ORAL ARGUMENT NOT REQUESTED
No. 23-2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTHONY BUNTYN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
The Honorable Judge Kea W. Riggs, No. 1:20-CR-00708-KWR

BRIEF FOR THE UNITED STATES AS APPELLEE

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MISCELLANEOUS:

GLOSSARY

FBI	Federal Bureau of Investigation
PTS	Prisoner Transport Services
SCDC	Shawnee County Department of Corrections

STATEMENT OF PRIOR OR RELATED CASES

There have been no prior or related appeals in this case.

STATEMENT OF JURISDICTION

Defendant Anthony Buntyn appeals his judgment of conviction. The district court had jurisdiction under 18 U.S.C. 3231 and entered final judgment on January 31, 2023. 1R.1486-1491.[1] Buntyn filed a timely notice of appeal the same day. 1R.1492. This Court has jurisdiction under 18 U.S.C. 3742(a) and 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports Buntyn's conviction under 18 U.S.C. 242 for willfully depriving detainees of their right to be free from deliberate indifference to conditions of confinement that pose a substantial risk of serious harm to their health or safety, resulting in bodily injury.

2. Whether the district court properly exercised its discretion in precluding the defense from using the word "malice" to discuss the willfulness element during closing argument.

3. Whether the district court's *Allen* instruction was proper.

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[1] "R.__" refers to the volume and page number of the record on appeal. "Supp.R.__" refers to the volume and page number or timestamp of the supplemental record on appeal containing designated trial exhibits. "GX __" refers to the government's trial exhibits. "Br. __" refers to the page numbers in Buntyn's opening brief.

STATEMENT OF THE CASE

This case arises from inhumane conditions of confinement that pretrial detainees experienced while in the custody of Buntyn, a prisoner-transport officer. A jury convicted Buntyn of one count under 18 U.S.C. 242 for willfully acting with deliberate indifference to conditions of confinement that posed a substantial risk of serious harm to pretrial detainees' health and safety, in violation of the Fourteenth Amendment. 1R.1431.[2] The jury also found that Buntyn's deliberate indifference caused one detainee, S.K., to suffer bodily injury.[3] 1R.1432.

[2] Whereas the Eighth Amendment governs conditions-of-confinement claims for individuals serving criminal sentences, *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), the Fourteenth Amendment's Due Process Clause governs such claims in the pretrial-detention context, *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). The Fourteenth Amendment provides greater protection than the Eighth Amendment. A corrections official violates the Eighth Amendment if they act with "deliberate indifference" toward conditions of confinement that pose "an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. In contrast, the Fourteenth Amendment prohibits any condition of confinement that "amount[s] to punishment." *Bell*, 441 U.S. at 535. This Court has recognized that conditions of confinement that would violate the Eighth Amendment "necessarily violate[]" the Fourteenth Amendment. *Blackmon v. Sutton*, 734 F.3d 1237, 1241 (10th Cir. 2013). Although Buntyn was charged with and convicted of violating pretrial detainees' Fourteenth Amendment rights (*see* 1R.32, 1431), the indictment framed the charge in terms of and the jury was instructed based on the Eighth Amendment's deliberate-indifference standard (*see* 1R.32, 1404-1406).

[3] This brief refers to crime victims by their initials to protect their privacy.

A. Factual Background

Buntyn worked for Prisoner Transport Services (PTS), a private company that is hired by various law enforcement agencies to transport people who have outstanding warrants issued by those agencies and who are arrested in another state. PTS is contracted to pick up the detainee and transport him or her to the jurisdiction that issued the outstanding warrant. *See* 2R.448-465. Buntyn worked for PTS as a transport officer for several months beginning in January 2017. 2R.1120-1121, 1224. This case arises from a multiday transport in March 2017, for which Buntyn served as the senior officer. 2R.1236.

1. PTS policies and practices

PTS has several policies governing the conditions of confinement in which people in its custody are transported. Transport officers must "provide a safe, secure and humane environment" for all detainees and may not subject them to "cruel and unusual punishment." Supp.1R.71. They are prohibited from resorting to "[c]orporal punishment . . . under any circumstances" or from engaging in "vengeful, brutal, or discriminatory treatment" of detainees. Supp.1R.20.

Individuals in PTS custody must be "fully restrained by handcuffs, waist chain and leg irons." Supp.1R.68. Ordinarily, a detainee is cuffed with their hands in front of their body. 2R.814-815. "In extreme cases," however, "agents may be required to apply modified restraint techniques, such as cuffing behind the back . . .

to ensure the safety and security of prisoners or to prevent escape or maintain order." Supp.1R.69. But PTS policy does not permit an individual to be restrained with their hands behind their back for more than four hours and requires that individuals so restrained be "checked often (Every 15 minutes) to ensure their safety and welfare." Supp.1R.69. Transport officers must notify a trip manager—a PTS employee responsible for coordinating detainee pick-ups and drop-offs, overnight stays, and addressing any problems that arise on the road—any time that they cuff a detainee's hands behind their back. 2R.1287-1289, 1306.

PTS policy requires all individuals in the company's custody for more than 24 hours to "receive 3 meals per day . . . in the form of breakfast, lunch and dinner." Supp.1R.86. PTS policy also requires officers to provide individuals in the company's custody with water, including "additional bottle(s) of water or a sports drink as needed to maintain an acceptable level of hydration in extremely hot climates or when vehicle air conditioning units fail to operate properly." Supp.1R.87.

Transport officers must "provide adequate opportunities for prisoners in [their] custody to use restroom facilities, stand and stretch and maintain personal hygiene." Supp.1R.85. Specifically, agents are required to arrange restroom breaks at "secure correctional facilities" at least "every 4 hours" or more frequently "when possible." Supp.1R.85. "In geographic locations where secure facilities

may be limited," PTS policy permits up to six hours between bathroom breaks. Supp.1R.85. But any time that "prisoners are required to wait longer than 6 hours for a restroom break," agents must submit "an incident report" and notify their trip manager. Supp.1R.85.

PTS officers typically conduct transports in vans that the company says can accommodate up to 12 pretrial detainees. 2R.791; *see also* 2R.1177 (Buntyn's testimony that the vans accommodate 12 average-sized people but that detainees would be "uncomfortable" if larger individuals were onboard). Under the company's policies, there must be one transport officer for every six detainees. 2R.791. At least two officers are therefore assigned to the vast majority of PTS trips. 2R.791. On trips with multiple officers, one is designated the "officer-in-charge," and that individual is "responsible for the entire trip." 2R.790. Junior officers must obey all lawful orders given by the officer-in-charge, even if they "question the wisdom of such order." Supp.1R.20.

PTS vans have three secured areas for detainees. In the vans' rear, there are two compartments separated by a wall, one on the driver's side and one on the front passenger's side. 2R.797. Each rear compartment is designed to accommodate four detainees. 2R.797. The rear compartments' windows are painted over, meaning that detainees in those compartments sit in complete

darkness. 2R.311-312, 795. Detainees in the rear compartments sit on benches with their backs against the van's wall. 2R.313-314.

A third secured area is located between the cab where the driver and front passenger sit and the rear compartments. 2R.795. Detainees in this middle compartment sit on a bench, facing the same direction as the driver and front passenger. 2R.312. Female detainees typically are seated in this compartment to keep them separated from male detainees. 2R.795-796; *see also* Supp.1R.72. The middle compartment is sometimes equipped with a "segregation cage," which is "a metal or caged partition . . . between the last seat and the wall" large enough to keep one detainee separated from all others. 2R.796. The segregation cage can be used to separate males and females from one another. 2R.817. But it also can be used to prevent "violent or combative" detainees from "injur[ing] other[s]." Supp.1R.74. A transport officer must notify a trip manager when they place a detainee in the segregation cage for disruptive or noncompliant behavior because that practice is "not a custom on a trip" and "doesn't happen on a regular basis." 2R.1306.

The segregation cage limits the space available for detainees in the middle compartment, which otherwise is designed to accommodate four people. 2R.795; *see also* 2R.349, 584 (observing that the segregation cage left room for only one or, at most, two detainees next to the segregation cage). Transport officers must

"consider the size and physical condition of prisoners as well as medication needs when making seating arrangements." Supp.1R.73.

2. Buntyn's PTS employment begins.

Buntyn began working for PTS on January 23, 2017. 2R.1121. At the outset of his employment, he signed PTS's "Policy on Humane Treatment of Inmates." 2R.1231-1232. That policy provides:

> Prisoners will at all times be free from harassment and discrimination. They also have the right not to receive cruel and unusual punishment. We do not punish anyone. Prisoners have the right to receive medical care and treatment upon demand. Prisoners have the right to be transported in a safe, secure and humane manner.

GX 15. Buntyn received two weeks' training. 2R.1122. On Buntyn's first PTS transport, the officer-in-charge was a field-training officer who showed Buntyn "how to apply what [he] learned in class . . . as [they] went along the trip." 2R.1123. Buntyn was the junior officer on three or four transports before the one at issue in this case. 2R.1123. From his training and experience prior to the March 2017 transport, Buntyn was aware that he could not punish people in his custody and that he owed them a duty of care, including to keep them safe, to feed them, and to provide them water and bathroom breaks. 2R.1232-1234. He also recognized that while certain aspects of the trip were outside of his control, such as the van's configuration and the scheduling of pickups or overnight stops, he

controlled where detainees sat on the van and the scheduling of meals and restroom stops. 2R.1235-1236.

3. March 2017 transport

On, March 18, 2017, Buntyn left on a multiday transport that began in Nashville, Tennessee. 2R.1125-1126; Supp.1R.130-139. Buntyn was the officer-in-charge, and he was accompanied by another officer, Robert Baldinger. Supp.1R.130. Buntyn's responsibility for the transport ended prematurely ten days later when the van arrived for an overnight stay at the Shawnee County Detention Center (SCDC) in Topeka, Kansas, where officials observed what they believed to be signs of abuse of the detainees. *See* Supp.1R.136. This case is based on events during an eight-day period when three pretrial detainees—W.Y., A.S., and S.K.—were on Buntyn's van. During that period, Buntyn exposed the detainees to inhumane conditions of confinement.

a. Exposure to human waste

Throughout the March 2017 trip, there were long intervals between bathroom stops. 2R.316. An activity log that Buntyn and Baldinger kept during the trip documents multiple gaps exceeding six hours, including one 36.5-hour gap. *See* Supp.1R.130-139 (documenting restroom stops with the notation "R/R"); *see*

also 2R.518 (noting that the activities log documents 15 restroom stops over seven to eight days).[4]

Detainees were "very vocal" in telling Buntyn and Baldinger that they needed to use the bathroom more regularly, but to no avail. 2R.317, 321-322. When male detainees could not wait to use a restroom, they would urinate in empty water bottles. 2R.317-319. W.Y. estimated that he had to urinate in bottles 20 to 30 times during his time on the van. 2R.317-318. Because the van was moving and detainees were restrained with handcuffs, shackles, and belly chains, urine regularly spilled onto the van's floor and onto the detainees' clothing. 2R.318, 322, 663-664. Bottles of urine accumulated on the van's floor, and the detainees would sometimes kick them out when they eventually got off the van. 2R.281, 320-321, 587; *see also* 2R.281 (a jail official expressing "shock[]" at finding urine-filled bottles in the jail's sally port immediately after the van's departure). On one occasion, a female detainee urinated on herself after Buntyn rebuffed her repeated requests to use a restroom. 2R.323-325, 1274-1275; *see also* 2R.598-599 (S.K.

[4] W.Y. and S.K. identified three additional restroom stops not documented on the activity log in Riverside, California; Las Vegas, Nevada; and Phoenix, Arizona. *See* 2R.326, 332-333, 592. Note: For activity-log entries beginning on March 25, the dates are one day off (*i.e.*, entries marked March 25 actually occurred on March 26, and so forth). 2R.566.

observing that the same female "smelled a lot more potent[ly]" of urine than others on the van, as if she had urinated on herself).

Because detainees regularly had to relieve themselves on the van, it reeked of urine. 2R.320, 591. Buntyn hung air fresheners in the back of the van to mask the detainees' stench. 2R.366. But neither the van nor the detainees' clothing were cleaned during the eight days at issue. 2R.322, 663-664.

b. Prolonged use of restraints

Throughout the eight-day period at issue in this case, Buntyn restrained W.Y., A.S., and S.K. at various points by cuffing their hands behind their backs and sometimes also placing them in the van's segregation cage for prolonged stretches. The trip manager for the March 2017 transport, Edward Esquilin, had no recollection of Buntyn reporting any of these incidents. 2R.1305-1311. If Buntyn had made such reports, Esquilin would have remembered because trip managers are required to write daily reports that document any problems that arise during transports. 2R.1308-1311. PTS also had no record of communications between Buntyn and the trip manager about use of force and conditions of confinement on the March 2017 transport. 2R.1319.

i. Riverside County, California

On March 25, the van arrived at the jail in Riverside County, California, for a restroom stop. 2R.326; *see also* Supp.1R.134. While walking from the van to

the jail, A.S. knelt to adjust the shackles around his legs. 2R.325-328. Without warning, Buntyn reacted by slamming A.S. against a wall and telling him not to "mess around." 2R.327, 328-329. After this incident, Buntyn put A.S. in the van's segregation cage with his hands cuffed behind his back. 2R.329, 331. A.S. was restrained in that manner for at least eight to ten hours and missed two meals. 2R.331.

ii. Las Vegas, Nevada

Later that same day, the van stopped at a correctional facility in Las Vegas, Nevada, to drop off one detainee, pick up another, and for a restroom break. 2R.332-333, 1154-1155; Supp.1R.134. Because he had missed two meals, A.S. was very hungry. 2R.331, 334. A.S. saw McDonald's bags sitting on a table near where the van parked and went to look for food inside them. 2R.334. Buntyn reacted by slamming A.S. to the ground and shocking him with a TASER StrikeLight, "an electronic control device" that can "be used as a weapon to inflict pain through . . . electrical impulse." 2R.334-336, 524. After this incident, A.S. was placed back in the segregation cage with his hands cuffed behind his back without being given an opportunity to use the restroom. 2R.335-337. A.S. stayed in the segregation cage for roughly five or six hours this time, missed one meal, and received no water. 2R.337.

iii. Maricopa County, Arizona

On March 26, the van stopped in Maricopa County, Arizona (Phoenix), to pick up S.K. 2R.575-576. S.K. was "horrified" and "[t]errified" by the van's state when he first saw it. 2R.587. The van "stunk" of body odor, urine, and trash; the detainees "looked disheveled" and "dirty"; and "the environment looked . . . horrible." 2R.587, 591. Because S.K. was still recovering from being stabbed in both of his knees (Supp.2R.4-5, 35), he worried that the van's unsanitary conditions put him at risk of infection (2R.587). S.K. voiced his concerns, but Buntyn "didn't care." 2R.588. When S.K. continued to object on health grounds to being placed on the filthy van, Buntyn called over a jail nurse, who looked over S.K.'s medical records and declared him "cleared" for transport without physically examining him. 2R.588.

After S.K. boarded the van, the next stop was another jail in Maricopa County a short distance away to pick up another detainee and for a restroom stop. 2R.590, 592. While lining up to return to the van, S.K. told a corrections officer about the conditions on the van. 2R.595. Buntyn saw S.K. talking to the officer, pulled him out of line, and said that S.K. "was going to be an issue." 2R.595. He then cuffed S.K.'s hands behind his back and put him in the van's segregation cage instead of where he had previously been sitting in one of the rear compartments. 2R.595-596.

S.K.'s hands remained cuffed behind his back from 10 a.m. until dusk the same day, and he was not given lunch or dinner that the other detainees received or any water. 2R.599, 601, 607-608. Even if S.K. had been offered food during that stretch, he would not have been able to eat because his hands were cuffed behind his back the entire time. 2R.600-602. When the sun was going down, Buntyn released S.K. from the segregation cage and moved his handcuffs to the front after S.K. apologized to Buntyn for "[t]elling the officer . . . about the van." 2R.602-603. Buntyn put S.K. back in one of the van's rear compartments, where the other detainees gave him a little food that they previously "hid" for him. 2R.603, 605, 608.

iv. New Mexico

Later that day, the van stopped at a jail in Socorro County, New Mexico, to pick up a detainee. Supp.1R.136. Ten detainees already were on the van at the time. Supp.1R.136. At least four detainees, including S.K., W.Y., and A.S., were seated in one of the rear compartments, and Buntyn and Baldinger intended to place the detainee being picked up in that compartment, exceeding its four-person capacity. 2R.339, 607, 797. The detainees protested another detainee being seated in their compartment by refusing to get off the van. 2R.339, 608-609. Buntyn ordered the men off the van, and they reluctantly complied. 2R.341-342, 610-611, 613.

When S.K. got off the van, Buntyn said that he was going to cuff his hands behind his back again, which S.K. verbally protested. 2R.613. Buntyn reacted to S.K.'s protests by running him into a brick wall in the jail's sally port, shoulder and forehead first, and then cuffing S.K's hands behind his back. 2R.614-616. W.Y. started "yell[ing]" in response to Buntyn's treatment of S.K. 2R.617.

Once W.Y. was off the van, Buntyn grabbed W.Y. by the arm, pushed him against the wall, and shocked him multiple times with his TASER StrikeLight. 2R.342-344, 618-621; Supp.3R., at 2:03-2:43. S.K., A.S., and W.Y. pleaded with jail officials to do something about how they were being treated by Buntyn and the conditions of confinement on the van. 2R.622; Supp.3R., at 2:43-3:18, 4:12-6:00, 7:04-7:22. Buntyn responded by grabbing S.K. and pushing him head and shoulder first into the chain-link fence that enclosed the jail's sally port, resulting in lacerations to those parts of his body. 2R.623-624; Supp.3R, at 4:27-4:36. Because S.K.'s hands were cuffed behind his back, he could not brace for impact. 2R.623.

After the situation in the sally port calmed down, Buntyn attempted to cuff W.Y.'s hands behind his back. 2R.344-345. W.Y. pleaded with Buntyn not to restrain him in that manner, explaining that he had recently recovered from a heart attack and had shoulder injuries. 2R.345, 1257-1258; Supp.3R., at 14:26-14:52 ("Please don't put this pain on me."); *see also* GX 56, at 1-2 (W.Y. requesting

medication for his heart at the Kitsap County Jail and stating that he had a degenerative disk and torn ligaments in his shoulder). At first, W.Y.'s entreaties seemed to work, as he was placed back in the van's rear with his handcuffs still in front. 2R.346.[5]

But at the next stop at a jail in Albuquerque, New Mexico, jail officials ordered S.K., A.S., W.Y., and the fourth detainee in their compartment off the van, and Buntyn cuffed their hands behind their backs (S.K.'s hands had remained cuffed behind his back since the stop in Socorro County). 2R.347-348, 407, 632-633, 1200. The four detainees were then placed in the van's middle compartment, with W.Y. in the segregation cage. 2R.348, 633-635.

The four detainees remained in the middle compartment with their hands cuffed behind their backs for at least nine hours, without receiving any food or water or having any opportunity to use the restroom until W.Y. and S.K. apologized to Buntyn. 2R.349-350, 635-637, 647-650. S.K. recalled that they were released from the middle compartment somewhere in Colorado where they were dropping off a detainee. 2R.635; *see also* Supp.1R.136 (documenting a drop-off in Golden, Colorado at 11:50 p.m. on March 26 (actually March 27), more than 17 hours after the van left Albuquerque and more than 22 hours after it left Socorro

[5] The Socorro County jail stopped accepting transport vans altogether in response to the incident with Buntyn's van. 2R.282.

County). The four detainees were not given food or allowed to go to the restroom once they were released from the middle compartment. 2R.651.

W.Y. described the sensation of having his hands released after so much time as "like someone was tearing [his] shoulder off." 2R.350. The multiple hours that W.Y. spent in the segregation cage were "traumatic" for him. 2R.428. S.K. similarly was in "[h]orrible . . . pain" from having his hands restrained behind his back for so long. 2R.636, 664.

c. Blasting heat

At some point, the van drove through the Arizona desert, causing the temperature on the van to rise. 2R.350-351. Making the situation more uncomfortable, Buntyn and Baldinger had placed five detainees in each of the van's rear compartments, even though each compartment was designed to accommodate no more than four people. 2R.351. And because detainees wear whatever clothing they happened to be wearing when they were arrested, some were wearing heavy clothing. For example, W.Y. was wearing a flannel shirt, thick pants, boots, and socks at the time, and S.K. was wearing a hooded sweatshirt. 2R.351, 634. The detainees could not remove any heavy layers because of their restraints. 2R.351-352, 635.

As the temperature on the van became increasingly uncomfortable, the detainees yelled for Buntyn and Baldinger to do something about the heat. 2R.352,

634. But rather than turning on the air conditioning, Buntyn blasted the heat, saying "I've got something for y'all" to the detainees. 2R.352-353, 634. The detainees yelled "really loud[ly]" for Buntyn to turn off the heat, but the heat remained on for around 20 minutes. 2R.354-355. During this interval, W.Y. "thought [he] was going to die." 2R.352-353. He described this incident as "one of the scariest moments of [his] life." 2R.352, 424 (crying while testifying). W.Y. pleaded with Buntyn to turn off the heat by appealing to his faith and military service. 2R.353. This prompted Buntyn to stop the van, open the rear door and, with his hand on his gun, threaten W.Y. by saying that if W.Y. "ever questioned [Buntyn's] service or his religion again that [Buntyn] would kill [W.Y.] and . . . take [his] chances in court." 2R.355.

4. Buntyn attempts to silence detainees.

After Buntyn released W.Y., A.S., S.K., and the fourth detainee from the middle compartment somewhere in Colorado, he attempted at several points to discourage them from telling anyone about how he had treated them. From that point until the van reached SCDC in Kansas, about one day later, Buntyn's "demeanor" toward the detainees changed, and he was "nicer." 2R.652-666; *see also* Supp.1R.136. Contrary to PTS policy (Supp.1R.19, 85, 87), Buntyn began letting the detainees out of the van at gas stations and bought them cigarettes and

soda (2R.652). To S.K., Buntyn "seemed like he was trying to make up for something." 2R.652-654.

Once the van arrived at SCDC, Buntyn threatened the detainees that they would be charged with felonies and that A.S. would be deported if they "talked about what was going on in the van." 2R.356, 660-661. Buntyn reminded the detainees to "remember what we talked about" while they were standing in the SCDC holding area waiting to be processed by the jail's staff. 2R.358-360.

5. Shawnee County Detention Center investigates and reports Buntyn and refuses to release detainees to him.

Officer Daryl Edwards-Jenkins booked the detainees on Buntyn's van into SCDC. 2R.748. As part of the booking process, detainees are patted down to make sure that they are not bringing anything dangerous into the facility. 2R.750. While conducting pat-downs, Officer Edwards noticed that "multiple" detainees smelled like "a mix of body odor, sweat, and urine" and that their clothing was wet to the touch, which he found "[v]ery" unusual and concerning. 2R.761-762. He also observed that some detainees were missing various articles of clothing that "didn't make any sense," such as socks or underwear, which he also found "[v]ery" unusual and concerning. 2R.762-763. Another "unusual" thing that Officer Edwards observed was that the detainees did not want to interact with Buntyn, who was in the room for the pat-downs, and that they tried to "stay a little further away" from him. 2R.763-764.

While patting down A.S., Officer Edwards asked him to remove his boots and socks. 2R.767. When A.S. complied, Officer Edwards smelled something like "rotting flesh," a smell unlike any other he had ever encountered while patting down a detainee who had arrived on a prisoner-transport van. 2R.267. A.S.'s feet were "in pretty bad shape." 2R.767. They were pale white, cracked, and Officer Edwards could see blood on them. 2R.767; *see also* 2R.362, 366-367 (W.Y. describing A.S.'s feet as "in a state of rot" and like "white cheese"); 2R.682 (S.K. describing A.S.'s feet as having "a jungle rot"); GX 51, at 3-5. W.Y. also noticed the smell, which made W.Y. "turn [his] head," even though he was in the hallway outside the room where A.S. was being patted down. 2R.362. W.Y. recognized the odor as a "strong smell" that had permeated the van. 2R.362.

Officer Edwards thought he recognized A.S.'s symptoms as "trench foot," which he himself had experienced during his military service. 2R.770. Buntyn likewise thought that he recognized A.S.'s symptoms from his own military service. 2R.1218. Trench foot is a condition "caused by an excessive amount of moisture on the foot," which can "lead to the skin to breakdown [sic]," increasing the risk of infection. 2R.896-897. Although Officer Edwards described his own case of trench foot as "much milder" than how he perceived A.S.'s, he described the condition as "pretty painful," like his skin was being "torn away from [his] foot," and said that it "[t]ook some time to get back up and . . . walk around like

normal." 2R.770-771. Later on, Officer Edwards observed that A.S. appeared to be in increasing pain and discomfort and was avoiding putting weight on his feet. 2R.772-773; *accord* 2R.682.

As part of the booking process, medical staff at the jail medically screen detainees. 2R.883-884. Kelly Johnson, a registered nurse, examined A.S. and found that he had "multiple medical concerns" and "was emotionally upset and tearful." 2R.891-892. Nurse Johnson identified a red and white pustule on A.S.'s leg that she suspected was methicillin-resistant Staphylococcus aureus (MRSA), a bacterial infection common in carceral settings. 2R.893-895; *see also* GX 40, at 1. She also noted that A.S. had "some type of skin problem" on his feet (GX 40, at 1), which she, like Officer Edwards, identified as "trench foot" (2R.896). Nurse Johnson observed that A.S.'s feet were "odorous." GX 40, at 7. Among the "hundreds" of detainees that Nurse Johnson medically screened during her time at SCDC, none had a foot condition like A.S.'s. 2R.897, 941-942. A.S. also had a rash on his buttocks, the appearance of which was "consistent with a heat rash." 2R.898. After examining A.S., Nurse Johnson called the on-call doctor, who—without examining A.S.—prescribed over the phone an antifungal cream, a steroid cream, and an antibiotic to treat his conditions. 2R.902-903, 923-926, 940.

Apart from A.S., Nurse Johnson also observed that another detainee was experiencing swelling in their extremities that she did not commonly observe

among in-transport detainees. 2R.909-910. Another nurse examined S.K. and observed that he had sustained lacerations and abrasions on his left shoulder (from when Buntyn pushed him into the wall in Socorro County). 2R.912-914; *see also* GX 42, at 2; GX 49, at 2-3. The same nurse examined W.Y. and observed that he, too, was experiencing swelling in his extremities. 2R.915-917. Overall, Nurse Johnson was "concerned" after examining the detainees because of both the quantity and the severity of the medical issues that they were experiencing. 2R.917-918.

After Officer Edwards had finished booking the detainees into the jail, he contacted Lieutenant Matthew Barnhill, the operations supervisor the night of March 28, 2017. 2R.194-195, 766. In response to Officer Edwards's concerns, Lieutenant Barnhill began an investigation. 2R.775. Lieutenant Barnhill observed A.S. telling a booking officer that his feet were hurting. 2R.195-196. Like Officer Edwards and Nurse Johnson, Lieutenant Barnhill thought A.S.'s condition looked like trench foot, which he too had experienced during military service. 2R.200-201. When Lieutenant Barnhill had trench foot, he experienced "sharp and dull" pain whenever he walked, but his symptoms were "miniscule compared to" A.S.'s. 2R.201.

On the whole, Lieutenant Barnhill observed that the detainees appeared "[n]ervous" and "scared" and that they were "unkempt, dirty, [and] kind of smelled

a little bit." 2R.207-209. Some complained about their wrists or knees swelling. 2R.208. The detainees told Lieutenant Barnhill that they "didn't want to leave" SCDC. 2R.208. Lieutenant Barnhill found that "odd" because most pretrial detainees who stop at SCDC want to get to their final destination "as quick as possible." 2R.209.

Concerned about the pretrial detainees' appearance and complaints, Lieutenant Barnhill called SCDC's deputy director, Major Tim Phelps. 2R.210. Never before had Lieutenant Barnhill called Major Phelps in the middle of the night to report a concern. 2R.211. Major Phelps directed Lieutenant Barnhill to take pictures of the detainees' injuries and to obtain written statements from them. 2R.213. In taking pictures, Lieutenant Barnhill observed that—consistent with the detainees' complaints—some of their hands, wrists, and ankles were swollen, from which he inferred that their restraints had been "too tight." 2R.227. Based on the information that Lieutenant Barnhill gathered, Major Phelps issued an order that the detainees should not be released to Buntyn's custody. *See* 2R.228-229. Prisoner-transport vehicles stop at SCDC regularly, roughly four to five times per week. 2R.170-171, 755; *see also* 2R.887 (Nurse Johnson stating that SCDC "was a common place for prisoner transports to come"). No other order against releasing detainees to a transport officer's custody has ever been issued in the jail's history. 2R.230.

Major Phelps reported his concerns about the March 2017 transport to the Federal Bureau of Investigation (FBI) and to the Federal Bureau of Prisons, which led to Buntyn's eventual arrest and conviction. 2R.439-440.

B. Procedural History

On February 26, 2020, a federal grand jury returned a three-count indictment against Buntyn. 1R.31-34. Counts 1 and 2 charged Buntyn with violating 18 U.S.C. 242 by willfully depriving detainees of their constitutional rights while acting under color of law. 1.R.32-33. Specifically, Count 1 charged Buntyn with using unreasonable force against W.Y., while Count 2 charged him with depriving W.Y., A.S., S.K., and other detainees of their Fourteenth Amendment right to be free from deliberate indifference to conditions of confinement that pose a substantial risk of serious harm to health or safety. 1R.32.[6] The indictment further charged in Counts 1 and 2 that Buntyn's actions resulted in bodily injury to the named detainees, and the indictment charged in Count 1 that the offense involved the use of a dangerous weapon. 1R.32. Count 3 charged Buntyn with witness tampering in violation of 18 U.S.C. 1512(b)(3). 1R.33.

[6] As explained above, *see* note 2, *supra*, although the indictment charged Buntyn with violating pretrial detainees' Fourteenth Amendment rights, it relied on the Eighth Amendment's deliberate-indifference standard in articulating that violation.

The case proceeded to trial in September 2022. 2R.1-1442. After the government's case-in-chief, Buntyn moved for acquittal under Rule 29 of the Federal Rules of Criminal Procedure. 2R.944. As relevant here, the defense argued that Buntyn did not act "willfully," as required to violate 18 U.S.C. 242. 2R.945. Buntyn did not challenge the sufficiency of the evidence showing that he violated the Fourteenth Amendment. The district court denied Buntyn's motion. 2R.957. Buntyn then testified in his own defense. 2R.1118-1284.

After the close of evidence, the district court explained to the jury that they would begin deliberations the next day after being instructed and hearing closing arguments. 2R.1330. While making clear that the court "certainly [would] not . . . rush the jury in making a decision," it advised jurors staying in hotels that they "may want to check out in the morning" based on the "possibility that [they might] be done" the next day. 2R.1330. The court therefore urged jurors staying in hotels to speak with the courtroom deputy, noting that hotel reservations are not "in [the court's] area of expertise." 2R.1330. After the jury left for the day, Buntyn renewed his Rule 29 motion, which the district court denied. 2R.1331.

In crafting its jury instruction on the willfulness element applicable to both Counts 1 and 2, the district court relied largely on the government's proposed instruction, but it made several modifications to the proposed language at Buntyn's request. 1R.1048-1050, 1187-1189. Neither in proposing his own instruction on

the willfulness element nor in responding to three different drafts of instructions prepared by the court with the parties' assistance did Buntyn request that the instruction state that a defendant must act with "malice" to satisfy the willfulness element. *See* 1R.673-674, 701-702, 1157, 1242-1243. Nevertheless, defense counsel repeatedly used the term "malice" in discussing the willfulness element throughout the trial proceedings. 2R.165-166 (opening argument), 945 (argument regarding Rule 29 motion), 1331 (argument regarding renewed Rule 29 motion).

Based on defense counsel's repeated use of the term, the government made an oral motion in limine to preclude the defense from using the term "malice" in its closing argument. 2R.1341. "[M]alice is not . . . a correct legal term associated with willfulness under [Section] 242," the government noted, and the term does not "appear in the Court's instructions." 2R.1341. The district court granted the government's motion, agreeing that "[w]illfulness and malice have two different legal definitions." 2R.1342.

The jury deliberated for just under 11 hours. *See* 2R.1432, 1437. Roughly seven and a half hours into its deliberations, it submitted a note asking, "What do we do if we cannot come to a unanimous decision?" 2R.1432. The district court proposed addressing the jury's question by giving an instruction of the sort approved by the Supreme Court for such circumstances in *Allen v. United States*, 164 U.S. 492 (1896). 2R.1432-1433. Both parties agreed with that course of

action. 2R.1433. Buntyn did not request, either before or after the court gave the instruction, that the *Allen* instruction specifically address jurors' hotel accommodations. 2R.1433, 1436-1437.

After deliberating for nearly three more hours, the jury reached a unanimous verdict. 2R.1437. The jury found Buntyn guilty on Count 2, the charge regarding his deliberate indifference toward the conditions of confinement on the van. 1R.1431. It also found that Buntyn's deliberate indifference resulted in bodily injury to S.K., but not to W.Y. or A.S. 1R.1432. The jury acquitted Buntyn of the other two charges. 1R.1431-1432. The district court sentenced Buntyn to 24 months' imprisonment and one year of supervised release. 1R.1487-1488.

Buntyn timely appealed. 1R.1492.

SUMMARY OF ARGUMENT

This Court should affirm Buntyn's Section 242 conviction for subjecting detainees in his custody to inhumane conditions of confinement. Buntyn's challenges to the sufficiency of the evidence, the district court's ruling precluding defense counsel from using the word "malice" in closing argument, and the court's *Allen* instruction all lack merit and should be rejected.

1. Ample evidence supported the properly instructed jury's verdict that Buntyn willfully violated the constitutional rights of detainees in his custody.

As a preliminary matter, this Court need not review Buntyn's argument that the evidence was insufficient to show that he violated the Fourteenth Amendment. Buntyn forfeited that argument when he failed to make it in support of his Rule 29 motions, and he waived it on appeal by failing to argue in his opening brief that he has satisfied the plain-error standard of review.

In any event, the evidence was more than sufficient to support the jury's finding that Buntyn deprived the detainees of their Fourteenth Amendment rights. First, the evidence—including testimony from two detainees, officials at jails in two different jurisdictions, and corroborating documents—showed that Buntyn exposed detainees on his van to human waste by denying them adequate restroom stops; restrained W.Y., A.S., and S.K. in uncomfortable positions for no legitimate penological purpose and prolonged periods during which he denied them food, water, and restroom breaks; and blasted detainees with hot air while driving through the Arizona desert. Each of those conditions either independently or in combination were objectively "sufficiently serious" to violate the Fourteenth Amendment's Due Process Clause. *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Next, the evidence showed that Buntyn acted with "deliberate indifference" to those conditions, meaning that he "kn[e]w[] of and disregard[ed]" them. *Ibid.* (internal quotation marks omitted) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994)).

Indeed, according to W.Y. and S.K.'s testimony, Buntyn created the conditions of confinement at issue.

The evidence also was sufficient to show that Buntyn acted "willfully," that is, with the "specific intent to deprive a person of a federal right." *Screws v. United States*, 325 U.S. 91, 103 (1945). Even Buntyn's own testimony showed that he knowingly violated PTS policy by keeping detainees' hands cuffed behind their backs for longer than four hours at a time. W.Y. and S.K. both testified to obviously inhumane conditions of confinement such as being transported in a urine-soaked van and being restrained in painful positions for long periods of time without food, water, or an opportunity to use the restroom. Both detainees also testified that Buntyn attempted to prevent discovery of his actions by doing favors for detainees in an attempt to make up for his misconduct and by threatening them with criminal and immigration consequences if they reported him. In these circumstances, willfulness easily can be inferred from such conduct. *See United States v. Brown*, 654 F. App'x 896, 910 (10th Cir. 2016).

2. The district court acted well within its "broad discretion" over the scope of closing arguments by precluding the defense from using the word "malice" to describe the willfulness element. *See Herring v. New York*, 422 U.S. 853, 862 (1975). That word appears nowhere in the court's instructions and, given its distinct meaning, likely would have confused the jury if included.

3. The district court did not plainly err in failing to specifically address jurors' hotel accommodations in its *Allen* instruction. That instruction, to which Buntyn did not object, included none of the problematic factors that courts consider when evaluating whether an *Allen* instruction is "improperly coercive." *United States v. Coulter*, 57 F.4th 1168, 1192 (10th Cir.) (citation omitted), *cert. denied*, 143 S. Ct. 2627 (2023). The court also preempted any pressure that jurors staying in hotels might otherwise have felt to reach a verdict on the first day of deliberations by instructing them to make appropriate arrangements with the courtroom deputy.

ARGUMENT

I. Sufficient evidence supported Buntyn's conviction under 18 U.S.C. 242.

To establish a violation of 18 U.S.C. 242, the government must prove beyond a reasonable doubt that the defendant: (1) acted willfully; (2) deprived another individual of a federal right; and (3) acted under color of law. 18 U.S.C. 242; *see also United States v. Lanier*, 520 U.S. 259, 264 (1997). The statute also sets forth a felony provision that allows for imprisonment for up to ten years (instead of up to one year) if the government proves a fourth element: (4) that the defendant's unlawful conduct resulted in bodily injury or involved the use of a dangerous weapon. 18 U.S.C. 242; *see also United States v. LaVallee*, 439 F.3d 670, 687 (10th Cir. 2006). Buntyn was charged in Count 2 with violating Section

242 by depriving detainees of their Fourteenth Amendment right to be free from deliberate indifference to conditions of confinement that pose a substantial risk of serious harm to health or safety, resulting in bodily injury to three identified victims—W.Y., A.S., and S.K. 1R.32-33. The jury convicted him on that count but found that bodily injury resulted only to S.K. 1R.1431-1432.

On appeal, Buntyn challenges the first and second elements (the willfulness-element and the deprivation-of-a-right-element). Br. 34, 44. This Court should reject Buntyn's challenge because he has waived appellate review of his sufficiency claim regarding the deprivation-of-a-right-element, and because ample evidence supported the jury's findings on both elements.[7]

A. Standard of review

This Court reviews de novo a district court's denial of a motion for judgment of acquittal based on the insufficiency of the evidence. *United States v. Walker*, 74 F.4th 1163, 1190 (10th Cir. 2023), *petition for cert. pending*, No. 23-6119 (filed Nov. 28, 2023). Sufficiency-of-the-evidence review is "highly deferential." *Ibid.* (citation omitted). Reversal is warranted only if after "mak[ing] reasonable inferences in the light most favorable to the Government," this Court concludes that "no rational trier of fact could have found the essential elements of the crime

[7] Buntyn does not challenge on appeal the jury's findings that Buntyn acted under color of law or that the conduct at issue resulted in bodily injury to S.K.

beyond a reasonable doubt." *Ibid.* (citation omitted). The reviewing court does not "inquire into the jury's credibility determinations or its conclusions regarding the weight of the evidence." *United States v. Kaufman*, 546 F.3d 1242, 1263 (10th Cir. 2008). Moreover, the evidence presented "need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt." *United States v. Bowen*, 437 F.3d 1009, 1014 (10th Cir. 2006).

Where "a defendant challenges in district court the sufficiency of the evidence on specific grounds, all grounds not specified in the [Rule 29] motion are . . . forfeited." *United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011) (internal quotation marks and citation omitted). The plain-error standard ordinarily governs review of forfeited sufficiency claims. *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir. 2012). Under that standard, a defendant "must show: (1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights." *United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir. 2003) (citation omitted). "If [the defendant] satisfies these criteria, this Court may exercise discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (citation omitted); *see also United States v. Goode*, 483 F.3d 676, 681 n.1 (10th Cir. 2007) (stating that "all active members of this court . . . agree[d] that a forfeited claim of insufficient evidence must be reviewed under the plain-error standard set forth in

Kimler" and rejecting the notion that "the fourth prong of plain-error review does not apply in the context of a challenge to the sufficiency of the evidence").

But a defendant waives appellate review of a forfeited sufficiency claim entirely if he fails to argue for plain-error review in his opening brief. *United States v. Leffler*, 942 F.3d 1192, 1198-1199 (10th Cir. 2019). Under such circumstances, this Court retains discretion to review the forfeited claim under the plain-error standard. *Id.* at 1198. But it should exercise that discretion in a defendant's favor only if doing so would "serve the adversarial process." *Id.* at 1200.

B. Buntyn forfeited a sufficiency claim regarding evidence of a Fourteenth Amendment violation and waived appellate review of the same by failing to argue for plain-error review.

In his renewed Rule 29 motion, Buntyn challenged the sufficiency of the evidence only on the willfulness element for the count on which he was convicted. 2R.1331. On appeal, Buntyn attempts to bootstrap his sufficiency challenge to include an attack on the deprivation-of-a-right element, stating that his renewed Rule 29 motion preserved the argument that "the Government failed to prove he willfully violated anyone's rights—encompassing all three elements." Br. 32. But the renewed motion expressly focused only on the willfulness element. 2R.1331 ("I think that in regards to Count 1 and 2 there is insufficient evidence as a matter of law to show that Mr. Buntyn acted with malice [Buntyn's shorthand for the

willfulness element].”). And even if this Court were to treat Buntyn’s renewed Rule 29 motion as implicitly incorporating every argument made in his initial motion, that earlier motion specifically addressed every single element of the offense and the sentencing enhancement *except* the deprivation-of-a-right element. 2R.945-946 (arguing that there was insufficient evidence of the color-of-law and willfulness elements and of bodily injury). Accordingly, Buntyn forfeited a sufficiency claim regarding evidence of a Fourteenth Amendment violation. *See Cooper*, 654 F.3d at 1117.

Although this Court reviews forfeited sufficiency claims under the plain-error standard, *DeChristopher*, 695 F.3d at 1091, Buntyn waived even this level of appellate review for the deprivation-of-a-right element by failing to argue for plain-error review in his opening brief. *See* Br. 32; *see also Leffler*, 942 F.3d at 1198-1199. This Court should follow the approach that it took in *Leffler* and decline to exercise its discretion to review that claim notwithstanding Buntyn’s waiver. *See id.* at 1200. As in *Leffler*, Buntyn’s “failure to argue for plain-error review in his opening brief [does not] appear to be a product of mistake.” *Id.* at 1198 (internal quotation marks and citation omitted). Indeed, Buntyn went out of his way to construe his renewed Rule 29 motion as having preserved a sufficiency claim regarding the deprivation-of-a-right element, when it plainly did not. *See* Br. 32. And, like the defendant in *Leffler*, Buntyn is not proceeding pro se on appeal.

Id. at 1199. Thus, reviewing Buntyn's sufficiency-of-the-evidence claim to include an attack on the deprivation-of-a-right element would not "serve the adversarial process." *Id.* at 1200.

C. Sufficient evidence supported the jury's finding that Buntyn deprived detainees of their Fourteenth Amendment rights.

If, notwithstanding Buntyn's waiver, this Court reviews his sufficiency claim regarding the evidence of a Fourteenth Amendment violation, the jury's finding on that issue easily survives plain-error review.

At the outset, Buntyn asks this Court to review the evidence too narrowly by focusing exclusively on Buntyn's conduct toward S.K. Br. 34-44. That focus flows from Buntyn's misapprehension of the jury's verdict. According to Buntyn, "[t]he jury acquitted [him] of the charges related to [W.Y.] and [A.S.]; it only convicted [him] of being deliberately indifferent to conditions of confinement that posed a substantial risk of serious harm to" S.K. Br. 34. Not so. The jury found that the government had proven the bodily-injury element necessary to establish a felony violation only with respect to S.K.—a finding that Buntyn does not contest on appeal. 1R.1432. But the jury did not "acquit" Buntyn of Count 2 as it pertains to W.Y. or A.S. *See* 1R.1431. Thus, the jury could have found that Buntyn subjected any or all of the three named victims to unconstitutional conditions of confinement, and this Court accordingly should review all evidence that supports the jury's conviction.

Under the Fourteenth Amendment's Due Process Clause, pretrial detainees are entitled to "humane conditions of confinement," including "the basic necessities of adequate food, clothing, shelter, and medical care" and to "reasonable measures to guarantee [their] safety." *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998)); *see also Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Conditions of confinement violate the Fourteenth Amendment if, viewed objectively, they are "sufficiently serious," meaning that they "den[y] the minimal civilized measure of life's necessities." *Craig*, 164 F.3d at 495 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Corrections officials can be held liable for unconstitutional conditions of confinement if they act with "deliberate indifference to [detainee] health and safety," meaning that they "know[] of and disregard an excessive risk to [detainee] health and safety." *Ibid.* (internal quotation marks omitted) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994)).

1. The conditions of confinement during the March 2017 transport were objectively sufficiently serious.

Whether conditions of confinement are objectively sufficiently serious depends on "the particular facts of each situation." *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001). The "circumstances, nature, and duration of the challenged conditions" all are relevant, and "no single factor controls the outcome" of the inquiry. *Ibid.* (internal quotation marks and citation omitted). Conditions of

confinement that would not independently violate the Fourteenth Amendment might do so "in combination" when they have a "mutually enforcing effect." *Craig*, 164 F.3d at 495 (quoting *Wilson*, 501 U.S. at 304); *accord Mitchell v. Maynard*, 80 F.3d 1433, 1442 (10th Cir. 1996) ("It is important to consider the conditions of confinement as a whole.").

Moreover, conditions of confinement violate the Fourteenth Amendment if they amount to "unnecessary and wanton inflictions of pain" that are "totally without penological justification." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (internal quotation marks omitted) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). Thus, even deprivations that last for shorter intervals "violate the Constitution when they lack a penological purpose." *Berkshire v. Dahl*, 928 F.3d 520, 538 (6th Cir. 2019) (quoting *Barker v. Goodrich*, 649 F.3d 428, 436 (6th Cir. 2011)).

Consistent with these principles, the jury was instructed that to find that the conditions of the detainees' confinement violated the Fourteenth Amendment, they should consider "the circumstances, nature, and duration of the conditions that the detainees were confined in during their transport . . . , including any evidence of how long detainees were in the PTS transport van and whether they received sufficient medical care, food, water, clothing, and the opportunity to excrete human waste." 1R.1405. The jury also was instructed that it could "consider whether the

presence of multiple conditions of confinement may have combined to create an environment that, as a whole posed a substantial risk of serious harm to health and safety." 1R.1405. Buntyn did not object to these instructions and does not challenge them on appeal.

Exposure to human waste. A reasonable jury could find that detainees, including W.Y., A.S., and S.K., experienced objectively sufficiently serious conditions of prolonged exposure to human waste. During the March 2017 transport, detainees regularly had to wait long periods of time to use the restroom. The activity log that Buntyn and Baldinger filled out during the transport shows multiple stretches between bathroom breaks exceeding six hours, including one 36.5-hour gap. *See* Supp.1R.130-139; *see also* 2R.316 (W.Y. testimony concerning long intervals between bathroom breaks). Although Buntyn claimed that numerous additional restroom stops occurred that are not reflected on the activity log (2R.1139-1140, 1144, 1154-1155, 1202-1203, 1206), a jury reasonably could discount his self-serving testimony.

The lack of adequate restroom breaks forced detainees to urinate in water bottles, resulting in spillage on the van floor and on detainees' clothing. 2R.318-319, 322, 663-664. And on at least one occasion, it forced a detainee to urinate on herself. R.323-325, 1275-1276; *see also* 2R.598-599. The pervasive presence of urine on the van is corroborated by Officer Edwards's testimony that the detainees

smelled like urine and that their clothing was wet to the touch when they arrived at SCDC. 2R.761-762. Moreover, A.S. developed a condition during the transport that multiple SCDC officials—including the nurse who medically screened him—perceived to be trench foot (2R.200-201, 770, 896), a condition "caused by an excessive amount of moisture on the foot" (2R.896-897). Whatever the correct diagnosis was, a reasonable jury could infer that A.S.'s condition was caused by prolonged contact with urine during his time on the van. Even Buntyn's own expert could not discount the possibility that prolonged exposure to urine could have caused A.S.'s symptoms. 2R.1009-1010.

Courts have recognized that such facts can rise to the level of a constitutional violation. In *DeSpain*, for example, this Court found a cognizable Eighth Amendment violation where a prisoner lacked access to working toilets and was exposed to standing water containing other peoples' urine and feces for a 36-hour period. 264 F.3d at 974. Other courts have reached the same conclusion based on similar evidence or allegations. *See Bilal v. Geo Care, LLC*, 981 F.3d903, 914 (11th Cir. 2020) (finding a cognizable Fourteenth Amendment claim based on allegations that transport officers refused to allow a pretrial detainee to use the bathroom during a 600-mile transport, which caused the detainee to "defecate in his clothing and sit in his excrement for about 300 miles"); *Berkshire*, 928 F.3d at 538 (finding a cognizable Eighth Amendment claim based on evidence

that a prison official denied a restroom break to a prisoner for six to seven hours, causing him to sit in his own urine and feces). Buntyn downplays the conditions on the van by stressing that there is no evidence that feces or other bodily fluids besides urine were present on the van. Br. 36. But, as this Court explained, "[e]xposure to human waste"—undifferentiated by category—"like few other conditions of confinement, evokes both health concerns . . . and the more general standards of dignity embodied in the Eighth Amendment"—and, by extension, the Fourteenth Amendment's Due Process Clause. *DeSpain*, 264 F.3d at 974. The Constitution does not recognize Buntyn's perceived hierarchy of human waste.

Buntyn cites several out-of-circuit cases to argue that the evidence concerning exposure to human waste does not amount to a constitutional violation. Br. 36-37. As an initial matter, *DeSpain* is binding precedent that governs conditions-of-confinement cases involving exposure to human waste in this circuit, and Buntyn fails to distinguish it.[8] In any event, the non-binding cases on which Buntyn relies do not involve situations where, as here, detainees unavoidably came

[8] Whereas DeSpain was exposed to human waste for 36 hours, *DeSpain*, 264 F.3d at 974, Buntyn inaccurately contends that S.K. was on the van for 33 hours (Br. 35). Even if, contrary to reason, the constitutionality of conditions of confinement turned on a mere three-hour durational difference, S.K. was on the van for nearly *58 hours* (*see* Supp.1R.134, 136 (showing the van leaving Phoenix at 11:30 a.m. on March 25 (actually March 26) and arriving in Topeka at 9:15 p.m. on March 27 (actually March 28)) and that W.Y. and A.S. were on the van for even longer (*see* Supp.1R.132-138)).

into physical contact with human waste as a result of being confined in conditions as cramped as a van with up to 12 detainees. *See Dykes v. Benson*, No. 22-1184, 2022 WL 19076614, at *6 (6th Cir. Nov. 22, 2022) (inmate placed in cell with unknown substances on walls and toilet smelling of feces and urine); *Smith v. Copeland*, 87 F.3d 265, 268 (8th Cir. 1996) (detainee exposed to the smell of his own urine and feces due to an overflowed toilet after denying correctional officers' offer to flush the toilet and clean up the mess); *Whitnack v. Douglas Cnty.*, 16 F.3d 954, 956 (8th Cir. 1994) (inmate and detainee placed in cell for three or four hours with a toilet covered in dried feces, a sink covered in hair and vomit, walls covered with dried mucus before being given cleaning supplies).

A reasonable jury also could find that the pervasive presence of urine on the van put S.K. at particular risk. S.K. was still recovering from being stabbed in both of his knees when he got on the van. Supp.2R.4-5, 35. Buntyn attempts to discount the risk of infection that S.K. faced by noting that a nurse in Maricopa County told S.K. that he was medically cleared to get on the van. Br. 38 (citing 2R.1164). But the nurse simply looked over S.K.'s medical records; she did not examine his wounds or the conditions on the van to determine if S.K. was at risk of infection. 2R.588.

Prolonged use of restraints. W.Y. and S.K. each testified that Buntyn cuffed their hands behind their backs and placed them in the van's segregation

cage for stretches ranging from at least five hours to potentially longer than 22 hours in response to their speaking out about the conditions on the van. 2R.346-349, 595-596, 599, 607-613, 628, 632-635; *see also* Supp.1R.136. And W.Y. testified that the same thing happened to A.S. twice, first, when he stepped out of line while going to the restroom at one jail and, second, when he opened up a bag sitting at a table at another jail to look for food. 2R.325-337. W.Y. and S.K. testified that when the detainees were so restrained, they did not receive food or water and were denied restroom breaks. 2R.331, 337, 349-350, 599-601, 607-608, 635-637. Both men testified that being restrained in that manner for such long periods of time was extremely painful. 2R.350, 636, 664. And, in W.Y.'s case, Buntyn cuffed his hands behind his back and placed him in the segregation cage for a prolonged period even though W.Y. told Buntyn that he was recovering from a heart attack and had shoulder injuries that would make being restrained in that manner especially painful. 2R.345, 1257-1258; Supp.3R., at 14:26-14:52.

Although Buntyn denied that some of these incidents occurred and tried to justify others (2R.1150, 1160, 1166, 1264-1265), a jury reasonably could discount Buntyn's self-serving denials and justifications. That is especially true because Buntyn never reported these incidents to his trip manager (2R.1308-1309, 1311, 1319), even though PTS requires notification to trip managers any time that an officer cuffs a detainee's hands behind their back or places them in a segregation

cage for disciplinary reasons (2R.1306; *see also* Supp.1R.85). And, in any event, Buntyn admitted that he cuffed W.Y., A.S., S.K., and one other detainee's hands behind their backs and placed them together in the van's cramped middle compartment in response to their mere verbal opposition. 2R.1200-1201.

Courts have recognized such facts can rise to the level of a constitutional violation. For example, in *Gee v. Pacheco*, 627 F.3d 1178 (10th Cir. 2010), this Court held that a plaintiff stated an Eighth Amendment claim based on allegations that he was restrained "with a stun belt, belly chains, handcuffs, and a black box covering the handcuffs, which prevented him from accessing the food and water provided to . . . other prisoners" during a 24-hour transport between prisons. *Id.* at 1189. Admittedly, none of the stretches during which Buntyn cuffed detainees' hands behind their backs and placed them in the van's segregation cage extended quite that long (although a reasonable jury could find that S.K. was so restrained for more than 22 hours between the time that the van left Socorro County and when it arrived in Golden, Colorado (*see* 2R.613, 635; Supp.1R.136)). But nothing in *Gee* suggests that the alleged conditions would have been constitutional if they had persisted for somewhat less than 24 hours.

Moreover, courts have found cognizable conditions-of-confinement claims where, as here, individuals were restrained "without penological justification." *Hope*, 536 U.S. at 737 (citation omitted). In *Hope*, for example, the Supreme

Court found a cognizable Eighth Amendment violation where, after "[a]ny safety concerns had long since abated," prison officials handcuffed a prisoner to a hitching post for a seven-hour period, during which he experienced "unnecessary pain caused by the handcuffs and the restricted position of confinement" and was unnecessarily exposed to "heat of the sun," "prolonged thirst," and "deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." 536 U.S. at 738. Similarly, in *Barker*, the Sixth Circuit found a cognizable Eighth Amendment violation where, "for no legitimate penological purpose," prison officials placed a prisoner in a detention cell with his hands cuffed behind his back for 12 hours, "during which time he missed a meal and was unable to sit or lie down without pain, use the restroom, or obtain water from the fountain." 649 F.3d at 434.

Buntyn cites two unpublished cases for the proposition that "handcuffing an inmate does not offend a constitutional right." Br. 40-41. But neither of those cases involved handcuffing behind the back or a person being placed in extremely cramped quarters while so restrained. *See Van Hallcy v. Clements*, 519 F. App'x 521, 522 (10th Cir. 2013); *Cunningham v. Eyman*, 17 F. App'x 449, 452 (7th Cir. 2001). Thus, those cases offer little persuasive guidance here.

Blasting heat. A reasonable jury also could find that Buntyn responded to detainees' complaints about the van's temperature while traversing the Arizona

desert by intentionally blasting them with hot air. 2R.352-353, 634-635, 1221-1222. In *Patel v. Lanier County*, 969 F.3d 1173 (11th Cir. 2020), the Eleventh Circuit found a cognizable Eighth Amendment claim based on evidence that transport officers left a pretrial detainee on "a hot transport van—without any ventilation or air conditioning—for a period of approximately two hours," when the officers could have brought the man inside the jail. *Id.* at 1183-1184. Although the claim at issue in that case was an Eighth Amendment *excessive-force* claim, the court observed that it "might also have been pleaded (and analyzed) as a conditions-of-confinement claim." *Id.* at 1182 n.6.

W.Y. estimated that Buntyn blasted the detainees with heat for 20 minutes (2R.354-355), admittedly less than the two-hour period at issue in *Patel*. But the heat was so extreme that W.Y. "thought [he] was going to die." 2R.352-353. And here, unlike in *Patel*, the heat in Arizona was far from the only condition of confinement at issue. Although the evidence that Buntyn blasted the detainees with heat might not be sufficient on its own to support the jury's verdict, it does "in combination" with the evidence of exposure to human waste and prolonged use of restraints. *Craig*, 164 F.3d at 495 (citation omitted).

2. Buntyn acted with deliberate indifference to the unconstitutional conditions of confinement.

That Buntyn acted with deliberate indifference to the conditions highlighted above is beyond serious dispute. The jury was instructed that to find that Buntyn

acted with deliberate indifference, it must find that Buntyn (1) "kn[e]w[] that the detainee or detainees [were] confined in conditions that pose[d] a substantial risk of serious harm to health and safety"; and (2) "disregard[ed] the risk by failing to take reasonable measures to abate that risk." 1R.1405. In applying that standard, the jury was instructed that it could "consider any evidence, including whether [Buntyn] had an opportunity to hear the detainees' complaints about the conditions" of confinement or "to observe the conditions of confinement and their impact on the detainees' health and safety" or "whether any of the conditions of confinement . . . were obvious." 1R.1405-1406. Buntyn did not object to this instruction and does not challenge it on appeal.

The evidence showed that beyond knowing of and disregarding the unconstitutional conditions of confinement, Buntyn personally created them. W.Y. testified that Buntyn regularly chose not to stop for restroom breaks for intervals exceeding hours. 2R.316. That testimony is corroborated by the activity log. *See* Supp.1R.130-139. W.Y. and S.K. both testified that Buntyn restrained detainees in painful positions for prolonged periods during which he denied them food, water, or bathroom breaks. 2R.325-337, 346-350, 595-596, 599, 601, 607-613, 628, 632-637, 647-650, 664. And both detainees testified that Buntyn intentionally blasted them with heat when they complained about the temperature on the van. 2R.352-353, 634, 1221-1222. W.Y. and S.K. also testified that the detainees repeatedly

spoke out about these conditions and that Buntyn ignored their pleas. 2R.317, 321-325, 345, 352-355, 588, 634. And video from the van's stop at the Socorro County jail captures detainees speaking out about these conditions in Buntyn's presence. Supp.3R., at 2:58-3:19, 4:55-5:12, 13:40-14:52.

Buntyn's argument that he did not act with deliberate indifference focuses solely on his decision on one of two occasions to cuff S.K.'s hands behind his back and his justification for that decision. Br. 42-43. In addition, Buntyn argues that he attempted to "alleviate th[e] risk" of harm to S.K. based on his claim that he checked on S.K. every 15 minutes and moved the handcuffs to the front at the first possible opportunity. Br. 41 (quoting *Marsh v. Butler Cnty.*, 268 F.3d 1014, 1027 (11th Cir. 2001), *abrogation in part recognized in Aberman v. PNC Bank, Nat'l Ass'n*, No. 23-10182, 2023 WL 3910573, at *1 n.1 (11th Cir. June 9, 2023)), 43. But, again, a reasonable jury need not credit Buntyn's self-serving account, including his unsupported assertion that there was no other secured facility where he could have stopped to adjust S.K.'s handcuffs to the front during the five hours that elapsed between the van's departure from Phoenix and its arrival in Payson, Arizona. *See* 2R.1171; Supp.1R.134, 136.

* * *

In light of the above, there was more than sufficient evidence that Buntyn violated detainees' Fourteenth Amendment rights. And affirming the jury's

finding of a Fourteenth Amendment violation certainly would not call into question "the fairness, integrity, or public reputation of judicial proceedings." *Kimler*, 335 F.3d at 1141. Accordingly, the jury's finding of a Fourteenth Amendment violation survives plain-error review.

D. Sufficient evidence supported the jury's finding that Buntyn acted willfully.

Section 242's willfulness element requires proof of a "specific intent to deprive a person of a federal right," *Screws v. United States*, 325 U.S. 91, 103 (1945), but does not require that a defendant "have been thinking in constitutional terms," *id.* at 106. The jury was instructed that it could find that Buntyn acted willfully, through "circumstantial evidence," including, but not limited to, "what [Buntyn] said; what [he] did or failed to do; [his] demeanors and behaviors; [his] training and experience; [and] any statements that [he] made before, during or after" the incidents at issue. 1R.1399, 1404; *see also United States v. Brown*, 654 F. App'x 896, 910 (10th Cir. 2016). Buntyn does not challenge that instruction on appeal.

Buntyn barely addresses the willfulness element, arguing only that he "acted at all times consistently with his training." Br. 44. That representation is not only

contradicted by the evidence, but also by Buntyn's own testimony.[9] *See* Supp.1R.69 (PTS policy precluding detainees from being restrained with their hands behind their backs for more than four hours). Buntyn's specific intent to deprive detainees of their Fourteenth Amendment rights also can be inferred from the "plain[]" wrongfulness of keeping detainees in urine-soaked conditions and keeping them restrained in painful positions for prolonged periods without giving them food, water, or an opportunity to use the restroom. *Screws*, 325 U.S. at 106; *see also* pp. 39-46, *supra*. Indeed, Buntyn testified that he knew that he owed a duty of care to the detainees in his custody and that he was specifically responsible for providing them with adequate food, water, and restroom breaks. 2R.1233. Willfulness also can be inferred from the evidence concerning Buntyn's "efforts to prevent detection of [his] wrongful behavior." *Brown*, 654 F. App'x at 910; *see also* 2R.356, 652-666.

[9] Buntyn testified that he moved S.K.'s handcuffs to the front in Payson, Arizona after he had cuffed them behind S.K.'s back in Phoenix. 2R.1167-1168. The activity log states that the van arrived in Payson five hours after it left Phoenix. *See* Supp.1R.134-136. Buntyn also testified that after he cuffed S.K.'s hands behind his back in Socorro County, New Mexico, and did the same to W.Y., A.S., and one other detainee in Albuquerque, he moved the four detainees' handcuffs to the front at a stop not listed on the activity log in Bernalillo, New Mexico. 2R.1203. According to a trip manifest, Buntyn and Baldinger picked up a detainee in Bernalillo at 8:30 A.M. on March 27, just under four hours after it left Albuquerque and ten hours after the van left Socorro County. Supp.1R.125, 136.

A reasonable jury readily could have found beyond a reasonable doubt that Buntyn acted willfully. This Court should therefore uphold his conviction based on the sufficiency of the evidence.

II. The district court did not abuse its discretion by precluding the defense from using the word "malice" to discuss the willfulness element during closing argument.

Buntyn contends that the district court "violated his constitutional right to present a defense" by precluding his counsel from using the word "malice" to discuss the willfulness element during closing argument. Br. 44-45. This argument fails.

A. Standard of review

The abuse-of-discretion standard governs review of "any limitations placed by a district court on closing arguments." *United States v. Apperson*, 441 F.3d 1162, 1206 (10th Cir. 2006).

B. The district court's motion-in-limine ruling was appropriate.

This Court should affirm the district court's ruling to preclude the defense from using the word "malice" during closing argument because it was a proper exercise of discretion to prevent the jury from becoming confused regarding the legal elements of a Section 242 offense. In *Herring v. New York*, 422 U.S. 853 (1975), the Supreme Court held that "a *total denial* of the opportunity for final argument . . . is a denial of the basic right of the accused to make his defense." *Id.*

at 859 (emphasis added). At the same time, the Court stressed that district courts "must be . . . given great latitude in controlling the duration and limiting the scope of closing summations" to ensure that "argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." *Id.* at 862. In *United States v. Manriquez Arbizo*, 833 F.2d 244 (10th Cir. 1987), for example, this Court held that a district court did not abuse its "broad discretion" by prohibiting a defendant from commenting during closing argument in a way that would have been misleading to the jury on testimony that the court had limited. *Id.* at 247; *see also United States v. Doe*, 705 F.3d 1134, 1149 (9th Cir. 2013) (holding that a district court acted "well within [its] discretion" in precluding a defendant from "arguing incorrect statements of law" during closing argument).

Here, the district court similarly did not abuse its broad discretion to limit the scope of closing arguments by precluding the defense from using the word "malice" to discuss the willfulness element. As the court explained, "[w]illfulness and malice have two different legal definitions." 2R.1342; *see also* pp. 49-50, *supra* (setting forth the definition of "willfulness" as used in Section 242); *Malice*, Black's Law Dictionary (11th ed. 2019) (defining the term as "[i]ll will; wickedness of heart," while noting that that definition "is most typical in nonlegal contexts"). The court acted well within its discretion in concluding that the jury

might have been confused by the defense using a legal term that appeared nowhere in the jury instructions. *See* 1R.1399.

III. The district court did not plainly err in giving an *Allen* instruction.

After the jury had deliberated for roughly seven and a half hours, it asked the district court what it should do if it could not come to a unanimous verdict. 2R.1432. Under such circumstances, a district court may give an instruction to encourage further deliberation. *See Allen v. United States*, 164 U.S. 492, 501-502 (1896). After consultation with counsel and without objection, the district court gave an *Allen* instruction in this case. 2R.1432-1433; *see also* 2R.1436-1437 (no objection after the *Allen* instruction was given). Buntyn challenges that decision for the first time on appeal, but his argument lacks merit.

A. Standard of review

Ordinarily, this Court reviews an *Allen* instruction under the abuse-of-discretion standard. *United States v. Cornelius*, 696 F.3d 1307, 1321 (10th Cir. 2012). But where, as here, the defendant fails to object to an *Allen* instruction, the plain-error standard applies. *United States v. Hernandez-Garcia*, 901 F.2d 875, 876 (10th Cir. 1990).

B. The district court's *Allen* instruction was not improperly coercive.

An *Allen* instruction is impermissible if it is "improperly coercive." *United States v. Coulter*, 57 F.4th 1168, 1192 (10th Cir.) (citation omitted), *cert. denied*,

143 S. Ct. 2627 (2023). To determine whether an *Allen* instruction is improperly coercive, this Court considers "(1) the language of the instruction, (2) whether the instruction is presented with other instructions, (3) the timing of the instruction, and (4) the length of the jury's subsequent deliberations." *Ibid.* (citation omitted). The district court's *Allen* instruction was not deficient, let alone plainly so, in any of those respects.

First, an *Allen* instruction's language is not improperly coercive if it "urge[s] all jurors, not just those in favor of acquittal, to consider their views" and "stresse[s] the importance of integrity in being an impartial, deliberate fact-finder." *Coulter*, 57 F.4th at 1192 (alterations in original; citation omitted). The district court's instruction contained just such non-coercive language:

> Those of you who believe that the Government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourself if the evidence is really convincing enough given that other members of the jury are not convinced. And those of you who believe that the Government has not proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt that you have is a reasonable one, given that other members of the jury do not share your doubt.
>
> . . .
>
> It is your duty, as jurors, to consult with one another and deliberate with a view towards reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

2R.1435-1436.

Second, where a district court instructs a jury to apply the *Allen* instruction in conjunction with its previous instructions, that "reduces the likelihood of coercion." *Coulter*, 57 F.4th at 1193. The district court here did just that, instructing the jury: "I will ask that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the instructions that I have previously given you." 2R.1436.

Third, where a district court delivers an "*Allen* instruction after the jury informed the court that it was unable to reach a verdict," that "weighs against a determination of improper coercion." *Coulter*, 57 F.4th at 1192 (citation omitted); *see also* 2R.1432-1433. Here, the jury asked the court after it had deliberated for seven and half hours what it should do if it failed to reach a unanimous verdict. 2R.1432.

Finally, the jury deliberated for nearly three additional hours after receiving the *Allen* instruction—nearly half as long as it deliberated *before* sending the note. 2R.1437. That is longer than juries deliberated in several cases in which this Court found no abuse of discretion (let alone plain error) in an *Allen* instruction. *E.g.*, *United States v. Ellzey*, 936 F.2d 492, 501 n.2 (10th Cir. 1991) (one and a half hours); *United States v. Butler*, 904 F.2d 1482, 1488 (10th Cir. 1990) (two hours); *United States v. McKinney*, 822 F.2d 946, 950 (10th Cir. 1987) (one hour and 20

minutes). Moreover, the jury returned a mixed verdict (1R.1431-1432), which is "a strong indication of lack of coercion." *Spears v. Greiner*, 459 F.3d 200, 207 (2d Cir. 2006).

Unmoored from any of the relevant factors, Buntyn argues that the district court's *Allen* instruction was improperly coercive because it failed to specifically address the circumstances of jurors staying in hotels. Br. 48-49. Setting aside Buntyn's failure to raise that concern either before or after the court had issued its instruction (2R.1432-1433, 1436-1437), his argument ignores the court's remarks to the jury the previous day about hotel rooms. While making clear that the court "certainly [would] not . . . rush the jury in making a decision," it advised jurors staying in hotels that they "may want to check out in the morning" based on the "possibility that [they might] be done" the next day. 2R.1130. The court urged jurors staying in hotels to speak with the courtroom deputy, noting that hotel reservations are not "in [the court's] area of expertise." 2R.1130. Presumably, the courtroom deputy adequately addressed the inherent uncertainty regarding the timing of the jury's deliberations. Anything to the contrary is pure speculation on Buntyn's part.

For these reasons, the district court did not err, let alone plainly so, when it gave an *Allen* instruction to the jury. The court's instruction bore all the hallmarks that this Court has identified of a proper, non-coercive charge to continue

deliberation. And the court addressed any pressure that jurors staying in hotels might have felt to reach a verdict on the first day of deliberation by instructing them to make appropriate arrangements with the courtroom deputy.

CONCLUSION

For the foregoing reasons, this Court should affirm Buntyn's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,711 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

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Date: December 15, 2023

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, prepared for submission via ECF, complies with the following requirements.

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Date: December 15, 2023