Documents from *United States v. Hickman*, Docket No. 6:15-cr-00042 (E.D. Ky.)

Prosecution of correctional officers under 18 U.S.C. §§ 242 and 2 for assaulting a pretrial detainee and willfully failing to provide the detainee with necessary medical care, resulting in the detainee's death.

1. Indictment, 10/27/2015
2. Indictment 2, 10/27/2015
3. Plea Agreement, 11/09/2016
4. Howell Guilty Verdict, 05/11/2017
5. Sentencing Memorandum, 06/26/2017
6. Sentencing Memorandum, 10/25/2017
7. Criminal Minutes – Sentencing, 11/01/2017
8. Guilty Plea and Sentence, 11/03/2017
9. DOJ Press Release, Howell Sentenced, 02/23/2018
10. Howell Judgment and Sentence, 02/23/2018
11. Court of Appeals Opinion, 03/14/2019

UNDER SEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA

V. **INDICTMENT NO.** 6:15cr42 ART

DAMON WAYNE HICKMAN and
WILLIAM CURTIS HOWELL,

* * * * *

THE GRAND JURY CHARGES:

INTRODUCTION

At all times relevant to this Indictment:

1. The Kentucky River Regional Jail (hereinafter KRRJ) in Hazard, Kentucky, was a jail in Perry County, Kentucky, responsible for the custody, control, care and safety of inmates, including "pretrial detainees" (people who have been ordered by a court of law to be detained following arrest, but have not yet been convicted of committing an offense).

2. Defendant **DAMON WAYNE HICKMAN** was employed by the KRRJ as a Supervisory Deputy Jailer.

3. Defendant **WILLIAM CURTIS HOWELL** was employed by the KRRJ as a Supervisory Deputy Jailer.

4. Defendants **DAMON WAYNE HICKMAN** and **WILLIAM CURTIS**

HOWELL were responsible for the custody, care, and safety of inmates, including pretrial detainees, at the KRRJ.

5. L.T. was a pretrial detainee at the KRRJ.

COUNT 1
18 U.S.C. § 242
18 U.S.C. § 2

1. The allegations contained in the Introduction above are restated and incorporated herein by reference.

2. On or about July 9, 2013, in Perry County, in the Eastern District of Kentucky,

DAMON WAYNE HICKMAN and
WILLIAM CURTIS HOWELL,

while acting under color of law and while aiding and abetting one another, willfully deprived L.T. of the right, protected and secured by the Constitution and laws of the United States, to due process of law, which includes the right of a pretrial detainee to be free from a jail official's deliberate indifference to his serious medical needs. Specifically, defendants HICKMAN and HOWELL, knowing that L.T. had a serious medical need, willfully failed to provide L.T. with necessary medical care, thereby acting with deliberate indifference to a substantial risk of harm to L.T., and resulting in bodily injury to, and the death of, L.T., all in violation of 18 U.S.C. §§ 242 and 2.

COUNT 2
18 U.S.C. § 242
18 U.S.C. § 2

1. The allegations contained in the Introduction above are restated and

incorporated herein by reference.

2. On or about July 9, 2013, in Perry County, in the Eastern District of Kentucky,

DAMON WAYNE HICKMAN and
WILLIAM CURTIS HOWELL,

while acting under color of law and while aiding and abetting one another, willfully deprived L.T. of the right, protected and secured by the Constitution and laws of the United States, to due process of law, which includes the right of a pretrial detainee not to be subjected to excessive force amounting to punishment. Specifically, defendants HICKMAN and HOWELL assaulted L.T., resulting in bodily injury to L.T., all in violation of 18 U.S.C §§ 242 and 2.

COUNT 3
18 U.S.C. § 1519

1. The allegations contained in the Introduction above are restated and incorporated herein by reference.

2. On or about July 9, 2013, in Perry County, in the Eastern District of Kentucky,

DAMON WAYNE HICKMAN,

acting in relation to and contemplation of a matter within the jurisdiction of the Federal Bureau of Investigation, an agency of the United States, knowingly falsified and made a false entry in a record and document with the intent to impede, obstruct, and influence the investigation of the matter within federal jurisdiction; that is, defendant HICKMAN made

PENALTIES

COUNT 1:	Death or life imprisonment, a fine of not more than $250,000, and a term of supervised release of not more than 5 years.
COUNT 2:	Not more than 10 years imprisonment, a fine of not more than $250,000, and a term of supervised release of not more than 3 years.
COUNT 3:	Not more than 20 years imprisonment, a fine of not more than $250,000, and a term of supervised release of not more than 3 years.
PLUS:	Restitution.
PLUS:	Mandatory special assessment of $100 per felony count.

UNDER SEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA

V. **INDICTMENT NO.** 6:15cr42 ART

DAMON WAYNE HICKMAN and
WILLIAM CURTIS HOWELL,

* * * * *

THE GRAND JURY CHARGES:

INTRODUCTION

At all times relevant to this Indictment:

1. The Kentucky River Regional Jail (hereinafter KRRJ) in Hazard, Kentucky, was a jail in Perry County, Kentucky, responsible for the custody, control, care and safety of inmates, including "pretrial detainees" (people who have been ordered by a court of law to be detained following arrest, but have not yet been convicted of committing an offense).

2. Defendant **DAMON WAYNE HICKMAN** was employed by the KRRJ as a Supervisory Deputy Jailer.

3. Defendant **WILLIAM CURTIS HOWELL** was employed by the KRRJ as a Supervisory Deputy Jailer.

4. Defendants **DAMON WAYNE HICKMAN** and **WILLIAM CURTIS**

HOWELL were responsible for the custody, care, and safety of inmates, including pretrial detainees, at the KRRJ.

5. L.T. was a pretrial detainee at the KRRJ.

COUNT 1
18 U.S.C. § 242
18 U.S.C. § 2

1. The allegations contained in the Introduction above are restated and incorporated herein by reference.

2. On or about July 9, 2013, in Perry County, in the Eastern District of Kentucky,

DAMON WAYNE HICKMAN and
WILLIAM CURTIS HOWELL,

while acting under color of law and while aiding and abetting one another, willfully deprived L.T. of the right, protected and secured by the Constitution and laws of the United States, to due process of law, which includes the right of a pretrial detainee to be free from a jail official's deliberate indifference to his serious medical needs. Specifically, defendants HICKMAN and HOWELL, knowing that L.T. had a serious medical need, willfully failed to provide L.T. with necessary medical care, thereby acting with deliberate indifference to a substantial risk of harm to L.T., and resulting in bodily injury to, and the death of, L.T., all in violation of 18 U.S.C. §§ 242 and 2.

COUNT 2
18 U.S.C. § 242
18 U.S.C. § 2

1. The allegations contained in the Introduction above are restated and

incorporated herein by reference.

2. On or about July 9, 2013, in Perry County, in the Eastern District of Kentucky,

DAMON WAYNE HICKMAN and
WILLIAM CURTIS HOWELL,

while acting under color of law and while aiding and abetting one another, willfully deprived L.T. of the right, protected and secured by the Constitution and laws of the United States, to due process of law, which includes the right of a pretrial detainee not to be subjected to excessive force amounting to punishment. Specifically, defendants HICKMAN and HOWELL assaulted L.T., resulting in bodily injury to L.T., all in violation of 18 U.S.C §§ 242 and 2.

COUNT 3
18 U.S.C. § 1519

1. The allegations contained in the Introduction above are restated and incorporated herein by reference.

2. On or about July 9, 2013, in Perry County, in the Eastern District of Kentucky,

DAMON WAYNE HICKMAN,

acting in relation to and contemplation of a matter within the jurisdiction of the Federal Bureau of Investigation, an agency of the United States, knowingly falsified and made a false entry in a record and document with the intent to impede, obstruct, and influence the investigation of the matter within federal jurisdiction; that is, defendant HICKMAN made

falsified and false entries in an official log, documenting observations of L.T. by 1) writing that he observed L.T. at specific times when he did not in fact observe L.T.; and 2) writing that L.T. was "10-4" (meaning safe and not in obvious physical distress), when, in fact, as he then knew L.T. was not "10-4," all in violation of 18 U.S.C. § 1519.

A TRUE BILL

KERRY B. HARVEY
UNITED STATES ATTORNEY

PENALTIES

COUNT 1:	Death or life imprisonment, a fine of not more than $250,000, and a term of supervised release of not more than 5 years.
COUNT 2:	Not more than 10 years imprisonment, a fine of not more than $250,000, and a term of supervised release of not more than 3 years.
COUNT 3:	Not more than 20 years imprisonment, a fine of not more than $250,000, and a term of supervised release of not more than 3 years.
PLUS:	Restitution.
PLUS:	Mandatory special assessment of $100 per felony count.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CRIMINAL ACTION NO. 15-CR-00042-ART

UNITED STATES OF AMERICA **PLAINTIFF**

V. **PLEA AGREEMENT**

DAMON WAYNE HICKMAN **DEFENDANT**

* * * * *

1. Pursuant to Federal Rule of Criminal Procedure 11(c)(1), the Defendant will enter a guilty plea to a lesser included offense of Count 1 of the Indictment, charging a violation of 18 U.S.C. §§ 242 and 2, while acting under color of law, willfully depriving L.T. of the right, protected and secured by the Constitution and laws of the United States, to due process of law, which includes the right of a pretrial detainee to be free from a jail official's deliberate indifference to his serious medical needs; specifically knowing L.T. had a serious medical need, willfully failed to provide L.T. with necessary medical care, thereby acting with deliberate indifference to a substantial risk of harm to L.T. and resulting in bodily injury to L.T., Count 2 of the Indictment, charging a violation of 18 U.S.C. §§ 242 and 2, while acting under color of law, willfully depriving L.T. of the right protected and secured by the Constitution and laws of the United States, to due process of law, which includes the right of a pretrial detainee not to be subjected to

excessive force amounting to punishment; specifically assaulting L.T. resulting in bodily injury to L.T, and Count 3 of the Indictment, charging a violation of 18 U.S.C. § 1519, acting in relation to and contemplation of a matter within the jurisdiction of the Federal Bureau of Investigation, an agency of the United States, knowingly falsifying and making a false entry in a record and document with the intent to impede, obstruct, and influence the investigation of the matter within federal jurisdiction, that is falsifying an official log documenting observations of L.T. by writing that L.T. was "10-4" when, in fact, as he then knew, L.T. was not "10-4."

2. The essential elements of Count 1 are:

(a) First, that the Defendant acted under color of law;

(b) Second, that the Defendant, aided and abetted by another, violated the victim's Constitutional right to due process of law; the right not to be denied necessary medical attention by a law enforcement officer who is aware of the victim's serious medical need.

(c) Third, that the Defendant acted willfully; and

(d) Fourth, that the crime resulted in bodily injury to the victim.

3. The essential elements of Count 2 are:

(a) First, that the Defendant acted under color of law;

(b) Second, that the Defendant, aided and abetted by another, violated the victim's Constitutional right to due process of law; to be free from excessive force amounting to punishment.

(c) Third, that the Defendant acted willfully; and

(d) Fourth, that the crime resulted in bodily injury to the victim.

4. The essential elements of Count 3 are:

(a) First, that the Defendant falsified or made a false entry in a record or document;

(b) Second, that the record or document related to a matter within the jurisdiction of a federal agency; and

(c) Third, that the Defendant acted with the specific intent to impede, obstruct, or influence an investigation of a matter within the jurisdiction of an agency of the United States.

5. As to the charges, the United States could prove the following facts that establish the essential elements of the offenses beyond a reasonable doubt, and the Defendant admits these facts:

Hickman and Howell were supervisory deputy jailers at the KRRJ on July 9, 2013, when they used excessive force against L.T., a pretrial detainee who died approximately four hours later. The assault that led to L.T.'s death began at approximately 7:19 a.m. when Hickman and Howell attempted to remove a mat from L.T.'s cell located in the detox area. When Hickman opened the cell door, L.T. rushed out of the cell flailing his arms and ran past Hickman and Howell. Howell tased L.T. as L.T. ran into the booking area. When the taser did not appear to affect L.T., Hickman then took L.T. down to the floor. Hickman then kicked L.T. without justification in the torso as he was lying on the floor. With the help of two other deputies, Hickman and Howell carried L.T. back to the detox hallway, a few feet away from the booking area.

As the deputies carried L.T., he was able to obtain the taser. Deputies quickly placed L.T. on the floor just outside of his cell and within seconds, retrieved the taser from L.T.

Once deputies retrieved the taser, Hickman and Howell continued to assault L.T. Hickman and Howell continued to use force against L.T. on the floor of the detox hallway in front of his cell door. As L.T. was being restrained and was under control, Howell punched L.T. in the head and stomped on L.T.'s arm; while Hickman drive tased him. Hickman or Howell also kicked L.T. in the pelvic area. At the end of the assault, L.T. was injured and bleeding from an open head wound. The deputies placed him back in his cell and, before closing the door, Howell stepped into the cell and kicked L.T. in the face. Hickman knew that L.T had a serious medical need because he and Howell kicked, punched and tased L.T, and because L.T. was bleeding from an open head wound from being punched by Hickman.

After the assault, both Hickman and Howell had L.T.'s blood on their arms, hands and clothing. Hickman and Howell cleaned the blood off of their own arms, but left L.T. in his cell and intentionally failed to provide him with medical care. Hickman authored an observation log noting that L.T. was "10-4" when Hickman knew L.T. was not 10-4 with the intent to obstruct the investigation regarding what happened to L.T. Approximately four hours later, a maintenance worker C.D. discovered L.T. in his cell, not breathing.

Once L.T. was found unresponsive, emergency responders performed CPR and transported L.T. to a local hospital approximately one minute away, where L.T. was

pronounced dead. L.T. had multiple shoe and boot prints on his body, including a large boot print on his torso from blunt force trauma and a shoe print on his face.

An autopsy found that the primary cause of death was hemorrhaging, caused by a pelvic fracture, and that blunt force trauma to L.T.'s head, trunk and extremities also contributed to his death.

6. With regard to Count 1, the statutory punishment is up to 10 years imprisonment, a fine of not more than $250,000, or both, and a term of supervised release of not more than 3 years. A mandatory special assessment of $100 applies, and the Defendant will pay this assessment to the U.S. District Court Clerk at the time of the entry of the plea.

7. With regard to Count 2, the statutory punishment is not more than 10 years imprisonment, a fine of not more than $250,000, or both, and a term of supervised release of not more than 3 years. A mandatory special assessment of $100 applies, and the Defendant will pay this assessment to the U.S. District Court Clerk at the time of the entry of the plea.

8. With regard to Count 3, the statutory punishment is not more than 20 years imprisonment, a fine of not more than $250,000, or both, and a term of supervised release of not more than 3 years. A mandatory special assessment of $100 applies, and the Defendant will pay this assessment to the U.S. District Court Clerk at the time of the entry of the plea.

9. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), the United States and the Defendant recommend the following sentencing guidelines calculations, and they may object to other calculations. This recommendation does not bind the Court. The United States and the Defendant reserve the right to object to, remain neutral on, or agree with any and all guideline computations that are different.

United States Sentencing Guidelines (U.S.S.G.), November 1, 2016, manual, will determine the Defendant's guideline range.

(a) Pursuant to U.S.S.G. § 1B1.3, the Defendant's relevant conduct consists of the actions described in Paragraph 5 of this document.

(b) Pursuant to U.S.S.G. §2A2.2(a) [directed here by U.S.S.G. § 2H1.1(a)(1)], the base offense level for Counts 1 and 2 is a 14.

(c) The parties have not reached an agreement as to whether pursuant to U.S.S.G. §2A2.2(b)(2)(B), the base offense level would be increased by 4 levels for use of a dangerous weapon (shoes).

(d) Pursuant to U.S.S.G. §2A2.2(b)(3)(C), the United States will argue to increase the base offense level 7 levels (Permanent or Life-Threatening Bodily Injury). Pursuant to U.S.S.G. §2A2.2(b)(3)(A), the Defendant reserves the right to argue to increase the base offense level by 3 levels (Bodily Injury). The adjusted base offense level should the Court determine the injury was Permanent or Life Threatening is 24 because Pursuant to U.S.S.G. §2A2.2(b)(3), the cumulative adjustments from the application of subdivisions (2) and (3) cannot exceed 10 levels.

(e) Pursuant to U.S.S.G. §2H1.1(b)(1), increase the base offense level by 6 levels (the offense was committed under the color of law).

(f) The parties have not reached an agreement as to whether pursuant to §3A1.3 (restraint of victim), the base offense level would be increased by 2 levels.

(g) Pursuant to §3C1.1 (obstruction of justice), the base offense level would be increased by 2 levels.

(h) Pursuant to U.S.S.G. § 3D1.2(a) and (c), the parties agree that Counts 1, 2 and 3 group.

(i) Pursuant to 18 U.S.C. § 3553(a), the United States may seek an upward variance based on the history and characteristics of the Defendant and to adequately reflect the serious nature of the offense and the Defendant may argue for a downward variance based upon other factors pursuant to 18 U.S.C. § 3553(a).

(j) Pursuant to U.S.S.G. § 3E1.1, and unless the Defendant commits another crime, obstructs justice, or violates a court order, decrease the offense level by 2 levels for the Defendant's acceptance of responsibility. If the offense level determined prior to this 2-level decrease is 16 or greater, the United States will move at sentencing to decrease the offense level by 1 additional level based on the Defendant's timely notice of intent to plead guilty.

10. No agreement exists about the Defendant's criminal history category pursuant to U.S.S.G. Chapter 4.

11. The Defendant will not file a motion for a decrease in the offense level based on a mitigating role pursuant to U.S.S.G. § 3B1.2.

12. The Defendant waives the right to appeal the guilty plea and conviction. The Defendant reserves the right to appeal his sentence. Except for claims of ineffective assistance of counsel, the Defendant also waives the right to attack collaterally the guilty plea, conviction, and sentence. The Defendant reserves the right to appeal any order of restitution not agreed to by the Defendant as restitution may be requested by the victim's family.

13. The Defendant agrees to cooperate fully with the United States Attorney's Office by making a full and complete financial disclosure. Within 30 days of pleading guilty, the Defendant agrees to complete and sign a financial disclosure statement or affidavit disclosing all assets in which the Defendant has any interest or over which the Defendant exercises control, directly or indirectly, including those held by a spouse, nominee, or other third party, and disclosing any transfer of assets that has taken place within three years preceding the entry of this plea agreement. The Defendant will submit to an examination, which may be taken under oath and may include a polygraph examination. The Defendant will not encumber, transfer, or dispose of any monies, property, or assets under the Defendant's custody or control without written approval from the United States Attorney's Office. If the Defendant is ever incarcerated in connection with this case, the Defendant will participate in the Bureau of Prisons Inmate Financial Responsibility Program, regardless of whether the Court specifically directs participation or imposes a schedule of payments. If the Defendant fails to comply with any of the provisions of this paragraph, the United States, in its discretion, may refrain from moving the Court pursuant to U.S.S.G. § 3E1.1(b) to reduce the offense level by one additional level, and may argue that the Defendant should not receive a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a).

14. The Defendant understands and agrees that, pursuant to 18 U.S.C. § 3613, whatever monetary penalties are imposed by the Court will be due and payable immediately and subject to immediate enforcement by the United States. If the Court

imposes a schedule of payments, the Defendant agrees that it is merely a minimum schedule of payments and not the only method, nor a limitation on the methods, available to the United States to enforce the judgment. The Defendant waives any requirement for demand of payment on any fine, restitution, or assessment imposed by the Court and agrees that any unpaid obligations will be submitted to the United States Treasury for offset. The Defendant authorizes the United States to obtain the Defendant's credit reports at any time. The Defendant authorizes the U.S. District Court to release funds posted as security for the Defendant's appearance bond in this case, if any, to be applied to satisfy the Defendant's financial obligations contained in the judgment of the Court.

15. If the Defendant violates any part of this Agreement, the United States may void this Agreement and seek an indictment for any violations of federal laws, and the Defendant waives any right to challenge the initiation of additional federal charges.

16. This document and the plea supplement contain the complete and only Plea Agreement between the United States Attorney for the Eastern District of Kentucky, the Civil Rights Division and the Defendant. The United States has not made any other promises to the Defendant. The United States will dismiss any other charges that are filed against the Defendant regarding A.T. and G.H. as part of this written plea agreement at the time of sentencing.

17. This Agreement does not bind the United States Attorney's Offices in other districts, or any other federal, state, or local prosecuting authorities.

18. The Defendant and the Defendant's attorney acknowledge that the Defendant understands this Agreement, that the Defendant's attorney has fully explained this Agreement to the Defendant, and that the Defendant's entry into this Agreement is voluntary.

KERRY B. HARVEY
UNITED STATES ATTORNEY

Date: 11/9/16 BY: _____
Hydee R. Hawkins
Assistant United States Attorney

Date: 11/9/16 BY: _____
Sanjay Patel
Attorney, Civil Rights Division
Criminal Section

Date: 11-9-16 _____
Damon Wayne Hickman
Defendant

Date: 11/5/16 _____
Eric E. Ashely
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT LONDON

UNITED STATES OF AMERICA,

Plaintiff,

V.

WILLIAM CURTIS HOWELL,

Defendant.

CRIMINAL ACTION 6:15-42-KKC

VERDICT FORM

*** *** ***

INTERROGATORY NO. 1

Do you find William Curtis Howell guilty of the crime charged in Count 1 of the indictment?

YES ✓ NO _____

If **YES**, please proceed to Interrogatory Three.

If **NO**, please proceed to Interrogatory Two.

INTERROGATORY NO. 2

Do you find that William Curtis Howell committed the lesser included offense of Count 1?

YES _____ NO _____

Please proceed to Interrogatory Three.

INTERROGATORY NO. 3

Do you find William Curtis Howell guilty of the crime charged in Count 2 of the indictment?

YES ✓ NO _____

If **No**, please proceed to Interrogatory Four.

If **YES**, your deliberations are over. Your foreperson should sign and date the verdict form on the last page and notify the court security officer that you are ready to return to the courtroom.

INTERROGATORY NO. 4

Do you find that William Curtis Howell's actions in committing the lesser included offense of Count 2?

YES _____ NO _____

Your deliberations are over. Your foreperson should sign and date the verdict form on the last page and notify the court security officer that you are ready to return to the courtroom.

Please sign and date this verdict form and notify the court security officer that you are ready to return to the courtroom.

5-11-17

DATE

463

FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CRIMINAL ACTION NO. 15-CR-00042-KKC

UNITED STATES OF AMERICA **PLAINTIFF**

V. **SENTENCING MEMORANDUM AND REQUEST FOR UPWARD VARIANCE**

DAMON WAYNE HICKMAN **DEFENDANT**

* * * * *

PROCUEDURAL BACKGROUND

The Defendant (Hickman) was charged in a three-count Indictment. [R. 1: Indictment.] He entered a guilty plea to a lesser included offense of Count One, willfully failing to provide necessary medical care to Larry Trent (Trent), a pretrial detainee, resulting in bodily injury to Trent, in violation of 18 U.S.C. §§ 2 & 242; Count Two, subjecting Trent to excessive force amounting to punishment resulting in bodily injury to Trent, in violation of 18 U.S.C. §§ 2 & 242; and Count Three, obstruction of justice, in violation of 18 U.S.C. § 1519. [R. 116: Plea Agreement.] The plea agreement provided that the charges against Hickman regarding Alex Taulbee and Gary Hill would be dismissed at the time of sentencing. [*Id*.] The written plea agreement further provided that the United States would be seek an upward variance based on the history and characteristics of the Defendant and to adequately reflect the serious nature of the

offense. [*Id.*] The advisory guideline range as set forth in the Presentence Investigation Report is 108-135 months imprisonment.

The factors set forth in 18 U.S.C. § 3553(a), include but are not limited to,

- the nature and circumstances of the offense and history and characteristics of the defendant,
- the need for the sentence imposed to reflect the seriousness of the offense,
- to promote respect for the law,
- to provide just punishment for the offense,
- to afford adequate deterrence to criminal conduct,
- to protect the public from further crimes of the defendant, and
- to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The Defendant's conduct in this case and his prior use of excessive force against inmates at the Kentucky Regional River Jail (KRRJ) while working as a supervisory deputy jailer tasked with keeping order in the jail and keeping inmates safe is egregious. The United States is requesting a four-level upward variance from the upper end of the advisory guidelines to reflect the seriousness of the offense, to promote respect for the law, to provide a just punishment for the offense pursuant to 18 U.S.C. § 3553(a)(2)(A) and based upon the nature and circumstances of the offense and the history and characteristics of the Defendant pursuant to 18 U.S.C. § 3553(a)(1).

FACTUAL BACKGROUND

Hickman and Howell were supervisory deputy jailers at the KRRJ on July 9, 2013, when they used excessive force against Trent, a pretrial detainee who died approximately four hours later. [R. 116: Plea Agreement; R. 1: Indictment.] The assault that led to Trent's death began at approximately 7:19 a.m. when Hickman and Howell attempted to remove a mat from Trent's cell located in the detox area. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 15-17; R. 196: Exhibit and Witness List, Exhibits 6a-b (KRRJ video surveillance footage).] As Deputy Mize Neace testified during Howell's jury trial and shown on the video footage, Trent was moved from general population to a detox cell several hours earlier after Trent appeared confused. [R. 196: Exhibit and Witness List, Exhibit 6d.] According to Neace, who interacted with Trent as recently as approximately 7:00 a.m., Trent was not acting aggressive or causing any problems that would have required the removal of items from the cell.

When Hickman opened the cell door, Trent rushed out of the cell flailing his arms and made contact with Hickman with either an open hand or fist. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 17-19.] Hickman punched Trent and Trent fell to floor. [R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 17-19; R. 196: Exhibit and Witness List, Exhibits 6a-b (KRRJ video surveillance footage).] Trent then got up and ran past Hickman and Howell into the booking area. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 17-19.] Howell tased Trent as Trent ran into the booking area, however, the taser did not appear

to affect Trent. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 19-20.] Hickman threw Trent down to the floor, and without justification, kicked Trent in the torso when he was lying on the floor of the booking area. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 20-22.] With the help of two other deputies, Hickman and Howell carried Trent back towards the detox hallway, a few feet away from the booking area. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 21-22.] As the deputies carried Trent, he was able to obtain the taser. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 23-24.] The deputies quickly placed Trent on the floor just inside the detox hallway, and within seconds, retrieved the taser from Trent. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 24-25.]

After deputies retrieved the taser, and while Trent was lying on the floor restrained by several deputy jailers, Hickman and Howell continued to assault Trent without justification as admitted by Hickman in his plea agreement and during his testimony at Howell's jury trial. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 25, 27, 29-32.] As further admitted by Hickman in his plea agreement, and established during Howell's jury trial though the testimony of Hickman, J.C. Combs, Hazell Watts, Hazel Kilburn and Randal Howard, who saw different parts of the interaction, Howell punched Trent in the head, kicked Trent in the face and stomped on Trent's arm while Hickman repeatedly punched Trent in the head and tased him. [R. 208: Randall Howard, TR (Jury Trial, Day 3) at 97, 106-107, 109, 113; R. 208: Hazel

Watts, TR (Jury Trial, Day 3) at 60-63.] Hickman and Howell were mad and cussing at Trent during this time. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 35-37.] After deputies placed him back in his cell, Howell stepped into the cell and kicked Trent before closing the door. [R. 207: Hazell Kilburn, TR (Jury Trial, Day 2) at 103; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 31-32.] Hickman was standing right next to Howell. [R. 207: Damon Hickman, TR (Jury Trial Day 2) at 32.] Howell was mad and upset at the time he kicked Trent without justification. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 35, 37.] Hickman further admitted that either he or Howell also kicked Trent in the pelvic area. [R. 116: Plea Agreement.]

At the end of the assault, Trent was injured and bleeding from an open head wound. Hickman and Howell had Trent's blood on their arms, hands and clothing. [R. 116: Plea Agreement; R. 196: Exhibit and Witness List, Exhibit 8c (photograph of Trent's face).] They cleaned the blood off of themselves, but left Trent in his cell without medical care because of "self preservation," as further explained by Hickman during Howell's trial as not getting Trent treatment because they did not want to get in trouble. [R. 196: Exhibit and Witness List, Exhibits 6a-b (KRRJ video surveillance footage); R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 38.] Approximately four hours later, a maintenance worker discovered Trent unresponsive in his cell. [R. 116: Plea Agreement; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 45.]

Emergency responders performed CPR and transported Trent to the nearby hospital for treatment. [R. 206: Anthony Ford, TR (Jury Trial, Day 1) at 15.] However, attempts by Dr. Bart Francis and other hospital staff to revive Trent failed and he was pronounced dead less than an hour after arriving at the hospital. Dr. Francis testified during Howell's jury trial that had Trent received timely treatment they would have discovered the internal bleeding and he would have had a good chance of surviving. An autopsy found that the primary cause of death was hemorrhaging caused by a pelvic fracture, that blunt force trauma to Trent's head, trunk and extremities contributed to his demise. [R. 196: Exhibit and Witness List, Exhibit 9 (Stipulation regarding cause of death).]

Ford and Dr. Francis both testified during Howell's jury trial that Trent had multiple shoe and boot prints on his body, including a large boot print over his ribs. [R. 206: Anthony Ford TR (Jury Trial Day 1) at 15.] Trent suffered fractured ribs beneath the boot print and on the other side of his chest that were not caused by medical treatment. [R. 196: Exhibit and Witness List; Exhibit 9 (Stipulation regarding cause of death).] When Ford asked Hickman why nobody was rendering any medical treatment to Trent at the time emergency responders arrived, Hickman responded, "because he is an inmate." [R. 206: Anthony Ford TR (Jury Trial Day 1) at 18-19.]

Hickman also falsified an observation log stating that he had checked Trent numerous times and that even as late as 10:30 a.m. Trent was "10-4," or O.K. [R. 196: Exhibit and Witness list, Exhibit 46. Kilburn testified during Howell's jury trial that

when she walked by Trent's cell prior to 9:00 a.m., he was lying on the floor of his cell not moving. [R. 207: Hazell Kilburn, TR (Jury Trial Day 3) at 104-106. Robert Maggard also testified during Howell's jury trial that when he looked into Trent's cell shortly after the altercation Trent was not moving. Dr. Francis testified during Howell's jury trial that based upon the type of injuries Trent suffered, he would have been unconscious and unable to speak shortly after suffering this type of injury.

In addition to the false observation log completed by Hickman, Hickman signed off on the incident report prepared by Howell that day. The incident report about the altercation with Trent omitted any referenced to Hickman and Howell hitting and kicking Trent and omitted any reference to the injuries suffered by Trent during the altercation. [R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 37-42; R. 196: Exhibit and Witness List, Exhibit 37 (Incident report prepared by William Curtis Howell dated 7/9/13).]

FACTUAL BACKGROUND OF PRIOR INMATE ASSAULTS BY HICKMAN

May 28, 2005, Taylor Estep assault:

On or about May 29, 2005, Taylor Estep's father (Estep) (now deceased) called the Perry County Jail (currently the KRRJ) and advised Chief Deputy Jailer John Feltner (Feltner) that Hickman had assaulted his son for running his mouth. Feltner testified during Hickman's 404(b) hearing that he spoke to both Estep and Hickman about what had happened and that Hickman admitted smacking Estep because the inmate would not "hush." Feltner reprimanded Hickman by imposing three days of unpaid leave and issued

him a written reprimand for hitting Estep. [R. 100: Exhibit and Witness list; Exhibit 1 (Employee warning record as to Damon Hickman dated 6/1/2005).] Estep testified during Hickman's 404(b) hearing that Hickman "sucker-punched" him in the face and knocked him out and that Estep did nothing to prompt Hickman's assault. Estep further testified that he needed stitches for his injuries. Hickman did not provide Estep with any medical treatment and Estep testified during Hickman's 404(b) hearing that he still has a scar above his lip from the assault. [R. 62: 404(b) Notice by USA as to Damon Wayne Hickman and William Curtis Howell; R. 100: Exhibit and Witness list for 404(b) hearing held on 9/26/2016 and 9/27/2016 as to Damon Hickman; R. 104: Minute Entry for oral argument hearing as to Damon Hickman held on 9/27/2016.]

The court found by a preponderance of the evidence that Hickman assaulted Estep. [R. 105: Minute Entry Order.]

April 13, 2010, Dustin Turner assault:

Dustin Turner, an inmate at the KRRJ on April 13, 2010, testified at Hickman's 404(b) hearing and during the Kevin Asher jury trial that he was hit and kicked repeatedly by Hickman and Asher when he was lying on the floor of his cell and when he was strapped into a restraint chair. [R. 121: Dustin Turner TR (Hickman 404(b) hearing, Day 1) at 7-9, 11.] Hickman and Asher assaulted him by punching and kicking him when he was on the ground. [R. 121: Dustin Turner TR (Hickman 404(b) hearing, Day 1) at 7-9, 11; (16-00050-ART) R. 37: Damon Hickman, TR (Asher 404(b) hearing at 24-26.] After assaulting him on the floor, they placed Turner into a restraint chair at which time

Hickman hit him repeatedly in the head. [R. 121: Dustin Turner TR (Hickman 404(b) hearing, Day 1) at 8-9.] Turner had a visible boot print on his face from the assault. Turner was taken to the hospital for treatment by Asher and another deputy jailer after he cried and continued to yell that he needed medical help. [*Id*. at 12-13.] When the doctor asked Turner what happened, Asher, who was standing next to Turner, told the doctor Turner fell. Turner agreed because he had to go back to the jail. [*Id*. at 15-17.] Turner suffered a closed head injury and broken tooth. [*Id*. at 17-19; R. 100: Exhibit and Witness List, Exhibit 14e-g (photographs of Turner's injuries), Sealed Exhibit 15 (Medical records of Turner.] Turner was 5'8" and weighed approximately 145 pounds at the time he was assaulted. [(16-CR-00050-ART) R. 36: Exhibit and Witness List, Exhibit 3 (Booking detail for Dustin Turner).]

Hickman testified during the Asher 404(b) hearing and the Asher Jury trial that after he and Asher unlawfully assaulted Turner that Turner asked repeatedly for medical attention. [(16-CR-00050) R. 37: Damon Hickman, TR (Kevin Asher 404(b) Hearing) at 26; (16-CR-00050) R. 62: Damon Hickman, TR (Kevin Asher Jury Trial, Day 2) at 64.]

Hickman and Asher were afraid Turner was hurt and that they would get in trouble so Hickman hit himself in the face with a shaving cream can and Asher scratched his own arm to make it look like Turner assaulted them. [(16-CR-00050) R. 37: Damon Hickman, TR (Kevin Asher 404(b) Hearing) at 27; (16-CR-00050) R. 62: Damon Hickman, TR (Kevin Asher Jury Trial, Day 2) at 64-67.]

Hickman called the police and when Hazard Police Department Officer Bruce Fields (Fields) responded, Hickman falsely reported they had been assaulted by Turner and had Fields photograph their self-inflicted injuries. [(16-CR-00050) R. 37: Damon Hickman, TR (Kevin Asher 404(b) Hearing) at 27-30; (16-CR-00050) R. 62: Damon Hickman, TR (Kevin Asher Jury Trial, Day 2) at 73-75; R. 100: Exhibit and Witness List, Exhibits 14a-b (photographs of Damon Hickman taken by Bruce Fields), Exhibits 4c-d (photographs of Kevin Asher taken by Bruce Fields.]

Fields testified during Hickman's 404(b) hearing and during the Asher jury trial that Hickman and Asher told him they were assaulted by an inmate, that he photographed their purported injuries but that neither Hickman or Asher looked like they had been assaulted. [Bruce Fields, TR (Hickman 404(b) hearing, Day 1) at 37-46.] Turner looked like he had been assaulted. [*Id.* at 45.] He photographed Turner's injuries; however, Fields could not get Turner to tell him what happened so that he did not investigate the matter further. [*Id.* at 45-47; R. 100: Exhibit and Witness List, Exhibits 14-e-g (photographs of Dustin Turner depicting injuries to his face).] Fields never pursued charges against Turner for assaulting Hickman and Asher because he did not believe they had been assaulted by Turner. [Bruce Fields, TR (Hickman 404(b) hearing, Day 1) at 47.]

Hickman and Asher wrote false reports to make it look like Turner assaulted them so they would not get in trouble. [R. 100: Exhibit and Witness List; Exhibit 10 (Incident Report Dustin Turner); R. 37: (16-CR-00050) Damon Hickman, TR (Kevin Asher 404(b)

Hearing) at 33-37.] Hickman and Asher assaulted Turner without justification because they could. [(16-CR-00050) R. 37: Damon Hickman, TR (Kevin Asher 404(b) Hearing) at 51; (16-CR-00050) R. 62: Damon Hickman, TR (Kevin Asher Jury Trial, Day 2) at 61-62.]

The court found by a preponderance of the evidence that Hickman and Asher assaulted Turner. [R. 105: Minute Entry Order; (16-CR-00050) R. 40: Minute Entry for Telephone Conference as to Kevin Eugene Asher overruling Defendant's objection to Government's Notice of Intent to Introduce Evidence; (16-CR-00050) R. 41: Minute Entry Order as to Kevin Eugene Asher overruling Kevin Asher's objections.]

October 11, 2011, Alex Taulbee assault:

On October 10, 2011, approximately two years before the charged incident, Hickman assaulted inmate Alex Taulbee (Taulbee) after Taulbee was arrested for DUI. The incident occurred during the booking process at KRRJ and in the presence of former deputy jailers Jarrod Lucas and Matthew Amburgey.

Taulbee testified during the Hickman 404(b) hearing that he was arrested with one of Hickman's female relatives the night he was booked into the KRRJ. As he was being strip searched at KRRJ, Hickman punched him in the ear without provocation. Hickman punched Taulbee so hard he broke his own hand as a result of the punch. Taulbee's ear was bleeding and he was not given any medical treatment despite repeated requests.

Lucas and Amburgey witnessed Hickman assault Taulbee. Lucas testified during Hickman's 404(b) hearing that after Hickman punched Taulbee in the head, Hickman

went to the hospital because he thought he broke his hand and that after Hickman left the room, Lucas, Amburgey and another deputy pushed Taulbee to the ground and kicked him repeatedly without justification. Hickman suffered a broken hand and was treated at the hospital. [R. 62: 404(b) Notice by USA as to Damon Wayne Hickman and William Curtis Howell; R. 100: Exhibit and Witness list for 404(b) hearing held on 9/26/2016 and 9/27/2016 as to Damon Hickman; R. 100: Exhibit and Witness list, Exhibit 7 (sealed medical records for Damon Hickman); R. 104: Minute Entry for oral argument hearing as to Damon Hickman held on 9/27/2016.]

The court found by a preponderance of the evidence that Hickman assaulted Taulbee. [R. 105: Minute Entry Order.]

November 16, 2012, Gary Hill assault:

On November 16, 2012, Hickman and Asher assaulted inmate Gary Hill shortly after Hill was arrested and taken to KRRJ. Hill, a disabled miner, testified during the Hickman's 404(b) hearing and the Asher jury trial that he was detained at KRRJ and placed in a detox cell because he was intoxicated on a combination of prescription medication and alcohol. [R. 131: Gary Hill TR (Hickman 404(b) hearing, Day 2) at 3-4, 8-9.] Hill asked to make a telephone call. He was told he gave up that right when he was arrested. Hill admittedly became angry and attempted to flood his cell in retaliation by turning on the water faucet in his cell. [Id. at 9-10.]

Hickman heard the water and proceeded to Hill's cell with Asher. [(16-CR-00050) R. 62: Damon Hickman, TR (Kevin Asher Jury Trial, Day 1) at 12, 15-16.]

Hickman called Hill a "son-of-a-bitch," and punched him in the face. [R. 131: Gary Hill, TR (Hickman 404(b) hearing) at 11; [(16-CR-00050) R. 62: Damon Hickman, TR (Kevin Asher Jury Trial, Day 1) at 18-19.] Hill fell to the ground and Hickman kicked him multiple times while he was lying in the fetal position on the ground posing no threat. [R. 131: Gary Hill, TR (Hickman 404(b) hearing) at 11-12; (16-CR-00050) R. 62: Damon Hickman, TR (Kevin Asher Jury Trial, Day 1) at 19-21.] When Hill started to get up, Hickman and Asher made fun of Hill because he soiled himself during the assault. [R. 131: Gary Hill, TR (Hickman 404(b) hearing, Day 2) at 13-14.] They told Hill that they would swear that Hill struck Hickman first. [*Id*. at 14.] Hickman and Asher both held out the badges on their uniform shirts and said that they could do whatever they wanted to because they were "the law dog." [R. 131: Gary Hill, TR (Hickman 404(b) hearing, Day 2) at 13; (16-CR-00050) R. 62: Damon Hickman, TR (Kevin Asher Jury Trial, Day 1) at 22.]

Hickman and Asher then placed Hill in a restraint chair and Hickman punched Hill several times in the head. [R. 131: Gary Hill, TR (Hickman 404(b) hearing, Day 2) at 14-15.] Hill woke up a short time later, lying on a mat on the floor of his cell. [*Id*. at 15.] When Hill who was in extreme pain requested medical attention, Hickman and Asher took him to another room in the jail and a person Hill did not know represented himself to be a doctor and laughed at Hill. [*Id*. at 16-17.] Hickman testified during Asher's jury trial that when Hill requested medical attention, Asher put on a coat and hat and talked in a foreign accent pretending to be a doctor. [(16-CR-00050) R. 62: Damon Hickman, TR

(Kevin Asher Jury Trial, Day 1) at 26-29.] They did not get medical treatment for Hill because they did not want to get in trouble. [*Id*. at 26.] Hickman punched Hill so hard Hickman thought he broke Hill's jaw. [*Id*. at 23, 41.]

Hickman and Asher talked about what they were going to put in their incident reports to avoid getting in trouble and agreed they would falsely state Hill was combative and slipped and fell in the water when trying to pull away. [(16-CR-00050) R. 62: Damon Hickman, TR (Kevin Asher Jury Trial, Day 1) at 31-33.]

Hickman's report, dated November 16, 2012, stated that Hill became combative, and that Hickman had to use a "stiffarm [sic] to stop the inmate from doing harm to [the deputies] or hisself [sic]. The stiffarm [sic] caused the inmate to fall back into the wall." Asher's report, written nine months later on August 15, 2013, mirrored Hickman's, and added that Hickman's "stiff arm" caused Hill to lose "control of himself" and that Hill "slipped on the wet floor [and fell] into the wall." [R. 100: Exhibit and Witness List, Exhibit 12 (Incident report signed by Damon Hickman and witnessed by Kevin Asher), Exhibit 11 (Incident report signed by Kevin Asher and witnessed by Damon Hickman.] Neither report stated that Hill was injured or provided any additional description of force used by the deputies other than Hickman's "stiff arm." [*Id.*]

Photographs taken by Hill's daughter several days after the assault show the injuries to Hill's face. [R. 131: Gary Hill, TR (Hickman 404(b) hearing, Day 2) at 21; R. 100 Exhibit and Witness List, Exhibit 17 (Photograph of Gary Hill showing injuries to his face).] Hill sought medical treatment when he was released to a rehabilitation center.

He had bruising on his face for several months and still has numbness in his jaw from the assault. [R. 100: Exhibit and Witness List, Exhibit 21 (sealed medical records of Gary Hill); R. 131: Gary Hill TR (Hickman 404(b) hearing, Day 2) at 31-32.]

The court found by a preponderance of the evidence that Hickman assaulted Hill. [R. 105: Minute Entry Order.]

Hickman's job, based on his training and experience, was to keep the jail and inmates safe and secure, and he was aware he was not allowed to punish inmates for verbally misbehaving; however, Hickman testified during the Kevin Asher trial that he assaulted Turner and Hill because he could. [R. 131: Damon Hickman, TR (Kevin Asher Jury Trial, Day 2) at 77-78.]

FACTORS IN SUPPORT OF UPWAWRD VARIANCE PURSUANT TO 18 U.S.C. §§ 3553(a)(1) and (a)(2)(A)

When considering the factors set forth in 18 U.S.C. § 3553(a), including a sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense pursuant to 18 U.S.C. § 3553(a)(2)(A) and a sentence based upon the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1), a four level variance from the upper end of the advisory guidelines is warranted.

Hickman, a supervisor at the KRRJ for several years, instilled an environment of abuse and violence against inmates as set forth in detail above. He and his fellow deputies, as he has acknowledged, were obligated to keep the jail and the inmates safe.

However, under Hickman's leadership, he and a number of his fellow deputies engaged in acts of repeated violence against inmates going back to approximately 2005. Trent's death while senseless and deplorable came as no surprise to many of the deputies and inmates who spent time at the KRRJ and observed Hickman's bully mentality on a regular basis. Looking at his recreational use of unwarranted violence and complete disregard for the medical needs of those he injured, the eventual death of an inmate while the jail was under his watch was inevitable.

The brutality Hickman inflicted on Taylor Estep, Alex Taulbee, Dustin Turner and Gary Hill because he was "mad" or because "he could" demonstrates a complete lack of respect for the law and paints a picture of an individual who utilized his position of power and trust over many years to inflict unwarranted violence on those he was obligated to protect.

Not only did Hickman inflict violence on inmates himself, he engaged in these horrific acts with other supervisors including Asher and Howell. If the brutality was not aggravating enough, he then covered up the brutality inflicted on inmates by denying them medical treatment, writing false incident reports, pretending to take inmate Hill to a fake doctor after hitting him so hard he thought he broke his jaw, inflicting injuries upon himself and making a false report to a police officer after he and Asher assaulted Turner. He even denied medical treatment to Taulbee after he hit Taulbee so hard that Hickman broke his own hand. His violence and callousness towards inmates continued to worsen as evidenced by the terrible brutality he and Howell inflicted upon Trent followed by his

preparation of an entirely false observation log indicating Trent was "10-4,", when in fact it is clear from the overwhelming evidence presented during the Howell trial that Trent was likely deceased at that time. Hickman betrayed the community he was paid to serve and until Trent's death remained a supervisor at the KRRJ.

Although Hickman agreed to give testimony regarding Kevin Asher and William Curtis Howell, he was made fully aware that the court would consider his prior violent conduct towards Estep, Taulbee, Turner and Hill at the time of sentencing when imposing a sentence in addition to all of the surrounding circumstances of Trent's death. Hickman is also aware that the United States would seek a greater sentence than otherwise set forth by the advisory guidelines based upon the prior violence set forth above and the surrounding circumstances of the instant offense. [R. 116: Plea Agreement (16-CR-00050-ART); R. 37: Court, TR (Kevin Asher 404(b) hearing) at 10-11; R. 63: Damon Hickman, TR (Kevin Asher Jury Trial, Day 2) at 112-114; R. 207: Damon Hickman, TR (Jury Trial, Day 2), at 3-6.

The United States is asking the court to start near the high-end of the advisory guidelines when imposing a four-level upward variance. The Court can consider the aggravating nature of the underlying facts in this offense in starting at or near the high-end of the advisory guidelines and to grant an upward variance. *United States v. Nixon*, 664 F.3d 624, 626 (6th Cir. 2011). The court in *Nixon* held that it was permissible to vary upward because of the serious effect on operation of government even though the guideline range included an enhancement for targeting a government officer. Likewise,

the court can consider the nature and extent of Trent's injuries and the specific details of the obstructive conduct even though the advisory guidelines provide for certain enhancements for using a deadly weapon, inflicting permanent or life threatening injuries and obstruction of justice. Had Hickman merely kicked Trent a few times and inflicted injuries that left permanent scars and made one misrepresentation on an incident report or an observation log, he would be subject to the same enhancements. Here, Hickman and Howell brutally beat Trent and then left him in his cell for hours with no medical attention. These facts alone warrant an upward variance, as does the nature of the beating and the extent of the obstructive conduct by Hickman when he wrote an entirely false medical log to avoid getting in trouble. The false observation log portrayed Trent as fine when he was mortally wounded and close to death. *See also United States v. Lanning*, 633 F.3d 469, 474, 75 (6th Cir. 2011) upholding the court's decision to impose an upward variance under 18 U.S.C. § 3553(a) based on the need for deterrence and protection of the public, the seriousness of the offense, the need to provide him with treatment and his lack of respect of the law. The *Lanning* court imposed an upward variance primarily based on *Lanning's* history of petty crimes, which was permissible because the court did not overly emphasize his criminal history and likelihood of reoffending, but carefully balanced the sentencing factors to arrive at its upward variance. *Id.*

When the court considers all of the sentencing factors, particularly the serious nature of the instant offense and the history and characteristics of the defendant, a four-

level upward variance is warranted. Hickman's violence went undetected because of loyalty of fellow-deputies and the reluctance of witnesses like Dustin Turner, Taylor Estep, Alex Taulbee and Gary Hill to take on the KRRJ. It is understandable that inmates would remain silent not thinking they would be found credible over Hickman. This is exactly what Hickman banked on for so many years as he continued to inflict unwarranted violence upon inmates.

Hickman underestimated inmates like Gary Hill. Further, he never imagined his fellow deputy jailers such as Jarrod Lucas, Matthew Amburgey, J.C. Combs and even Jason Turner would come forward and cooperate regarding the violence inflicted on inmates by Hickman and others. Prior to sentencing, a judge may consider past crimes, including those for which a defendant has been indicted but not convicted, as well as the factual basis for dismissed counts. *Allen v. Stovall*, 156 F.Supp. 2d 791 (E.D. Michigan District Court 2001) citing *United States v. Johnson*, 823,F.2d 840, 842 (5th Cir. 1987).

A four-level variance (168-210 months imprisonment) similar to the upward variance imposed in *United States v. Borders*, 489 Fed. Appx. 859, 862 (6th Circuit 2012) where the court considered uncharged conduct and the 45% upward variance imposed in *United States v. Brock*, 501 F.3d 762 (6th. Cir. 2007)(abrogated by *Ocasio v. United States* on other grounds) citing *United States v. Poynter*, 495 F.3d 349, 354-55 (6th Cir. 2007) is appropriate.

Respectfully submitted:

CARLTON S. SHIER, IV
ACTING UNITED STATES ATTORNEY

T.E. WHEELER II
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

By: /s/ Hydee R. Hawkins

Hydee R. Hawkins
Assistant United States Attorney
260 West Vine Street
Lexington, KY 40507-1612
(859) 233-2661
Hydee.Hawkins@usdoj.gov

/s/ Sanjay Patel

Sanjay Patel
Trial Attorney
U.S. Department of Justice
Civil Rights Division, Criminal Section
601 D Street NW #5200
Washington, DC 20530
(202) 514-3204
(202) 514-8336 FAX
Sanjay.Patel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send an electronic notice to the following registered CM/ECF participants:

Eric E. Ashley
Counsel for Damon Wayne Hickman

s/Hydee R. Hawkins
Assistant United States Attorney
Lexington, KY 40507-1612
(859) 233-2661
Hydee.Hawkins@usdoj.gov

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CRIMINAL ACTION NO. 15-CR-00042-KKC

UNITED STATES OF AMERICA **PLAINTIFF**

V. **SENTENCING MEMORANDUM AND RESPONSE TO DOWNWARD DEPARTURE**

WILLIAM CURTIS HOWELL **DEFENDANT**

* * * * *

PROCEDURAL BACKGROUND

The Defendant (Howell) was charged in a two-count Indictment. [R. 1: Indictment.] Howell was convicted of both Counts following a four-day jury trial. Count One, willfully failing to provide necessary medical care to Larry Trent (Trent), a pretrial detainee, resulting in bodily injury to Trent, in violation of 18 U.S.C. §§ 2 & 242; Count Two, subjecting Trent to excessive force amounting to punishment resulting in bodily injury to Trent, in violation of 18 U.S.C. §§ 2 & 242. [R. 193: Jury Verdict.] The advisory guideline range as set forth in the Presentence Investigation Report is 151-188 months imprisonment.

The factors set forth in 18 U.S.C. § 3553(a), include but are not limited to;

- the nature and circumstances of the offense and history and characteristics of the Defendant;

- the need for the sentence imposed to reflect the seriousness of the offense;
- to promote respect for the law;
- to provide just punishment for the offense;
- to afford adequate deterrence to criminal conduct;
- to protect the public from further crimes of the Defendant; and,
- to provide the Defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The Defendant's conduct in this case while working as a supervisory deputy jailer at the Kentucky Regional River Jail (KRRJ) tasked with keeping order in the jail and keeping inmates safe is egregious. The United States is requesting a sentence within the advisory guidelines to reflect the seriousness of the offense, to promote respect for the law, to provide a just punishment for the offense pursuant to 18 U.S.C. § 3553(a)(2)(A) and based upon the nature and circumstances of the offense and the history and characteristics of the Defendant pursuant to 18 U.S.C. § 3553(a)(1).

FACTUAL BACKGROUND

Hickman and Howell were supervisory deputy jailers at the KRRJ on July 9, 2013, when they used excessive force against Trent, a pretrial detainee who died approximately four hours later. [R. 1: Indictment.] The assault that led to Trent's death began at approximately 7:19 a.m. when Hickman and Howell attempted to remove a mat from Trent's cell located in the detox area. [R. 217: Curtis Howell, TR (Jury Trial, Day 3) at 27-29; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 15-17; R. 196: Exhibit and

Witness List, Exhibits 6a-b (KRRJ video surveillance footage).] As Deputy Mize Neace testified during Howell's jury trial and was shown on the video footage, Trent was moved from general population to a detox cell several hours earlier after Trent appeared confused. [R. 196: Exhibit and Witness List, Exhibit 6d.] KRRJ Deputy James Combs (Combs) interacted with Trent as recently as approximately 7:00 a.m., and, according to Combs, Trent was not acting aggressively or causing any problems that would have required the removal of items from the cell. [R. 218: James Combs, TR (Jury Trial, Day 2) at 11-12.] Jason Turner (Turner) interacted with Trent minutes prior to Howell and Hickman opening Trent's cell door, and although Trent seemed to not comprehend some of Turner's questions, Trent was not posing a threat or doing anything that would have made it necessary to open his cell door and remove any items from his cell. [R. 223: Jason Turner, TR (Jury Trial, Day 2) at 11-12.]

When Hickman opened the cell door, Trent rushed out of the cell flailing his arms and made contact with Hickman with either an open hand or fist. [R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 17-19.] Hickman punched Trent and Trent fell to floor. [R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 17-19; R. 196: Exhibit and Witness List, Exhibits 6a-b (KRRJ video surveillance footage).] Trent then got up and ran past Hickman and Howell into the booking area. [R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 17-19.] Howell tased Trent as Trent ran into the booking area, however, the taser did not appear to affect Trent. [R. 217: Curtis Howell, TR (Jury Trial, Day 3) at 29-30; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 19-20.] Hickman threw Trent

down to the floor, and without justification, kicked Trent in the torso when he was lying on the floor of the booking area. [R. 217: Curtis Howell, TR (Jury Trial, Day 3) at 32, 86-87; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 20-22.] With the help of two other deputies, Hickman and Howell carried Trent back towards the detox hallway, a few feet away from the booking area. [R. 217: Curtis Howell, TR (Jury Trial, Day 3) at 34-35; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 21-22.] As the deputies carried Trent, he was able to obtain the taser. [R. 217: Curtis Howell, TR (Jury Trial, Day 3) at 35-36; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 23-24.] The deputies quickly placed Trent on the floor just inside the detox hallway, and within seconds, retrieved the taser from Trent. [R. 223 Jason Turner, TR (Jury Trial, Day 2) at 18-19; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 24-25.]

After deputies retrieved the taser, and while Trent was lying on the floor restrained by several deputy jailers, Hickman and Howell continued to assault Trent without justification. [R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 25, 27, 29-32.] As established during Howell's jury trial though the testimony of Hickman, Combs, Hazel Watts, Hazell Kilburn and Randall Howard, who saw different parts of the interaction, Howell punched Trent in the head, kicked Trent in the face and stomped on Trent's arm while Hickman repeatedly punched Trent in the head and tased him when Trent was restrained and posing no threat. [R. 208: Randall Howard, TR (Jury Trial, Day 3) at 97, 106-107, 109, 113; R. 218: James Combs, TR, (Jury Trial, Day 2) at 24-25; R. 208: Hazel Watts, TR (Jury Trial, Day 3) at 60-63.] Hickman and Howell were mad and cussing at

Trent during this time. [R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 35-37; R. 218: James Combs, TR (Jury Trial Day 2) at 24-27; R. 208: Hazel Watts, TR (Jury Trial, Day 3) at 60-63.]

After deputies placed him back in his cell, Howell stepped into the cell and kicked Trent before closing the door. [R. 207: Hazell Kilburn, TR (Jury Trial, Day 2) at 103; R. 207: R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 31-32.] Hickman was standing right next to Howell. [R. 207: Damon Hickman, TR (Jury Trial Day 2) at 32.] Howell, who was angry, called Trent a "mother fucker" at the time he stepped into his cell and kicked him in the face when Trent was posing no threat. [R. 223: Jason Turner, TR (Jury Trial, Day 2) at 24-25; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 35, 37.]

At the end of the assault, Trent was injured and bleeding from an open head wound. Hickman and Howell had Trent's blood on them. ??[R. 217, Curtis Howell, TR (Jury Trial Day 3) at 56-57, 85; R. 207: Damon Hickman, TR (Jury Trial Day 2) at 33-35; R. 196: Exhibit and Witness List, Exhibit 8c (photograph of Trent's face).] They cleaned the blood off of themselves, but left Trent in his cell without medical care because of "self-preservation," as further explained by Hickman during Howell's trial as not getting Trent treatment because they did not want to get in trouble. [R. 196: Exhibit and Witness List, Exhibits 6a-b (KRRJ video surveillance footage); R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 38.] Approximately four hours later, a maintenance worker discovered Trent unresponsive in his cell. [R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 45.]

Emergency responders performed CPR and transported Trent to the nearby hospital for treatment. [R. 206: Anthony Ford, TR (Jury Trial, Day 1) at 15.] However, attempts by Dr. Bart Francis and other hospital staff to revive Trent failed, and he was pronounced dead less than an hour after arriving at the hospital. Dr. Francis testified during Howell's jury trial that had Trent received timely treatment they would have discovered the internal bleeding and he would have had a good chance of surviving. An autopsy found that the primary cause of death was hemorrhaging caused by a pelvic fracture, and that blunt force trauma to Trent's head, trunk and extremities contributed to his demise. [R. 196: Exhibit and Witness List, Exhibit 9 (Stipulation regarding cause of death).]

Ford and Dr. Francis both testified during Howell's jury trial that Trent had multiple shoe and boot prints on his body, including a large boot print over his ribs. [R. 206: Anthony Ford TR (Jury Trial Day 1) at 15.] Trent suffered fractured ribs beneath the boot print and on the other side of his chest that were not caused by medical treatment. [R. 196: Exhibit and Witness List; Exhibit 9 (Stipulation regarding cause of death).] When Ford asked Hickman why nobody was rendering any medical treatment to Trent at the time emergency responders arrived, Hickman responded, "because he is an inmate." [R. 206: Anthony Ford TR (Jury Trial Day 1) at 18-19.]

Howell also prepared a false incident report. The incident report about the altercation with Trent omitted any reference to Hickman and Howell hitting and kicking Trent and omitted any reference to the injuries suffered by Trent during the altercation.

[R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 37-42; R. 196: Exhibit and Witness List, Exhibit 37 (Incident report prepared by William Curtis Howell dated 7/9/13).]

It was obvious to Howell and Hickman when Trent was placed back in his cell that he was seriously injured. Hazell Kilburn testified during Howell's jury trial that when she walked by Trent's cell prior to 9:00 a.m., he was lying on the floor of his cell not moving. [R. 207: Hazell Kilburn, TR (Jury Trial Day 3) at 104-106.] Robert Maggard also testified during Howell's jury trial that when he looked into Trent's cell shortly after the altercation Trent was not moving. Dr. Francis testified during Howell's jury trial that based upon the type of injuries Trent suffered, he would have likely been unconscious and unable to speak shortly after suffering this type of injury.

FACTUAL BACKGROUND OF PRIOR INMATE ASSAULT OF LARRY TRENT WATSON

December 27, 2012:

During the investigation, Larry Trent Watson (Watson) was interviewed by FBI Special Agent Christopher Hubbuch. Watson reported that the Defendant assaulted him on December 27, 2012. As Watson was leaving the KRRJ for court that day, he saw his girlfriend in the hallway. When Watson spoke to her, the Defendant became very angry, grabbed Watson by the neck, took him into the kitchen, and began to choke him. The Defendant told Watson that he took him into the kitchen because there were no cameras there. Two transport officers from Knott County (Stacey Garland and Ricky Prater) were present and observed the Defendant smack Watson on the back of the head after Watson

spoke to his girlfriend. These officers felt that the Defendant's use of physical force on Watson was inappropriate. (See attached sealed Exhibits 1 and 2).

RESPONSE TO DEFENDANT'S REQUEST FOR A DOWNWARD DEPARTURE BASED UPON HOWELL'S PHYSICAL IMPAIRMENT PURSUANT TO U.S.S.G. §5H1.4

Although there is no dispute that Howell has a litany of physical conditions that require medication, and that vision problems have rendered him unable to drive, these medical conditions are not so extreme that he cannot receive adequate care at a federal medical center. When Howell was housed at FMC Butner, there was no indication he suffered from any physical condition that could not be adequately addressed. In fact, it was noted that his mental and emotional condition actually improved during his time at FMC Butner.

Howell currently resides at his own residence, has had no significant difficulty complying with the terms of his supervision, has been mobile enough to get to medical appointments, his presentence interview, and his court appearances. Howell was able to navigate to and from his jury trial and remain in the courtroom for eight to nine hours per day. Howell's medical conditions are not to such an unusual degree that this case can be distinguished from the typical case covered by the guidelines.

Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary

physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirmed defendant, home detention may be as efficient as, and less than, imprisonment. U.S.S.G. §5H1.4.

In *United States v. Helton*, 676 Fed.Appx 476, *480-81 (6th Cir. 2017), the district court's denial of a downward departure pursuant to U.S.S.G. § 5H1.4 was upheld. Although the district court denied Helton's request for a downward departure, the court did consider his poor health when applying all of the sentencing factors of 18 U.S.C. § 3553(a) and granted *Helton* a variance below the minimum guideline range when imposing a sentence of 180 months imprisonment. *Id.* at *480-81. Similarly, although it is proper for the court to consider Howell's health issues when weighing the statutory sentencing factors, Howell's motion for a downward departure based on his health conditions should be denied.

RESPONSE TO DEFENDANT'S REQUEST FOR A DOWNWARD DEPARTURE BASED UPON HOWELL'S MENTAL AND EMOTIONAL IMPAIRMENT PURSUANT TO U.S.S.G. §5H1.3

(this section to be filed under seal)

RESPONSE TO DEFENDANT'S REQUEST FOR A DOWNWARD DEPARTURE BASED UPON THE VICTIM'S CONDUCT PURSUANT TO U.S.S.G. §5K2.10

Howell's request for a downward departure based on Trent's wrongful conduct is not supported by the evidence. Howell violently assaulted Trent after Trent was fully restrained and causing absolutely no threat. Howell, still angry, even continued to assault Trent after he was lying helpless and bleeding in his cell by stepping into his cell, cussing at Trent and kicking him hard enough to leave the imprint of his shoe on Trent's face. Howell, who was still angry, called Trent a "mother fucker" at the time he stepped into his cell and kicked him in the face when Trent was posing no threat. [R. 223: Jason Turner, TR (Jury Trial, Day 2) at 24-25; R. 207: Damon Hickman, TR (Jury Trial, Day 2) at 35, 37; R. 196: Exhibit and Witness List, Exhibit 8c (photograph of Trent's face).]

"If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." U.S.S.G. §5K2.10. In determining whether a downward departure is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation. *Id*.

If a defendant reasonably believes himself to be in danger due to the conduct of the victim, then a downward departure may be granted. *United States v. Williams*, No. 7: 14-015-DCR, Sentencing Memorandum by Eric Williams (D.E. 30); Minute Entry for Sentencing as to Eric Williams (D.E. 32). *Williams* was serving a prison sentence at Big Sandy and witnessed a fight break out between two other inmates. (D.E. 30). *Williams* stepped in to defend another inmate and stabbed the victim in the neck with a shank. *Id.* The victim eventually bled out and died at the hospital. Plea Agreement for Eric Williams (D.E. 25). The victim was considerably bigger than the inmate *Williams* was defending and had a reputation for violence. (D.E. 30) The victim was 5'10" and 229 pounds, the inmate *Williams* was defending was 5'4" and 110 pounds and *Williams* was 5'10" and 155 pounds. Sentencing Memorandum by the United States (D.E. 31). *Williams* was granted a downward departure at the time of sentencing pursuant to U.S.S.G. §5K2.10. (D.E. 32). *See also United States v. Church*, 731 F.3d 530 (6th Cir. 2013). *Church* and the victim were both inmates at Big Sandy and affiliated with a

prison gang. *Id*. at 532-33. Although the victim was the initial aggressor towards a third inmate, and *Church* took steps to diffuse the situation, *Church* and another inmate later the same day confronted the victim. *Id*. When the victim made a threatening comment and was knocked to the ground by the other inmate, *Church* instructed the other inmate to further assault the victim and left the cell. *Id*. The victim died from injuries inflicted with a shank by the other inmate. *Church* denied knowledge of the shank or that the beating would be so severe. *Church's* request for a downward departure pursuant to U.S.S.G. §5K2.10 was denied by the district court and upheld on appeal. *Id*. at 533-34.

Although Trent came running out of his cell when Hickman and Howell opened the cell door, he at most caused a superficial cut to Howell's lip as he attempted to run away from them. The video footage, along with the testimony from numerous witnesses at trial, does not support Howell's request for a downward departure because of Trent's conduct. Trent never posed the level of threat that justified the amount of force used against him. Even Howell testified that the kick Hickman administered to Trent when he was lying on the ground in the booking area was excessive.

Trent grabbed the taser and had possession of it for several seconds, which there is no dispute, created a potential for danger. However, given the size of Trent compared to all of the deputies that had Trent restrained in the hallway after the taser was removed, his lack of resistance after the taser was removed, his inability to cause any harm to the deputies, there was no longer a reasonable perception of danger to the deputies. Additionally, there was an alarmingly disproportionate amount of violence inflicted on

Trent by both Howell and Hickman after he no longer posed any danger. When considering all of the factors, Howell has not established a sufficient basis for a downward departure and his motion should be denied.

FACTORS IN SUPPORT OF GUIDELINE SENTENCE PURSUANT TO 18 U.S.C. §§ 3553(a)

When considering the factors set forth in 18 U.S.C. § 3553(a), including a sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense pursuant to 18 U.S.C. § 3553(a)(2)(A) and a sentence based upon the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1), a sentence within the advisory guidelines is warranted.

Howell, a supervisor at the KRRJ for several years, contributed to the environment of abuse and violence against inmates as set forth in detail above. He and his fellow deputies, as he has acknowledged during his trial testimony, were obligated to keep the jail and the inmates safe. However, he abused his supervisory role by engaging in unwarranted physical abuse of inmates, the most senseless and cruel being the violence he and Hickman inflicted upon Trent. Trent's death while senseless and deplorable came as no surprise to many of the deputies and inmates who spent time at the KRRJ and observed Hickman's bully mentality on a regular basis and to a lesser extent, lack of respect for inmates by Howell. Hickman and Howell were both paid supervisors the morning Trent was assaulted and left bloodied and beaten in his cell by Hickman and

Howell. Their complete disregard for the welfare of another human being after the escalating amount of violence they used against Trent is difficult to comprehend, yet looking at the culture led by Hickman and followed by Howell and others, the eventual death of an inmate in this environment was inevitable.

The unnecessary force Howell inflicted on Watson because he was mad or frustrated, and moreover, the brutality he and Hickman inflicted on Trent because they were angry, demonstrates a complete lack of respect for the law. The force used by Howell sadly demonstrates Howell's willingness to utilize his position of power and trust to inflict unwarranted violence on those he was obligated to protect. Howell's subsequent actions are incredible. Howell, admittedly covered in Trent's blood, failed to take any action to help Trent, even though by his own admission during his trial testimony that he knew Trent was injured, and he was obligated to ensure Trent received medical attention.

The brutality inflicted upon Trent is an aggravating factor, and his conduct became even more aggravated when he covered up the brutality by failing to tell the jail administrator that Trent was bleeding from a head wound and failed to make any effort to get Trent medical treatment. [R. 217: Howell, TR (Jury Trial, Day 3) at 61, 101, 107.] Howell then wrote a false incident report in which he omitted the use of force used by Hickman and Howell against Trent and omitted any reference to Trent being injured and bleeding. [R. 217: Howell, TR (Jury Trial, Day 3) at 92-94.] His own violence against Trent and the violence he observed Hickman inflict upon Trent absolutely required him,

as part of his duty to keep inmates safe and the jail secure, to ensure Trent received medical attention. Howell betrayed the community he was obligated to serve by losing his temper and inflicting unwarranted brutality upon Trent. He further betrayed the community by his obstructive behavior following the assault of Trent.

Although there is no dispute that Howell has some genuine physical impairments and had some serious mental impairments, those impairments are not outweighed by other sentencing factors the court considers when imposing an appropriate sentence. Most significant in this case,the serious nature of this offense, promoting respect for the law and deterring this conduct in the future.

The United States is asking the court to impose a sentence within the advisory guidelines. The court can consider the nature and extent of Trent's injuries and the specific details of the obstructive conduct. Had Howell and Hickman merely kicked Trent a few times and inflicted injuries that left permanent scars and made one misrepresentation on an incident report or an observation log, they would be subject to the same enhancements. Here, Hickman and Howell brutally beat Trent after he was lying helpless and posing no threat. And while difficult to comprehend, they left him in his cell for hours with no medical attention. These facts alone warrant a guideline sentence rather than a downward departure or downward variance, as does the nature of the beating and the extent of the obstructive conduct by Howell. Howell lied to his supervisor by telling him nobody was injured and then wrote a false incident report completely void of the overwhelming amount of force used by Howell and Hickman

upon Trent and that Trent had suffered an open head wound and was bleeding when they placed him back into his cell.

When the court considers all of the sentencing factors, particularly the serious nature of the instant offense, a downward departure pursuant to 5H1.3 and 5H1.4 is not warranted nor is a downward variance for those conditions. However, should the court find that a downward departure or a downward variance pursuant to 18 U.S.C. § 3553(a) factors is appropriate, the United States for all the above mentioned reasons urges the court on balance not to grant a departure or variance greater than four-levels. Howell is asking the court to grant him probation and based upon all of the sentencing factors in light of the evidence presented at trial that would be a grave miscarriage of justice. Howell may have health issues and it may be difficult to be away from his son, however, he was part of a brutal assault on an inmate after the inmate was fully restrained by almost 900 pounds of deputy jailers and not posing any threat. Howell thought nothing of leaving that person helpless without a care other than to try to keep himself and Hickman out of trouble by lying to the jail administrator and falsifying his incident report to make it appear the altercation was minor.

Thankfully, a few deputy jailers at the KRRJ agreed to break the silence about what took place off camera. Luckily, inmates that had been in and out of the KRRJ, some who will likely be back inside the KRRJ, were willing to come forward and tell the jury the nightmare they helplessly watched unfold that dreadful morning of July 9, 2013. Howell characterizes the witnesses as inconsistent and not credible, which is

understandable, however, that is clearly not how the jurors viewed the witness testimony in this case.

A guideline sentence, when considering all of the sentencing factors and the underlying facts in this case, is appropriate.

Respectfully submitted:

CARLTON S. SHIER, IV
ACTING UNITED STATES ATTORNEY

JOHN M. GORE
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

By: /s/ Hydee R. Hawkins
Hydee R. Hawkins
Assistant United States Attorney
260 West Vine Street
Lexington, KY 40507-1612
(859) 233-2661
Hydee.Hawkins@usdoj.gov

/s/ Sanjay Patel
Sanjay Patel
Trial Attorney
U.S. Department of Justice
Civil Rights Division, Criminal Section
601 D Street NW #5200
Washington, DC 20530
(202) 514-3204
(202) 514-8336 FAX
Sanjay.Patel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2017, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send an electronic notice to the following registered CM/ECF participants:

Willis G. Coffey
Counsel for William Curtis Howell

s/Hydee R. Hawkins
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT LONDON
CRIMINAL MINUTES - SENTENCING

Case No. 6:15-cr-42-KKC-01 At London Date November 1, 2017

USA vs Damon Wayne Hickman X present ____ custody X bond ____ OR

DOCKET ENTRY: The parties appeared for sentencing as noted. The Court adopts the Presentence Report, including the guideline calculations, prepared by the United States Probation Office as its findings. There were no objections to the sentence as stated. The Government's oral motion to dismiss the Indictment in London Criminal Case No.: 6:16-cr-42-KKC-01 is GRANTED for the reasons as stated on the record. The Government's Sealed Motion [DE # 212] is GRANTED for the reasons as stated on the record.

PRESENT: HON. KAREN K. CALDWELL, CHIEF U.S. DISTRICT JUDGE

Rebecca Chaney	Diane Farrell	Hydee Hawkins & Sanjay Patel
Deputy Clerk	Court Reporter	Assistant U.S. Attorney

Counsel for Deft Eric Ashley X present X retained ____ appointed

PROCEEDINGS: SENTENCING (non-evidentiary)

X Objections to Presentence Report are OVERRULED for the reasons as stated on the record.

____ No objections to Presentence Report.

____ The Court Reporter shall transcribe the proceeding of the hearing on the Objections to the Presentence Report and file in the record.

X Court's Advice of Right to Appeal read in open court and provided to defendant.

X Transcript shall be deemed as written findings of Court.

X Judgment shall be entered (See Judgment & Commitment.)

____ Defendant released consistent with the terms and conditions of the Judgment to be entered herewith.

X Defendant remanded to custody of the United States Marshal.

Copies: COR, USP, USM

Initials of Deputy Clerk rcc

TIC: 1/35

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky – Southern Division at London

UNITED STATES OF AMERICA
v.
Damon Wayne Hickman

JUDGMENT IN A CRIMINAL CASE

Case Number: 6:15-CR-42-KKC-1
USM Number: 18315-032
Eric E. Ashley
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1, 2, and 3

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:242 & 2	Aiding and Abetting Deprivation of Civil Rights Under Color or Law	07/09/2013	1&2
18:1519	Obstruction of Justice	07/09/2013	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) Indictment 6:16-CR-42-KKC-01 ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 1, 2017
Date of Imposition of Judgment

Karen K. Caldwell
Signature of Judge

Honorable Karen K. Caldwell, Chief U.S. District Judge
Name and Title of Judge

11/3/17
Date

DEFENDANT: Damon Wayne Hickman
CASE NUMBER: 6:15-CR-42-KKC-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Ct. 1: 120 Months; Ct. 2: 120 Months; Ct. 3: 126 Months, all counts imposed concurrent, for a Total Term of ONE HUNDRED TWENTY-SIX (126) MONTHS IMPRISONMENT

☒ The court makes the following recommendations to the Bureau of Prisons:
It is recommended that the defendant participate in a job skills and/or vocational training program.
It is recommended that the defendant participate in a mental health assessment and any recommended treatment.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Damon Wayne Hickman
CASE NUMBER: 6:15-CR-42-KKC-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

THREE (3) YEARS on each Counts 1, 2, and 3, concurrent, for a Total Term of THREE (3) YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Damon Wayne Hickman
CASE NUMBER: 6:15-CR-42-KKC-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Damon Wayne Hickman
CASE NUMBER: 6:15-CR-42-KKC-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must attend and successfully complete any mental health diagnostic evaluations and treatment or counseling programs as directed by the probation officer, to include anger management. You must pay for the cost of treatment services to the extent you are able as determined by the probation officer.

2. You must have no contact with the victim's family. (The Government shall provide the Probation Office with a list of family members prior to the defendant's release from custody.)

DEFENDANT: Damon Wayne Hickman
CASE NUMBER: 6:15-CR-42-KKC-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 300.00 ($100/ct)	$ N/A	$ Waived	$ TBD

☐ The determination of restitution is deferred until ____ ____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Damon Wayne Hickman
CASE NUMBER: 6:15-CR-42-KKC-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
Restitution shall be determined at a later date. Any outstanding balance owed upon commencement of incarceration must be paid in accordance with the Federal Bureau of Prisons' Inmate Financial Responsibility Program. Any outstanding balance owed upon commencement of supervision must be paid according to a schedule set by subsequent orders of the Court.
Criminal monetary penalties are payable to:
Clerk, U. S. District Court, Eastern District of Kentucky
310 S. Main Street, Room 215, London KY 40741

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Friday, February 23, 2018

Former Supervisory Deputy Jailer at Kentucky River Regional Jail Sentenced to 10 Years in Prison for Charges Related to the Death of a Detainee

The Justice Department today announced that William Curtis Howell, 61, a former supervisory deputy jailer at the Kentucky River Regional Jail (KRRJ) in Perry County, Kentucky, has been sentenced to 120 months in federal prison related to his role in violently assaulting a pre-trial detainee and willfully failing to provide necessary medical attention that led to his death. Acting Assistant Attorney General John Gore of the Civil Rights Division, U.S. Attorney Robert M. Duncan Jr. for the Eastern District of Kentucky, and Special Agent in Charge Amy Hess for the Federal Bureau of Investigation, made the announcement.

United States District Judge Karen K. Caldwell formally sentenced Howell, on his conviction. Under federal law, Howell must serve 85 percent of his prison sentence. Following the completion of his prison term, he will be under the supervision of the United States Probation Office for three years.

On May 11, 2017, a jury convicted Howell of using excessive force against a detainee, Larry Trent, 54, and to deliberately denying him medical care after violently beating him. Another former supervisory deputy jailer, Damon Wayne Hickman, pleaded guilty on Nov. 9, 2016, to the same charges, and to obstructing justice by creating a fake medical log to cover up his and Howell's misconduct. Hickman was sentenced on Nov. 1, 2017, to serve 126 months in prison.

According to evidence and testimony presented during Howell's jury trial and Hickman's pretrial hearings, on July 9, 2013, at the Kentucky River Regional Jail in Hazard, Kentucky, Hickman and Howell violently beat Trent and left him in his cell, seriously injured and bleeding from an open head wound. Trent, who was in custody for a DUI charge, ultimately died from injuries sustained during the beating. Hickman, who was initially charged along with Howell, pleaded guilty prior to trial and testified against Howell.

According to evidence, the assault started when Howell and Hickman opened the door to Trent's cell to remove a sleeping-mat, and Trent ran out of the cell. Howell tased Trent and after Trent was brought to the floor, Hickman, without justification, violently kicked Trent in the ribs. While deputies carried Trent back to his cell, Trent took the taser from the deputy jailers. Witnesses testified that after deputies retrieved the taser from Trent and while Trent was restrained on the floor by deputy jailers, Howell and Hickman, without justification, punched, kicked, and stomped on Trent. Witnesses further testified that, before closing the cell door, Howell stepped into Trent's cell and kicked Trent in the head while Trent was on the floor and posing no threat. Further testimony was presented that, after the assault, Trent's blood was in the detox hallway, booking area and on the deputies involved.

The evidence further revealed that Trent was lying motionless in his cell, without medical attention, with blood all over his face. Approximately four hours after the beating, another employee at the jail discovered Trent's motionless body. Paramedics were summoned and Trent was transported to a local hospital, where he was pronounced dead.

"Corrections officers throughout the country carry out their duties in a responsible manner on a daily basis," said Acting Assistant Attorney General John Gore of the Civil Rights Division. "Attacks like this one dishonor those responsible corrections officers and is a violation of civil rights, and the Department of Justice will prosecute such misconduct."

“There is no place in law enforcement or corrections for this shocking and illegal conduct,” said U.S. Attorney Robert M. Duncan Jr. “The actions of those convicted dishonor the work done and sacrifices made by the overwhelming majority of law enforcement and corrections officers. All persons, including pretrial detainees and inmates, should be free of this sort of abuse. Our Office is committed to prosecuting these cases and ensuring that all persons are treated fairly under the law.”

Autopsy results presented at trial showed that Trent died from internal bleeding caused by a displaced pelvic fracture, and from blunt force trauma to his head, torso, and extremities.

According to evidence presented at pretrial hearings for Hickman and at an unrelated jury trial of another KRRJ supervisory deputy jailer, Kevin Asher, Hickman and Asher assaulted another pre-trial detainee at the same jail in 2012. On Oct. 19, 2017, Asher was sentenced to 108 months imprisonment for his involvement in that unrelated inmate assault.

The Kentucky River Regional Jail houses pre-trial detainees from Perry and Knott Counties. As a supervisory deputy jailer, Hickman was responsible for the custody, care, safety and control of the inmates at the jail.

The investigation was conducted by the FBI and the Kentucky State Police. Assistant U.S. Attorney Hydee Hawkins of the United States Attorney’s Office and Trial Attorney Sanjay Patel of the Civil Rights Division prosecuted this case on behalf of the federal government.

Component(s):
Civil Rights Division
Civil Rights - Criminal Section
USAO - Kentucky, Eastern

Press Release Number:
18-235

Updated February 23, 2018

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 – Criminal Monetary Penalties

UNITED STATES DISTRICT COURT

Eastern District of Kentucky – Southern Division at London

UNITED STATES OF AMERICA
v.
William Curtis Howell

JUDGMENT IN A CRIMINAL CASE

Case Number: 6:15-CR-42-KKC-02

USM Number: 18316-032

Willis G. Coffey
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 & 2 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:242	Deprivation of Rights Under Color of Law (Resulting in Bodily Injury), Aiding and Abetting	07/09/13	1 & 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 23, 2018
Date of Imposition of Judgment

Karen K. Caldwell
Signature of Judge

Honorable Karen K. Caldwell, Chief U.S. District Judge
Name and Title of Judge

2/23/18
Date

DEFENDANT: William Curtis Howell
CASE NUMBER: 6:15-CR-42-KKC-02

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Cts. 1 & 2: One Hundred Twenty (120) Months on each Count to run concurrently, for a total term of ONE HUNDRED TWENTY (120) MONTHS

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant participate in any mental health treatment for which he qualifies while in custody.
It is recommended that the defendant get credit for time served for time served in Perry County Circuit Court Case No.: 13-CR-172.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 04/13/2018.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: William Curtis Howell
CASE NUMBER: 6:15-CR-42-KKC-02

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Three Years on each of Counts 1 & 2 to run concurrently, for a total term of THREE (3) YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: William Curtis Howell
CASE NUMBER: 6:15-CR-42-KKC-02

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: William Curtis Howell
CASE NUMBER: 6:15-CR-42-KKC-02

SPECIAL CONDITIONS OF SUPERVISION

1. You must attend, successfully complete, and pay for any mental health diagnostic evaluations and treatment or counseling programs as directed by the probation officer.

2. You must have no contact with the victim's family.

3. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1), but including other devices excluded from this definition), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search will be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

4. Per USSG §5F1.5, the Court imposes an occupational restriction as to employment in the corrections industry.

5. You must provide the probation officer with access to any requested financial information.

6. You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you are in compliance with the installment payment schedule.

DEFENDANT: William Curtis Howell
CASE NUMBER: 6:15-CR-42-KKC-02

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00 ($100/Count)	$ N/A	$ Waived	$ 480.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Estate of L.T. (Victim) ATTN: Jennifer Brewer 302 Fern Court Winchester, KY 40391-7119	$480.00	$480.00	100%

TOTALS	$ 480.00	$ 480.00	100%

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: William Curtis Howell
CASE NUMBER: 6:15-CR-42-KKC-02

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 680.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Any outstanding balance owed upon commencement of incarceration must be paid in accordance with the Federal Bureau of Prisons' Inmate Financial Responsibility Program. Any outstanding balance owed upon commencement of supervision must be paid according to a schedule set by subsequent orders of the Court. Criminal monetary penalties are payable to: Clerk, U. S. District Court, Eastern District of Kentucky, 310 S. Main Street, Room 215, London KY 40741.

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

William Curtis Howell (6:15-CR-42-KKC-02), $480.00; Damon Wayne Hickman (6:15-CR-42-KKC-01), $480.00; Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: March 14, 2019

Mr. Eric E. Ashley
Law Offices of Eric E. Ashley
711 W. Main Street
Louisville, KY 40202

Mr. Thomas E. Chandler
Dayna Zolle
U.S. Department of Justice
Civil Rights Division, Appellate Section
P.O. Box 14403
Washington, DC 20044-4403

Ms. Hydee R. Hawkins
Mr. Charles P. Wisdom Jr.
Office of the U.S. Attorney
260 W. Vine Street, Suite 300
Lexington, KY 40507-1612

Mr. Brian P. Lennon
Warner, Norcross & Judd
111 Lyon Street, N.W., Suite 900
Grand Rapids, MI 49503

Mr. Adam Troy Ratliff
Warner, Norcross & Judd
2000 Town Center, Suite 2700
Southfield, MI 48075

Re: Case No. 17-6391/18-5206, *USA v. Damon Hickman*
Originating Case No. : 6:15-cr-00042-1

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Robert R. Carr

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 19a0120n.06

Case Nos. 17-6391/18-5206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAMON HICKMAN (17-6391); WILLIAM CURTIS HOWELL (18-5206), Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BEFORE: KEITH, STRANCH, and DONALD, Circuit Judges.

BERNICE BOUIE DONALD, Circuit Judge. This consolidated appeal arises from the beating death of a pre-trial detainee at the Kentucky River Regional Jail ("KRRJ"), at the hands of Damon Hickman and William Curtis Howell, KRRJ supervisory deputy jailers. Hickman pleaded guilty to two counts of willful deprivation of constitutional rights (aiding and abetting), in violation of 18 U.S.C. §§ 242 and 2, and one count of obstruction of justice, in violation of 18 U.S.C. § 1519, and was sentenced to 120 months' imprisonment. Howell was tried by a jury and convicted of two counts of willful deprivation of constitutional rights (aiding and abetting), in violation of 18 U.S.C. §§ 242 and 2, and sentenced to 120 months' imprisonment. They each filed separate appeals.

Hickman argues that the district court erred by granting the government's motion for a downward departure, but then failing to apply an actual reduction to his sentence. Hickman also

challenges the district court's application of the following sentencing enhancements: (1) a four-level sentencing enhancement for use of a dangerous weapon under U.S.S.G. § 2A2.2(b)(2)(B); (2) a seven-level enhancement for inflicting permanent or life-threatening injuries under § 2A2.2(b)(3)(C); (3) a two-level enhancement for the victim being restrained under § 3A1.3; (4) a two-level enhancement for obstruction of justice under § 3C1.1; and (5) a six-level enhancement for acting under color of law under 2H1.1(b)(1). Howell argues that the district court erred by: (1) failing to properly instruct the jury on the subjective aspect of deliberate indifference, and (2) improperly permitting the jury to consider his falsification of two reports as evidence of having a guilty conscience. We affirm as to both defendants.

I. BACKGROUND

On July 5, 2013, Larry Trent was arrested on a bench warrant and for driving under the influence of alcohol, and was detained at the KRRJ. Trent was initially placed in general population, but after he became confused and disoriented, jailers determined that he was detoxing and moved him to a detox cell for closer observation. On the morning of July 9, 2013, Hickman and Howell arrived for their 7:00 a.m. shift. Howell had a brief encounter with Trent, in which he described Trent as "confused" and "talking out of his head" stating someone was "going to kill [him] in the morning." According to Hickman, Trent was not posing any danger or displaying any signs of aggression, but Hickman "could tell [Trent] was withdrawing from something" because he was "fidgeting" with screws.

Believing Trent should not have a mat or other personal item in his cell at the time, Hickman sought Howell's assistance in removing them. As Hickman and Howell opened Trent's cell, Trent rushed towards them "flailing" his arms, striking Hickman. Hickman responded by punching Trent twice in the face and head, and Howell began tasing Trent. Although Trent initially

went down, he immediately got up and hurried out of the cell towards the booking area of the jail. Howell and Hickman followed behind, and Howell began applying the taser to Trent's lower back. When the taser did not appear to affect Trent, Hickman forced Trent to the ground. Eventually, several other deputy jailers began assisting in restraining Trent.

After Trent was subdued and lying on the floor, Hickman—standing 6'6 tall and weighing nearly 400 pounds—kicked Trent in the torso, leaving an imprint of his boot in Trent's body. With the help of other deputy jailers, Hickman and Howell then carried Trent back to the detox cell. At some point, Trent got a hold of Howell's taser and began deploying it. Because the taser prongs were still attached to Trent, he repeatedly shocked himself. The deputies immediately placed Trent back on the floor outside of the detox cell and retrieved the taser. As several jailers restrained Trent on the floor near the cell, Hickman and Howell continued to punch, kick and stomp Trent. Specifically, Howell repeatedly punched Trent in the head and stomped on Trent's arm, as Hickman continuously shocked Trent with the taser gun. Either Howell or Hickman also kicked Trent in the pelvic area. After placing Trent back in his cell, Howell stepped in the cell and began "kick[ing] [Trent] in the face" with so much force that he left his shoe impression on Trent's head. Hickman and Howell then left Trent in the cell bleeding from an open wound to his face.[1] Neither sought medical assistance for Trent.

Pursuant to KRRJ procedure, jailers must prepare an incident report whenever force is used on an inmate, whether reasonable or not, and a taser report if a taser gun is deployed. The report must include "why [the force] was used" and "any injuries that an inmate sustains" so that incidents involving force "can be investigated and looked at" by the Department of Corrections. Some time after assaulting Trent, Howell completed an incident and taser report. However, Howell failed to

[1]Much of the assault was captured on surveillance.

disclose that Hickman kicked Trent in the torso, that Howell punched Trent in the face, or that Howell kicked Trent in the head after placing him back in his cell. Nor did Howell indicate in the report that Trent was bleeding from an open head-wound and was otherwise injured. Howell also called the jail administrator, Tim Kilburn, to report the incident. Howell testified that he informed Kilburn that Trent "had a cut on his head." However, Kilburn's notes reflected that Howell informed him that "no one had any injuries, except for [Howell]" having a "busted lip." Hickman then authored an observation log in which he falsely reported that he checked on Trent numerous times and that Trent was "10-4"—an indication that Trent was okay.

Hours after the assault, a KRRJ maintenance worker discovered Trent unresponsive in his cell. Emergency responders arrived and noted large amounts of blood on the floor, walls, and "sink area" of Trent's cell, and multiple shoe and boot prints on Trent's body. What "stuck out the most" to the emergency technician was the large "boot print" on Trent's chest. Trent was transported to a local hospital, where he was pronounced dead. An autopsy revealed Trent's primary cause of death was hemorrhaging, caused by a displaced pelvic fracture. Blunt force trauma to Trent's head, trunk and extremities also contributed to his death. On October 27, 2015, a grand jury indicted Hickman and Howell on two counts of aiding and abetting deprivation of rights under color of law, in violation of 18 §§ U.S.C. 242 and 2, and one count of obstruction of justice, in violation of 18 U.S.C. § 1519.

Hickman's Sentence

Hickman pleaded guilty to each count in the indictment. At sentencing, the district court adopted the recommendations in Hickman's presentence investigation report ("PSR"). Hickman's PSR revealed that, for sentencing purposes, Hickman's offenses would be "grouped together" under count one of the indictment. Hickman's PSR revealed a base offense level of 14 for count

one. *See* U.S.S.G. § 2H1.1; § 2A2.2. He received a four-level increase for use of a dangerous weapon, *see* § 2A2.2(b)(2)(B), and a seven-level increase because the victim sustained life-threatening injuries, *see* 2A2.2(b)(3)(C). However, because the "cumulative adjustments from application of subdivisions (2) and (3) shall not exceed 10 levels," *see* § 2A2.2(b)(3)(E), the district court adjusted Hickman's offense level to 10, bringing his total base offense level to 24. From there, he received a six-level increase because the offense was committed under color of law, *see* § 2H1.1(b)(1); a two-level increase because the victim was restrained in the course of conduct, *see* § 3A1.3; a two-level increase for obstruction of justice, *see* § 3C1.1; and a three-level reduction for acceptance of responsibility, for an adjusted offense level of 31.

Hickman objected to each enhancement, but the district court overruled his objections. The district court adopted the PSR's advisory sentencing guideline range of 108 to 135 months' imprisonment. The government moved for a four-level upward variance based on the seriousness of Hickman's offense, and also for a 35% downward departure from the varied range based on Hickman's cooperation in the case.[2] As to the government's request for an upward variance, the district court stated that although it would "ordinarily . . . vary upward" it was "not going to do that" because Hickman "accepted responsibility for his actions and has cooperated with the government." The court then addressed the government's request for a downward departure, which it also denied. In doing so, the court noted Hickman's cooperation, but ultimately determined that, because of the "severity of the crime," it was "not persuaded that [Hickman] should be able to cooperate his way out of the hole that he has dug in this case." The court sentenced Hickman to 126 months' imprisonment.

[2]Hickman was also indicted on related charges stemming from an assault on two other inmates. As part of Hickman's plea agreement, the government agreed to dismiss the unrelated indictment, but noted it would seek an upward variance based on the unrelated conduct.

Howell's Conviction and Sentence

Howell proceeded to trial on two counts of deprivation of constitutional rights under color of law, in violation of 18 U.S.C. §§ 242 and 2: one for deliberate indifference to Trent's medical needs, and the other for depriving Trent of his constitutional right to be free from excessive force. Before closing arguments, the district court held a jury instruction conference. As relevant here, Howell objected to two proposed jury instructions: (1) the proposed jury instruction stating that the jury may consider as evidence of consciousness of guilt that he omitted information from the taser and incident report, and (2) a portion of the deliberate indifference instruction stating that "[j]ail officials who actually know of a substantial risk to pretrial detainees' health or safety are not deliberately indifferent if the jail official responds reasonably."

With respect to the first, Howell argued that "an innocent person may omit certain information for some other reason." The district court overruled Howell's objection, finding that "there was evidence that information was omitted" and that Howell was free to argue that the omission was "by mistake or [that it] meant nothing."

With respect to the second, Howell's challenge was successful. He argued that the jury instruction improperly lowered the state of mind to a "negligence" standard for deliberate indifference, where a heightened standard was required. The district court sustained Howell's objection and modified that portion of the instruction as follows:

> Deliberate indifference requires that the defendant knew of and disregarded a substantial risk of serious of serious harm to [the detainee's] health and safety, even if the harm ultimately was not averted.

Other than requesting the court to add that "[m]ere negligence is insufficient to prove . . . that definition," Howell had "[no] more objections" to the instruction. The jury convicted Howell on both counts, and the district court sentenced him to 120 months' imprisonment.

II. ANALYSIS

a. Hickman's Sentencing Challenge

On appeal, Hickman argues that the district court erred by granting the government's motion for a downward departure but then failing to apply an actual reduction to his sentence. He also challenges the district court's application of five sentencing enhancements: (1) a four-level enhancement for use of a dangerous weapon under § 2A2.2(b)(2)(B); (2) a seven-level enhancement for inflicting permanent or life-threatening injuries under § 2A2.2(b)(3)(C); (3) a two-level enhancement for finding that the victim was restrained under § 3A1.3; (4) a two-level enhancement for obstruction of justice under § 3C1.1 ; and (5) a six-level enhancement for acting under color of law under 2H1.1(b)(1). We disagree with Hickman as to each challenge.

We review the procedural reasonableness of a district court's sentence for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). "In reviewing for procedural reasonableness, a district court abuses its discretion if it commits a significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range" or by "selecting a sentence based on clearly erroneous facts . . . ." *United States v. Callahan*, 801 F.3d 606, 626 (6th Cir. 2015) (quoting *United States v. Johnson*, 640 F.3d 195, 201–02 (6th Cir. 2011)) (internal quotation marks omitted). We accord a "rebuttable presumption of reasonableness" to a sentence that is within the advisory Guidelines range. *Id.* at 627 (quoting *United States v. Kirchhof*, 505 F.3d 409, 413 (6th Cir. 2007)). We review the district court's interpretation of the Guidelines de novo, and its application of the Guidelines for clear error. *United States v. Duke*, 870 F.3d 397, 401 (6th Cir. 2017).

Downward departure. We begin with Hickman's argument that the district court erred by granting the government's request for a downward departure but failing to reduce his sentence.

Hickman's argument fails for one main reason: the district court denied the government's request for a downward departure. In response to the government's request for departure, the district court stated it "was not persuaded that [Hickman] should be able to cooperate his way out of the hole he has dug in this case" and denied the government's request. Because our review of a district court's denial of a downward departure is limited to instances where the district court mistakenly believed it lacked the discretion to grant a departure, a challenge Hickman does not raise, we lack jurisdiction to consider this challenge. *See United States v. Mapp*, 311 F. App'x 738, 740 (6th Cir. 2008) ("[W]e shall not review decisions of a district court not to depart downward unless the record reflects that the district court was not aware of or did not understand its discretion to make such a departure." (internal quotation mark omitted)).

Dangerous Weapon Enhancement. Next, Hickman challenges the district court's application of a four-level enhancement under § 2A2.2(b)(2)(B), finding that Hickman's boot was a dangerous weapon. We find no error. The Guidelines define a "dangerous weapon" as "an instrument capable of inflicting death or serious bodily injury." § 1.B1.1, n.1(E). This "includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury." § 2A2.2, n.1. Employing a "'functional approach' to 'what constitutes a dangerous weapon' under the Guidelines," we recognize that, "in the proper circumstances, almost anything can count as a dangerous weapon," including—as relevant here—"tennis shoes" and "rubber boots." *Callahan*, 801 F.3d at 628 (quoting *United States v. Tolbert*, 668 F.3d 798, 802–03 (6th Cir. 2012)).

"The ultimate inquiry is whether a reasonable individual would believe that the object is a dangerous weapon [*i.e.*, capable of inflicting serious bodily injury] under the circumstances." *Tolbert*, 668 F.3d at 801 (quoting *United States v. Rodriguez*, 301 F.3d 666, 668 (6th Cir. 2002)).

For instance, in *Duke*, we held that a table was a dangerous weapon where the defendant struck the victim's head upon it. 870 F.3d at 404. We explained that the "manner [in which the table] was used," along with the "bruising" and "abrasion" suffered by the victim, "illustrat[ed] that [the defendant] used the table in a dangerous manner." *Id.* at 402. The same is true here. Hickman weighed nearly 400 pounds and wore a size 15 boot; he admittedly kicked Trent in the torso with enough force that his boot-print remained embedded in Trent's body hours later. A reasonable individual would undoubtedly believe that Hickman's large shoe size, when combined with Trent's vulnerable position of lying on the floor, was "capable of inflicting serious bodily injury." *Tolbert*, 668 F.3d at 801. Even more, the bruising and boot print on Trent's body indicates that Hickman "used [his boot] in a dangerous manner." *Duke*, 870 F.3d at 402. Thus, the district court did not err in finding that Hickman's boot was a dangerous weapon.

In arguing that the dangerous weapon enhancement should not apply, Hickman contends that "the boot was incidental" and just "happened to be on his foot when [he delivered] the kick [to Trent]." Hickman's Br. at 12. Hickman contends that because it was only "one kick" and the boot is not "steel toed" or "worn with intent to do damage," it cannot be considered a dangerous weapon. Hickman Br. at 12. He is mistaken. Whether his boot was steel toed, or whether he wore it with the intent to use it as a dangerous weapon is of no moment to our analysis. Rather, because a reasonable person would have known that Hickman's boot "was capable of causing serious bodily injury," and he used it "in a dangerous manner," his boot was a dangerous weapon for purposes of the four-level enhancement under § 2A2.2(b)(2)(B).[3]

[3]Hickman relies on the Fifth Circuit's decision in *United States v. Nunez-Granados*, 546 F. App'x 483 (5th Cir. 2013), where the court held the defendant's shoe was not a dangerous weapon. Unlike here, the defendant in *Nunez-Granados* kicked the officer as he "attempt[ed] to free himself from [the officer's] grasp." This case is easily distinguishable as Hickman used his boot, not to "free himself," but to inflict harm upon Trent.

Permanent or Life-Threatening Injury Enhancement. Hickman contends that the district court erred in applying the seven-level enhancement under § 2A2.2(b)(3)(C). Pursuant to § 2A2.2(b)(3)(C), a seven-level enhancement is required "[i]f the victim sustained [permanent or life-threatening] bodily injury." A life-threatening injury includes an "injury involving a substantial risk of death." § 1B1.1. n.1(K). As relevant conduct, a court may consider "all acts and omissions committed, aided, abetted, counseled . . ., or willfully caused by the defendant," including "all harm that resulted from these acts." *United States v. Settle*, 414 F.3d 629, 632 (6th Cir. 2005) (quoting § 1B1.3(a)(1)).

Hickman argues that "there is no proof at all that [he] was the individual who inflicted [the] injuries [upon Trent]" because Trent died from a pelvic fracture on his left side, but Hickman kicked Trent in his upper right side. Thus, he contends the district court improperly enhanced his sentence for causing life-threatening injuries. Hickman Br. at 13. This argument fails for two reasons. First, the record contradicts Hickman's assertion that his individual conduct did not contribute to Trent's death. Hickman admitted in his plea agreement that he or Howell "kicked [Trent] in the pelvic area"—the primary cause of Trent's death. Moreover, blunt force trauma to Trent's head, trunk and extremities also contributed to his death. Hickman admits to "kick[ing] [Trent] without justification in the torso," to "drive tas[ing]" Trent while he was subdued, and to "continu[ing] to assault" Trent as he lay on the floor. This alone supports the district court's finding that Hickman's direct actions resulted in Trent's life-threatening injuries. Second, even if Hickman did not directly cause Trent's life-threatening injuries, Hickman aided and abetted Howell's assault on Trent. Relevant conduct for a sentencing enhancement includes "all acts . . . aided [and] abetted." § 1B1.3(a)(1). Hickman likewise acknowledges in his plea agreement that

he aided and abetted Howell as Howell punched Trent in the face, stomped on his arm, and kicked him in the face. Thus, we find no error by the district court.

Physically Restrained Enhancement. Hickman also argues that § 3A1.3, which provides for a two-level enhancement "[i]f [the] victim was physically restrained in the course of the offense," is inapplicable because Trent was "still reaching up with his arms, and kicking with his legs," and therefore was not restrained. Hickman Br. at 14. We disagree. The Guidelines define "physically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up." U.S.S.G. § 1B1.1 n.1(L). In *United States v. Coleman*, we explained that "force" is to "compel[] [one's actions] by physical means or by legal requirement." 664 F.3d 1047, 1049 (6th Cir. 2012) (quoting *Black's Law Dictionary* 718 (9th ed. 2009)).

Hickman again focuses on the single kick to Trent in arguing that Trent was not restrained because he was "reaching" and "kicking." But as discussed, the district court may consider Hickman's individual acts as well as those of Howell that Hickman aided and abetted. Hickman concedes in his plea agreement that "[a]s [Trent] was being restrained and was under control, Howell punched [Trent] in the head and stomped on [Trent's] arm," while Hickman tased Trent. Hickman also testified that "after Trent was [no longer] a threat and was being physically restrained," Howell "hit [Trent] a few times in the face." Accordingly, the record supports the district court's finding that Trent was physically restrained for purposes of the sentencing enhancement under § 3A1.3.[4]

[4]Hickman relies on a Fifth Circuit case, *United States v. Clayton*, 172 F.3d 347 (5th Cir. 1999), in arguing that the restraint enhancement should not apply in excessive-force cases. In doing so, Hickman relies on a single sentence from *Clayton*: "the lawfulness of the defendant's restraint of the victim at the time the unreasonable or excessive force occurs is not a concern implicated by U.S.S.G. § 3A1.3." However, Hickman reads this sentence out of context. In *Clayton*, the victim was lawfully handcuffed at the time of the assault. *Id.* at 353. The Fifth Circuit held that the

Double Counting. Finally, Hickman asserts that the district court improperly double counted two sentencing enhancements. By penalizing him twice for the same conduct, he argues, the district court violated his right to be free from double jeopardy. Hickman's double jeopardy claim fails as a matter of law. It is well-established that "double jeopardy principles generally have no application in the sentencing context 'because the determinations at issue do not place a defendant in jeopardy for an offense.'" *United States v. Wheeler*, 330 F.3d 407, 413 (6th Cir. 2003) (quoting *Monge v. California*, 524 U.S. 721, 728 (1998)). We have previously explained that "[t]his rule also applies to sentencing enhancements, which constitute increased penalties for the latest crime, rather than 'a new jeopardy or additional penalty for the earlier crimes.'" *Id.* (quoting *Monge*, 524 U.S. at 728). Given that Hickman's challenge is to the district court's application of sentencing enhancements, his double jeopardy claim fails.

Although framed as a double jeopardy violation, Hickman's arguments more accurately raise issues of impermissible double counting by the district court. "Impermissible 'double counting' occurs when precisely the same aspect of a defendant's conduct factors into his sentence in two separate ways." *Duke*, 870 F.3d at 404 (quoting *United States v. Farrow*, 198 F.3d 179, 193 (6th Cir. 1999) (superseded on other grounds)). However, "not all instances of double counting are impermissible." *Wheeler*, 330 F.3d at 413. "[A] court may impose two enhancements arising from the same conduct, provided the enhancements 'penalize distinct aspects of [a defendant's] conduct and distinct harms.'" *United States v. Sweet*, 776 F.3d 447, 451 (6th Cir. 2015) (quoting *United States v. Smith*, 516 F.3d 473, 476 (6th Cir. 2008)).

---

enhancement for restraint was appropriate despite the victim being *lawfully* restrained, explaining that "the *lawfulness* of the defendant's restraint of the victim at the time the unreasonable or excessive force occurs is not a concern implicated by U.S.S.G. § 3A1.3." *Id.* In other words, the enhancement is appropriate whether or not the officer's restraint was lawful. This does not help Hickman.

This argument fares no better for Hickman. As discussed, Hickman pleaded guilty to two counts of aiding and abetting deprivation of civil rights under color of law, in violation of 18 U.S.C. §§ 242 and 2, and one count of obstruction of justice, in violation of 18 U.S.C. § 1519. Hickman points to two instances of alleged double counting: (1) the district court's application of a two-level enhancement under § 3C1.1 for obstruction of justice, and (2) the district court's application of the six-level enhancement under § 2H1.1(b)(1)(B) for acting under color of law. As to the first, Hickman contends that, because he was convicted of obstruction of justice, in violation of 18 U.S.C. § 1519, the district court erred by also applying the two-level enhancement for obstruction of justice under § 3C1.1 based on the same conduct for which he was convicted. We disagree with Hickman. Section 3C1.1 provides for a two-level enhancement "[i]f . . . the defendant willfully obstructed or impeded . . . the . . . investigation," and "the obstructive conduct related to . . . the defendant's [underlying] offense or conviction." As relevant here, the accompanying comments for § 3C1.1 explain that "if the defendant is convicted of [an obstruction offense]," the enhancement "is not to be applied to the offense level for *that* offense" unless "significant further obstruction occurred." § 3C1.1 cmt. n.7 (emphasis added).

Hickman reads this to mean the two-level enhancement cannot apply if he is convicted of the underlying offense and the obstruction offense. He has misread the Guidelines. The commentary instructs that the enhancement "is not to apply to the [*obstruction*] offense level." § 3C1.1 n.7. But we have explained that when an obstruction offense is grouped together with other counts for purposes of determining the defendant's base offense level, "the obstruction of justice enhancement applies to the grouped counts . . . ." *United States v. Pego*, 567 F. App'x 323, 330 (6th Cir. 2018) (citing § 3C1.1 n.8).

This is precisely what the district court did here. As reflected in Hickman's PSR—which the district court adopted—the court grouped Hickman's obstruction of justice offense with his underlying offense for violation of 18 U.S.C. § 242. This established a base offense level of 14 for Hickman's violation of § 242 alone. The district court then applied the two-level enhancement for obstruction of justice. Thus, the district court's application of the two-level enhancement does not constitute impermissible double counting because Hickman's "specific conduct for [falsifying records] did not factor into [his] sentence in two separate ways." *See United States v. Moon*, 513 F.3d 527, 543 (6th Cir. 2008) (upholding the district court's application of the obstruction of justice enhancement under § 3C1.1 where the district court grouped the defendant's obstruction count with the underlying offense).

Similarly unavailing is Hickman's challenge to the district court's application of a six-level enhancement under § 2H1.1(b)(1)(B) for acting under color of law. Section 2H1.1(b)(1) provides for a six-level enhancement if "the defendant was a public official at the time of the offense" or "the offense was committed under color of law." Hickman contends that the district court's application of this enhancement was impermissible double counting because acting under color of law is already factored into his underlying offense under 18 U.S.C. § 242. Thus, Hickman argues he was punished twice for acting under color of law. We disagree.

In *United States v. Smith*, 196 F.3d 676, (6th Cir. 1999), we considered a similar challenge to the district court's application of a sentencing enhancement where the conduct warranting the enhancement also constituted an element of the defendant's underlying offense. In *Smith*, we found the Fifth Circuit's reasoning in *United States v. Kings*, 981 F.2d 790, 793 (5th Cir. 1993), persuasive that a district court does not engage in double counting by applying an enhancement

when the Guideline establishing the base offense level—as opposed to the statute establishing criminal liability—does not take the conduct into account. *Id.* at 683–84.

In *Kings*, the defendant was convicted of assaulting a federal officer in violation of 18 U.S.C. § 111. *Id.* at 793. Like here, the Guideline for the defendant's offense contained a cross-reference to § 2A2.2 for aggravated assault as the base offense level. *Id.* Although an element of 18 U.S.C. § 111 included the victim being a government official, the district court still applied a three-level enhancement pursuant to § 3A1.2 because the victim was an officer. *Id.* at 792–93. Rejecting the defendant's challenge to the enhancement as impermissible double counting, the Fifth Circuit explained that, because the defendant's "conduct constituted aggravated assault" by cross-reference to § 2A2.2, and "the base offense level for [aggravated assault] does *not* reflect the fact that the victim was a government official," the district court did not err by "increas[ing] the assault group offense level for an official victim." *Id.* at 793 (emphasis in original). *See also United States v. Webb*, 252 F.3d 1006, 1010 (8th Cir. 2001) (upholding a six-level enhancement under § 2H1.1(b)(1) for acting under color of law although the defendant was convicted under § 242); *United States v. Volpe*, 224 F.3d 72, 76 (2d Cir. 2000) (same).

The same is true here. Indeed, acting under color of law is an element of Hickman's underlying offense. However, as *Kings* instructs, the relative inquiry is not whether the elements of Hickman's *offense* include the same conduct as the enhancement, but whether "the base offense level" for which the defendant is sentenced includes the same conduct as the enhancement. *Kings*, 981 F.2d at 793. Hickman's base offense level does not include acting under color of law. Recall that to determine Hickman's base offense level of 14, the district court cross-referenced U.S.S.G. § 2A2.2 (aggravated assault). Like *Kings*, "the base offense level for [aggravated assault] does *not* reflect the fact that [Hickman acted under color of law]." *Kings*, 981 F.2d at 793. We have

previously explained that "the harm to be punished, and deterred, by the 'under color of law' enhancement is the misuse of power by one with governmental authority." *United States v. McCoy*, 480 F. App'x 366, 373 (6th Cir. 2012). Hickman's base offense level does not—by itself—"penalize [the] distinct aspects of [Hickman's] conduct and distinct harms" that § 2H1.1(b)(1)(B) set out to punish. *Sweet*, 776 F.3d at 451. Thus, because acting under color of law factored into Hickman's sentence only through the six-level enhancement under § 2H1.1(b)(1), the district court did not err.

b. Howell's Challenge

Howell raises two challenges on appeal: (1) that the district court improperly instructed the jury on the subjective element of deliberate indifference; and (2) that the district court improperly instructed the jury that it may consider his falsification of two reports as evidence of consciousness of guilt. We address each in turn.

"We review challenges to a district court's jury instruction for abuse of discretion." *United States v. Geisen*, 612 F.3d 471, 485 (6th Cir. 2010). The district court does "not abuse its discretion unless the jury charge 'fails accurately to reflect the law.'" *United States v. Ross*, 502 F.3d 521, 527 (6th Cir. 2007) (quoting *United States v. Layne*, 192 F.3d 556, 574 (6th Cir. 1999)). Considering the jury instruction "as a whole," reversal is proper "only if the instructions . . . were confusing, misleading, or prejudicial." *Ross*, 502 F.3d at 527 (quoting *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir. 1999)). Objections not properly preserved, however, are reviewed for plain error. *United States v. Castano*, 543 F.3d 826, 833 (6th Cir. 2008). "In the context of challenges to jury instructions, '[p]lain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice.'" *Id.* (quoting *United States v. Newsom*, 452 F.3d 593, 605 (6th Cir. 2006)).

Deliberate Indifference Jury Instruction. Howell first challenges the district court's jury instruction on the subjective element of deliberate indifference. Howell objected to part of the district court's proposed instruction that related to the subjective component of deliberate indifference, arguing that it implied a negligence standard when a higher standard was warranted. The district court agreed with Howell, sustained the objection, and modified the instruction. Based on that modification, Howell indicated he had no further objection to the deliberate indifference instruction. Because Howell made no objection to the modified instruction, his claim is not properly preserved, and we review his challenge for plain error.[5] *Castano*, 543 F.3d at 833.

Deliberate indifference has both an objective and subjective component. *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018) (citation omitted). The subjective component requires showing that the defendant had actual knowledge that a "substantial risk" of serious harm existed, whereas the objective inquiry requires a showing that an inmate had a "serious medical need." *Id.* at 737–38. With respect to the objective component, the district court instructed the jury that it was required to determine whether:

> (A) Larry Trent's medical need was serious, meaning it posed a substantial risk of serious harm to his health. A serious medical need is a one for which treatment has been recommended or that is so obvious that even a person without medical training would easily recognize that medical care is needed. A defendant's state of mind about the seriousness of the injury is not to be considered. Rather you must ask yourself whether a reasonable person in the same situation as the defendant would have viewed Larry Trent's injuries as being a serious medical need[.]

[5] Howell contends that he objected to the entire deliberate indifference instruction, and thus it was properly preserved. We disagree. Howell's objection related entirely to the portion of the jury instruction that referenced a negligence standard. Moreover, after the district court modified the jury instruction Howell indicated he had no further objections. Therefore, this argument fails. *See United States v. Semrau*, 693 F.3d 510, 526–527 (6th Cir. 2012) ("[A] party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." (quoting Fed. R. Crim. P. 30(d))).

The court then instructed the jury as to the subjective prong, stating:

> (B) If you find that Larry Trent had a serious medical need, the government must then prove that that the defendant was deliberately indifferent to that need. This is found only if the government proves:
>
> a. that the defendant was aware of or perceived facts from which to infer that a substantial risk of serious harm to Larry Trent existed;
>
> b. that the defendant drew the inference that a substantial risk of serious harm existed, meaning the defendant was actually aware of or knew that Larry Trent had a serious medical need; and;
>
> c. that the defendant chose to disregard that substantial risk to Larry Trent.
>
> Mere negligence is insufficient to prove deliberate indifference. Deliberate indifference requires that the defendant knew of and disregarded a substantial risk to Larry Trent's health and safety, even if the harm ultimately was not averted.

Howell contends that the district court "injected contradiction and confusion into the instructions" by stating that Howell's state of mind about the seriousness of the injury should not be considered, and moments later instructing the jury to consider Howell's mental state as to the subjective prong. Howell Br. at 16. He argues that, because the district court did not "properly explain the two-part test or give any other context," the instruction was "confusing, misleading and prejudicial." Howell's Br. at 16. We disagree. The district court first explained the objective element, instructing the jury that Howell's "state of mind about the seriousness of the injury is not to be considered." The district court then proceeded to instruct the jury as to the subjective element, explaining that it must find that Howell was "actually aware of" or "knew" that a substantial risk of serious harm to Trent's health existed, but that he "chose to disregard" it. The instructions, viewed as a whole, correctly state the law concerning deliberate indifference. We find no error, much less plain error.

Concealment of Evidence Jury Instruction. We likewise reject Howell's argument that the district court erred by instructing the jury that it could consider Howell's omission from the

incident and taser reports as evidence of Howell's guilty conscience. Howell argues that (1) the district court erred in giving this instruction because the evidence failed to support the four inferences required before a court may issue a "flight" instruction; and (2) the instruction was not warranted because there was insufficient evidence in the record to establish that he intentionally omitted information from the reports. We disagree.

Sixth Circuit Pattern Jury Instruction 7.14 permits a court to instruct a jury that it may consider evidence of "[f]light, [c]oncealment of [e]vidence, [or] [f]alse [e]xculpatory [s]tatements" as circumstantial evidence that the defendant "thought he was guilty and was trying to avoid punishment." The jury may, "[o]n the other hand," conclude that the defendant's conduct was the result of "some other [innocent] reason." Pattern Jury Instruction 7.14. Over Howell's objection, the district court instructed the jury that "if [it] believed that [Howell] omitted information from written reports," it could consider the omission as evidence that "he thought he was guilty and was trying to avoid punishment" or that the information was omitted "for some other [innocent] reason." Howell contends the district court was first required to determine the probative value of the evidence by employing a four-part test establishing an inference:

> (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

United States v. Dillon, 870 F.2d 1125, 1127 (6th Cir. 1989) (citing *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977)). However, our application of this four-part test has been limited to cases involving *actual flight*. *See United States v. Dye*, 538 F. App'x 654, 664–65 (6th Cir. 2013) (applying the four-part test where the defendant borrowed his girlfriend's car to leave town shortly after learning authorities were looking for him); *Dillon*, 870 F.2d at 1126-27 (applying the four-part test where the defendant fled after learning that his co-conspirator planned

to testify before the grand jury). That each of the four inferences explicitly reference "flight" further illustrates that its application is limited to cases involving actual flight.

The district court did not give a *flight* instruction in this case. Rather, the court instructed the jury on *concealment of evidence*, likewise provided by the Sixth Circuit Pattern Jury Instruction 7.14. Contrary to Howell's assertion, we have not applied an inference test in cases where a defendant suppresses or conceals evidence.[6] Because the district court did not give a flight instruction, it was not required to consider the four-part test.[7]

Howell argues next that there was insufficient evidence that he omitted information from the incident reports. This argument is equally unavailing. In a per curiam decision in *United States v. Singleton*, we upheld the district court's concealment-of-evidence instruction as to the defendant's fabrication of evidence, explaining that—with adequate evidence in the record—such instruction is proper where the court "sufficiently caution[s] the jury" to consider the suppression of evidence, "together with other evidence" as to a defendant's "guilt or innocence." 904 F.2d 37, 8-9 (6th Cir. 1990) (per curiam) (citing *United States v. Scheibel*, 870 F.2d 818, 822 (2d Cir. 1989)).

The evidence amply supports the district court's instruction. Howell testified that he was required to complete an incident report anytime force was used, including "why [the force] was used" and "any injuries that an inmate sustain[ed]." Howell also knew that the purpose of the

[6]Howell relies primarily on two out-of-circuit cases, *United States v. Beahm*, 664 F.2d 414 (4th Cir. 1981), and *United States v. Silverman*, 861 F.2d 571 (9th Cir. 1988), in arguing that the four-inference test should apply in this context. Aside from them being non-binding, they are also easily distinguishable. Unlike here, they both involved allegations of actual flight.

[7]At any rate, even if the four-part test had applied in this case, Howell's conduct—which included making materially false statements about the incident within hours of the assault—would have been sufficient to support each of those inferences.

reports was to "investigat[e]" incidents involving force. Yet, Howell omitted crucial information from the incident and taser reports, including that he and Hickman repeatedly kicked, punched and tasered Trent, and that Trent was visibly injured.[8] Thus, there was sufficient evidence for the jury to infer that Howell omitted this information from the reports because "he thought he was guilty and was trying to avoid punishment." Sixth Circuit Pattern Jury Instruction 7.14. Moreover, the district court also instructed the jury that it could consider that the information was omitted "for some [innocent] reason." We find no error.

Undeterred, Howell argues consciousness of guilt cannot be inferred because he completed the reports before learning of Trent's condition and before he was "aware of the specific charges against him." But even if Howell were not aware of the full extent of Trent's injuries or of any charges against him, Howell was aware of the amount of force used, that Trent was injured, and that information in the reports might be provided to the Department of Corrections to investigate. The evidence adequately supports the jury instruction.

III. CONCLUSION

For these reasons, we affirm.

[8]Though Howell testified that he simply "forgot" to report the information, the jury was free to consider this testimony as evidence of "some [innocent] reason" for his omission. But the jury rejected his testimony.