No. 11-30877

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MATTHEW DEAN MOORE;
MELVIN WILLIAMS,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests oral argument in this matter. Given the number and nature of the issues raised, as well as the underlying facts of the case, the United States believes oral argument would assist this Court in resolving the issues presented.

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STATEMENT OF JURISDICTION

Defendants-Appellants Matthew Dean Moore and Melvin Williams were indicted and convicted under the criminal laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment as to the defendants on September 15, 2011. Moore R. 435-439; Williams R. 437-442.[1] Moore filed a timely notice of appeal on September 16, 2011. Moore R.

[1] Separate records on appeal have been submitted for Williams and Moore in this matter. The citations "Williams R. __" and "Moore R. __" refer to the page
(continued…)

440. Williams filed a timely notice of appeal on September 20, 2011. Williams R. 443. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support Williams' conviction on Count 1 for violating 18 U.S.C. 242 (deprivation of rights under color of law).

2. Whether the evidence was sufficient to support Moore's conviction on Count 2 for violating 18 U.S.C. 1519 (obstruction of justice).

3. Whether the evidence was sufficient to support Moore's conviction on Count 3 for violating 18 U.S.C. 1001 (false statements to the FBI).

4. Whether the district court used the correct base offense level under the Sentencing Guidelines in sentencing Williams.

5. Whether the district court abused its discretion in sentencing Moore.

STATEMENT OF THE CASE

1. On July 29, 2010, a federal grand jury returned a three-count indictment charging defendants, then New Orleans Police Department (NOPD) officers, in connection with the beating death of Raymond Robair. Moore R. 16-20. Count 1

(…continued)
number following the Bates stamp "USCA5" in the respective defendant's record on appeal. Citations to "Doc. __ at __" refer to documents in the district court record, as numbered on the district court's docket sheet, and page numbers within those documents. Citations to "Williams Br. __" refer to page numbers in Williams' opening brief. Citations to "Moore Br. __" refer to page numbers in Moore's opening brief.

charged Williams with violating 18 U.S.C. 242 by unreasonably kicking Robair and striking him with his police baton while acting as a NOPD officer, willfully depriving Robair of his right to be free from the use of unreasonable force by a law enforcement officer. Moore R. 17. Count 2 charged Williams and Moore with violating 18 U.S.C. 1519 and 18 U.S.C. 2 by submitting an NOPD incident report falsely describing the circumstances surrounding the injuries that Robair suffered while in their custody. Moore R. 18. Count 3 charged Moore with violating 18 U.S.C. 1001 by falsely stating to the FBI that Williams never kicked or hit Robair. Moore R. 18-19.

A seven-day joint jury trial was held from April 4 to April 13, 2011. Moore R. 245, 247, 249, 253-254, 256, 287-288. At the end of the government's evidence, and again at the close of all of the evidence, defendants moved for judgments of acquittal, which the court denied. Williams R. 1215-1216, 1472-1473. On April 13, 2011, the jury found defendants guilty on all counts. Moore R. 288. The jury also found that Williams' violation of Section 242 "resulted in the death of Raymond Robair." Moore R. 301-302; Williams R. 1576-1577. On April 22, 2011, Moore filed a motion for judgment of acquittal as to Count 2, which the court denied. Moore R. 320-326, 357-368.

2. Williams and Moore filed objections to their Presentence Investigation Report, as well as motions for a sentence below the applicable sentencing

guidelines range. Moore R. 392-409; Williams R. 418-429. The district court addressed defendants' objections and arguments at the sentencing hearing. Moore R. 1599-1669. The court sentenced Williams to 262 months' imprisonment on Count 1 and 240 months' imprisonment on Count 2, to be served concurrently. Williams R. 438. The court sentenced Moore to 70 months' imprisonment on Count 2 and 60 months' imprisonment on Count 3, to be served concurrently. Moore R. 435-439.

On September 15, 2011, the court entered final judgments as to both defendants. Moore R. 435-439; Williams R. 437-442. Both defendants filed timely notices of appeal. Moore R. 440; Williams R. 443.

STATEMENT OF FACTS

This case arises out of the beating death of Raymond Robair, a then 48 year-old African-American male, while in the custody of two NOPD officers, defendants Moore and Williams. The evidence at trial established that, while on patrol, defendants stopped Robair and, after Moore restrained him, Williams kicked Robair and beat Robair with his police baton, causing injuries that resulted in Robair's death later that day at the hospital. Subsequently, defendants filed a false incident report claiming that they had picked up an unidentified African-American male in need of medical attention due to possible drug use. In addition, Moore falsely told the FBI that no force had been used against Robair.

1. Defendants' Stop And Beating Of Raymond Robair

On July 30, 2005, at approximately 9:00 a.m., Raymond Robair was outside on Dumaine Street in the Treme neighborhood of New Orleans. Williams R. 735, 858, 874. A NOPD patrol car turned onto Dumaine street and pulled over to the curb in front of a house near Robair. Williams R. 736, 858-859. The car was driven by Williams, who had been employed by the NOPD since 1994; Moore, a rookie NOPD officer who graduated from the police academy several months earlier, was in the front passenger seat.[2] Williams R. 1261, 1363, 1386. When the patrol car stopped, Robair turned to go the opposite way. Williams R. 736, 860, 877, 904. Moore got out of the patrol car, grabbed Robair, threw him to the ground, got on top of him, and tried to handcuff him. Williams R. 737, 752-753, 859-860, 878-879, 895, 899, 904. Williams also got out of the car, helped Moore handcuff Robair, and yelled for everyone to "get the fuck on up the street." Williams R. 737-738, 861.

According to the testimony of four neighborhood residents who witnessed the events, while Robair was on the ground with Moore on top of him, Williams kicked him in the torso. Williams R. 738, 756, 861, 900, 908-909, 1070. Robair let out a loud scream. Williams R. 738, 761, 891, 900. Williams then began

[2] At this time, Moore's employment status was that of a recruit, and Williams was his field training officer. Williams R. 1156, 1261, 1365.

striking Robair across the legs and torso with his metal police baton while Moore held Robair. Williams R. 738-739, 756-760, 862, 900, 1056, 1070. Robair did not try to resist (Williams R. 860-861), and Moore did nothing to stop Williams from beating Robair (Williams R. 738-739, 864, 899-900).

Williams and Moore then put Robair in the back of their patrol car and drove away. Williams R. 864, 901. Robair looked hurt and in obvious pain. Williams R. 1055.

2. Officers Moore And Williams Transport Robair To The Hospital, Where Robair Dies

The officers drove to the emergency room (ER) at Charity Hospital, arriving at approximately 9:20 a.m. Williams R. 787, 779-780, 789. They took Robair out of their patrol car and placed him in a wheelchair. Williams R. 1372. A triage nurse brought Robair, who was unresponsive, into the emergency room. Williams R. 780. The charge nurse was told that Robair had been "found down," *i.e.*, lying on the ground. Williams R. 780-781, 789.

The charge nurse testified that two police officers came in with Robair, and that neither officer identified himself or provided a badge number, which was unusual. Williams R. 781-782. She spoke to Williams, but was told only that the patient had been found under a bridge and had a history of drug use. Williams R. 784, 832-833, 841. Williams did not provide any information about the patient's name. Williams R. 784. During this conversation, Moore stood back and did not

say anything. Williams R. 784. The officers appeared to be in a hurry to leave, and they left the emergency room after approximately ten minutes. Williams R. 785. But approximately 15 minutes later they returned, and Williams said that they had found some crack cocaine in the back of their car. Williams R. 795-796, 833. The defendants then left. Williams R. 796. Williams did not show the nurse the cocaine, and did not provide any additional information about what happened to the patient or suggest that his condition might have resulted from trauma. Williams R. 795-797.

Because the medical staff at the hospital had only the information that Williams had given them about Robair's condition and what had happened to him, they treated Robair as a drug overdose in the emergency room rather than take him to the trauma room. Williams R. 791. Dr. Bob Sigillito and Dr. Matthew LeBoeuf treated Robair in the ER. Williams R. 792. Both doctors testified that they were told by the triage nurse that the police found the patient unconscious and brought him to the hospital. Williams R. 1105-1106, 1195-1196. Dr. Sigillito further testified that he never personally spoke with the police officers, and that the officers never showed him any cocaine. Williams R. 1106-1107, 1113-1114, 1142-1143. LeBoeuf also testified that the police officers did not show him any drugs. Williams R. 1197.

There were no visible outward signs of trauma and no evidence of blood (Williams R. 792, 1110), but a blood test showed that Robair had cocaine in his system and he had track marks on his arm (Williams R. 802-805).[3] He remained unconscious and was placed on a cardiac monitor and given a series of tests to get additional information. Williams R. 792-793. His high heart rate suggested that he may have had a heart attack or some response to cocaine. Williams R. 806-807. X-rays showed that Robair had one broken rib. Williams R. 1132.

At approximately 10:55 a.m. – over an hour and a half after Robair was dropped off at the hospital – the doctors drew fluid from Robair's abdomen and determined that he had internal bleeding. Williams R. 794, 1114. At that point, Dr. Sigillito strongly suspected trauma. Williams R. 1115. Robair was immediately taken from the emergency room to an operating room (Williams R. 797), but it was too late to save him. His spleen had ruptured, triggering massive internal bleeding. Williams R. 969-970. At 1:22 p.m., Robair was pronounced dead. Williams R. 831. Had defendants told the ER staff the truth of what happened to Robair – *i.e.*, that he was a victim of blunt force trauma – Robair would have been given different treatment from the beginning and, according to

[3] The charge nurse testified, however, that the fact that cocaine was present in his blood did not necessarily mean that the patient was on cocaine at that time; cocaine can remain present in the system from 24 to 60 hours. Williams R. 835.

the expert opinion of the charge nurse, would likely have survived. Williams R. 798, 841.

When Dr. Sigillito finished treating Robair, he wanted to talk to the police officers who brought Robair to the hospital to tell them that Robair had been injured so the officers could further investigate. Williams R. 1107. Dr. Sigillito asked the nursing staff and other doctors if the police officers had left any contact information, and was told they had not. Williams R. 1107-1108. As a result, Dr. Sigillito called the police dispatch and said that he needed to speak with the officers who dropped off a patient at the hospital that morning. Williams R. 1094, 1108. A police dispatcher subsequently made a broadcast to notify NOPD officers that a doctor at Charity Hospital had called to identify the officers who had dropped off an injured man that morning; neither Williams nor Moore responded. Williams R. 1092-1094, 1100-1101, 1108. Robair was ultimately identified when hospital personnel found an address book in his pocket. Williams R. 1293-1294.

Dr. Sigillito testified that in his 12 years working at Charity Hospital this was the only time the police, rather than an EMS unit, had brought an unresponsive, critically injured patient to the hospital. Williams R. 1109, 1146. Dr. LeBoeuf similarly testified that in his experience this was the first time such a patient had been brought to the hospital by the police rather than EMS. Williams R. 1196, 1200.

3. The Autopsies

Two autopsies were performed on Robair. The first was performed by Dr. Paul McGarry of the Orleans Parish Coroner's Office the day after Robair's death. Gov't Ex. 6. Dr. McGarry testified for the defendants. He stated that the cause of death was internal bleeding due to a ruptured spleen, and that the manner of death was blunt injury to the left side of the chest due to a fall from accidental causes.[4] Williams R. 1334-1338. Dr. McGarry did not examine the spleen, however, because it had been removed at the hospital, but he did review a report that described the spleen. Williams R. 1334-1335. He also did not dissect Robair's legs or thighs (*i.e.*, do a skin dissection) to look for areas of deep bruising, even though he knew that there were allegations of "police involvement." Williams R. 976, 1357.

On August 10, 2005, Dr. Kris Sperry, the chief medical examiner for the State of Georgia, performed a second autopsy. Williams R. 919, 927; Gov't Ex. 2.[5] He testified that he found a large number of injuries in the lower extremities,

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[4] Dr. McGarry suggested that Robair could have fallen onto a hard surface with his left arm against his chest. Williams R. 1338. The first page of the autopsy report provides: "Classification of Death: Accidental." Gov't Ex. 6.

[5] Dr. Sperry testified as an expert in forensic pathology. He testified that he has performed over 6,300 autopsies, provides training to others in forensic pathology, and has testified over 650 times in court as an expert in forensic pathology. Williams R. 920-921.

including massive soft tissue hemorrhaging between the knee and the hip (Williams R. 949-952); "the whole front and side and back of the thigh, the right thigh from about the buttock area down to the knee[,] was massively hemorrhagic or was extremely bruised" (Williams R. 953).[6] Dr. Sperry also looked at the spleen, and testified that there had been a "crushing injury of the spleen," which caused rapid internal bleeding and caused Robair's death. Williams R. 969-970. He further explained that Robair "sustained massive force on the left side of the chest that broke four ribs and crushed his spleen," and that "this type of injury tells me * * * that the amount of force that would compress the left side of the lower chest and abdomen was very, very great, much more than * * * just a punch or falling on to something." Williams R. 969-970. Dr. Sperry also testified that Dr. McGarry, by not examining Robair's legs and spleen, did not perform the type of autopsy that is necessary in suspected police-custody death cases. Williams R. 976.

Dr. Sperry testified that he found deep bruising on the back of the chest and four fractured ribs. Williams R. 955. He stated that the "fractures of the ribs and the crushing disruption of the spleen happened at the same time" (Williams R.

[6] Dr. Sperry testified that the injuries to the lower half of Robair's body were consistent with being hit by a baton. Williams R. 981. He also testified that even though there were extensive injuries to Robair's legs, it is not unusual not to see outward manifestations on the skin, particularly not in "dark skinned" or African American individuals. Williams R. 977.

997), and that these injuries could not have resulted from medical treatment (Williams R. 1036, 1043).[7]

Dr. Sperry concluded that, given the severity of Robair's injuries, he "was the victim of a beating." Williams R. 978. He stated that Robair "ha[d] multiple blunt impacts, multiple blows on very different parts of his body, unrelated to one another," which would not be caused by someone falling down at street level onto the curb. Williams R. 979, 981. Moreover, Dr. Sperry testified that the injuries to the ribs and spleen were consistent with a kick. Williams R. 980. He concluded that Robair "died as the consequence[] of sustaining a beating during the course of which his spleen was ruptured and he rapidly went into shock and ultimately died as a complication of the massive hemorrhage," and that his death "should be classified as a homicide." Williams R. 982. Specifically, his autopsy report concluded: "The location, severity, and distribution of the soft tissue injuries involving the decedent's extremities indicate that he was the victim of a beating, with blows being directed to his thighs and the backs of his legs, and he sustained very direct and severe blunt force trauma to his left lower chest and abdomen,

[7] Dr. Sperry was asked about the fact that Robair's initial X-ray showed only one broken rib, but the autopsy revealed four broken ribs. Williams R. 1037; see also Williams R. 996-998. He stated that "to find a difference between an X-ray interpretation and what we find during an autopsy is standard." Williams R. 1037-1038.

which caused the rupture of his spleen, rapidly evolving internal hemorrhage, and ultimately his death. Thus, the manner of death is homicide." Gov't Ex. 2 at 10.

Relatedly, Dr. Michael Baden, a forensic pathologist, was retained by defendants to review the autopsy reports and medical records. He testified at trial that he did not see any evidence of a beating other than the spleen injury, and that he could not testify as to the cause of that injury. Williams R. 1420-1421. He also testified that the injury to Robair's spleen could have been caused by a hard kick (Williams R. 1431-1433), and acknowledged that some of Robair's injuries, including his leg injuries, were consistent with a beating or blunt force trauma, including the use of a baton (Williams R. 1454-1456). Dr. Baden also testified that it was "possible" that Robair was the victim of a homicidal beating. Williams R. 1461. At the same time, he also testified that a fall onto a curb "could cause * * * some of the autopsy findings related to the fractured ribs and the spleen injury." Williams R. 1402.

4. The False Incident Report

On the same day that Robair died at the hospital, defendants filled out a NOPD "incident report" purporting to set forth the details of what happened in their encounter with Robair. Gov't Ex. 9. The report does not mention any use of force against Robair. The first page of the report, handwritten, described the incident as a "medical incident" and listed both Williams and Moore as "Reporting

Officer[s].” Gov’t Ex. 9. The report’s typewritten “Narrative” stated that the officers helped a person they believed needed medical attention, and who fell to the ground when he saw the officers. The narrative further stated that they found a plastic bag of a white powdery substance on the ground, which they believed was powder cocaine, and transported the individual to the hospital. Gov’t Ex. 9.

Williams told Moore that they had to write a police report. Williams R. 1281. Moore testified, however, that he did not write any part of the report (including the cover page), it was not his handwriting on the cover page (it was Williams’), it was not his signature at the bottom of the cover page, he did not prepare the typewritten part of the report (the narrative of what happened), and he never read the report (at that time). Williams R. 1281-1283. Moore also testified that the report did not falsify the events of that day. Williams R. 1283. Finally, he testified that he did not hear a radio dispatch call asking the officers who dropped off a patient at Charity Hospital to return to the hospital. Williams R. 1284.

Williams testified that he wrote the police report, and that it was his handwriting on the cover sheet. Williams R. 1375. FBI Agent John Dalide testified, however, that Moore told him during an interview that he (Moore) had prepared the handwritten cover sheet to the report and that the handwritten notes were his. Williams R. 1166-1167. Dalide also testified that Moore was listed on the report as a “Reporting Officer.” Williams R. 1167.

5. Officer Moore's False Statements To The FBI

In 2010, in connection with the FBI's investigation of this case, Moore was twice interviewed by Dalide. Williams R. 1153-1154. According to Dalide, Moore explained that when he and Williams drove down Dumaine Street, someone was pointing at an individual running toward their vehicle. Williams R. 1160. Moore stated that they stopped the car, he got out, the individual ran into the street, made some evasive move, and then fell to the ground when his shoe came off. Williams R. 1160. Moore stated that he jumped on the individual and attempted to handcuff him, but that the individual's hands were under his body and he was having trouble with the handcuffs. At that point, Williams came over to help and both hands were handcuffed. Williams R. 1160-1161. Moore further stated that the individual was then placed against the police car and patted down, and at that time he observed a plastic bag with a white powdery substance on the ground near where the individual had fallen. Williams R. 1162. Dalide specifically asked Moore if he or Williams ever kicked or struck Robair with a police baton; Moore answered no. Williams R. 1169.[8]

[8] The statements by Moore to Dalide form the basis of Count 3 of the indictment. Moore R. 18.

6. The Testimony Of Defendants Williams And Moore Concerning The Robair Incident

Both defendants testified at trial and gave similar accounts of what happened with regard to Robair. Moore testified that when he got out of the patrol car, the individual did a "shuffle move" like he was trying to run, and then one of the individual's shoes came off and he fell to the ground on the curb. Williams R. 1265-1267, 1273-1274. Moore stated that he hit the ground "really hard" and that it sounded like the "wind had got knocked out of him." Williams R. 1268-1269. Moore stated that he immediately got on top of the individual and tried to find his hands and handcuff him, and that Williams assisted him. Williams R. 1267-1269, 1275. Moore further testified that Williams never kicked the individual or hit him with his police baton. Williams R. 1267-1269, 1275. Williams similarly described Robair falling onto the curb and being handcuffed. Williams R. 1367-1372, 1387-1390. Williams also testified that he never kicked Robair or struck him with a police baton. Williams R. 1376, 1390.

SUMMARY OF THE ARGUMENT

1. Williams' argument that the evidence was insufficient to establish that he caused Robair's death is at odds with the overwhelming evidence establishing that Williams beat and kicked Robair and that, as a result, Robair's spleen ruptured, causing his death. Four eyewitnesses testified that they saw Williams kick Robair while Robair was on the ground. All three forensic pathologists who testified

agreed that Robair died of internal bleeding from a ruptured spleen. Dr. Sperry testified that the "crushing injury" to Robair's spleen was caused by "massive force," force much greater than simply "falling on to something." Given this testimony, a reasonable jury could have concluded beyond a reasonable doubt that Robair's death was proximately caused by, and a foreseeable result of, being kicked in the chest, *i.e.*, that it is possible that kicking someone in the chest could cause internal injuries or bleeding, which would ultimately cause the victim to die.

2. The evidence was sufficient to sustain Moore's conviction for aiding and abetting a violation of 18 U.S.C. 1519 by submitting a police report falsely describing the circumstances surrounding the injuries Robair suffered while in defendants' custody. There was evidence that Moore wrote the cover sheet to the report, obtained at Williams' request information that was included in the report, and was listed as a "Reporting Officer" on the report. Further, a rational jury could have found that once the incident occurred, and knowing that they had to file an incident report, Moore had an interest in, and therefore the intent to, cover up what happened and deflect a potential investigation of the matter.

3. The evidence was sufficient to sustain Moore's conviction for violating 18 U.S.C. 1001 by falsely stating to an FBI agent that Williams did not kick or beat Robair. Moore's argument that the FBI already knew his position as to what happened, and therefore his statements could not have influenced or impaired the

investigation, is beside the point. The standard for determining materiality is not whether the false statements actually influenced a government decision, but whether the statements were *capable* of influencing such a decision.

4. In sentencing Williams, the district court correctly determined that the base offense level was voluntary manslaughter, not involuntary manslaughter. Voluntary manslaughter is an intentional killing that would constitute second degree murder (*i.e.*, an intentional killing with *malice*), except for the mitigating factor that the defendant acted in a "sudden quarrel" or the "heat of passion." Involuntary manslaughter differs because the defendant's mental state is not sufficiently culpable to meet the traditional elements of malice, and reflects the lesser standard of gross negligence or a reckless disregard for human life. The district court correctly determined that Williams acted with malice because he had the intent to cause serious bodily injury. That finding supported the application of second degree murder, and rendered involuntary manslaughter inapplicable. Although the court did not make a finding that Williams' conduct resulted from a sudden quarrel (as the government argued below), which would reduce second degree murder to voluntary manslaughter, that omission worked to Williams' benefit. Had the court considered, but rejected, the elements of voluntary manslaughter, the court could have applied second degree murder as the base offense guideline.

5. The district court correctly determined Moore's sentence. Moore's argument that his sentence cannot be based on the "cross reference" to a higher base offense level (U.S.S.G. § 2X3.1) because the obstruction took place *before* there was an ongoing investigation is not correct. The plain language of the cross reference in Sentencing Guideline § 2J1.2(c)(1) – if the "offense involved obstructing the investigation * * * of a criminal offense" – does not confine application of the provision to the obstruction of an *ongoing* investigation. Where the defendant engages in the obstruction of justice reasonably anticipating that there will be a criminal investigation, and does so for the purpose of obstructing that investigation, the fact that the criminal investigation has not yet begun is of no consequence. In this case, defendants were aware that they could be investigated by the FBI and prosecuted in federal court for civil rights violations. Indeed, that is why they falsified the incident report. Therefore, because defendants knew that there would likely be an investigation of Robair's death, and they could obstruct the investigation by filing the false police report, defendants' obstruction plainly falls within the scope of the cross reference in Sentencing Guideline § 2J1.2(c)(1).

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN WILLIAMS' CONVICTION ON COUNT 1 FOR VIOLATING 18 U.S.C. 242, WITH DEATH RESULTING

A. Standard Of Review

The sufficiency of the evidence is reviewed to determine "whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States* v. *Ned*, 637 F.3d 562, 568 (5th Cir.), cert. denied, 132 S. Ct. 276 (2011). In making this determination, the court "considers the evidence in the light most favorable to the government, drawing all reasonable inferences and credibility choices made in support of the verdict." *Ibid.* "Under this highly deferential standard, * * * the jury is free to chose among reasonable constructions of the evidence." *United States* v. *Diaz*, 420 F. App'x 456, 461 (5th Cir. 2011) (internal quotation marks and citation omitted). The evidence need not exclude every reasonable hypothesis of innocence to support a guilty verdict. *United States* v. *Machelena-Orovio*, 719 F.2d 738, 743 n.4 (5th Cir. 1983).

B. The Evidence Was Sufficient To Establish That Williams Kicked Robair And Struck Robair With His Baton, Causing Robair's Death

To prove a violation of Section 242, the government must prove beyond a reasonable doubt that the defendant: (1) willfully; (2) deprived another of a federal

right; (3) under color of law. *United States* v. *Brugman*, 364 F.3d 613, 616 (5th Cir. 2004). If the violation results in bodily injury, or involves the use of a dangerous weapon, it is punishable by up to ten years' imprisonment. If the violation results in death, it is punishable by imprisonment "for any term of years or for life." 18 U.S.C. 242. Because the jury found that Williams' violation of Section 242 resulted in Robair's death (Williams R. 1576), and he was sentenced accordingly, the allegation that Robair died as a result of Williams' conduct is an element of the offense.[9]

In challenging the sufficiency of the evidence, Williams argues only that the evidence was insufficient to establish that he "caused Robair's death by kicking him," *i.e.*, that death was a "'foreseeable result' of [his] conduct." Williams Br. 46-47. Williams rests this argument on testimony he says suggests that: (1) Robair's injury was caused when he tripped and fell to the ground with Moore on top of him; or (2) Robair's spleen was injured during his treatment at the hospital. Williams Br. 48-49. Williams also asserts that given Robair's "lifestyle," "cirrhotic liver," and enlarged spleen, even if Williams did kick him, there was no "rational basis for the jury to conclude that * * * Robair would die from [the]

[9] As this Court has recognized, Section 242 defines three separate offenses, and bodily injury, use of a dangerous weapon, and death resulting are elements of the offense that, if charged in the indictment, the government must prove beyond a reasonable doubt. *United States* v. *Williams*, 343 F.3d 423, 431-434 (5th Cir. 2003).

kick." Williams Br. 49. These arguments are not correct and are contrary to the overwhelming evidence that Williams kicked Robair, rupturing his spleen and causing his death.

1. First, Williams asserts that because the government and the defendants presented two different theories of how Robair's spleen may have been injured, the jury must necessarily entertain a reasonable doubt as to the cause of the injury, warranting reversal. Williams Br. 48-49. Williams notes that both defendants testified that Robair fell on the curb when one of his shoes came off, and that Drs. McGarry and Baden testified that Robair's injuries were caused by, or at least consistent with, such a fall.[10] Williams Br. 48; see pp. 10, 13, 16, *supra*. Williams relies on this Court's decision in *United States* v. *Lopez*, 74 F.3d 575, 577 (5th Cir. 1996), which stated: "If the evidence * * * gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, we must reverse the conviction, as under these circumstances a reasonable jury *must necessarily entertain* a reasonable doubt." (internal quotation marks and citation omitted).

[10] We note that the government extensively cross-examined Dr. McGarry concerning other autopsies he performed in similar in-custody death cases where his conclusions were later called into question by a second autopsy. Williams R. 1344-1351. For this reason, the jury had a reasonable basis to discount Dr. McGarry's testimony.

This argument is baseless. First, defendant's "theory" is contrary to the overwhelming weight of the evidence. Most importantly, it ignores the testimony of the four eyewitnesses that they saw Williams kick Robair while Robair was on the ground. See pp. 5-6, *supra*. Indeed, there was no testimony from anyone who witnessed the event that corroborates defendants' version of what happened. Defendant's theory is also contrary to the testimony of Dr. Sperry, who testified that the "crushing injury" to Robair's spleen was caused by "massive force," force much greater than simply "falling on to something." See pp. 11-13, *supra*. Moreover, even Dr. Baden, one of defendant's experts, acknowledged that the injury to the spleen could have been caused by a hard kick, as well as by a fall on a curb. See p. 13, *supra*. He also testified, in response to the question whether it would be reasonable to call Robair's death a homicide, that he could only say whether his injuries were consistent with a certain version of what happened, and that the manner of death is "undetermined" and "depends on the credibility of the witnesses, credibility of the police officers, * * * and that's really the job for a jury and not for a doctor." Williams R. 1420-1421.

Second, the language from *Lopez* upon which defendant relies, standing alone, is an incomplete explanation of the reviewing court's role in addressing a sufficiency claim and, as construed by defendant, would negate the very role of the jury as fact-finder. It is the jury's role to determine which witnesses are believable

and which are not, and whether the government's evidence, to the extent credited, establishes the elements of the offense beyond a reasonable doubt. And in making this determination, the jury is free to choose among reasonable constructions of the evidence, and to rely on their common sense and experience. *Diaz*, 420 F. App'x at 461; *United States* v. *Holmes*, 406 F.3d 337, 351 (5th Cir. 2005). Therefore, it is not the case that, simply because there are competing versions of the underlying facts (*i.e.*, did Williams kick Robair or not; could the injury to the spleen have been caused by a fall on to a curb, rather than a kick), a reasonable jury *must have* entertained a reasonable doubt.[11]

In short, this case is no different from the bulk of cases – including other prosecutions under Section 242 – where the parties' evidence presents competing versions of the facts, and the case turns on whether the defendant did or did not do a specific act. If the mere fact of competing and contradictory testimony is enough

[11] Further, the language quoted from *Lopez* refers to cases turning on circumstantial evidence, and omits the predicate that, in all cases, the evidence must be viewed in the light most favorable to the government. Cf. *United States* v. *Santillana*, 604 F.3d 192, 195 (5th Cir. 2010) ("We will reverse * * * if *after viewing the evidence in the light most favorable to the prosecution*, the evidence still gives equal or nearly equal support to a theory of guilt and a theory of innocence * * * because in that event, a reasonable trier of fact must necessarily entertain reasonable doubt") (emphasis added). The four eyewitnesses who testified that they saw Williams kick Robair offered *direct* evidence of Williams' conduct. Further, this is not a case where, *viewing the evidence in the light most favorable to the government*, the evidence gives equal support to a finding of guilt or a finding of innocence.

to preclude a finding of guilt, there would be few guilty verdicts in the typical "he said, she said" case. See, *e.g.*, *United States* v. *Melgoza*, No. 11-50413, 2012 WL 1146104 at *1 (5th Cir. Apr. 6, 2012) ("Four witnesses testified that Melgoza unnecessarily and repeatedly kicked Sanchez in the face and head after he had been secured * * *. This evidence was sufficient to support Melgoza's conviction under [Section 242]. * * * While Melgoza testified that he did not kick Sanchez * * *, the jury was free to reject this evidence and accept the evidence of the other eyewitnesses."); cf. *United States* v. *Harris*, 293 F.3d 863, 869-870 (5th Cir. 2002) (rejecting defendant's argument in Section 242 excessive force case that there was inadequate evidence to prove beyond a reasonable doubt that victim's head injury was caused by defendant striking the victim with his baton, rather than the victim hitting his head against the car). At bottom, both defendants testified, giving the jury an opportunity to thoroughly assess their credibility, and the jury rejected their testimony.

2. Williams also asserts that because there was evidence suggesting that Robair's spleen was injured while he was being treated at the hospital, a rational jury could not conclude beyond a reasonable doubt that Robair's injury occurred "before Robair arrived at the hospital, much less that [it was] inflicted b[y] Williams' kicking him." Williams Br. 48-49. Williams notes testimony that the first X-ray taken at the hospital showed Robair had one broken rib, but ultimately it

was determined that he had four broken ribs. Seep. 12 n.7, *supra*. Williams suggests that during the course of Robair's treatment at the hospital, the medical staff broke three more of Robair's ribs and thereby crushed his spleen. Williams Br. 48-49.

This argument again ignores both the bulk of the testimony at trial and the jury's proper role in weighing credibility and making reasonable constructions of the evidence. Given Dr. Sperry's testimony that (1) it is not unusual for an X-ray and an autopsy to be inconsistent in this context (*i.e.*, the number of broken ribs); (2) Robair's fractured ribs and injury to the spleen happened at the same time; (3) Robair suffered a "crushing injury" to the spleen caused by "massive force"; and (4) the fractured ribs and crushed spleen could not have resulted from medical treatment (see pp. 11-13, *supra*), as well as the testimony of the four eyewitnesses that Williams kicked Robair, a reasonable jury could conclude beyond a reasonable doubt that Robair's ruptured spleen did not occur during medical treatment but resulted from the kick.[12] Williams' *conjecture*, based on selected portions of the evidence, that the broken ribs and spleen injury *might* have occurred for a different

[12] Dr. Sigillito, who treated Robair in the emergency room, also testified that he knew of nothing that could have happened at the hospital to cause Robair's spleen to be crushed. Williams R. 1134.

reason, or at a different time, is not sufficient to overturn the jury's determination based on its view of the evidence and credibility determinations.[13]

3. Williams next asserts that, even if he did kick Robair, given Robair's "lifestyle," "cirrhotic liver," and enlarged spleen, the jury could not have reasonably concluded that Robair would die from the kick. Williams Br. 49.[14] Williams, in other words, suggests that even if he kicked Robair, Robair's death was not a foreseeable result of this action. This argument is also baseless.

To satisfy the "death results" element of Section 242, the government was not required to prove that Williams *intended* to kill Robair by kicking him; only that "death ensued as a proximate result of the accused[']s willful violation of a victim's defined rights." *United States* v. *Hayes*, 589 F.2d 811, 820 (5th Cir. 1979).[15] In *Hayes*, this Court stated that when Congress amended Section 242 by

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[13] Dr. Baden testified that he believed that the spleen ruptured in the hospital (Williams R. 1417), and Williams emphasized this point in closing argument (Williams R. 1527-1528). The jury, of course, was free to accept or reject this testimony.

[14] There was evidence in the record that Robair had an enlarged spleen, cirrhosis of the liver from drinking alcohol (which causes the spleen to enlarge), and had been a drug user. See Williams R. 961, 965-967, 992, 1335.

[15] The jury was instructed that to find that Robair died as a result of Williams' conduct:

> The government need not prove that the defendant intended for the victim to die. The government must prove only that the victim's death was a

(continued…)

adding the "death resulting" provision, it must have been "fully cognizant of the principles of legal causation," *i.e.*, that "a person is held responsible for all consequences proximately caused by his criminal conduct." *Id*. at 821. Therefore, the Court expressly rejected the argument that Section 242 requires an intent to cause death, stating that "the more severe punishment prescribed for those Section 242 violations resulting in death is clearly designed to deter the type of conduct that creates an unacceptable risk of loss of life." *Ibid.*; see also *United States* v. *Marler*, 756 F.2d 206, 215-216 (1st Cir. 1985) (if defendant willfully subjected a person to a deprivation of rights, "and death results – whether or not it was intended – the higher penalty applies provided death was a natural and foreseeable result of the improper conduct") (internal quotation marks omitted).

As we have noted, four eyewitnesses testified that Williams kicked Robair in the side and that, as a result, Robair let out a loud scream. One eyewitness testified that he thought Robair must have broken a rib and that he knew Robair was hurt as

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(…continued)

> foreseeable result of the defendant's willful depravation [sic] of the victim's constitutional right. Should you find that some other factor or some intervening circumstance caused or contributed to the victim's death, you may still find that the death resulted from the defendant's conduct if you find beyond a reasonable doubt that such other factor was a foreseeable result of the defendant's actions.

Williams R. 1560. Williams does not object to this instruction.

a result of being kicked; another testified that Robair made a "death scream." Williams R. 862-863, 891, 900. There was also eyewitness testimony that Robair was then placed in the police car, and that when he arrived at the hospital he was unresponsive and taken inside with a wheelchair. Further, all three doctors who testified as expert witnesses agreed that Robair died from a ruptured spleen. Dr. Sperry testified that Robair had a "crushing injury" to the spleen caused by "massive force * * * that broke four ribs and crushed his spleen." Williams R. 969-970. Dr. Sperry also testified that a person with a Grade IV splenic laceration could not stay on their feet more than a few minutes, a conclusion consistent with Robair's condition when he arrived at the hospital. Williams R. 1042; see generally pp. 11-13, *supra*. Given this testimony, a reasonable jury could have concluded beyond a reasonable doubt that Robair's death was proximately caused by, and a foreseeable result of, being kicked in the chest, *i.e.*, that it is possible that kicking someone in the chest could cause internal injuries or bleeding, which would ultimately cause the victim to die.[16]

[16] This conclusion is consistent not only with *Hayes*, but also with similar cases finding that defendant's willful violation of Section 242 proximately caused the victim's death. See, *e.g.*, *United States* v. *Sharma*, 394 F. App'x 591, 592-593 (11th Cir. 2010) (victim died of assault in prison; corrections officer proximately caused death by intentionally moving victim into different cell anticipating victim would be assaulted), cert. denied, 131 S. Ct. 1708 (2011); *United States* v. *Harris*, 701 F.2d 1095, 1101-1102 (4th Cir. 1983) (migrant worker died of heat stroke;

(continued…)

4. Finally, *Moore* argues that the evidence was insufficient to support *Williams*' conviction for violating Section 242. Moore Br. 19-33. Moore acknowledges that he was "neither charged nor convicted under Count one," but asserts that he was "effectively sentenced" on Counts 2 and 3 "as if he were." Moore Br. 19. Moore cannot raise issues concerning a count for which he was not charged, and therefore this Court need not address these issues. Moreover, as addressed below (Issue V, pp. 53-65, *infra*), the court correctly determined Moore's sentence. In any event, Moore's arguments addressing the sufficiency of the evidence supporting Williams' conviction on Count 1 are largely duplicative of Williams' arguments, addressed above. Moore Br. 20-24 (addressing whether the evidence established that Robair's injuries resulted from Williams' kick), 29-31 (noting that the initial X-ray showed only one rib fracture, but the autopsy showed that there were four, indicating a lack of proximate cause). Moore's other arguments, even if considered by this Court, are either baseless,[17] unrelated to the

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defendants proximately caused death by holding victim in involuntary servitude and forcing him to continue working in a potato field knowing he was ill).

[17] Moore argues that the testimony of the four eyewitnesses was sometimes conflicting or inconsistent, and that these witnesses variously had criminal records, might have been on drugs, had recently suffered a stroke, or had undergone a lunacy hearing. Moore Br. 25-27. These arguments are directed to the credibility of the witnesses, which is the province of the jury. Moore also argues that various snippets of testimony suggesting that Robair could not have lived longer than an

(continued…)

sufficiency of the evidence,[18] or both.

(…continued)
hour with a ruptured spleen negates any reasonable inference that Williams caused Robair's death. Moore Br. 22. Some of this testimony, however, was in the context of the *absence of any medical intervention*. Williams R. 1129. In any event, although the jury was free to consider this evidence, there was other – and substantially more – evidence that Williams kicked Robair, and that he died from a ruptured spleen from a massive blow that could not have been caused by his medical care at the hospital. See pp. 5-6, 11-13, *supra*. Moreover, none of the doctors testified to the conclusion Moore suggests – that Robair's spleen injury could not have occurred before he arrived at the hospital because he lived for approximately four hours after arriving at the hospital.

[18] Moore argues that the court erred by failing to give defendants an opportunity to be heard before responding to the jury's questions concerning the definition of "foreseeable," and by responding that the jury should rely on the jury instructions (*i.e.*, by failing to give a supplemental jury instruction). Moore Br. 31-33; see also Williams Br. 49. Although counsel is entitled to notice before a supplemental jury instruction is given, here the court *declined* to give any further instruction. Moreover, a trial court need not "define terms unless they are outside the common understanding of a juror or are so technical or specific as to require a definition." *United States* v. *Mullendore*, No. 93-7185, 1993 WL 347111, at *4 (5th Cir. Aug. 17, 1993) (internal quotation marks and citation omitted). The term "foreseeable" is not unduly technical or outside the common understanding of a jury. Moore also argues that the government improperly elicited negative testimony concerning the NOPD that may have prejudiced the jury against the defendants. Moore Br. 28. The cited testimony was elicited on cross-examination in response to the testimony of a NOPD Internal Affairs officer, a defense witness, who found no police wrongdoing in connection with Robair's death. See Williams R. 1221-1231. Therefore, defendants opened the door to this testimony, which was not part of the government's case in chief. This testimony was not improper; in all events, any error was harmless error given the overwhelming evidence supporting the jury's verdict that Williams kicked Robair, rupturing his spleen and causing his death.

II

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN MOORE'S CONVICTION ON COUNT 2 FOR AIDING AND ABETTING THE SUBMISSION OF A FALSE INCIDENT REPORT

Count 2 charged Moore and Williams with violating 18 U.S.C. 1519 and 18 U.S.C. 2 by obstructing a federal investigation through the submission of a false NOPD incident report and aiding and abetting each other. See Gov't Ex. 9. Moore argues that the evidence was insufficient to convict him on this count because: (1) he did not write the report; (2) he provided only a single, true piece of information for the report, *i.e.*, the name of Robair's attending physician (Dr. Sigillito); (3) as a police trainee, he had no authority over the report and no ability to influence its content, and therefore did not actively engage in the creation of a false report; and (4) there is insufficient evidence that he acted with the requisite criminal intent to obstruct a federal investigation. Moore Br. 33-45.[19]

These arguments lack merit. Moore's conviction does not turn on whether *he* made a *false* entry in the incident report. Rather, there was ample evidence presented at trial from which the jury could have concluded that Moore *aided and abetted* Williams in preparing the false report.

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[19] The standard of review for a sufficiency of the evidence argument is set forth on page 20, *supra*.

1. To prove that Moore aided and abetted the violation of 18 U.S.C. 1519, the government was required to prove four elements beyond a reasonable doubt: (1) the substantive offense occurred (*i.e.*, a person knowingly falsified a document in the violation of 18 U.S.C. 1519)[20]; (2) Moore associated with the criminal venture; (3) Moore purposely participated in the criminal venture; and (4) Moore sought by his actions to make the venture successful. See Williams R. 1564 (jury instructions); *United States* v. *Gulley*, 526 F.3d 809, 816 (5th Cir. 2008); see also *United States* v. *Peters*, 283 F.3d 300, 308 (5th Cir. 2002) ("To aid and abet means to assist the perpetrator of a crime by some affirmative act intended to aid the venture, while sharing the requisite criminal intent"); *United States* v. *Polk*, 56 F.3d 613, 620 (5th Cir. 1995) (same).[21] A defendant "associates" with a criminal

[20] To establish a violation of Section 1519 the government must prove that: (1) the defendant falsified a document (here, that he included in the incident report a false description of the circumstances of Robair's death and omitted a description of what really happened, *i.e.*, that they used force without provocation); (2) the defendant did so knowingly; and (3) the defendant acted with the intent to impede, obstruct, or influence an investigation of any matter within the jurisdiction of any agency of the United States, or "in relation to or contemplation of any such matter." Williams R. 1561 (jury instructions).

[21] The jury instructions on Count 2 specifically stated that, to find a defendant aided and abetted in violating Section 1519, the jury must find the four elements noted above. See Williams R. 1564. The jury was also instructed that: "[T]he guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. * * * If another person is acting under the direction of the defendant or if defendant joins another person and performs acts with the intent to commit a crime, then the law

(continued…)

venture when the defendant "share[s] in the criminal intent of the principal." *United States* v. *Jaramillo*, 42 F.3d 920, 923 (5th Cir. 1995). A defendant "participates" in the criminal activity when the defendant "act[s] in some affirmative manner designed to aid the venture." *Ibid.*; see also *United States* v. *Garcia*, 242 F.3d 593, 596 (5th Cir. 2001) (same). In short, a conviction for aiding and abetting merely requires that defendants' association with and participation in the venture were calculated to bring about the venture's success. *Jaramillo*, 42 F.3d at 923; see also *Gulley*, 526 F.3d 816 ("An aider and abettor is liable for criminal acts that are the natural or probable consequence of the crime that he counseled, commanded or otherwise encouraged.") (internal quotation marks and citation omitted).[22]

2. The evidence presented at trial, with all reasonable inferences drawn in the light most favorable to the government, makes clear that a rational jury could

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(…continued)
holds the defendant responsible for the acts and conduct of such other person just as though the defendant had committed the acts or engaged in such conduct." Williams R. 1563.

[22] At the same time, the jury was correctly instructed that the mere presence and association are not alone enough to sustain a conviction for aiding and abetting. See Williams R. 1564 ("Of course, the mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator."); see generally *Jaramillo*, 42 F.3d at 923.

have found that Moore aided and abetted in the crime of making a false NOPD incident report with the intent to impede, obstruct, or influence a federal investigation. First, the evidence was sufficient to support Williams' conviction of violating 18 U.S.C. 1519 by submitting a false police report, and Williams has not challenged his conviction on that count in this appeal.[23] Therefore, the evidence established that the underlying offense occurred (the violation of 18 U.S.C. 1519).

Second, there was substantial evidence that Moore associated with the criminal venture by sharing Williams' criminal intent. As the district court correctly found, a "rational jury could have reasonably inferred from * * * [the] evidence that from the time the incident occurred, Defendant Moore had the intent to cover up what happened and that, accordingly, he also had the intent to impede, obstruct, or influence a potential investigation of that matter." Moore R. 364. For example, Dalide testified that Moore told him that Williams did not kick or strike Robair. Williams R. 1169. Moore knew otherwise, however, and also knew that they had to write an incident report. Williams R. 1281. Further, he falsely told Dalide in two interviews that Williams did not kick or strike Robair (Williams R.

[23] See pp. 5-6, 13-14, *supra*, summarizing the trial court evidence concerning Williams' beating of Robair and the typed narrative of the NOPD incident report, which Williams admitted writing.

1169) (for which he was convicted on Count 3; see Issue III, *infra*), and testified similarly at trial (Williams R. 1269-1272).[24]

Third, Moore's own testimony makes clear that he took part in the preparation of the incident report and therefore purposely participated in the criminal venture. He admitted that he knew an incident report had to be written (Williams R. 1280-1281, 1304); he gathered information that went into the report, including the name of Dr. Sigillito (Williams R. 1280-1281); and he provided Williams with that information for inclusion in the report (Williams R. 1281, 1304).[25] In addition, Agent Dalide testified that Moore told him during an interview that he (Moore) had prepared the handwritten "face" (cover) sheet to the report and that the handwritten notes were his. Williams R. 1167. Moreover, Moore was listed as a "Reporting Officer" on the report. Williams R. 1166-1167.

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[24] Moore suggests that the statements he made in his subsequent interviews are not relevant to his intent to obstruct justice, which must have existed at the time the report was written. Moore Br. 44-45. We agree that Moore must have had the requisite intent at the time the report was written and submitted. As the district court noted, however, evidence of Moore's conduct *after* the submission of the report can be relevant to whether he shared Williams' intent to submit a false police report. See Moore R. 364 n.1. Therefore, where, as here, Moore continued to maintain that the underlying assault of Robair never occurred, which was obviously in his best interest to do, it would be reasonable to infer that it would also have been in his interest to ensure that the police report, which he knew they were required to file, reflected that (false) version of events.

[25] The typed narrative of the report refers to Dr. Sigillito and the statements that he made. See Gov't Ex. 9.

This evidence was sufficient to support the finding that Moore, who had witnessed the incident, spoke and worked with Williams in preparing the incident report.

Finally, this evidence also supports the conclusion that Moore sought by his actions to make the venture (the filing of the false police report) succeed. A rational jury could have found that once the incident occurred, and knowing that they had to file an incident report, Moore had an interest in, and therefore the intent to, cover up what happened and deflect a potential investigation of the matter – a cover up that began at Charity Hospital when defendants dropped off Robair without leaving their names or badge numbers, and falsely told the charge nurse that the patient had been found under a bridge and had a history of doing cocaine.

3. Moore argues that there is insufficient evidence to establish that he wrote the cover sheet, and that even if he did, that fact alone would not have been sufficient to support his conviction. Moore Br. 38-39. Moore notes that although Dalide testified that Moore told him that he wrote the cover sheet (Williams R. 1166-1167, 1182), Dalide admitted on cross-examination that the handwriting did not look similar to Moore's handwriting on another document (the "trip sheet") (Williams R. 1183). Moore Br. 37-38; Gov't Exhs. 9, 10.

Moore is effectively challenging the jury's decision to credit Dalide's direct testimony, and not to credit Moore's testimony. The jury declined to draw an adverse inference from Dalide's acknowledgement that the handwriting on the face

sheet and trip sheet did not look similar. But again, the evidence, along with all reasonable inferences, must be viewed in the light most favorable to the government, and credibility determinations are the province of the jury.[26] In any event, the government does not rely solely on the cover sheet to establish that Moore aided and abetted Williams in submitting a false police report. The jury could have found that Moore took part in the commission of the offense – *i.e.*, participated in some manner in the preparation of the report – because he was a witness to the event, he knew a report had to be prepared and submitted, he obtained at Williams' request information that was included in the report, he was a "Reporting Officer" on the report, and subsequently (and consistently) maintained that Robair was not kicked or beaten. See Moore R. 367 (district court found that the "jury could have relied upon Defendant Moore's own admission that he gave the name of Dr. Sigillito to Defendant Williams to find that he took part in the commission of the offense").

Next, Moore argues that he did not contribute a single *false* fact to the report, and therefore he did not engage in any affirmative conduct to aid the venture or make it succeed. Moore Br. 38-39. The district court correctly rejected

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[26] We note that there was no admissible testimony from Williams concerning who wrote the face sheet. Although Williams stated on re-direct that he recognized the handwriting on the face sheet as his, the court sustained the government's objection to that testimony. Williams R. 1392-1393.

the argument that "because the name of Dr. Sigillito is in fact correct, the act of contributing the doctor's name to the report cannot count as participation in the criminal venture." Moore R. 365. As the court explained, to the extent the report falsely described the incident as a medical matter, the information Moore gave to Williams that was included in the report "bolstered the report's misleading portrayal of the incident as a medical event, one in which Defendants simply rendered humanitarian aid to Robair." Moore R. 366. In any event, as noted above, Moore's conduct to aid the venture was not limited to gathering that information. Agent Dalide testified that Moore told him during an interview that he (Moore) had prepared the handwritten "face" (cover) sheet to the report and that the handwritten notes were his; Moore also was listed as a "Reporting Officer" on the report. See pp. 13-14, *supra*.

Moore further suggests that because he was a probationary officer (a "mere trainee"), working under Williams' direction, he did not, and could not have, "influence[d]" the report's content, and therefore did not "*actively*" participate in the creation of a false document. Moore Br. 40-41. Again, however, Moore is raising a matter that is beside the point. The issue is not whether Williams may have been the driving force behind the obstruction, but whether the facts are sufficient to sustain Moore's conviction for aiding and abetting the obstruction of justice. Indeed, it is implicit in the various formulations of aiding and abetting –

e.g., that the defendant "assisted" the perpetrator of the crime, "associated" with the criminal venture, or "participate[]d * * * in some affirmative manner designed to aid the venture" – that the aider and abettor may play a lesser role in the crime. See *Jaramillo*, 42 F.3d at 923; *United States* v. *Gray*, 443 F. App'x 515, 519 (11th Cir. 2011) (a "culpable aider and abettor need not perform the substantive offense, need not fully know of its details, and need not even be present") (citation omitted), cert. denied, No. 11-9660, 2012 WL 1120019 (May 14, 2012). Moreover, there is no requirement that the government prove that Moore was in a position to "influence" the content of the report he knew would be false to cover up defendants' conduct. A reasonable jury could have concluded that Moore saw Williams kick and beat Robair, assisted Williams in dropping Robair off at the hospital without leaving any identification, was with Williams when Williams (falsely) told the charge nurse that Robair was found under a bridge and had a history of drug use, knew they had to write a report that would indicate that they acted in a lawful manner, and actively participated in the creation of the false document by obtaining information for the report at Williams' request and being one of the report's "Reporting Officers."

Finally, Moore argues that the government "did not provide any evidence that Moore acted with a * * * wrongful intent." Moore Br. 42. Moore asserts that his "innocuous act" of "transmit[ing] a single item of truthful information" is not

evidence of the requisite intent. Moore Br. 42-43. He also asserts that Section 1519 includes a "nexus requirement" that requires a connection between his conduct in obtaining and giving Williams the information about Dr. Sigillito and "the federal matter which the action was contemplated to obstruct." Moore Br. 42. In other words, according to Moore, a "defendant who lacks the knowledge that his action is likely to affect the federal matter necessarily lacks the requisite intent to obstruct it." Moore Br. 43.

These arguments are also baseless. There is no requirement that a defendant must know that his conduct is impeding a pending investigation, or that there be a nexus between his conduct and the federal investigation. Section 1519 makes it unlawful to falsify a document with the intent of obstructing the "proper administration of any matter within the jurisdiction of any department * * * of the United States * * *, *or in relation to or contemplation of any such matter*." 18 U.S.C. 1519 (emphasis added). Therefore, "proof of such a nexus is not required," and "[b]y the plain terms of [Section] 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime." *United States* v. *Moyer*, 674 F.3d 192, 208 (3d Cir. 2012) (citation omitted). To "ensure that the statute is applied broadly, criminal liability also extends to acts done *in contemplation of* such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is not a bar to prosecution." *Id.* at 210

(internal quotation marks and citation omitted); see also *United States* v. *Morris*, 404 F. App'x 916, 917 (5th Cir. 2010) (a conviction under Section 1519 does not require proof that the obstruction occurred in relation to an ongoing investigation).

III

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN MOORE'S CONVICTION ON COUNT 3 FOR MAKING FALSE, MATERIAL STATEMENTS TO THE FBI

Count 3 charged Moore with knowingly making false, material statements to the FBI when he told FBI agent Dalide, on two occasions, that Williams never hit or kicked Robair. See p. 15, *supra*. Moore argues that the evidence was insufficient to sustain his conviction because his statements were not "material" to the FBI's decision to bring civil rights charges. Moore Br. 46. He asserts that the FBI already knew his position as to what happened, and therefore his statements merely "continu[ed] and track[ed] his earlier statements" and could not have influenced or impaired the investigation. Moore Br. 47-48. Moore further asserts that the government continued to ask the same question to "pile conviction upon conviction," and therefore Count 3 was fatally "multiplicitous." Moore Br. 47-48. These arguments are baseless.[27]

[27] The standard of review for a sufficiency of the evidence argument is set forth on page 20, *supra*.

18 U.S.C. 1001 prohibits, as relevant here, any person, "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States," from "knowingly and willfully * * * mak[ing] any materially false, fictitious, or fraudulent statement or representation." 18 U.S.C. 1001(a)(2).[28] A "material" statement is one that has "a natural tendency to influence, or be capable of influencing, the decision of a decisionmaking body to which it was addressed." *United States* v. *Richardson*, No. 11-40244, 2012 WL 1059692, at *10 (5th Cir. Mar. 30, 2012) (citation omitted). Therefore, the "standard is not whether the false statement actually influenced a government decision or even whether it probably influenced the decision; the standard is whether the statement was *capable* of influencing the agency decision." *Ibid.* (internal quotation marks and citation omitted). In fact, a statement "may still be material even if it is ignored or never read by the agency receiving the misstatement." *Ibid.* (internal quotation marks and citation omitted). Moore has cited no contrary authority.

[28] To establish a violation of 18 U.S.C. 1001, the government must prove that a defendant: (1) knowingly and willfully (2) made a statement (3) that was false (4) and material, (5) in a matter within the jurisdiction of an agency of the United States. See Williams R. 1565-1566 (jury instructions); *United States* v. *Richardson*, No. 11-40244, 2012 WL 1059692, at *9 (5th Cir. Mar. 30, 2012). The statements at issue that Moore made were that Williams did not kick or beat Robair; the decision the FBI was trying to make was whether to charge Williams with a federal crime for assaulting Robair.

Under the "capable of influencing" standard, it is of no moment whether the FBI already knew the substance of Moore's statements (his denials that Williams kicked or beat Robair).[29] Numerous courts have rejected the argument that because the government investigator *already knew* the answers to the questions he asked, the answers could not be material, emphasizing that the standard is whether the statements are *capable of influencing* the investigator, not whether they actually did so. See, *e.g.*, *United States* v. *Fondren*, 417 F. App'x 327, 336 (4th Cir.) (rejecting defendant's argument that his "statements were not material because the FBI investigators already knew the answers to the questions they asked him") (citing cases), cert. denied, 132 S. Ct. 256 (2011); *United States* v. *White*, 270 F.3d 356, 365 (6th Cir. 2001) (false statements may be material "even if the receiving agent or agency knows that they are false"). In short, the test for materiality turns on the "intrinsic capabilities of the statement itself" to influence the investigator "that transcend the immediate circumstances in which it is

[29] The extent to which Dalide may have known that Moore was lying is unclear. Moore cites to Dalide's testimony that he reviewed Moore's prior statements to the NOPD, but that testimony does not indicate *when* he reviewed the statements. See Moore Br. 47 n.39; Williams R. 1171. In any event, as we address here, Dalide's prior knowledge is not relevant to whether Moore's false statements were material.

offered." *United States* v. *McBane*, 433 F.3d 344, 351-352 (3d Cir. 2005).[30] In this case, because Moore's false statements go to the heart of the federal crime that the FBI was investigating, a jury could have found Moore's statements to be material beyond a reasonable doubt.

Finally, Moore suggests that Count 3 was "multiplicitous." Moore Br. 46. "Multiplicity" is charging "a single offense in multiple counts, thus raising the potential for multiple punishment for the same offense." *United States* v. *Reagan*, 596 F.3d 251, 253 (5th Cir. 2010) (citation omitted). There is no multiplicity issue here.[31] Moore was charged with two distinct and separate acts – aiding and abetting in the submission of a false police report (18 U.S.C. 1519), and making false statements to the FBI five years later during the FBI's investigation of

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[30] Indeed, any other standard would be unworkable because, in many cases, the defendant will not know what the investigator already knows about the matter being investigated (and the scope or detail of that knowledge), and the defendant's culpability would turn on some sort of comparison between each statement made and the investigator's prior knowledge. Presumably, the government would have the burden of showing that each statement made contained new information. Moreover, if the government could not make that showing, an individual would be permitted to lie to an investigative officer with impunity.

[31] We note that a "defendant must challenge the multiplicity of an indictment before trial or forfeit the issue"; otherwise, on appeal the defendant may only challenge the multiplicity of sentences. *United States* v. *Reedy*, 304 F.3d 358, 364 (5th Cir. 2002). Because Moore did not raise this argument before trial, it is forfeited. Moreover, this argument is not properly addressed to the sufficiency of the evidence.

Robair's death (18 U.S.C. 1001).[32] These are distinct prohibited acts, and each statute requires proof of an act the other does not. *United States* v. *Reedy*, 304 F.3d 358, 363 (5th Cir. 2002); see also *United States* v. *Lankford*, 196 F.3d 563, 577 (5th Cir. 1999).

IV

THE DISTRICT COURT CORRECTLY APPLIED THE BASE OFFENSE LEVEL FOR VOLUNTARY MANSLAUGHTER IN SENTENCING WILLIAMS

A. Standard Of Review

Sentencing decisions are reviewed for abuse of discretion. *United States* v. *Gonzalez-Alvidres*, 281 F. App'x 351, 353 (5th Cir. 2008); *United States* v. *Salazar*, 542 F.3d 139, 144 (5th Cir. 2008) (the "ultimate sentence is reviewed for reasonableness under an abuse-of-discretion standard"); see also *Gall* v. *United States*, 552 U.S. 38, 46 (2007). A district court's findings of fact for determining a base offense level are subject to the clearly erroneous standard. *Gonzalez-Alvidres*, 281 F. App'x at 353. A factual finding is not clearly erroneous "as long as it is plausible in light of the record as a whole." *United States* v. *Holmes*, 406 F.3d 337, 363 (5th Cir. 2005) (citation omitted). The Court reviews the district court's

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[32] As set forth above, Section 1519 required proof that Moore falsified a record or document (*i.e.*, falsified a "record"). Section 1001 required proof that Moore knowingly made a false material statement. See pp. 33 & n.20, 43 & n.28, *supra*.

interpretation and application of the sentencing guidelines *de novo*. *Gonzalez-Alvidres*, 281 F. App'x at 353.

B. The District Court Correctly Determined That The Base Offense Level For Voluntary Manslaughter Applied In Sentencing Williams

Williams does not dispute that under the guideline for a violation of Section 242, the court applies "the offense level from the offense guideline applicable to any underlying offense." See U.S.S.G. § 2H1.1. Williams argues, however, that the court erred in applying the base offense level for "voluntary manslaughter," which is 29, rather than for "involuntary manslaughter," which is 18. See U.S.S.G. §§ 2A1.3 & 2A1.4(a)(2)(A). Because the evidence supports the conclusion that Williams acted with the intent to cause serious bodily harm or, at a minimum, with extreme recklessness and wanton disregard for human life (*i.e.*, he acted with malice), the court correctly applied the base offense level for voluntary manslaughter.

1. The initial Presentence Report determined that the appropriate base offense level was that of voluntary manslaughter. Doc. 122 at ¶ 39. The government did not object to the report, but Williams did, asserting, in part, that involuntary manslaughter should apply because the evidence "at most" established that he acted recklessly. Defendant Melvin Williams' Objections to the Presentence Report at 2 (Aug. 5, 2011). The final presentence report addressed his objection, concluding that Williams' actions were consistent with a "sudden

quarrel" as "indicated in the definition of voluntary manslaughter in 18 U.S.C. § 1112(a)." Doc. 135 at 24.[33]

Williams also filed a motion for a sentence below the guideline range. Williams R. 418-429. The government responded that if any departure is warranted, it should be *upward* and that the base offense level should be second degree murder. Moore R. 1625; Doc. 140 at 8-9. The government, citing the testimony of the witnesses to the assault, stated that Williams was aware of the risk of bodily injury when he kicked and beat Robair, and therefore he acted with malice, which in turn supports application of the guideline for second degree murder. Doc. 140 at 6. The government also acknowledged that malice can be negated by a "sudden quarrel or heat of passion," and that based on the evidence "one could reasonably conclude" that Williams unlawfully killed Robair in such circumstances, which would support the application of the guideline for voluntary manslaughter. Doc. 140 at 8. The government asserted, however, that absent such

[33] "Voluntary manslaughter" is defined to be the "unlawful killing of a human being without malice * * *[u]pon a sudden quarrel or heat of passion." 18 U.S.C. 1112(a). "Involuntary manslaughter" is defined as the "unlawful killing of a human being without malice * * *[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. 1112(a). As discussed below, this definition of *voluntary* manslaughter can be misleading because, notwithstanding the phrase "without malice," the traditional elements of malice are elements of the offense. See pp. 49-50, *infra*.

evidence, *i.e.*, if the court opted *not* to use voluntary manslaughter, the second degree murder guideline should apply. Doc. 140 at 8-9.

At the sentencing hearing, the court concluded that voluntary manslaughter applied.[34] Moore R. 1621. The court explained that although the statute defines voluntary manslaughter to be the unlawful killing *without malice*, it nevertheless includes the element of malice, although negated by the existence of a "sudden quarrel or heat of passion." See Moore R. 1617 (citing *United States* v. *Browner*, 889 F.2d 549, 552-553 (5th Cir. 1989)). The court further explained that malice encompasses "an intent to kill or an intent to do serious bodily harm." Moore R. 1617 (citing *Lara* v. *United States Parole Comm'n*, 990 F.2d 839, 841 (5th Cir. 1993)).[35] Although the court concluded that Williams did not have the intent to

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[34] See generally Moore R. 1603 (Williams' argument); Moore R. 1612 (government's argument).

[35] The federal homicide statutes adopt the "traditional common-law offenses of murder and manslaughter." *Browner*, 889 F.2d at 551. Voluntary manslaughter is an intentional killing (that can be reflected by *extreme* recklessness) that would constitute second degree murder except for the mitigating factor that the defendant acted in a sudden quarrel or the heat of passion. See *United States* v. *Serawop*, 410 F.3d 656, 665 (10th Cir. 2005) ("The only difference between second degree murder and voluntary manslaughter in the homicide hierarchy is that voluntary manslaughter is committed in the heat of passion, and the presence of this mitigating factor negates the malice that would otherwise attach given an intentional or reckless mental state."). In other words, because voluntary manslaughter "encompasses all of the elements of murder[,] it requires proof of the physical act of unlawfully causing the death of another, and of the mental state that *would* constitute malice, but for the fact that the killing was committed in

(continued…)

kill (Moore R. 1618), it found that the facts of the case supported the conclusion that Williams acted with the intent to cause serious bodily injury (Moore R. 1618-1621). In these circumstances, the district court did not err in applying voluntary manslaughter as the base offense level.

2. Williams argues that, "[a]t most," he used "unnecessary force that amounted to gross or criminal negligence" when he attempted to extricate Robair's hands from under him, not that he acted with malice. Williams Br. 55. The facts show otherwise. See pp. 5-6, *supra*. Indeed, it is difficult to imagine how Williams could *not* have intended to cause bodily injury by kicking Robair as hard as he did, and repeatedly striking Robair with his baton, after Robair was being held defenseless by Moore.[36] Moreover, based on the evidence summarized above,

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(…continued)
adequately provoked heat of passion or provocation." *Id*. at 665 (quoting *Browner*, 889 F.2d at 553). For this reason, the district court correctly noted that under Section 1112, voluntary manslaughter requires a showing of malice, *i.e.*, either an intent to kill, intent to do serious bodily injury, or extreme recklessness and wanton disregard for human life (*i.e.*, a "depraved heart"). *Browner*, 889 F.2d at 552; see also *United States* v. *Velazquez*, 246 F.3d 204, 212 (2d Cir. 2001). Involuntary manslaughter differs because the defendant's mental state is not sufficiently culpable to meet the traditional elements of malice, but rather reflects gross negligence or a reckless disregard for human life. *Browner*, 889 F.2d at 553.

[36] Cf. *United States* v. *Conatser*, 514 F.3d 508, 523-524 (6th Cir. 2008) (district court did not clearly err in finding that correctional officer acted with malice in striking prisoner in the head, later discovering him unconscious, and failing to inform EMT that he had been struck in the head; defendant's "conduct so grossly deviated from a reasonable standard of care that he must have been aware
(continued…)

the jury convicted Williams of violating Section 242, thereby necessarily finding that he knew what he was doing was wrong and chose to do it anyway. For these reasons, the court's conclusion that Williams acted with the intent to cause serious bodily injury, *i.e.*, malice, is not clearly erroneous.[37]

Further, because the district court correctly determined that Williams acted with malice, involuntary manslaughter cannot apply. Involuntary manslaughter is unlawfully causing the death of another, but "the offender's mental state is not

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(…continued)
of a serious risk of death or serious bodily injury"); *United States* v. *Long Feather*, 299 F.3d 915, 916-917 (8th Cir. 2002) (evidence supported a voluntary manslaughter conviction where defendant and victim engaged in a physical altercation, victim was knocked to the ground, defendant kicked the victim in the head, and victim died a day later); *United States* v. *Milton*, 27 F.3d 203, 208 (6th Cir. 1994) (unprovoked defendant fired two shots into victim's car; "[d]espite [defendant's] statement that he only meant to scare [victim], from his actions we infer that he must have been aware of the risk of death or serious bodily injury," and therefore he acted with malice sufficient for second degree murder).

[37] Williams notes that the jury was not asked to determine the elements of voluntary or involuntary manslaughter. Williams Br. 55. To the extent Williams suggests that the base offense level can be based only on facts specifically found by the jury, that argument is wrong where, as here, the defendant's sentence is not above the statutory maximum. See, *e.g.*, *United States* v. *Rogers*, 457 F. App'x 268, 270 (4th Cir. 2011) ("A sentencing court may find the facts relevant to applying the cross reference by a preponderance of the evidence as long as the Guidelines are treated as advisory and the sentence falls within the statutory maximum authorized by the jury's verdict"), cert. denied, 132 S. Ct. 1778 (2012); *United States* v. *Setser*, 568 F.3d 482, 498 (5th Cir. 2009); *United States* v. *Cartwright*, 252 F. App'x 452, 455 (3d Cir. 2007).

sufficiently culpable to meet the traditional malice requirements." *Browner*, 889 F.2d at 553; see also *United States* v. *Paul*, 37 F.3d 496, 499 (9th Cir. 1994).

3. Williams also suggests that because "there was no evidence presented of provocation or sudden passion, * * * the voluntary manslaughter guidelines should not have been applied." Williams Br. 56. The government argued below, however, that the facts supported a finding of "sudden quarrel." Doc. 140 at 8; Moore R. 1612. Although the court did not address that issue, its failure to do so worked to Williams' benefit. Given that Williams acted with malice, second degree murder *could* have applied, unless Williams acted "upon a sudden quarrel or heat of passion." See *United States* v. *Serawop*, 410 F.3d 656, 666 (10th Cir. 2005). In other words, had the court considered, but rejected, a finding of provocation or a "sudden quarrel," the court could have applied second degree murder as the base offense guideline. As noted above, however, the court confined its analysis to whether voluntary or involuntary manslaughter applied, concluding that Williams acted with the malice required for voluntary manslaughter. We assume Williams is not seeking as a remedy to the court's failure to address "sudden quarrel or heat of passion" that the court, in determining his sentence *de novo*, address whether second degree murder, rather than voluntary manslaughter, applies. See *United States* v. *Velazquez*, 246 F.3d 204, 212, 217 (2d Cir. 2001) (noting that defendants' "victory" is having sentences vacated because there was

no heat of passion, rendering voluntary manslaughter inapplicable, raised specter that *de novo* sentencing on remand could apply second degree murder based on finding of malice).[38]

V

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING MOORE

Moore argues that the district court incorrectly determined his sentence for three reasons: (1) the "cross reference" in Sentencing Guidelines § 2J1.2(c)(1) (the guideline for obstruction of justice) directing the court to apply Sentencing Guidelines § 2X3.1 if the offense involved "obstructing the investigation * * * of a criminal offense" does not apply here because the obstruction must be directed at an *ongoing* investigation; (2) the court abused its discretion in denying his motion for a departure or variance pursuant to 18 U.S.C. 3553(a)(1) and his sentence is "grossly unreasonable and excessive"; and (3) assuming the cross reference to Sentencing Guidelines § 2X3.1 applies, the court should have used involuntary

[38] In all events, there is sufficient evidence in the record supporting the conclusion that Williams acted "upon a sudden quarrel," including: Williams believed that Robair was in a high-crime area of drug activity, Robair was trying to flee, Moore was struggling with trying to handcuff one of Robair's wrists, and Williams yelled at Robair. Cf. *Lewis* v. *California*, No. 2:11-cv-1444, 2012 WL 487194, at *9 (E.D. Cal. Feb. 7, 2012) (under California law's similar definition of voluntary manslaughter, upon a "sudden quarrel" means that the killing happened suddenly in response to provocation, and not belatedly as revenge or punishment); see also Moore Br. 55-56; Doc. 140 at 8.

manslaughter in determining his base offense level. Moore Br. 48-58. We have addressed Moore's third argument above (pp. 47-53, *supra*) in addressing Williams' sentencing issues, and, for the same reasons, the court properly applied *voluntary* manslaughter as the underlying offense in sentencing Moore. Moore's two other arguments are not correct.[39]

1. The initial Presentence Report determined that the appropriate base offense level for Moore's convictions on Counts 2 and 3 (obstruction of justice and making false statements) was voluntary manslaughter. Doc. 123 at ¶ 39. The presentence report made this determination in three steps. First, the guideline for obstruction of justice is Sentencing Guidelines § 2J1.2(c)(1), but provides that the guideline for "accessory after the fact" (U.S.S.G. § 2X3.1) applies (*i.e.*, is "cross referenced") "[i]f the offense involved obstructing the investigation or prosecution of a criminal offense." Second, under Sentencing Guidelines § 2X3.1(a)(1), the base offense level is six levels lower "than the offense level for the underlying offense." Because the obstruction of justice related to the beating death of Robair, which is a civil rights violation (18 U.S.C. 242), Sentencing Guidelines § 2H1.1

[39] The standard of review for sentencing challenges is set forth on pages 46-47, *supra*. The abuse of discretion standard also applies to the review of denials of downward departures pursuant to 18 U.S.C. 3553(a). See, *e.g.*, *United States* v. *Garrigos-Diaz*, 426 F. App'x. 228, 230 (5th Cir. 2011). Further, arguments not raised below are reviewed for plain error. See, *e.g.*, *United States* v. *Gonzales*, 436 F.3d 560, 583 (5th Cir. 2006).

applies. Third, Sentencing Guidelines § 2H1.1 applies the base offense level "from the offense guidelines applicable to any underlying offense," which in this case is voluntary manslaughter because the assault resulted in Robair's death. Doc. 123 at ¶ 39.

Moore objected, asserting that even if the underlying offense refers to assaulting Robair, the underlying offense should be involuntary manslaughter, not voluntary manslaughter. Moore's Objections to Presentence Report at 3-9 (Aug. 5, 2011). The final presentence report addressed Moore's objections and concluded that voluntary manslaughter, not involuntary manslaughter, applied because Williams' actions were consistent with a "sudden quarrel," as defined in 18 U.S.C. 1112(a). Doc. 136 at 28. Moore also filed a motion for a downward departure and variance, arguing that he was entitled to a reduced sentence for: (1) aberrant behavior (U.S.S.G. § 5K2.20); (2) family ties and responsibilities (U.S.S.G. § 5H1.6), and/or (3) the factors set forth in 18 U.S.C. 3553(a). Moore R. 392-406; see also Moore R. 420-427 (government's opposition).

At the sentencing hearing, the court concluded that the base offense level for voluntary manslaughter applied. The court followed the rationale in the final presentence report and cited to its decision, in sentencing Williams, that rejected the application of involuntary manslaughter. Moore R. 1648-1650. The court also denied Moore's motion for a variance or departure, except for a two-level

reduction for being a minor participant. Moore R. 1651-1660, 1665. The court specifically rejected the request for a departure based on "aberrant behavior," stating that Moore was present at the beating and present at the hospital when lies were told, and he said nothing, and there were "a number of lies, * * * to the FBI, * * * to the New Orleans Police Department, to the Court, [and] to the jury." Moore R. 1665.

2. Moore first argues that Sentencing Guidelines § 2J1.2(c)(1)'s cross reference to Sentencing Guidelines § 2X3.1 cannot apply because the obstruction took place *before* there was ongoing investigation, *i.e.*, the language "obstructing the investigation * * * of a criminal offense" means that there must have been an *ongoing* investigation, and not merely that the defendant acted in contemplation of a possible future criminal investigation. Moore Br. 49-52. Moore asserts that the language "the investigation" makes clear that the investigation "must have existed," and that there must be a "nexus" between the obstruction and the investigation. Moore Br. 49-50. Moore did not make this argument below, and therefore it is reviewed for plain error. See, *e.g.*, *United States* v. *Gonzales*, 436 F.3d 560, 583 (5th Cir. 2006). In all events, Moore is not correct.

First, the plain language of the cross reference in Sentencing Guidelines § 2J1.2(c)(1) – "[i]f the offense involved obstructing the investigation * * * of a criminal offense" – does not confine application of the provision to the obstruction

of an *ongoing* investigation. That language clearly includes the obstruction of the investigation that the defendant can reasonably expect to follow from his conduct and in fact followed from the underlying criminal offense. In such a case, the obstruction "*involve[s]*" obstructing "the" investigation of a criminal offense, *albeit*, an investigation that had not yet begun. In this regard, the key word in the cross reference language is not the word "the," as Moore suggests, but rather the word "involved" (*i.e.*, "[i]f the offense *involved* obstructing the investigation * * * of a criminal offense"). It does so where the defendants reasonably anticipate that there will be a criminal investigation into the underlying conduct, and for that reason take action that is intended to thwart the investigation.

The instant case is precisely the kind of case that compels this conclusion. Given Williams' conviction on Count 1, the reasonable inference can be made that the defendants falsified the incident report in the hope that the investigation into Robair's death would conclude that Robair ruptured his spleen after he fell to the ground under the influence of drugs, and that defendants would be found not to have engaged in wrongdoing. The background commentary to Sentencing Guidelines § 2J1.2(c)(1) explains that the cross reference is provided because "the conduct covered by this guideline is frequently part of *an effort to avoid punishment* for an offense that the defendant has committed or to assist another person to escape punishment for an offense." U.S.S.G. § 2J1.2, cmt. (backg'd)

(emphasis added). That is the case here. The commentary further states that use of this cross reference "will provide an enhanced offense level when the obstruction *is in respect to a particularly serious offense*." U.S.S.G. § 2J1.2, cmt. (backg'd) (emphasis added). That is also the case here (the beating death of Robair). Neither of these statements suggests the kind of temporal nexus between the obstruction and the criminal investigation into the underlying conduct suggested by Moore.[40] Further, if the enhancement did not apply here, simply because the investigation defendants sought to obstruct had not yet commenced, the purpose of the cross-referenced enhancement would be thwarted.[41] In short, where the defendant

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[40] Moore also cites to *United States* v. *Clayton*, 172 F.3d 347, 353-355 (5th Cir. 1999), addressing an earlier version of the Sentencing Guidelines § 3C1.1 enhancement for obstruction, which required that the obstruction be "during" an investigation. Moore Br. 51. The Court concluded that the enhancement applied only when the obstruction occurs during the investigation of the defendant's underlying offense, *i.e.*, that there was "temporal or nexus requirement." *Id*. at 355. Given the language at issue in *Clayton* – applying to obstruction *during* an investigation – that is not present in Sentencing Guidelines § 2J1.2(c)(1), that case has no bearing here. We also note that Sentencing Guidelines § 3C1.1 now covers obstruction "with respect to" the investigation of the underlying offense.

[41] In this regard, the purpose of the cross reference is "to weigh the severity of one's actions in obstructing justice based on the severity of the underlying offense that was the subject of the judicial proceeding sought to be obstructed." *United States* v. *Brenson*, 104 F.3d 1267, 1285 (11th Cir. 1997). In other words, "the purpose of the cross-referencing * * * is to provide proportionality in the sentencing of such offenses." *Ibid*.; see also *United States* v. *Fields*, 72 F. App'x 361, 363 (6th Cir. 2003) ("The Sentencing Commission pursued proportionality in obstruction of justice cases by make the sentences for obstruction of justice dependent on the seriousness of the underlying offense."); *United States* v. *Arias*,

(continued…)

engages in the obstruction of justice reasonably anticipating that there will be a criminal investigation, and does so for the purpose of obstructing that investigation, the fact that the criminal investigation has not yet begun is beside the point.[42]

In this case, defendants were aware that they could be prosecuted in federal court for civil rights violations, which, of course, is why they falsified the incident report. The parties stipulated at trial that defendants "were both trained by the [NOPD] that a police officer who uses unnecessary force could be investigated by the FBI and prosecuted in federal court." Williams R. 1152. Williams testified that he knew that cases of excessive force can be investigated by the FBI, and that in doing so the FBI obtains the incident report, which is an important piece of evidence in the investigation. Williams R. 1385-1386. Moreover, the FBI in fact

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253 F.3d 453, 459 (9th Cir. 2001) ("the point of the cross reference is to punish more severely (and to provide a greater disincentive for) perjury in, and obstruction of, prosecutions with respect to more serious crimes"). For this reason, defendant need not have been charged with or convicted of the underlying offense when applying Sentencing Guidelines § 2X3.1. The underlying offense in this case – the beating death of Robair in violation of 18 U.S.C. 242 – is serious and the cross reference appropriately applies so that Moore receives a sentence for obstruction that is proportional to that underlying offense.

[42] We also note that, given that a violation of Section 1519 does *not* require that there be an ongoing investigation, it would be odd if the applicable Sentencing Guideline nevertheless imposed one.

opened an investigation on August 1, 2005, two days after the assault.[43] Williams R. 1182. Given defendants' knowledge of the investigation that would likely follow from Robair's death, and that by filing the false police report they intended to obstruct the investigation to avoid punishment, defendants' obstruction plainly falls within the scope of the cross reference in Sentencing Guidelines § 2J1.2(c)(1).

Finally, Moore's interpretation of Sentencing Guidelines § 2J1.2(c)(1) is, as a practical matter, unworkable. If the defendant falsifies a document anticipating (or reasonably expecting) that, given the nature of his conduct, an investigation will soon begin, and it does begin, *e.g.*, the following day, defendant should not escape the cross reference to an enhanced base offense level simply because, as it turns out, he filed his false report *before* the investigation actually commenced. Sentencing Guidelines § 2J1.2(c)(1) should not be read to create a race between the defendant completing his actions to cover up his wrongdoing, and the government opening up its investigation, with the result that if the defendant finishes first the cross referenced enhanced penalty cannot apply. Moreover, how does the sentencing court determine when "the investigation of a criminal offense" has

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[43] In addition, Daniel Wharton, who worked in the NOPD's Public Integrity Bureau at the time of the incident, testified that he was notified of the Robair incident the day after it occurred, and that he and two others "started the investigation on the day we were notified." Williams R. 1206-1207. Moore was interviewed about the incident on August 17, 2005, by NOPD's Public Integrity Bureau. Williams R. 1171; Gov't Ex. 16.

commenced so that it can determine if the obstruction related to an *ongoing* investigation? What is the trigger that determines "the investigation of a criminal offense" has commenced? These questions do not need to be answered under the common sense interpretation of the cross reference that obstruction "involve[s]" obstructing "the investigation * * * of a criminal offense" where defendants reasonably anticipated that there would be a criminal investigation, and acted to thwart or mislead that investigation.

3. Moore also argues that the court abused its discretion in denying his motion for a downward departure or variance. Moore Br. 53-54. He asserts that his sentence is "grossly unreasonable and excessive," and that the court failed to follow 18 U.S.C. 3553(a)(1) and consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Moore Br. 53 (quoting 18 U.S.C. 3553(a)(1)). Moore also asserts that he was sentenced for a crime he did not commit (presumably, the assault of Robair) and for obstruction concerning a document over which he had no control, and that given his "exceptional history," "need to care for an autistic child," and the PSR's "recognition of aberrant behavior," the sentence was unreasonable. Moore Br. 53. These arguments lack merit; under the totality of the circumstances, Moore's sentence was substantively reasonable.

Moore's conviction on Count 2 (obstruction) was punishable by up to 20 years' imprisonment; his conviction on Count 3 (false statements) was punishable by up to 5 years' imprisonment. See 18 U.S.C. 1519 & 1001(a). Moore was sentenced to 70 months on Count 2, and 60 months on Count 3, to run concurrently. Moore R. 1667. The sentence on Count 2 was at the bottom of the applicable sentencing guidelines' range.[44] In denying Moore's motion for a variance or departure, the court stated:

> [D]efendant was present through the entire beating. He did nothing. He was also present when the lies were told at the hospital which deprived Mr. Robair of proper treatment that led to his death. He did nothing.
>
> I don't feel that it's aberrant behavior because there were a number of lies. It wasn't just once. It was to the FBI, it was to the New Orleans Police Department, to the Court, to the jury. So I understand the motion, but I deny the motion for both the variance and for a departure.

Moore R. 1665. The court then addressed the factors in 18 U.S.C. 3553(a), stating:

> I have considered the guidelines applicable to the case as well as the relevant facts and circumstances involved, including the nature and circumstances of the offense, history, and characteristics of the defendant, in fashioning what I believe to be a reasonable sentence. It reflects the seriousness of the offense, promotes respect for the law, provides just punishment, affords adequate deterrence, protects the public, provides the defendant with appropriate educational, vocational, and medical care.

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[44] Moore's total base offense level was 27, which resulted in sentencing range of 70-87 months. Moore R. 1654. Although the final PSR determined that Moore's total offense level was 31, which, for criminal history category I, resulted in sentencing range of 108-135 months (Doc. 136 at 20), the court granted Moore a reduction for being a "minor participant," and agreed that the two-level increase for obstruction was not appropriate (Moore R. 1650-1653).

Moore R. 1666.

Because Moore's sentence is within the guidelines range, it is "presumptively reasonable." *Gall*, 552 U.S. at 51; *United States* v. *Newson*, 515 F.3d 374, 379 (5th Cir. 2008) ("In this circuit, a within-guidelines sentence enjoys, on review, a rebuttable presumption of reasonableness."). Moore has failed to rebut this presumption. In asserting that the sentence was greater than necessary, Moore essentially asks this Court to re-weigh the Section 3553 factors; the "sentencing judge, however, is in a superior position to find facts and judge their import under [Section] 3553(a) with respect to a particular defendant." *United States* v. *Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008). Moreover, when "the district court imposes a sentence within a properly calculated guidelines range and gives proper weight to the Guidelines and the 18 U.S.C. § 3553(a) factors, [the reviewing court] will give great deference to that sentence and will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines in light of the sentencing considerations set out in § 3553(a)." *Id*. at 338 (internal quotation marks and citation omitted).

In this case, the district court was well aware of Moore's arguments in support of his motion for a variance or departure, as the court summarized his arguments before inviting defense counsel to address them. See Moore R. 1655. Moore's attorney addressed these issues at length, a character witness addressed

the court, and the court indicated that it had read the letters filed on Moore's behalf. Moore R. 1655-1665. The court also made clear that it had considered the Section 3553(a) factors. Moore R. 1666. Therefore, "[t]he record and context show that the district court considered the facts and the parties' arguments." *United States* v. *Osorio-Abundiz*, 303 F. App'x 239, 240 (5th Cir. 2008). That is all that is required.[45]

In all events, given that Moore's conduct cost Robair his life and damaged a community's faith in their police officers, Moore's sentence – at the very bottom of the applicable sentencing range – was substantively reasonable and proportional to the severity of the underlying offenses. As a uniformed police officer, Moore: restrained Robair and watched his partner kick him and repeatedly hit him with his baton; heard Robair scream in pain when he was struck and heard him moaning in pain in the back of the police car; saw Robair unresponsive at the hospital and stood by as his partner lied to hospital staff about what had happened; after Robair's death, helped prepare and turned in a false police report to cover up what had happened; lied to the FBI about what had happened; and lied on the stand at trial. In short, Moore betrayed his oath to uphold and enforce the law, with fatal

[45] We also note, with respect to Moore's reference to his need to take care of his autistic child, that the Sentencing Guidelines provide that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted." U.S.S.G. § 5H1.6; see generally *United States* v. *McClatchey*, 316 F.3d 1122, 1130-1133 (10th Cir. 2003).

consequences. Given these facts, there is no basis for this Court to disturb the district court's sentence in this matter.[46]

CONCLUSION

For the foregoing reasons, this Court should affirm defendants' convictions and sentences.

Respectfully submitted,

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[46] Moore asserts that his sentence "starkly contrasts with sentences given to similarly situated police defendants." Moore Br. 54 (citing cases). The cases he cites, however, are readily distinguishable; in three of the cases, defendants' actions did not result in the victim's death, and in the other case (*United States* v. *Schmeltz*, 667 F.3d 685 (6th Cir. 2011)) the jury specifically found that the government had not proved "death resulting." See Sentencing Transcript (Doc. 306) at 14, *United States* v. *Gray*, No. 3:09cr182 (filed Apr. 13, 2011).

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2012, I electronically filed the foregoing Brief for the United States as Appellee with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that on June 14, 2012, I served a copy of the foregoing document on the following counsel of record by First Class Mail:

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CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING

I hereby certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. Rule 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Thomas E. Chandler
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Date: June 14, 2012

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set forth by this Court in its June 14, 2012, order granting the United States' Unopposed Motion For Leave To File Extra-Length Brief. The brief was prepared using Microsoft Word 2007 and contains 16,766 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: June 14, 2012