered that range along with the other factors set forth in 18 U.S.C. 3553(a), considered each defendants' arguments for a sentence outside the advisory Guidelines range, and explained its reasons for sentencing defendants within the advisory range. Defendants' sentences are thus procedurally reasonable and are entitled to a rebuttable presumption of reasonableness on review. Even without this presumption, however, defendants' sentences are substantively reasonable, as defendants have failed to provide any bases for concluding that the district court arbitrarily selected a sentence, relied on impermissible factors, or gave unreasonable weight to any particular factor when sentencing them.

## ARGUMENT[13]

## I

## THE EVIDENCE WAS SUFFICIENT TO SUPPORT CONATSER'S CONVICTION

*A. Standard Of Review*

This Court reviews a challenge to the sufficiency of the evidence supporting a criminal conviction *de novo*, see *United States* v. *Kelley*, 461 F.3d 817, 825 (6th Cir. 2006), and must affirm if the evidence, when viewed in the light most favorable to the government, would permit any reasonable jury to find guilt beyond a reasonable doubt. See *United States* v. *Talley*, 164 F.3d 989, 996 (6th Cir.), cert. denied, 526 U.S. 1137 (1999); see also *United States* v. *Gresser*, 935 F.2d 96, 100 (6th Cir.), cert. denied, 502 U.S. 885 (1991). This standard applies "whether the evidence is direct or circumstantial." *Gresser*, 935 F.2d at 100. With a court reviewing the evidence in this manner, a defendant challenging the sufficiency of the evidence bears a heavy burden. *United States* v. *Spearman*, 186 F.3d 743, 746 (6th Cir.), cert. denied, 528 U.S. 1033 (1999).

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[13] Although each defendant submitted a separate brief to this Court, some of the defendants' arguments overlap. For clarity, the government has grouped the defendants' common arguments and addresses them together where appropriate.

*B. Sufficient Evidence Supports Conatser's 18 U.S.C. 241 Conviction*

Section 241 of Title 18 provides, in pertinent part: "If two or more persons conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States * * * [t]hey shall be fined * * * or imprisoned * * * or both." 18 U.S.C. 241. To obtain a conviction under 18 U.S.C. 241, "the government must prove that [the defendant] knowingly agreed with another person to injure [a victim] in the exercise of a right guaranteed under the Constitution."[14] *United States* v. *Epley*, 52 F.3d 571, 575-576 (6th Cir. 1995). The government, however, "need not prove a formal agreement to establish the existence of a conspiracy to violate federal law." *United States* v. *Ellzey*, 874 F.2d 324, 328 (6th Cir. 1989). "[A] tacit or mutual understanding among the parties will suffice." *Ibid.*

The existence of a conspiracy may be proved directly through the testimony of co-conspirators. *United States* v. *Copeland*, 321 F.3d 582, 600 (6th Cir. 2003);

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[14] The constitutional rights at issue here are the pre-trial detainees' rights not to be deprived of liberty without due process of law, and the convicted prisoners' rights to be free from cruel and unusual punishment while in official custody and detention – rights protected by the Fourteenth and Eighth Amendments to the Constitution, respectively. See *Graham* v. *Connor*, 490 U.S. 386, 395 n.10 (1989); *Phelps* v. *Coy*, 286 F.3d 295, 299-300 (6th Cir. 2002), cert. denied, 537 U.S. 1104 (2003).

*Spearman*, 186 F.3d at 746. A conspiracy may also "be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan." *Ellzey*, 874 F.2d at 328 (quoting *United States* v. *Bavers*, 787 F.2d 1022, 1026 (6th Cir. 1985)); see also *Glasser* v. *United States*, 315 U.S. 60, 80 (1942) (government may rely entirely on circumstantial evidence to prove participation in a conspiracy). Thus, a defendant's knowledge and voluntary participation in a conspiracy may be inferred from the surrounding circumstances, including the defendant's actions and reactions to those circumstances. *United States* v. *Hodges*, 935 F.2d 766, 773 (6th Cir.), cert. denied, 502 U.S. 889 (1991); *United States* v. *Christian*, 786 F.2d 203, 211 (6th Cir. 1986); see also *Kelley*, 461 F.3d at 825 ("Once a conspiracy has been proven, only slight evidence is necessary to implicate a defendant as a participant in that conspiracy if the evidence shows the connection beyond a reasonable doubt.").

The record contains ample evidence from which a jury could reasonably infer the existence of an agreement among some of the officers on the second shift to (1) punish, harm and intimidate inmates by assaulting them, (2) encourage each other in this conspiracy by bragging about and reenacting the assaults, and (3) cover up the assaults by either failing to write reports or writing false reports when excessive force was used, and by withholding necessary medical care from inmates

after force was used. The record also contains ample evidence from which a jury could reasonably infer that Conatser knew of, and willfully participated in, the conspiracy.

Specifically, the testimony from the defendants' co-conspirators clearly established that certain second shift officers participated directly or indirectly in the unjustified use of force against inmates at the jail. Defendants' co-conspirators testified that certain second shift officers – including Conatser – routinely accompanied Marlowe into cells where he would assault loud and uncooperative, but non-aggressive, inmates. (See, *e.g.*, Hale, Tr. 722, 800, Apx. __; Bradley, Tr. 363-364, Apx. __; Westmoreland, Tr. 193-194, Apx. __). When these officers did not accompany Marlowe into the cells, they – including Conatser – would often stand outside the cell door where they could hear blows being struck inside. (Bradley, Tr. 365-367, 376, Apx. __; Westmoreland, Tr. 188, Apx. __). Indeed, witnesses testified that Conatser was outside of a cell immediately before and after Marlowe assaulted Martinez so brutally that Bradley, who was sitting 20 feet away, could hear the beating and Martinez's screams through the cell door. (Westmoreland, Tr. 181, 183, 188-189, 255-256, Apx. __; Bradley, Tr. 376, Apx. __). These same officers testified that Conatser was present when Marlowe exited the cell and bragged that he had just knocked Martinez out. (Westmoreland, Tr.

188-189, 209-210, 256, Apx. __; Bradley, Tr. 376, Apx. __). With regard to the Armes assault, Conatser's own incident report, as well as his and Marlowe's trial testimony, indicate that he was with Marlowe when Marlowe went into Armes's cell. (GX 22, Tr. 125, Apx. __; Conatser, Tr. 1729-1730, Apx. __; Marlowe, Tr. 1484, Apx. __). According to Marlowe's admissions to Westmoreland and Hale, Marlowe brutally assaulted Armes at that point in retaliation for Armes having earlier driven Marlowe off the road. (Westmoreland, Tr. 216-218, Apx. __; Hale, Tr. 734, Apx. __).

The evidence also established that these same second shift officers – including Conatser – directly participated in assaults against inmates in situations where little or no use of force was justified. (Westmoreland, Tr. 170-171, 215, Apx. __; Ferrell, Tr. 566-573, Apx. __; Hale, Tr. 722-724, 765, 800, Apx. __). The evidence further established these same second shift officers – including Conatser – would brag about and reenact the beatings that occurred during their shift. (Westmoreland, Tr. 190-192, Apx. __; Winfree, Tr. 489-490, 503-504, Apx. __; Bradley, Tr. 403-404, Apx. __). And these same officers – including Conatser – would discuss (and brag about) the long list of inmates that Marlowe had beaten into unconsciousness. (Westmoreland, Tr. 190-192, Apx. __; Bradley, Tr. 353-354, Apx. __).

A reasonable jury could also conclude from the evidence presented that Conatser and his co-conspirators took steps to cover up their illegal actions and protect their conspiracy. Although officers were required to prepare incident reports each time force was used against an inmate (Westmoreland, Tr. 194-195, Apx. __), the evidence established that officers – including Conatser – often either did not write reports after an inmate was beaten (see, *e.g.*, Westmoreland, Tr. 196, Apx. __; Finley, Tr. 932-933, Apx. __; Swallows, Tr. 1238, Apx. __), or wrote false reports to cover up a beating (Westmoreland, Tr. 209, Apx. __; GX 22 at 1, Tr. 125, Apx. __; Hale, Tr. 737, Apx. __; Westmoreland, Tr. 212, Apx. __; see also Bradley, Tr. 389-391, Apx. __; Westmoreland, Tr. 204-206, 212-213, Apx. __; Hale, Tr. 738, Apx. __). For example, Conatser's report following the Martinez incident falsely described Martinez's facial injuries as self-inflicted and omitted any mention of Marlowe's assault on Martinez. (Westmoreland, Tr. 209-210, Apx. __; GX 10, Tr. 125, Apx. __). Conatser's report of the Armes incident makes no mention of Marlowe's assault on Armes. (GX 22, Tr. 125, Apx. __).

Finally, when an inmate was injured as a result of a beating, these same officers would deny the inmates necessary medical care. (See, *e.g.*, Westmoreland, Tr. 205-206, Apx. __ (Marlowe's report falsely indicates that Martinez was provided basic medical care at the jail following the assault that broke his jaw); GX

9B, Tr. 125, Apx. __; see, *e.g.*, Swallows, Tr. 1238, Apx. __ (no evidence that officers provided McIntyre medical care at the jail following his assault); GX 22 at 1, Tr. 125, Apx. __; GX 21 at 2, Tr. 125, Apx. __ (reports of Armes incident do not indicate Armes was provided medical treatment at the jail for his broken cheekbone); see also Statement of Facts).

When viewed in the light most favorable to the government, the evidence indicates that Conatser's knowledge of, and involvement in, the conspiracy was much more extensive than that suggested in his brief. (Conatser Br. 14-20). Moreover, Conatser's argument (Conatser Br. 18-19) that his acquittal on the substantive counts supports a finding that he was not involved in a conspiracy is wholly unpersuasive. "[I]t is clear that a defendant may not upset a verdict solely because the verdict is not reconcilable with other verdicts rendered for or against the defendant." *United States* v. *Silva*, 846 F.2d 352, 357-358 (6th Cir. 1988); see also *United States* v. *Powell*, 469 U.S. 57 (1984); *Dunn* v. *United States*, 284 U.S. 390 (1932). The evidence fully supports the jury's finding that Conatser (1) knew of a common plan among second shift officers to deprive inmates of their civil rights, and (2) willingly participated in it. *Ellzey*, 874 F.2d at 328; *Christian*, 786 F.2d at 211.

## II

## MARLOWE'S SENTENCE IS CONSTITUTIONAL

Defendant Marlowe presents three constitutional challenges to his sentence. Marlowe first argues that his sentence violates the Sixth Amendment because the district court applied the guideline for second degree murder (instead of manslaughter) based on the court's own factual findings, rather than facts that a jury found or that he admitted. Marlowe also argues that his sentence violates the Fifth Amendment because the district court found by a preponderance of the evidence, rather than beyond a reasonable doubt, that the second degree murder guideline was most applicable to Marlowe's conduct. Finally, Marlowe argues that this Court's standard of review on appeal for sentences that fall within a properly calculated Guidelines range violates both the Fifth and the Sixth Amendments. These arguments, however, have previously been rejected by both this Court and the Supreme Court.

### *A. Standard Of Review*

This Court reviews the constitutionality of a sentence *de novo*. *Costo* v. *United States*, 904 F.2d 344, 346 (6th Cir. 1990).

*B. Marlowe's Sentence Conforms To The Sixth Amendment*

Marlowe argues (Marlowe Br. 26-32) that *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005), prohibit a sentencing court from using any fact to enhance a defendant's sentence if that fact was not found by a jury or admitted by the defendant. Marlowe thus argues that because the district court (rather than a jury) found that Marlowe's actions constituted second degree murder (rather than manslaughter) and applied the guideline corresponding to second degree murder when calculating his sentence, his sentence violates the Sixth Amendment.

Marlowe's argument is based on an incomplete reading of *Booker*. In *Booker*, the Supreme Court *did* hold that the Sixth Amendment is violated when a defendant's sentence is increased based on judicial factfinding under mandatory Federal Sentencing Guidelines. *Booker*, 543 U.S. at 226-244; see also *Blakely* 542 U.S. at 301-305 (reaching same conclusion under a determinate sentencing structure). But the Supreme Court *also* ruled that it was the mandatory nature of the Guidelines that caused the constitutional violation. The Court, therefore, struck down two provisions of the Sentencing Reform Act (SRA), 18 U.S.C. 3551 *et seq.*, that made the Guidelines mandatory. *Booker*, 543 U.S. at 245; see 18 U.S.C. 3553(b)(1) and 3742(e); see also *Booker*, 543 U.S. at 233 (explaining that with an

advisory system, "the selection of particular sentences in response to differing sets of facts * * * *would not implicate the Sixth Amendment*") (emphasis added). "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Booker*, 543 U.S. at 245-246 (citations omitted).

As this Court recently explained in *United States* v. *Kosinski*, 480 F.3d 769, 775 (6th Cir. 2007), "in enhancing [a] defendant's sentence based on factors not proven to a jury or admitted by a defendant, the district court does not violate [the Sixth Amendment] if it considered the guidelines to be advisory and not mandatory." Indeed, "[i]t is clear under the law of this Circuit that a district court may make its own factual findings regarding relevant sentencing factors, and consider those factors in determining a defendant's sentence." *United States* v. *Gardiner*, 463 F.3d 445, 461 (6th Cir. 2006). Put more simply: "*Booker* did not eliminate judicial factfinding." *United States* v. *Coffee*, 434 F.3d 887, 898 (6th Cir.), cert. denied, 126 S. Ct. 2313 (2006).

Marlowe's reliance on *Cunningham* v. *California*, 127 S. Ct. 856 (2007), is misplaced. At issue in *Cunningham* was California's determinate sentencing law, which established three levels of punishment for a defendant's conviction. Under

state law, the sentencing court imposed one of the three levels of punishment based on facts it found by a preponderance of the evidence. Relying on its previous decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), *Blakely*, and *Booker*, the Supreme Court held that California's determinate sentencing law violated the Sixth Amendment because it *required* sentencing courts to impose sentences based on facts not found by a jury or admitted by the defendant. 127 S. Ct. at 860. In reaching this holding, the Court expressly distinguished California's determinate sentencing law from the *now-advisory* federal sentencing system, which no longer presented constitutional concerns; the Court reiterated that an advisory sentencing system "would not implicate the Sixth Amendment." *Id.* at 870.

Marlowe thus fails in his efforts (Marlowe Br. 26-28) to equate California's three-level determinate sentencing law to the three statutory levels of punishment available to defendants convicted of violating 18 U.S.C. 242. To sustain a conviction under 18 U.S.C. 242, the government must prove beyond a reasonable doubt that the defendant had the specific intent to deprive his victim of a right secured to him under the Constitution. *Screws* v. *United States*, 325 U.S. 91, 104 (1945); *United States* v. *Epley*, 52 F.3d 571, 576 (6th Cir. 1995). A defendant convicted of violating 18 U.S.C. 242 is subject to one of three maximum sentences: up to a year's imprisonment; up to ten years' imprisonment if the defendant's

actions cause bodily injury to his victim or if he uses, attempts to use, or threatens to use a dangerous weapon, explosives or fire; and up to life imprisonment or death if the defendant's actions result in the death of his victim. 18 U.S.C. 242. Marlowe was convicted of violating 18 U.S.C. 242, and the jury explicitly found that his actions resulted in Kuntz's death. The *jury's* factual findings thus subjected Marlowe to a maximum sentence of life imprisonment. Unlike *Cunningham*, however, the district court was not *required* to sentence Marlowe to life imprisonment based on its own factual determinations. *Cunningham*, 127 S. Ct. at 870-871.

Marlowe's argument (Marlowe Br. 55-59) that the Constitution requires a jury to determine Marlowe's *mens rea* before he can be sentenced under the second degree murder guideline fails for similar reasons. If 18 U.S.C. 242 was similar to the statute at issue in *Cunningham*, which provided for levels of punishment based on a *judge*'s factual findings, then Marlowe's argument would have some force. But here, the district court's authority to sentence Marlowe up to life imprisonment is based on the jury's verdict – that Marlowe violated Kuntz's civil rights and that Kuntz's death resulted from Marlowe's actions. The district court properly sentenced Marlowe for violating *18 U.S.C. 242*, not for committing second degree murder. Marlowe's advisory Guidelines range was indeed *calculated* using the

guideline for second degree murder, as the Guidelines so instruct, see U.S.S.G. 2H1.1(a)(1), but doing so raises no constitutional concerns. *Booker*, 543 U.S. at 233; see also *Kosinski*, 480 F.3d at 775.

The district court here acted in accordance with the Constitution, Supreme Court precedent and this Court's precedent when it sentenced Marlowe to life imprisonment. The court made a factual determination that Marlowe's underlying conduct constituted second degree murder, not manslaughter,[15] and applied the corresponding guideline. (See Marlowe Sentencing, Tr. 118, Apx. __ (explaining that record evidence showed "malice [aforethought]")). Although this determination was not based on a jury's finding, it need not have been. Marlowe was sentenced under the now-advisory federal Guidelines system, thus eliminating any Sixth Amendment concerns. *Booker*, 543 U.S. at 233; *Cunningham*, 127 S. Ct. at 870; *Gardiner*, 463 F.3d at 461; *Coffee*, 434 F.3d at 898; *Kosinski*, 480 F.3d at 775.

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[15] Part III.B. discusses the factual basis for the district court's decision to apply the second degree murder guideline.

*C. Marlowe's Sentence Conforms To The Fifth Amendment*

Marlowe argues (Marlowe Br. 32-37) that his sentence violates the Fifth Amendment because the district court based its sentencing determination on facts that it found by a preponderance of the evidence rather than beyond a reasonable doubt. This argument is foreclosed by this Court's decision in *United States* v. *Gates*, 461 F.3d 703 (6th Cir. 2006). In *Gates*, this Court held that "judicial fact-finding in sentencing proceedings using a preponderance of the evidence standard post-*Booker* does not violate either Fifth Amendment due process rights, or the Sixth Amendment right to trial by jury." *Id.* at 708; see also *Kosinski*, 480 F.3d at 775 ("Post-*Booker*, under the advisory sentencing guideline regime, a sentencing enhancement is constitutional as long as it is based on reliable information and supported by a preponderance of the evidence.").

*D. Applying On Appellate Review A Rebuttable Presumption Of Reasonableness To A Properly Calculated Guidelines Sentence Does Not Render The Application Of The Guidelines Unconstitutional*

Marlowe next argues (Marlowe Br. 37-40) that applying the Guidelines is unconstitutional because this Court affords a presumption of reasonableness to a properly calculated Guidelines sentence when reviewing sentences on appeal. According to Marlowe, if a district court sentences a defendant within a properly calculated Guidelines range and this Court affords that sentence a presumption of

reasonableness, then the burden unconstitutionally shifts to the defendant to prove the sentence is unreasonable. Marlowe's argument fails because (1) the properly calculated Guidelines sentencing range is but one factor this Court considers when reviewing a sentence for reasonableness and, more importantly, (2) there is no evidence that this Court's standard of review on appeal obligated the district court to sentence Marlowe within the advisory Guidelines range.

*1. The Properly Calculated Guidelines Range Is Only One Component Of This Court's Reasonableness Determination*

Marlowe's assertion that this Court affords an unconstitutional presumption of reasonableness to any sentence falling within a properly calculated Guidelines range is based on a misinterpretation of this Court's case law and this Court's appellate review process. In *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006), this Court held that a sentence properly calculated under the Guidelines was entitled to a rebuttable presumption of reasonableness on appellate review. Shortly following the *Williams* decision, however, this Court explained that a sentence outside the Guidelines range (either higher or lower) would not be presumed *un*reasonable. *United States* v. *Foreman*, 436 F.3d 638, 644 (6th Cir. 2006). This Court further explained that, to be reasonable, a sentence must be supported by evidence in the record that the district court considered *all* of the relevant 18 U.S.C. 3553(a) factors. *Id.* at 644; *Kosinski*, 480 F.3d at 777 (explaining that "a

reasonable sentence requires consideration of the factors set forth in 18 U.S.C. 3553"). A sentence within the advisory Guidelines range, without more, provides this Court with no assurance that *Booker*'s remedial sentencing structure was followed. *Foreman*, 436 F.3d at 644 ("A sentence within the Guidelines carries with it no implication that the district court considered the 3553(a) factors if it is not clear from the record."); see also *Kosinski*, 480 F.3d at 777 ("[N]othing in *Booker* suggests that a sentence within the sentencing guideline range is per se reasonable.").

Moreover, Marlowe's assertion (Marlowe Br. 39-40) – that the district court's guideline selection "travels to this Court for review with a presumption of correctness that Mr. Marlowe should spend the rest of his life in prison" – seriously misstates the district court's obligations under the SRA. "[A] district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes' of section 3553(a)(2)." *United States* v. *Bolden*, 479 F.3d 455, 467 (6th Cir. 2007) (quoting *Foreman*, 436 F.3d at 644 n.1). To do so, a district court must consider *all* of the relevant 18 U.S.C. 3553(a) factors. *Foreman*, 436 F.3d at 644; *Kosinski*, 480 F.3d at 777.

Here, the district court made a factual determination that Marlowe's conduct

constituted second degree murder and applied its corresponding guideline. Applying a particular guideline, however, is "not the end of the sentencing inquiry; rather, it is just the beginning." *United States* v. *McBride*, 434 F.3d 470, 476 (6th Cir. 2006). The district court is to consult the appropriate Guidelines range and then "throw[] this ingredient into the section 3553(a) mix." *Ibid*. Thus, even after the district court here applied the second degree murder guideline, the court was free to conclude that the appropriate sentence for Marlowe was lower than that associated with the second degree murder guideline based on its consideration of the 3553(a) factors. *Foreman*, 436 F.3d at 643. Similarly, had the district court applied the involuntary manslaughter guideline, the district court may have nonetheless considered a higher sentence appropriate in light of the 3553(a) factors. *Ibid.* In either case, the sentence would be reviewed by this Court for reasonableness, and neither sentence would be presumed unreasonable. *Id.* at 644.

*2. There Is No Evidence To Suggest That This Court's Standard Of Appellate Review Influenced The District Court's Sentencing Decision*

Even if properly calculated Guidelines sentences receive a "heightened status" (Marlowe Br. 37) on appellate review, that status would not raise constitutional concerns unless there was some evidence that the district court here felt bound to sentence Marlowe within the now-advisory Guidelines range. Cf.

*Kosinski*, 480 F.3d at 778 (explaining that a district court "cannot assume that a sentenc[e] * * * within the sentencing guidelines is per se reasonable"). Marlowe fails to point to any evidence suggesting that this Court's standard of appellate review compelled the district court to sentence Marlowe within the advisory Guidelines range. In fact, the transcript of Marlowe's sentencing indicates that the district court expressly stated that it was *not* presuming the Guidelines range to be reasonable. (Marlowe Sentencing, Tr. 119, Apx. __). The district court explained that "to the extent * * * there is an objection about the appellate presumption of reasonableness, the Court affords the guidelines no presumption." (Marlowe Sentencing, Tr. 119, Apx. __). If it had, the district court would have been inappropriately replacing its mandate to impose "a sentence sufficient, but not greater than necessary, to comply with the purposes" of 18 U.S.C. 3553(a)(2) with this Court's *appellate standard of review*. See *Foreman*, 436 F.3d at 644 n.1. The district court recognized this – noting that it "simply [had] to calculate the guideline range, consider it along with 3553 and then impose a sentence." (Marlowe Sentencing, Tr. 119, Apx. __). It did so, and fully complied with *Booker*'s requirement to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes of section 3553(a)(2)." *Bolden*, 479 F.3d at 467 (quoting *Foreman*, 436 F.3d at 644 n.1); see also *Foreman*, 436 F.3d at 643.

## III

## THE DISTRICT COURT DID NOT ERR IN APPLYING THE GUIDELINE FOR SECOND DEGREE MURDER

### *A. Standard Of Review*

A district court's rulings on factual issues for sentencing purposes will not be set aside unless clearly erroneous. *United States* v. *Gardner*, 417 F.3d 541, 543 (6th Cir. 2005). Legal conclusions regarding the application of the Guidelines are reviewed *de novo*. *United States* v. *Foreman*, 436 F.3d 638, 640 (6th Cir. 2006).

### *B. The District Court Did Not Err In Applying The Guideline For Second Degree Murder*

The guideline for 18 U.S.C. 242 violations, U.S.S.G. 2H1.1, directs the district court to apply the greater of 12 or "the offense level from the offense guideline applicable to any underlying offense." U.S.S.G. 2H1.1(a)(1). This means the district court is to apply the guideline from "the offense guideline applicable to any conduct established by the offense of conviction," U.S.S.G. 2H1.1, comment. (n.1), and "all acts and omissions committed, aided, [or] abetted * * * by the defendant," and "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity," U.S.S.G. 1B1.3(1)(A)-(B).

The district court correctly concluded that the underlying conduct

established by Marlowe's conviction constituted second degree murder. Second degree murder is any killing committed with malice aforethought that is not within the statutory circumstances constituting first degree murder. See 18 U.S.C. 111(a). Malice aforethought may be shown with "evidence of conduct that is 'reckless and wanton, and a gross deviation from a reasonable standard of care, of such nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.'" *United States* v. *Milton*, 27 F.3d 203, 206 (6th Cir. 1994), cert. denied, 513 U.S. 1085 (1995); see also *United States* v. *Sheffey*, 57 F.3d 1419, 1430 (6th Cir. 1995), cert. denied, 516 U.S. 1065 (1996) (applying *Milton* test); see also *United States* v. *Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000) ("Second degree murder's malice aforethought element is satisfied by * * * intent-to-do-serious-bodily-injury."); *United States* v. *Velazquez*, 246 F.3d 204, 215 (2d Cir. 2001) ("An intent to cause a serious risk of a serious injury will frequently suffice to demonstrate a heightened disregard for human life.").

Here, there was overwhelming evidence that Kuntz's killing was committed with malice aforethought. Marlowe beat and kicked Kuntz twice. Hale then beat Kuntz at Marlowe's direction. Marlowe then stood by and took no action as Kuntz slipped into a coma and eventual brain death. All of Marlowe's actions – failing to provide necessary medical care after initially beating and then ordering Hale to

beat Kuntz – involved malice aforethought.

*1. Marlowe's Failure To Provide Necessary Medical Care Constituted Malice Aforethought*

The second degree murder guideline is appropriate if the defendant's conduct was "a gross deviation from a reasonable standard of care" such that "a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm." *Milton*, 27 F.3d at 206. Here, following Kuntz's three beatings, Marlowe failed to provide Kuntz with *any* care for at least *four hours* – despite knowing that Kuntz was unconscious and unresponsive during that time, and was thus, at the very least, facing a risk of serious bodily harm. *Ibid.* Although Marlowe attempts (Marlowe Br. 43-45) to minimize his malicious conduct by distorting the timeline of the evening's events, this attempt fails.

Marlowe knew at 7 p.m. that Kuntz was unconscious and unresponsive. (Marlowe, Tr. 1494, Apx. __; see also Holladay, Tr. 1572-1573, Apx. __). Marlowe also knew by 7 p.m. that Kuntz (1) had had brain surgery (Willis, Tr. 869, 923-924, Apx. __); (2) had been beaten in the head twice by Marlowe (Finley, Tr. 905-906, 912, Apx. __); (3) had been sprayed with a chemical agent (Willis, Tr. 853-854, Apx. __; Finley, Tr. 912, Apx. __); (4) had been beaten by Hale (Hale, Tr. 751, Apx. __); and, (5) had vomited on himself (Hale, Tr. 752, Apx. __).

Despite this knowledge, Marlowe did not order *any* medical attention for Kuntz – even though he acknowledged at trial that if an inmate or detainee is beaten during the shift, and if that person passes out, he is obligated to seek medical treatment for that person. (Marlowe, Tr. 1567, Apx. __).

Over the next *four hours*, Marlowe failed to summon any medical assistance for Kuntz despite the fact that Kuntz showed no signs of consciousness (1) when Marlowe and Hale moved Kuntz to clean him after he first vomited (Hale, Tr. 753, Apx. __); (2) when Marlowe and Hale moved him a second time to clean him after he vomited again (Hale, Tr. 754, Apx. __; Finley, Tr. 923-924, Apx. __); (3) while Marlowe and Hale "shook him," "[p]atted him on the back," and "poured" a "bucket of ice water" "down his body" (Hale, Tr. 754-755, Apx. __); (4) when officer Willis checked Kuntz's pupils for a response to light near the end of the shift (Willis, Tr. 858, Apx. __) (testifying that he immediately notified Marlowe of Kuntz's unresponsiveness); and, (5) when Marlowe and Hale placed smelling salts under Kuntz's nose near the end of the shift (Hale, Tr. 756, Apx. __).

It was not until after 10:30 p.m. that Marlowe agreed with Hale to call for help; but, even then, he did not turn to medical professionals. Rather, Marlowe agreed to call Hale's father, a commissioner at the jail. (Hale, Tr. 757, Apx. __; see also Willis, Tr. 858, Apx. __; Finley, Tr. 928, Apx. __). Marlowe, however,

did not tell Hale's father that both he and Hale had beaten Kuntz earlier in the evening. (Hale, Tr. 757-758, Apx. __). It was only after Hale's father said that Kuntz needed to go to the hospital that an ambulance was called for Kuntz. (Hale, Tr. 758, Apx. __). At that point, it was nearly 11:30 p.m. (Crowder, Tr. 956, Apx. __).

The EMTs arrived within minutes of being called. (Crowder, Tr. 957, Apx. __). Marlowe, however, did not tell the EMTs that Kuntz had been beaten three times earlier in the evening. (Crowder, Tr. 962-963, Apx. __). Had the EMTs known that Kuntz may have been suffering from a head injury, they would never have taken him to the University Medical Center; instead, the EMTs would have arranged for Kuntz to be flown by helicopter to a trauma center. (Crowder, Tr. 970, Apx. __).

Marlowe's actions – and inactions – are more than sufficient to support the district court's determination that Marlowe acted with a wanton disregard for the serious risk of death or serious bodily harm to Kuntz that constitutes malice aforethought. *Milton*, 27 F.3d at 206. In *United States* v. *McDougle*, 82 Fed. Appx. 153, 158 (6th Cir. 2003), two employees at a residential care facility beat their victim and then failed to inform medical personnel of the beating. This Court held that the second degree murder guideline was applicable to defendants' actions

because one could infer from defendants' efforts to cover up their actions that the defendants were aware "they were placing [the victim] at a substantial risk of serious bodily injury." *Ibid.* This Court also held that the second degree murder guideline applied to a defendant who "remained silent as [the victim] became increasingly ill and allowed [medical personnel] to treat [the victim] for the wrong condition, despite full knowledge of the true nature of [the victim's] maladies." *Ibid.*

The reasoning of *McDougle* applies here. Marlowe did nothing for at least four hours as Kuntz became increasingly ill after being beaten in the head no less than three times. 82 Fed. Appx. at 158; see also Hubbard, Tr. 1019, Apx. __ (testifying that if someone in Kuntz's condition received prompt medical treatment, that person could be "perfectly normal" with "no brain damage"); Levy, Tr. 1085, Apx. __ (testimony from medical examiner that Kuntz's injuries were treatable). When medical personnel were finally called to help Kuntz, Marlowe remained silent and failed to provide them with information critical to Kuntz's course of treatment. As in *McDougle*, Marlowe allowed Kuntz to be treated for the wrong condition, "despite full knowledge of the true nature of [Kuntz's] maladies." 82 Fed. Appx. at 158. Based on these actions, one can easily infer that Marlowe was aware he was at least placing Kuntz at a substantial risk of serious bodily

harm. *Ibid.* The district court thus did not err when it applied the guideline for second degree murder.

*2. Kuntz's Beating Involved Malice Aforethought*

The district court's decision to apply the second degree murder guideline to Marlowe's offense conduct is also supported by Marlowe's instruction to Hale to "take care of" Kuntz after his (Marlowe's) attempts to quiet Kuntz failed. (Hale, Tr. 748, Apx. __). The Guidelines provide that a defendant's base offense level should be based on all acts aided or caused by the defendant and that are reasonably foreseeable acts taken in furtherance of the conspiracy. U.S.S.G. 1B1.3(a)(1)(A)-(B). After Marlowe assaulted Kuntz twice, Marlowe "willfully caused" Hale to assault Kuntz. U.S.S.G. 1B1.3(a)(1)(A). Given (1) Marlowe's notification to Hale that his (Marlowe's) two attempts to silence Kuntz failed; (2) Hale's previous participation in assaults on inmates; (3) Marlowe's previous instructions to Hale on where to hit someone to maximize the potential for serious injury (Hale, Tr. 724-725, Apx. __); (4) the severity of injuries previously received by inmates at the jail (*e.g.*, Armes, Martinez); and (5) the conspirators' practice of denying injured inmates necessary medical care following a beating, Hale's brutal beating of Kuntz immediately following Marlowe's instruction to "take care" of the situation was a "reasonably foreseeable act[] * * * in furtherance of the jointly

undertaken criminal activity." U.S.S.G. 1B1.3(a)(1)(B). For these reasons, the district court correctly applied the second degree murder guideline when calculating Marlowe's offense level. (See Marlowe Sentencing, Tr. 118, Apx. __ ("[T]he record reflects malice [aforethought] and Mr. Marlowe's guilt for second degree murder at a minimum as a co-conspirator and an aider and abettor.")).

## IV

## THE DEFENDANTS' SENTENCES ARE REASONABLE

### *A. Standard Of Review*

This Court reviews a district court's sentence for reasonableness. *United States* v. *Johnson*, 467 F.3d 559, 563 (6th Cir. 2006); see also *United States* v. *Dexta*, 470 F.3d 612, 614 (6th Cir. 2006). To determine whether a defendant's sentence is reasonable, this Court focuses on the factors set forth in 18 U.S.C. 3553(a). *United States* v. *Booker*, 543 U.S. 220, 261 (2005) ("Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts * * * in determining whether a sentence is unreasonable."); see also *United States* v. *Webb*, 403 F.3d 373, 383 (6th Cir. 2005) (This Court must review "the factors evaluated and the procedures employed by the district court in reaching its sentencing determination."). Those factors are: (1) the nature and circumstances of the offense and the history and characteristics

of the defendant; (2) the need for the defendant's sentence imposed to satisfy the purposes set forth in the statute; (3) the kinds of sentences available; (4) the appropriate advisory Guidelines range; (5) any policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. 3553(a)(1)-(7).

After consulting the advisory Guidelines and "tak[ing] them into account when sentencing," *Booker*, 543 U.S. at 224, a district court is to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in 18 U.S.C. 3553(a)(2). 18 U.S.C. 3553(a). Those purposes are that the sentence imposed reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public from further crimes of the defendant, and provide the defendant with needed training or correctional treatment. 18 U.S.C. 3553(a)(2).

This Court reviews a sentence for both procedural and substantive reasonableness. *United States* v. *Collington*, 461 F.3d 805, 808 (6th Cir. 2006). A sentence is procedurally unreasonable if "the district judge fails to 'consider' the applicable Guidelines range or neglects to 'consider' the other factors listed in 18

U.S.C. [] 3553(a), and instead simply selects what the judge deems an appropriate sentence without such required consideration." *Webb*, 403 F.3d at 383. A district court, however, "need not recite [each 3553(a)] factor[]" when imposing a sentence. *United States* v. *Kirby*, 418 F.3d 621, 626 (6th Cir. 2005); see also *Williams*, 436 F.3d at 708 (explaining that a district court's consideration of the statutory factors "need not be evidenced explicitly"); see also *United States* v. *Johnson*, 403 F.3d 813, 816 (6th Cir. 2005) (explaining that this Court does not require the "ritual incantation" of the statutory factors to affirm a district court's sentence). But if a defendant "raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." *United States* v. *Richardson*, 437 F.3d 550, 554 (6th Cir. 2006).

A sentence is substantively unreasonable if the district court "select[s] the sentence arbitrarily, bas[es] the sentence on impermissible factors, fail[s] to consider pertinent [] 3553(a) factors or giv[es] an unreasonable amount of weight to any pertinent factor." *Webb*, 403 F.3d at 385.

If a district court sentences a defendant within the applicable advisory Guidelines range, this Court may afford that sentence "a rebuttable presumption of reasonableness." *Richardson*, 437 F.3d at 554; see also *Williams*, 436 F.3d at 708.

Even so, "a court imposing such a sentence must nonetheless articulate its reasoning with sufficient specificity to permit meaningful appellate review." *United States* v. *Cousins*, 469 F.3d 572, 576 (6th Cir. 2006). The presumption thus "does not excuse a sentencing court's failure to adhere to the procedural requirements of a reasonable sentence and indeed applies only to sentences that generally have satisfied these numerous requirements." *Ibid.*

*B. Conatser's Sentence Is Reasonable*

*1. Conatser's Sentence Is Procedurally Reasonable*

Conatser's sentence is procedurally reasonable because the district court (1) properly calculated and considered the applicable Guidelines range, (2) considered the relevant factors listed in 18 U.S.C. 3553(a), and (3) considered (and rejected) Conatser's arguments for a sentence below the advisory range. See *Webb*, 403 F.3d at 383. First, Conatser does not challenge the district court's calculation of his advisory Guidelines range. Second, the district court considered all of the relevant statutory factors in sentencing Conatser. The district court explained that it had "[c]onsidered all of the [statutory] factors" before imposing Conatser's sentence, and that a sentence below the advisory range "wouldn't reflect the seriousness of the offense that the jury has found and wouldn't afford adequate deterrence." (Conatser Sentencing, Tr. 66-67, 69-70, Apx. __; see also 18 U.S.C.

3553(a)(2)(A) & (B)). The court further explained that Conatser's lack of any prior criminal history justified a sentence at the bottom of the advisory range. (Conatser Sentencing, Tr. 70, Apx. __).

Finally, the transcript of his sentencing hearing provides ample evidence that the district court considered – and rejected – Conatser's arguments for a sentence below the Guidelines range. Conatser argued at sentencing that the nature of his offense, his personal characteristics, and his role in the conspiracy warranted a sentence below the advisory Guidelines range. (R. 241 at 6-8, Apx. __; Conatser Sentencing, Tr. 55-60, Apx. __). He repeats those arguments in his brief (Conatser Br. 21-26), and adds for the first time that a sentence below the advisory range is necessary to avoid a disparity in sentencing among his co-conspirators.

For example, Conatser argues (Conatser Br. 23-24) that his conduct does not support a sentence of 70 months' imprisonment because he essentially was convicted of falsifying his report of the Martinez beating, rather than overtly participating in the conspiracy. This argument – that the nature of his offense and his minimal role in the conspiracy warrants a lower sentence – is unpersuasive. A jury convicted Conatser of participating in a conspiracy to assault inmates and to cover up his and his co-conspirators' actions – not simply of falsifying one report (although his report regarding the Martinez incident certainly supports his

conspiracy conviction). (R. 187, Apx. __; R. 290 Tr. 2146-2147, Apx. __). Overwhelming evidence supports his conviction. See Part I, *supra*. Moreover, the district court did, in fact, take the nature of Conatser's offense into consideration when it sentenced him to 70 months' imprisonment – the court simply came to a different conclusion than did Conatser regarding the nature of his offense. The district judge expressly stated that a sentence below the advisory Guidelines range "wouldn't reflect the seriousness of the offense." (Conatser Sentencing, Tr. 66, Apx. __); see *Richardson*, 437 F.3d at 554; see also *United States* v. *Bolden*, 479 F.3d 455, 467-468 (6th Cir. 2007) (affirming sentence as reasonable where district court imposed sentence within middle of the advisory range based in part on the "extremely serious" nature of the offense).

Conatser's next argument (Conatser Br. 24), that he was "a pillar of his community," who enjoyed strong community support and "had no history of violence or anti-social behavior," thus warranting a sentence below the advisory range, is equally unpersuasive. The court specifically considered Conatser's lack of any prior criminal history when sentencing him. But rather than sentencing him below the advisory Guidelines range as Conatser urged, the court sentenced him at the extreme low end of the range. (Conatser Sentencing, Tr. 70, Apx. __).

Conatser also argues (Conatser Br. 24-26) that a sentence within the

Guidelines range would result in an unreasonable sentencing disparity between himself and his co-conspirators. Because Conatser failed to raise this before the district court, it may be reviewed only for plain error. *United States* v. *Olano*, 507 U.S. 725, 731 (1993); *United States* v. *Barajas-Nunez*, 91 F.3d 826, 830 (6th Cir. 1996). The district court did not err – plainly or otherwise. This Court has previously noted that "[t]he objective * * * is not to eliminate sentence disparities between defendants of the same case who have different criminal records; rather, the objective is to eliminate unwarranted disparities nationwide." See *United States* v. *LaSalle*, 948 F.2d 215, 218 (6th Cir. 1991) (explaining that "to reduce a defendant's sentence because of a perceived disparity between the sentences of one defendant and that of his co-defendant in the same case creates a new and unwarranted disparity between that first defendant's sentence and the sentences of all defendants nationwide who are similarly situated"). Moreover, this Court has recognized that, among defendants in the same case, a disparity between "co-conspirators who chose to plead guilty and cooperate with the prosecution" is reasonable. *United States* v. *Dexta*, 470 F.3d 612, 616 n.1.

Here, only two other co-conspirators charged in the indictment were convicted of conspiracy: Marlowe, who was sentenced to a concurrent ten years' imprisonment for his conspiracy conviction, and Hale, who pleaded guilty to

conspiracy and was sentenced to 108 months' imprisonment. Ferrell pleaded guilty to a substantive civil rights violation, not conspiracy. Conatser and Ferrell are therefore not "defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). Based on these facts, there is no basis for Conatser to argue that an unreasonable sentencing disparity exists between his sentence and Hale's or Ferrell's. Moreover, both Hale and Ferrell pleaded guilty and cooperated with the prosecution. See *Dexta*, 470 F.3d at 616 n.1.

*2. Conatser's Sentence Is Substantively Reasonable*

Conatser's sentence is also substantively reasonable. Provided the district court has complied with all of the procedural requirements in sentencing the defendant, a within-Guidelines sentence is credited with a rebuttable presumption of reasonableness. *Willliams*, 436 F.3d at 708; *Foreman*, 436 F.3d at 644. As noted above, the district court complied with all of *Booker*'s procedural requirements when sentencing Conatser; a presumption of reasonable thus applies to Conatser's sentence. *Foreman*, 436 F.3d at 644. But even absent this presumption, Conatser's sentence is substantively reasonable. No evidence suggests that the district court arbitrarily selected a sentence, based its sentence on impermissible factors, failed to consider relevant factors, or gave an unreasonable amount of weight to any factor. *Webb*, 403 F.3d at 385. Conatser has thus failed

to identify any reason warranting a sentence below the Guidelines range, nor could he. There is simply no evidence to suggest that Conatser's sentence – which lies at the extreme low end of the advisory range – is unreasonable. (See Conatser Sentencing, Tr. 70, Apx. __ ("[T]here is not an appropriate basis for a nonadvisory Guideline sentence.")).

*C. Marlowe's Sentence Is Reasonable*

*1. Marlowe's Sentence Is Procedurally Reasonable*

Marlowe's sentence is procedurally reasonable because the record shows, as it did with Conatser's sentence, that the district court (1) properly calculated Marlowe's advisory Guidelines range, (2) considered that range along with the other 3553(a) factors, and (3) considered and rejected Marlowe's arguments for a sentence below the advisory range. *Webb*, 403 F.3d at 383; *Richardson*, 437 F.3d at 554. First, as explained in Part III.B., the district court properly calculated Marlowe's advisory Guidelines range. Moreover, the record makes clear that the district court considered this range when sentencing Marlowe. (Marlowe Sentencing, Tr. 120, Apx. __). Second, the record makes clear that the district court expressly identified and considered all of the relevant statutory factors when sentencing Marlowe. (Marlowe Sentencing, Tr. 120-121, Apx. __). Finally, the transcript of his sentencing hearing makes clear that the district court considered –

and rejected – Marlowe's arguments for a sentence below the Guidelines range. The reasons Marlowe gave in support of a sentence below the advisory range, both at sentencing and in his brief, focus primarily upon his youth, the conditions at the jail, his family ties, and his behavior outside the jail. These factors, however, are adequately taken into account in the first statutory factor – "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. 3553(a)(1). Nonetheless, after hearing Marlowe's evidence at sentencing and his counsel's arguments in favor of a sentence outside the Guidelines range based on these factors, the district court repeated each of the grounds upon which Marlowe relied, recounted the testimony from Marlowe's witnesses, and ruled that the circumstances of the case and Marlowe's personal life "are not appropriate reasons to go outside the guideline range." (Marlowe Sentencing, Tr. 121-122, Apx. __).

Marlowe's argument (Marlowe Br. 52-53) that his sentence is unreasonable because the court neglected to consider factors other than the "family tragedy" described by the district court in reaching his sentence is unpersuasive. The district court indicated that it "considered the other factors that have been argued" and even found some more meritorious than others (such as Marlowe's lack of criminal history and lack of training). The court, however, determined that "on balance the

guideline sentence of life is the appropriate sentence considering [the statutory factors] and the guidelines." (Marlowe Sentencing, Tr. 123-124, Apx. __).

Marlowe's argument (Marlowe Br. 53-55) that his sentence generates an unreasonable disparity with Hale's sentence is equally unpersuasive. The district court *did* recognize some similarities between Hale's and Marlowe's conduct. For example, Hale beat Kuntz, and Marlowe "allowed * * * Kuntz to die through no intervention." (Marlowe Sentencing, Tr. 123, Apx. __). Moreover, the court recognized that Hale was, of course, "very culpable in the death of * * * Kuntz," and that Marlowe "was culpable as well." (Marlowe Sentencing, Tr. 123, Apx. __). But despite some similarities in their conduct, the district court correctly recognized that Hale and Marlowe "are not really similarly situated." (Marlowe Sentencing, Tr. 124, Apx. __). The court recognized that Hale pleaded guilty to violating 18 U.S.C. 241, which has a statutory maximum sentence of ten years' imprisonment. 18 U.S.C. 241. Hale also cooperated with the government and accepted responsibility for his actions. His sentence reflects those factors. See *Dexta*, 470 F.3d at 616 n.1. The district court also recognized that, unlike Hale, Marlowe was a supervisor, was convicted of seven counts (compared to Hale's one), and "[t]here was substantially more evidence at trial about * * * Marlowe abusing other inmates." (Marlowe Sentencing, Tr. 124, Apx. __). Based on these

factors, the district court correctly concluded that there was not an unwarranted sentencing disparity between Marlowe's and Hale's sentences "under the totality of the circumstances." (Marlowe Sentencing, Tr. 124, Apx. __).

For these reasons, the record provides ample evidence that Marlowe's sentence is procedurally reasonable. That is, the court considered the advisory range in conjunction with the statutory factors, considered Marlowe's arguments in favor of a sentence below the advisory range, and provided its reasoning for sentencing Marlowe within the advisory range. *Webb*, 403 F.3d at 383; *Richardson*, 437 F.3d at 554.

*2. Marlowe's Sentence Is Substantively Reasonable*

Marlowe's sentence is also substantively reasonable. Like Conatser's sentence, Marlowe's procedurally reasonable sentence is entitled to a presumption of reasonableness on review. *Williams*, 436 at 708; *Cousins*, 469 F.3d at 576. And like Conatser's sentence, Marlowe's sentence is substantively reasonable even without the presumption. Marlowe has failed to provide any evidence to suggest that the district court arbitrarily selected a sentence, relied on impermissible factors, or gave unreasonable weight to any particular factor. *Webb*, 403 F.3d at 385. Rather, the district court provided its reasons for sentencing Marlowe within the advisory range. The district court explained that Marlowe's case was

"difficult" and presented "a hard decision," but that "on balance the guideline sentence of life is the appropriate sentence considering [18 U.S.C.] 3553 and the guidelines." (Marlowe Sentencing, Tr. 124, Apx. __). Considering "both the reasons for leniency and for a harsh penalty * * * makes its explanation a reasonable one and the sentence itself reasonable." *Collington*, 461 F.3d at 810. Indeed, the district court fully explained its analysis in reaching its sentencing determination. As required by *Booker*, the district court considered both the Guidelines range and the statutory factors. Thus the district court's "final sentence was not random, but a reflection of its consideration of both." *Ibid.*

## CONCLUSION

For the foregoing reasons, this Court should affirm Conatser's conviction, and should affirm both Conatser's and Marlowe's sentences.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 9 software, the brief contains 15,309 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

A Motion To File An Oversize Proof Brief As Appellee has been submitted with this brief.

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DATED: June 19, 2007

## CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2007, a copy of the foregoing PROOF BRIEF FOR THE UNITED STATES AS APPELLEE wase served by pre-paid, overnight delivery on the following counsels of record:

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