Nos. 05-1812; 05-1889; 05-2143; 05-2294; 05-2295

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant

v.

PATRICK CARSON, ROBERT HEY, PETER JACQUEMAIN,

Defendants-Appellants

and

ROBERT JACQUEMAIN,

Defendant-Appellant-Cross-Appellee

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

PROOF BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with Appellants that oral argument will assist the Court in assessing the merits of this case.

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JURISDICTIONAL STATEMENT

This is an appeal from judgments in a criminal case. The district court sentenced and entered judgment against defendants Carson and Hey on June 8,

2005 (Judgments, R. 152, 153, Apx. __)[1], and against defendants Robert and Peter Jacquemain on July 26, 2005 (Judgments, R. 164, 165, Apx. __). Each defendant filed a timely notice of appeal. (Notices of Appeal, R. 150, 155, 168, 179, Apx. __). The United States filed a timely notice of appeal of Robert Jacquemain's sentence. (Notice of Appeal, R. 175, Apx. __). The district court had subject matter jurisdiction under 18 U.S.C. 3231. This Court has appellate jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742(b). On August 16, 2007, the United States filed with this Court the Solicitor General's personal approval to prosecute the government's cross-appeal of Robert Jacquemain's sentence.

GOVERNMENT'S RE-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the prosecutor's comments during closing argument warrant reversal under plain error review.

2. Whether the district court abused its discretion in providing the jury with instructions on excessive force that fully conformed with the requirements of *Graham* v. *Connor*, 490 U.S. 386 (1989), but that did not include specific language requested by one of the defendants.

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[1] Citations to "R. __" refer to documents in the district court record. Citations to "Tr. Vol. __ at __" refer to pages in the trial transcript identified by volume. Citations to "Carson Br. __," "Hey Br. __," "Peter Jacquemain Br. __," and "Robert Jacquemain Br. __" refer to pages in the defendants' opening briefs. Citations to "GX __" identify by number the government's trial exhibits. The first time an exhibit is cited, its citation is followed by the location in the trial transcript where the particular exhibit was admitted.

3. Whether sufficient evidence supports Peter Jacquemain's conviction for obstruction of justice.

4. Whether sufficient evidence supports Robert Hey's convictions for obstruction of justice and perjury.

5. Whether the district court abused its discretion in denying Hey's request for an evidentiary hearing regarding the victim's request for restitution.

6. Whether Patrick Carson's within-Guidelines sentence is substantively reasonable.

7. Whether Robert Jacquemain's sentence is unreasonable. (Government's cross-appeal).

STATEMENT OF THE CASE

On May 26, 2004, a federal grand jury returned a nine-count second superseding indictment against Patrick Carson, Robert Hey, Peter Jacquemain, Robert Jacquemain, and Daniel Gerkey, all of whom were, at relevant times, employed as police officers with the Mount Clemens Police Department. (Second Superseding Indictment, R. 84, Apx. __). Count I alleged that Carson, Peter Jacquemain, Robert Jacquemain, and Gerkey violated 18 U.S.C. 242 and 2 (deprivation of rights under color of law and aiding and abetting the same) by assaulting Robert Paxton, resulting in his bodily injury.[2] (R. 84 at 2, Apx. __). Count II alleged that all the defendants violated 18 U.S.C. 371 (conspiracy) by

[2] The government moved to dismiss Count I against defendant Gerkey before the end of trial. (Tr. Vol. 5 at 3-4, Apx. __).

conspiring to cover up the assault of Robert Paxton. (R. 84 at 2-6, Apx. __). The indictment alleged sixteen overt acts of the conspiracy, five of which were also charged in separate counts. (R. 84 at 4-6, Apx. __). Counts III-VI alleged that Carson, Robert Jacquemain, Peter Jacquemain and Gerkey, respectively, violated 18 U.S.C. 1512(b)(3) (obstruction of justice) by filing false police reports concerning the arrest of, and use of force against, Paxton. (R. 84 at 7, Apx. __). Count VII alleged that Hey violated 18 U.S.C. 1503 (obstruction of justice) by providing false and misleading statements to a grand jury investigating the assault of Paxton.[3] (R. 84 at 8, Apx. __). Count VIII alleged that Hey violated 18 U.S.C. 1623 (perjury) by providing materially false information to the grand jury investigating the assault of Paxton. (R. 84 at 8, Apx. __). Count IX alleged that Hey violated 18 U.S.C. 1512(c)(2) (obstruction of justice) by providing false and misleading testimony to a grand jury investigating the assault of Paxton. (R. 84 at 11, Apx. __).[4]

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[3] The government moved to dismiss Count VII before the end of trial. (Tr. Vol. 5 at 3-4, Apx. __).

[4] Pursuant to a plea agreement (Plea Agreement, R. 63, Apx. __), Duane Poucher pleaded guilty to Counts I, II, and V of the first superseding indictment, alleging violations of 18 U.S.C. 242 and 2, 18 U.S.C. 371, and 18 U.S.C. 1512(b)(3), respectively. (Judgment, R. 172, Apx. __). He was sentenced to two years' probation on each Count, to be served concurrently. (R. 172, Apx. __).

The trial of Carson, Hey, Peter Jacquemain, Robert Jacquemain and Gerkey began June 9, 2004. At the close of the government's case, the defendants all moved for judgments of acquittal[5] (Tr. Vol. 9 at 16-45); the district court took the motions under advisement (Tr. Vol. 9 at 22, 30, 33, 36, 39, 45, Apx. __). The defendants renewed their motions at the close of all evidence (Tr. Vol. 9 at 98, Apx. __); the district court again took them under advisement (Tr. Vol. 9 at 99, Apx. __).

The jury convicted Carson on Counts I, II and III. (Jury Verdict Form, R. 110, Apx. __). The jury convicted Hey on Counts VIII and IX. (R. 110, Apx. __). The jury convicted Peter Jacquemain on Count V, and acquitted him on Counts I and II. (R. 110, Apx. __). The jury convicted Robert Jacquemain on Count II, and acquitted him on Counts I and IV. (R. 110, Apx. __). Gerkey was acquitted of all charges. (R. 110, Apx. __).

After the trial, Robert Jacquemain moved for acquittal (Motion for Acquittal, R. 124, Apx. __), which Hey joined (Notice of Joinder, R. 138, Apx. __). Hey moved for a new trial (Motion for New Trial, R. 125, Apx. __), which Robert Jacquemain and Carson joined (Notices of Joinder, R. 127, 136, Apx. __).

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[5] Carson did not move for judgments of acquittal on Counts I and II. (Tr. Vol. 9 at 39, Apx. __).

Peter Jacquemain moved for acquittal (Motion for Acquittal, R. 126, Apx. __), which Robert Jacquemain and Hey joined (R. 127, 138, Apx. __). The district court denied all motions. (Orders, R. 140, 141, 142, Apx. __).

The district court sentenced Carson to 33 months' imprisonment to be followed by two years' supervised release. (R. 153, Apx. __). The district court sentenced Hey, Peter Jacquemain and Robert Jacquemain to three years' probation with six months' home confinement; Hey was sentenced to an additional six months' community confinement. (R. 152, 164, 165, Apx. __). These appeals followed.

STATEMENT OF FACTS

1. The Assault

Late in the evening of July 27, 2002, Robert Hey, an off-duty Mount Clemens police officer, was on his way to the police station with a civilian passenger, Brian Pike. (Pike, Tr. Vol 7 at 63-65, Apx. __). As Hey's vehicle headed into downtown Mount Clemens, Hey noticed a pickup truck following closely behind him. (Pike, Tr. Vol. 7 at 65-66, Apx. __). The driver of that truck, Robert Paxton, believed that Hey had cut him off in traffic. (Paxton, Tr. Vol. 4 at 156, Apx. __). Both cars then engaged in an escalating road rage incident. (Pike, Tr. Vol. 7 at 67, Apx. __; Paxton, Tr. Vol. 4 at 156-159, Apx. __). Hey thereafter

called into the Mount Clemens police station for assistance. (Pike, Tr. Vol. 7 at 67-68, Apx. __). Mount Clemens police officers Duane Poucher, Patrick Carson, Peter Jacquemain, Robert Jacquemain and Daniel Gerkey were on duty inside the station doing paperwork when Hey called in and reported that someone had tried to run him off the road. (Poucher, Tr. Vol. 3 at 55-56, Apx. __). Hey provided his location, and the officers at the station ran to their patrol cars to respond. (Poucher, Tr. Vol. 3 at 56-57, Apx. __; Pike, Tr. Vol. 7 at 67-72, Apx. __). Officers Poucher and Gerkey drove together (Poucher, Tr. Vol. 3 at 59, Apx. __) and were the first officers to leave the station (Robert Jacquemain, Tr. Vol. 8 at 40, Apx. __). Robert Jacquemain rode with Carson (Robert Jacquemain, Tr. Vol. 8 at 40, Apx. __), and Peter Jacquemain apparently drove alone.

Poucher and Gerkey eventually caught up with both Hey's car and the pickup truck driven by Paxton. (Poucher, Tr. Vol. 3 at 59, 61, Apx. __). Hey pulled his car over so that the on-duty officers could follow Paxton's truck. (Poucher, Tr. Vol. 3 at 62, Apx. __). Poucher and Gerkey followed Paxton into a residential neighborhood, where Paxton eventually pulled over to the right side of the street. (Poucher, Tr. Vol. 3 at 63-64, Apx. __; Pike, Tr. Vol. 7 at 74, Apx. __). Poucher stopped his police car at a slight angle about half a car's length behind Paxton's. (Poucher, Tr. Vol. 3 at 65, Apx. __). While Poucher radioed Paxton's

vehicle information into the police station, Carson and Robert Jacquemain pulled up next to, and slightly in front of, Poucher's vehicle. (Poucher, Tr. Vol. 3 at 65-66, Apx. __). The third police car stopped behind Poucher's. (Pike, Tr. Vol. 7 at 74, Apx. __). Hey, who followed the police cars, stopped his car on the left side of the street, behind Carson's. (Pike, Tr. Vol. 7 at 73-74, Apx. __).

Robert Jacquemain ran to the driver's side of the truck and opened the door. (Poucher, Tr. Vol. 3 at 66, Apx. __). Other officers quickly surrounded the door. (Pike, Tr. Vol. 7 at 78, Apx. __; Lane, Tr. Vol. 3 at 10, Apx. __). The officers yelled for Paxton to get out of the truck (Lane, Tr. Vol. 3 at 10, Apx. __), and when he did not, Robert Jacquemain reached into Paxton's truck and pulled him out head-first. (Poucher, Tr. Vol. 3 at 66, Apx. __; Pike, Tr. Vol. 7 at 79, Apx. __). Paxton was immediately thrown to the ground. (Poucher, Tr. Vol. 3 at 66, Apx. __; Pike, Tr. Vol. 7 at 79, Apx. __). At no point did Paxton stand on his own outside the truck; rather, he was taken from the truck to the ground in one fluid motion. (Pike, Tr. Vol. 7 at 79-80, 83, Apx. __; Poucher, Tr. Vol. 3 at 66-67, Apx. __; Lane, Tr. Vol. 3 at 10-11, Apx. __).

By the time Poucher exited his car and approached Paxton, Robert Jacquemain was holding Paxton face down in the street. (Poucher, Tr. Vol. 3 at 79-80, Apx. __; Paxton, Tr. Vol. 4 at 164, Apx. __). The officers then surrounded

Paxton and beat him – in view of several neighborhood residents. (Pike, Tr. Vol. 7 at 85, Apx. __; Anderson, Tr. Vol. 2 at 69, Apx. __; Lane, Tr. Vol. 3 at 12-13, Apx. __; Burkhardt, Tr. Vol. 4 at 130, Apx. __).

During the assault, Peter Jacquemain was either kneeling on, or crouched down next to, Paxton; Carson was crouched down near Paxton's head; and Gerkey was within a foot of Paxton's left side. (Poucher, Tr. Vol. 3 at 80, Apx. __). According to Poucher, Carson punched Paxton in the head at least twice, and Poucher later admitted to kicking Paxton two or three times while he was restrained. (Poucher, Tr. Vol. 3 at 81-83, Apx. __). The eyewitnesses, however, described seeing the officers throwing numerous punches and kicking Paxton while he was on the ground. (Pike, Tr. Vol. 7 at 85, Apx. __ (testifying that he saw officers' arms moving in a punching and grabbing motion); Anderson, Tr. Vol. 2 at 69, Apx. __ (testifying that police were "punching and kicking [Paxton] while he was on the ground"); Lane, Tr. Vol. 3 at 12-13, Apx. __ (testifying that she saw officers' arms moving back and forth accompanied by "thudding sound[s]," and saw officers kicking Paxton); Burkhardt, Tr. Vol. 4 at 130, Apx. __ (testifying that officers were bending over Paxton with their arms bent in a manner that indicated "somebody was getting their butt beat")). One eyewitness heard officers yelling while they were beating Paxton that that "will teach him to

go up against a police officer." (Anderson, Tr. Vol. 2 at 71, Apx. __). Paxton offered no real resistance during the assault; rather, he was attempting to shield himself from the assault and was pleading with the officers to stop. (Poucher, Tr. Vol. 3 at 81-83, Apx. __; Anderson, Tr. Vol. 2 at 71, Apx. __; Lane, Tr. Vol. 3 at 12, Apx. __).

Paxton was eventually handcuffed, lifted from the ground, and placed into a police car. (Poucher, Tr. Vol. 3 at 85, Apx. __; Paxton, Tr. Vol. 4 at 169-170, Apx. __). Carson and Robert Jacquemain drove him back to the police station. (Robert Jacquemain, Tr. Vol. 8 at 56, Apx. __). Shortly thereafter, some of the remaining officers walked back toward Hey's car. (Pike, Tr. Vol. 7 at 97, Apx. __). Hey and Pike got out of Hey's car and greeted the officers. (Pike, Tr. Vol. 7 at 97, Apx. __; Anderson, Tr. Vol. 2 at 74-75, Apx. __). They all eventually drove back to the police station. (Pike, Tr. Vol. 7 at 97, Apx. __; Poucher, Tr. Vol. 3 at 86, Apx. __).

Once at the station, Paxton was handcuffed to a bench and booked. (Robert Jacquemain, Tr. Vol. 8 at 57-58, Apx. __; Paxton, Tr. Vol. 4 at 171, Apx. __). Although he initially declined medical treatment, Paxton later agreed to go to the hospital for evaluation after he saw the extent of his injuries in a mirror. (Paxton, Tr. Vol. 4 at 173, Apx. __). Paxton required stitches to close two cuts – one under

his eye and one over his cheek bone. (Paxton, Tr. Vol. 4 at 175, Apx. __; Rook, Tr. Vol. 6 at 7, Apx. __). His right eye was bruised and swollen. (GX 17, Tr. Vol. 4 at 174, Apx. __). Paxton also had multiple abrasions on the left side of his face, along his cheek and chin. (GX 18, Tr. Vol. 4 at 180, Apx. __). The doctor who treated Paxton described his injuries as "blunt [force] trauma to the head." (Rook, Tr. Vol. 6 at 24, Apx. __).

2. The Cover-Up

a. The Reports

Poucher returned to the station and entered the squad room to write a report of the arrest. (Poucher, Tr. Vol. 3 at 88, Apx. __). Robert Jacquemain, who was already in the squad room with Hey, told Poucher that "we're going to say that [Paxton] got out of the car, we're going to say that he came at us." (Poucher, Tr. Vol. 3 at 89, Apx. __). Poucher took that to mean that Paxton was injured, and the officers were going to report that Paxton was the aggressor to justify the officers' use of force. (Poucher, Tr. Vol. 3 at 90, Apx. __ (testifying that they needed to say that Paxton was the aggressor so that they did not "get in trouble for beating him up"); Poucher, Tr. Vol. 3 at 92). After discussing what to include in their reports, Poucher was given a copy of Carson's completed report so that his report would coincide with the other officers'. (Poucher, Tr. Vol. 3 at 93, 96, Apx. __). Indeed,

all of the officers' reports – except Hey's[6] – indicate that Paxton exited his vehicle and charged at the officers. (See GX 20, Tr. Vol. 3 at 94, Apx. __ (Carson's report indicating that Paxton "exited the pickup and ran at [the police car] * * * with his fist clenched"; that he was taken to the ground because of his "threatening behavior"; and that he struggled with officers); GX 19, Tr. Vol. 3 at 92, Apx. __ (Poucher's report indicating that Paxton "exited his vehicle and was contacted by other officers," and that Paxton "struggled with officers"); GX 22, Tr. Vol. 5 at 147, Apx. __ (Peter Jacquemain's report indicating that "Paxton exit[ed] his vehicle and start[ed] running toward [the police car] in a threatening manner, (i.e., fists clenched)," and that Paxton "would not comply" with officers' commands); GX 21, Tr. Vol. 5 at 147, Apx. __ (Robert Jacquemain's report indicating that Paxton was "enraged and exited the vehicle"; that "it looked like [Paxton] was trying to run at [the police car]"; that Paxton was "noncooperative" and "began to resist arrest"; and that Paxton tried to "go beneath [his] truck" and had to be "pull[ed] off the ground").

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[6] Unlike the other officers' reports, Hey's report provides absolutely no details of the arrest. In fact, Hey's report does not even mention Paxton's arrest. Instead, it provides details only of the road rage incident with Paxton – up to the point when the marked police cars passed his vehicle and began to pursue Paxton's. (GX 24, Tr. Vol. 4 at 93, Apx. __). After noting that police cars began a pursuit of Paxton's vehicle, Hey's report concludes that he "then observed [Paxton's] vehicle stopped" near the police cars. (GX 24, Apx. __).

Based on these reports, a Mount Clemens detective, Raymond Langley, prepared a warrant request recommending criminal charges against Paxton for felonious assault with a motor vehicle, fleeing and eluding, and resisting arrest and obstructing. (Langley, Tr. Vol. 6 at 104, Apx. __; GX 29, Tr. Vol. 6 at 101, Apx. __). Langley presented the warrant request and the officers' incident reports to the county prosecutor, who authorized the warrant. (Langley, Tr. Vol. 6 at 105-107, Apx. __). The prosecutor's office then prepared a formal felony complaint against Paxton. (Langley, Tr. Vol. 6 at 108-109, Apx. __; GX 30, Tr. Vol. 6 at 108, Apx. __).

b. Paxton's Preliminary Hearing

Based on the felony complaint against Paxton, the Macomb County District Court held a preliminary examination in October 2002 to determine whether the evidence against Paxton warranted a trial. (Sabaugh, Tr. Vol. 6 at 115-116, Apx. __). On October 3, 2003, assistant prosecuting attorney Matthew Sabaugh called Carson and Robert Jacquemain as witnesses at the preliminary hearing to support the charges against Paxton. (Sabaugh, Tr. Vol. 6 at 118-124, Apx. __). Under questioning from Sabaugh, Robert Jacquemain testified that Paxton exited his car in an aggressive manner, resisted arrest after he was taken to the ground, tried to move underneath his truck while he was on the ground, and had to be pulled out

from underneath his truck. (Sabaugh, Tr. Vol. 6 at 123, Apx. __; Stipulation, GX 32, Tr. Vol. 8 at 12, Apx. __).

c. Paxton's Civil Suit

Paxton filed a civil suit against the city and the officers involved in his July 27, 2002 arrest. (Poucher, Tr. Vol. 3 at 100, Apx. __). Prior to meeting with the city's attorneys about the case, Robert Jacquemain spoke with Poucher about the need "to stick to the story about [Paxton] getting out of his vehicle." (Poucher, Tr. Vol. 3 at 101, Apx. __).

Because of the civil suit, Lieutenant Krutell, a supervisor at the Mount Clemens Police Department, began an investigation into the incident, and notified the officers involved of his intention to interview them. (Poucher, Tr. Vol. 3 at 102, Apx. __). Prior to Poucher's interview with Krutell, both Carson and Robert Jacquemain approached Poucher to confirm that he was still on board with the story that Paxton got out of his truck and came toward the officers. (Poucher, Tr. Vol. 3 at 107, Apx. __).

d. The FBI Investigation

In December 2002, the FBI began a civil rights investigation into the events of July 27, 2002. (Foltz, Tr. Vol. 6 at 144, Apx. __). As part of that investigation, FBI Agent Ray Foltz interviewed Robert Jacquemain in the spring of 2003.

(Foltz, Tr. Vol. 6 at 144-149, Apx. __). Robert Jacquemain told Foltz that Paxton exited his vehicle and came toward the police vehicle while waving his fists. (Foltz, Tr. Vol. 6 at 145, Apx. __). Robert Jacquemain also told Foltz that he did not see anyone strike or kick Paxton. (Foltz, Tr. Vol. 6 at 146, Apx. __).

e. The Grand Jury Investigation

During the months of August and September 2003, a federal grand jury conducted an investigation into the events surrounding Paxton's July 27, 2002, arrest, and whether any persons obstructed or endeavored or agreed to obstruct the investigation of those events. (Tr. Vol. 8 at 13-14, Apx. __). Hey testified before the grand jury on September 18, 2003. (GX 40, Tr. Vol. 8 at 15, Apx. __). Under repeated questioning, Hey denied seeing anything concerning Paxton's arrest, despite having pulled up behind one of the police cars on the scene. (GX 40, Apx. __). Hey testified that he did not see Paxton, nor did he see how Paxton was taken out of his car. (GX 40, Apx. __; Tr. Vol. 8 at 15-16, Apx. __). In fact, Hey testified that he did not see Paxton until after Paxton was placed in the back of a patrol car following his arrest. (GX 40, Apx. __; Tr. Vol. 8 at 16-17, Apx. __). Hey further testified that he did not see *any* officers on the scene during the arrest; the first time he saw an officer was when Peter Jacquemain walked back toward his (Hey's) car after Paxton was in custody. (GX 40, Apx. __; Tr. Vol. 8 at 17-18,

22, Apx. __). In fact, Hey testified that the *only* things he saw when he first arrived on the scene were the vehicles parked in the street. (GX 40, Apx. __; Tr. Vol. 8 at 18, Apx. __). Hey further testified that Pike, his passenger, talked about the fact that there was "fighting" after they arrived on the scene. (GX 40, Apx. __). Despite Pike drawing his attention to the arrest scene, Hey testified that he did not see anything. (GX 40, Apx. __).

The grand jury foreperson asked Hey:

> Foreperson: Just to try and summarize, you were out on the night in question, you were there, you saw nothing, you heard nothing, you know nothing, is that accurate?

(GX 40, Apx. __; Tr. Vol. 8 at 24-25, Apx. __). Hey responded:

> Hey: Well, I saw, I saw what happened to me and I was involved in that part of it, but as far as the accusations against the officers, no, I did not see that.

(GX 40, Apx. __; Tr. Vol. 8 at 25, Apx. __).

Following this response another grand juror asked Hey if he was afraid to testify or if there was someone forcing him to testify otherwise. (GX 40, Apx. __; Tr. Vol. 8 at 25, Apx. __). When Hey responded that he was telling the truth, a grand juror asked him if he was trying to protect someone. (GX 40, Apx. __; Tr.

Vol. 8 at 25, Apx. __). Hey testified that he was not.[7] (GX 40, Apx. __; Tr. Vol. 8 at 25, Apx. __).

f. The Trial

Poucher testified on behalf of the government and described the circumstances surrounding Paxton's arrest, the reports, and the subsequent internal and federal investigations stemming from Paxton's arrest. Poucher also testified about his guilty plea and the terms of his plea agreement. (Poucher, Tr. Vol. 3 at 110-111, Apx. __). He was thereafter subjected to extensive cross-examination regarding his motivations for entering into a plea agreement with the government. (Poucher (Carson cross), Tr. Vol. 4 at 38-54, Apx. __; Poucher (Gerkey re-cross) Tr. Vol. 4 at 108, Apx. __; Poucher (Carson re-cross), Tr. Vol. 4 at 114, Apx. __).

The only defendant to testify at trial was Robert Jacquemain. He testified that as he was exiting his police vehicle after Carson pulled up alongside Paxton's truck, he saw that Paxton had already gotten out of his truck. (Robert Jacquemain, Tr. Vol. 8 at 44, Apx. __). He testified that Paxton was "angry" and "irate," and

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[7] This testimony was consistent with Hey's earlier statements about the events of July 27, 2002. In his police report, Hey described in detail his version of the road rage incident, but included nothing about Paxton's arrest. (See GX 24, Apx. __). Hey also testified as a witness at Paxton's preliminary examination on the state court charges (Stipulation, GX 33, Tr. Vol. 8 at 14, Apx. __) and stated he could not see anything concerning Paxton's arrest from where he was parked. (Tr. Vol. 8 at 14-15, Apx. __).

that he had "his fists clenched" and was "waving them" at the officers. (Robert Jacquemain, Tr. Vol. 8 at 45, Apx. __). He further testified that Paxton took a few steps toward the police car. (Robert Jacquemain, Tr. Vol. 8 at 46, Apx. __). When Paxton refused to comply with his orders to get down, Robert Jacquemain tackled him. (Robert Jacquemain, Tr. Vol. 8 at 46, Apx. __). Robert Jacquemain denied reaching into the truck and pulling Paxton to the ground. (Robert Jacquemain, Tr. Vol. 8 at 47-48, Apx. __). He testified that he rolled over on top of Paxton and put his left knee on Paxton's left side. (Robert Jacquemain, Tr. Vol. 8 at 48, Apx. __). Carson, Gerkey, and Peter Jacquemain then surrounded Paxton as all of the officers attempted to handcuff him. (Robert Jacquemain, Tr. Vol. 8 at 49-51, Apx. __). Robert Jacquemain testified that Paxton struggled and resisted the officers' efforts to handcuff him. (Robert Jacquemain, Tr. Vol. 8 at 51, Apx. __). He further testified that he did not punch or kick Paxton, and he denied seeing any of the other officers punch or kick Paxton. (Robert Jacquemain, Tr. Vol. 8 at 55, Apx. __).

During the government's closing argument, the prosecutor discussed the government's plea deal with Duane Poucher. Without objection, the prosecutor explained to the jury:

> And you'll hear a lot about this deal, this deal that Mr. Poucher got. Well, ask yourselves, as you're hearing about this deal, why is Mr. Poucher, a veteran police officer, going to step up and admit that he committed three felonies if they didn't actually happen? If they didn't happen, what kind of deal is that? What kind of deal is that?
>
> And why is Poucher going to admit to committing three felonies when the best, the best he can receive from the United States government is a recommendation of at least a year in prison? If these felonies didn't happen, why would he take that medicine? Ask yourselves that when you're hearing about Mr. Poucher.

(Rosenthal, Tr. Vol. 10 at 43, Apx. __).

The jury convicted Carson on Counts I (deprivation of rights), II (conspiracy) and III (obstruction). The jury acquitted Hey on Count II, but convicted him on Counts VIII (perjury) and IX (obstruction). The jury acquitted Peter Jacquemain on Counts I and II, but convicted him on Count V (obstruction). The jury acquitted Robert Jacquemain on Counts I and IV (obstruction), but convicted him on Count II.

3. The Sentences

a. Carson's Sentence

The Presentence Report (PSR), based on the 2003 edition of the Sentencing Guidelines, calculated Carson's adjusted offense level at 22. (Carson PSR, Apx. __). Given his criminal history category of I, Carson's advisory Guidelines sentence was 41 - 51 months' imprisonment. Carson objected to the PSR, arguing

that it was error to apply an enhancement under U.S.S.G. 3A1.3 because "while it was true that Mr. Paxton was 'physically restrained during the incident,'" Paxton was being lawfully arrested at the time. (Carson Sentencing Memorandum, R. 148 at 2, Apx. __). Carson also sought downward departures based on (1) Paxton's misconduct, U.S.S.G. 5K2.10, (2) the case being outside the "heartland" of civil rights cases, U.S.S.G. 3553(b), and (3) aberrant behavior, U.S.S.G. 5K2.20. (R. 148 at 9-15, Apx. __). Carson also sought a sentence outside the advisory range based on the 18 U.S.C. 3553(a) factors. (R. 148 at 15-18, Apx. __).

The district court held a sentencing hearing on June 8, 2005. The court granted Carson's objection to the restraint of victim enhancement, concluding that the enhancement "seems * * * to be duplicative of the underlying offense," and that, while "maybe not in a legal sense, but in a factual sense" is "piling on." (6/8/2005 Carson Sentencing Tr. at 10, Apx. __). Carson's total offense level thus came to 20, with a corresponding advisory Guidelines range of 33 - 41 months' imprisonment. The district court rejected Carson's arguments for a sentence below the advisory range and sentenced him to 33 months' imprisonment.[8] (6/8/2005 Carson Sentencing Tr. at 21-24, Apx. __).

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[8] Carson was also ordered to pay three $100 special assessments and to be subjected to two years' supervised release after completion of his prison sentence. (R. 153, Apx. __).

b. Peter Jacquemain's And Robert Jacquemain's Sentences

Both Peter Jacquemain's and Robert Jacquemain's PSRs, based on the 2001 edition of the Sentencing Guidelines, calculated their adjusted offense levels at 16. (Peter Jacquemain PSR, Apx. __; Robert Jacquemain PSR, Apx. __). Given their criminal history categories of I, this resulted in an advisory Guidelines range of 21 - 27 months' imprisonment. Because both Jacquemains were convicted of obstruction of justice offenses that involved obstructing the investigation or prosecution of a criminal offense, their offense levels were based upon U.S.S.G. 2X3.1, the Accessory After the Fact guideline. See U.S.S.G. 2J1.2(c)(1). Under this guideline, the district court must determine the offense level for the crime to which the defendant was an accessory, including all specific offense characteristics that were known or should have been known by the defendant, see U.S.S.G. 2X3.1, App. note 1, and then subtract 6 from that offense level. U.S.S.G. 2X3.1(a). Because the district court had determined Carson's offense level to be 20 (which did not include an enhancement under U.S.S.G. 3A1.3, Restraint of Victim), the Jacquemains' offense levels were 14.

The government sought three additional enhancements. First, the government asserted that the Jacquemains' offense level should be 2 levels higher to reflect the fact that Paxton was restrained while assaulted. See U.S.S.G. 3A1.3.

Second, the government asserted that Robert Jacquemain should receive a 2 level enhancement under U.S.S.G. 3B1.1 for his leadership role in the conspiracy. Finally, the government asserted that Robert Jacquemain should receive a 2 level enhancement under U.S.S.G. 3C1.1 for obstruction of justice based upon his false testimony at trial that Paxton exited his truck and charged at the officers while waving his fists.

The district court held a sentencing hearing for both Peter Jacquemain and Robert Jacquemain on July 26, 2005. (Peter Jacquemain/Robert Jacquemain Sentencing Transcript, R. 195, Apx. __). The district court refused to apply the government's requested enhancements, and determined both Jacquemains' offense levels to be 14. (R. 195 at 22-24, Apx. __). The district court then departed from each defendant's adjusted offense level based on aberrant behavior, see U.S.S.G. 5K2.20, reasoning that their behavior was "so totally out of character for these defendants" and that "[t]hey were involved in the wrong place at the wrong time, and made a bad decision in the aftermath of that." (R. 195 at 33-34, Apx. __). Doing so reduced their adjusted offense levels to 11, with a corresponding advisory Guidelines range of 8 - 14 months' imprisonment. After considering the 18 U.S.C. 3553(a) factors, the district court imposed a sentence of three years'

probation, with the first 180 days to be served in home confinement.[9] (R. 195 at 39, Apx. __). The district court referenced the sentence Hey received (*i.e.*, six months' community confinement, six months' home confinement) and explained that it perceived "Robert and Peter Jacquemain as slightly less culpable than Robert Hey in this case." (R. 195 at 39, Apx. __).

SUMMARY OF ARGUMENT

1. The prosecutor's comments during closing argument were not improper and, as such, do not warrant a reversal. The prosecutor properly discussed a government witness's plea agreement during closing argument as a means for the jury to assess the witness's credibility. The nature of the plea agreement was discussed during the government's case-in-chief, and the witness's credibility and motivation for entering into the plea were subject to vigorous cross-examination. Even if improper, the prosecutor's comments do not warrant a reversal under plain error review because (1) the comments did not mislead the jury or prejudice the defendants, (2) the comments were isolated, (3) the comments were not deliberately made to inflame the jury, and (4) the evidence against the defendants was strong.

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[9] Both Peter Jacquemain and Robert Jacquemain were also ordered to serve 100 hours of community service and to pay a $100 special assessment. (R. 164, 165, Apx. __).

2. The district court's instructions on reasonable force were correct, and fully comported with *Graham* v. *Connor*, 490 U.S. 386 (1989). The substance of Carson's requested instruction on reasonable force was substantially covered by the charge the jury received, and Carson's defense was in no way impaired by that charge. When viewed as a whole, the instructions on reasonable force fairly and adequately submitted the issues and applicable law to the jury. The district court thus did not abuse its discretion in refusing to provide Carson's requested instruction to the jury.

3. The evidence was more than sufficient to sustain Peter Jacquemain's conviction for obstruction of justice. A reasonable jury could properly infer that Peter Jacquemain wrote a misleading report to prevent the communication of lawful information about a possible federal crime to federal officers charged with investigating those crimes. Other courts of appeals have held that the law requires only that misleading information is likely to be transferred to a federal agent. Here, the evidence showed that Peter Jacquemain received training on the potential federal consequences of using excessive force. A reasonable jury could easily conclude that Peter Jacquemain thus wrote a misleading report to prevent an inquiry into a possible federal crime.

Moreover, the Supreme Court's decision in *Arthur Andersen* has no application to this case. As other courts of appeals have held, *Arthur Andersen*'s reach is limited to prosecutions under 18 U.S.C. 1512(b)(2), which explicitly makes reference to acts of obstruction relating to *an official proceeding*. The statute under which Peter Jacquemain was convicted, 18 U.S.C. 1512(b)(3), makes no mention of an official proceeding, and thus the holding of *Arthur Andersen* has no applicability to Peter Jacquemain's case.

4. The evidence was more than sufficient to sustain Robert Hey's conviction for obstruction of justice. First, any nexus between obstructive conduct and an official proceeding that needs to be proven for a conviction under 18 U.S.C. 1512(c)(2) is satisfied here. The misleading testimony charged in the indictment took place *at the grand jury proceeding*. Second, the jury could reasonably infer that Hey was in a position to see the arrest scene unfold given that (1) several eyewitnesses (who were much further away from the arrest scene than was Hey) testified that they could see the arrest from their respective vantage points, and (2) Pike (who was sitting right next to Hey) testified that he had an unobstructed view of the arrest scene. Finally, Hey's assertion that his testimony was not essential to the government's case is irrelevant to whether he corruptly attempted to obstruct justice. To be guilty of violating 18 U.S.C. 1512(c)(2), a

defendant need not be successful in his attempts to obstruct justice; an attempt to obstruct is sufficient.

5. The evidence was more than sufficient to sustain Robert Hey's conviction for perjury. First, the testimony at issue, in which Hey denied seeing any person at the scene of Paxton's arrest until the incident was over, was clearly false. Numerous witnesses from a multitude of vantage points all saw significant details about what was transpiring. A passenger in Hey's vehicle, sitting right next to him, was able to observe the events in detail. The fact that the jury had to infer what Hey saw based upon the testimony of the other witnesses, and to reach its conclusion based upon the circumstances as they existed at the time, is of no consequence.

6. The district court did not abuse its discretion in refusing to hold an evidentiary hearing on Hey's motion for a new trial. Hey's request for new trial was based upon newly discovered evidence that was only relevant to impeach a witness, which is not sufficient. Moreover, that witness did not offer any testimony that was essential to Hey's convictions, and Hey does not even argue that the new evidence would likely result in an acquittal if a new trial were granted. Because the new trial motion was so clearly deficient, it was not an abuse of discretion to fail to hold a hearing to develop this record further.

7. Carson's sentence is reasonable. Carson does not challenge the procedural reasonableness of his sentence, nor could he. Because the district court calculated his advisory Guidelines range, considered that range along with the other factors set forth in 18 U.S.C. 3553(a), considered Carson's arguments for a sentence outside the advisory Guidelines range, and explained its reasons for sentencing Carson within the advisory range, Carson's sentence is entitled to a rebuttable presumption of reasonableness on review. Carson has not rebutted this presumption, as he failed to establish a basis for concluding that the district court arbitrarily selected a sentence, relied on impermissible factors, or gave unreasonable weight to any particular factor when sentencing him. The disparity that exists between his sentence and that of his co-defendants is not unreasonable, as no other defendant who went to trial was convicted of a substantive civil rights violation *and* conspiracy *and* obstruction of justice. Carson's within-Guidelines sentence is thus reasonable.

8. (Government's Cross-Appeal) Robert Jacquemain's sentence is unreasonable. The sentence is procedurally unreasonable because the district court failed to calculate the correct advisory Guidelines range. The court erred first by failing to award an enhancement to the base offense level to account for the fact that the beating victim was restrained when the officers struck him. The

court also erred in refusing to apply an enhancement for obstruction of justice, based upon Jacquemain's false trial testimony. The false testimony went to the core issues in the case, and was not only contradicted by all of the other evidence in the case but was rejected by the jury and the district court at the sentencing of other defendants. Because it was intentionally false and went to central issues, the enhancement should have applied. Finally, the district court abused its discretion by granting a three level reduction under U.S.S.G. 5K2.20 for Aberrant Behavior, where that departure is limited to conduct that is of transient and limited duration. Because the efforts to obstruct justice here spanned almost two years, the conduct was simply not of the kind to which the departure can apply.

Jacquemain's sentence of probation is also substantively unreasonable, because it fails to accomplish the statutory purposes of promoting respect for the law and reflecting the seriousness of the offense. Police officers who obstruct justice with the express purpose of covering up crimes of fellow officers strike at the core of the criminal justice system, and display blatant contempt for the law. A significant sentence of imprisonment is necessary to counteract the resulting undermining of respect for the law, and to restore the public's confidence in the integrity of the criminal justice system. The sentence is also substantively unreasonable because the district court failed to adequately consider the need to

avoid unwarranted disparities in sentences for defendants convicted of similar offenses.

ARGUMENT

I

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT WERE NOT IMPROPER AND DO NOT WARRANT REVERSAL UNDER PLAIN ERROR REVIEW

A. Standard Of Review

Claims of prosecutorial misconduct are mixed questions of law and fact that are reviewed *de novo*. This Court uses a two-step test to determine whether a prosecutor's comments warrant reversal. First, this Court must determine whether the comments were improper. *United States* v. *Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006). If improper, then this Court must determine whether they were flagrant and warrant reversal. *Ibid.*; *United States* v. *Francis*, 170 F.3d 546, 549 (6th Cir. 1999). To determine whether a prosecutor's improper comments were flagrant, this Court considers: (1) whether the statements tended to mislead the jury or prejudice the defendant; (2) whether the statements were isolated or among a series of improper statements; (3) whether the statements were deliberately or accidentally before the jury; and (4) the total strength of the evidence against the accused. *United States* v. *Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994).

Where, as here, a defendant has failed to object below, this Court reviews only for plain error. *Gardiner*, 463 F.3d at 459. To establish plain error, a defendant must show: (1) an error occurred; (2) that was obvious or clear; (3) that affected the defendant's substantial rights; and (4) thus seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States* v. *Rogers*, 118 F.3d 466, 471-473 (6th Cir. 1997). This Court determines whether a prosecutor's misconduct affects a defendant's substantial rights under plain error analysis by considering the four "flagrancy" factors set forth in *Carroll*. *United States* v. *Carter*, 236 F.3d 777, 784 (6th Cir. 2001).

B. The Prosecutor's Comments During Closing Argument Did Not Constitute Plain Error

Defendants Carson, Peter Jacquemain and Robert Jacquemain argue (Carson Br. 17-21; Peter Jacquemain Br. 15-16; Robert Jacquemain Br. 10-27) that the prosecutor made improper comments during the government's closing argument regarding Poucher's guilty plea. Specifically, the defendants argue that the prosecutor used Poucher's guilty plea as substantive evidence of the defendants' guilt when asking the jury to consider why Poucher would enter into a plea agreement and "step up and admit that he committed three felonies if they didn't actually happen." (Rosenthal, Tr. Vol. 10 at 43, Apx. __). This argument lacks

merit.

It is well-settled that the guilty plea of a co-defendant may not be offered by the government as substantive evidence of the defendant's guilt. See, *e.g.*, *United States* v. *Halbert*, 640 F.2d 1000, 1004 (6th Cir. 1981); *United States* v. *Christian*, 786 F.2d 203, 214 (6th Cir. 1986). It is equally well-settled, however, that the government may introduce a co-defendant's guilty plea as evidence of a witness's credibility. *Christian*, 786 F.2d at 214. Doing so permits the jury to "assess the credibility of the witness[] the government asks them to believe." *Halbert*, 640 F.2d at 1004. Indeed, much of the "potential for prejudice is negated when the pleading codefendant, such as [Poucher] in this case, testifies regarding the specific facts underlying the crimes in issue." *Christian*, 786 F.2d at 214. This Court has recognized that "[i]n such a case, it is reasonable to believe that the jury uses the testimony regarding the facts to convict the codefendants and the testimony regarding the guilty plea to assess the witness' credibility." *Ibid.*; see also *Halbert*, 640 F.2d at 1005 (introducing evidence of a co-defendant's guilty plea may "support the reasonableness of the witness' claim to firsthand knowledge because of admitted participation in the very conduct which is relevant," and "[t]he fact a witness has formally admitted personal responsibility enhances the circumstances adding up to that witness' believability"). Because the prosecutor

did not suggest that the jury consider Poucher's guilty plea as substantive evidence of the defendants' guilt, but instead asked them to consider Poucher's guilty plea only when assessing his credibility, it was not error for the prosecutor to address Poucher's plea in this manner.

Even if the prosecutor's comments were error, they were not plainly so. The jury first heard that Poucher pleaded guilty during counsel's opening statements. In fact, Carson's attorney discussed Poucher's plea during his opening, stating to the jury that "Poucher will tell you what went through his head and why he decided to do whatever he did," but that Poucher was hoping that "after [he was] done pointing the finger at these [defendants]," that he would get a reduced sentence. (Fishman, Tr. Vol. 2 at 60, Apx. __). The government first introduced evidence of Poucher's guilty plea, without objection, during Poucher's testimony as part of the government's case-in-chief. (Poucher, Tr. Vol. 3 at 110-111, Apx. __). Poucher was then subjected to vigorous cross-examination on the specific details of his plea and his motivations for entering into it. (Poucher (Carson cross), Tr. Vol. 4 at 47, Apx. __ ("[D]o you expect [the prosecutors] to [recommend a departure from the Sentencing Guidelines] if you do what you said you'd do, which is testify against these defendants?); Poucher (Carson cross), Tr. Vol. 4 at 48, Apx. __ ("[Y]our fate is in the hands of [the prosecutors], right, in a

sense?"); Poucher (Carson cross), Tr. Vol. 4 at 49, Apx. __ ("[Y]our understanding of your [plea] agreement is, if [the prosecutors] do it, you understand they're going to make some kind – or you expect they're going to make a recommendation to the judge as to what your sentence should be, correct?"); Poucher (Carson cross), Tr. Vol. 4 at 50, Apx. __ ("And you certainly hope, do you not, that [the judge] accepts the motion for the downward departure."); Poucher (Carson cross), Tr. Vol. 4 at 54, Apx. __ ("And you figure, do you not, that at least some part of what might happen to you in terms of sentence will be based on what you do in this trial, correct?"); Poucher (Carson cross), Tr. Vol. 4 at 54, Apx. __ ("But you do expect, do you not, or you know, do you not, that one of the factors that might influence your sentence is how the government perceives you did in this trial, wouldn't you agree?"); Poucher (Gerkey re-cross) Tr. Vol. 4 at 108, Apx. __ ("[The prosecutors] are the arbiters, in a sense, of what the truth is; correct? And in fact, under the [plea] agreement, if you give truthful information but they don't think it gives them substantial assistance, you don't get that motion, do you?"); Poucher (Carson re-cross); Tr. Vol. 4 at 114, Apx. __ ("[Y]ou agreed with [co-defendant's counsel] that the people who are going to decide that are going to be the government, as to whether you told the truth, correct?")). Defense counsels' extensive cross-examination of

Poucher's motivation for entering into a plea agreement was a clearly permissible manner of raising questions about Poucher's credibility before the jury. *United States* v. *Blandford*, 33 F.3d 685, 709 (6th Cir. 1994) ("If the codefendant testifies, * * * either the government or the defense may elicit evidence of a guilty plea for the jury to consider in assessing the codefendant's credibility as a witness."), cert. denied, 514 U.S. 1095 (1995); *Halbert*, 640 F.2d at 1004.

The government then briefly mentioned Poucher's plea agreement in its closing argument in response to the numerous attacks on Poucher's credibility during opening statements and the trial, and in anticipation of the numerous attacks that would (and, in fact, did) follow during defendants' closing arguments. (See, *e.g.*, Peter Jacquemain's Closing, Tr. Vol. 10 at 101, Apx. __ (discussing Poucher's "amazing ability" to "turn the truth spigot on," then "turn the lie spigot on," "get some more lies," and then "shut off"); Gerkey's Closing, Tr. Vol. 10 at 112-113, Apx. __ ("Let me tell you members of the jury, [Poucher] did get paid. He got paid with something far more valuable than money. He got paid with his freedom. * * * And you can be sure that Officer Poucher knew he wouldn't get that * * * freedom unless he said what he believed the government's theory was."); Carson's Closing, Tr. Vol. 10 at 137, Apx. __ ("Duane Poucher, by virtue of pleading guilty and agreeing to testify, now is in a position where the

government's going to ask that he get at least a year [imprisonment], and he told you of course, like anybody who knows their fate is up to the judge is hoping he's going to get nothing.")).

Defendants' claim that the prosecutor's statements were bold assertions that Poucher's guilty plea is evidence of defendants' guilt plainly fails. The prosecutor did not state an opinion or draw a conclusion for the jury; rather, the prosecutor asked the jury to consider Poucher's motivation for entering into a plea. (Rosenthal, Tr. Vol. 10 at 43, Apx. __). The rhetorical questions allowed the jury to "consider fully the possible conflicting motivations underlying the witness' testimony, and, thus, enable[d] the jury to more accurately assess the witness' credibility," following what had been an extensive attack on the witness' credibility by the defendants. *United States* v. *Townsend*, 796 F.2d 158, 163 (6th Cir. 1986). The prosecutor did not "propose or imply" that the jury was to consider the plea as substantive evidence against any of the defendants. See *Bradley* v. *Birkett*, 192 F. App'x 468, 475 (6th Cir. 2006). Instead, the prosecutor's questions referenced only the issue of Poucher's credibility, and "were presented in such a way as to indicate that they were for the jury to decide during its deliberations." *United States* v. *Green*, 305 F.3d 422, 430 (6th Cir. 2002); see also *ibid.* ("There is nothing improper about posing rhetorical questions

within the broad scope of a closing argument."); cf. *United States* v. *Monus*, 128 F.3d 376, 394 (6th Cir. 1997) (holding that hypothetical questions posed to the jury were proper argument given position taken by defense counsel), cert. denied, 525 U.S. 823 (1998). Because the prosecutor's rhetorical questions to the jury during closing argument focused on Poucher's credibility following a vigorous attack on his credibility at trial, they were in no way error – plain or otherwise. *Christian*, 786 F.2d at 214.

C. Even If The Prosecutor's Comments Constituted Plain Error, They Did Not Affect The Defendants' Substantial Rights

Even if the prosecutor's comments during closing argument constituted plain error, they did not affect the defendants' substantial rights such that a reversal is warranted. The "flagrancy" factors set forth in *Carroll*, whether considered individually or collectively, do not weigh in favor of reversal.

1. The Prosecutor's Comments Did Not Mislead The Jury Or Prejudice The Defendant

There is little chance that the prosecutor's rhetorical questions misled the jury because the prosecutor merely asked the jury to make a determination as to Poucher's credibility. (Rosenthal, Tr. Vol. 10 at 43, Apx. __). By asking the jury to consider Poucher's motivation for pleading guilty, the prosecutor was repeating ground that had already been well-covered during both direct and cross

examination at trial. Moreover, the prosecutor's comments were unlikely to confuse the jury given the judge's previous instruction to the jury that "[t]he fact that Duane Poucher has pleaded guilty to certain crimes is not evidence that the defendants are guilty," and that the jury could "not consider this against the defendants in any way." (Jury Instructions, Tr. Vol. 9 at 130, Apx. __); *United States* v. *Martinez*, 981 F.2d 867, 871 (6th Cir. 1992) (judge's instruction offered before closing arguments was sufficient "to neutralize" prosecutor's improper comment during closing argument), cert. denied, 507 U.S. 1041 (1993). There is no reason to assume that the jury disregarded the judge's instruction. *United States* v. *Walker*, 871 F.2d 1298, 1304 (6th Cir. 1989).

Furthermore, there is no evidence that the prosecutor's comments prejudiced any of the defendants. Poucher pleaded guilty to three felonies: (1) a substantive civil rights violation, (2) conspiracy, and (3) obstruction of justice. Three of the defendants (Carson, Peter Jacquemain, Robert Jacquemain) were charged with the same civil rights violation as Poucher, and all of the defendants were charged with conspiracy and obstruction. The jury, however, *acquitted* at least one defendant on *each* charge. That is, Peter Jacquemain was acquitted on Counts I (civil rights violation) and II (conspiracy), Robert Jacquemain was acquitted on Counts I (civil rights violation) and IV (obstruction), Hey was

acquitted on Count II (conspiracy), and Gerkey was acquitted on Counts II (conspiracy) and VI (obstruction). The fact that defendants were acquitted on *each charge* to which Poucher pleaded guilty weighs against the conclusion that the defendants were prejudiced by the prosecutor's comments. *United States* v. *Maliszewski*, 161 F.3d 992, 1004 (6th Cir. 1998), cert. denied, 525 U.S. 1183 (1999); see also *United States* v. *Restaino*, 369 F.2d 544, 546 (3d Cir. 1966); *United States* v. *Crosby*, 294 F.2d 928, 950 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962). The verdicts show that the jury obviously followed the judge's instructions and did not consider Poucher's plea as substantive evidence of guilt against any of the defendants. *Walker*, 871 F.2d at 1304.

2. The Prosecutor's Comments Were Isolated

For this Court to reverse, a prosecutor's "improper comments must be more than mere isolated remarks, incapable of infecting the entire trial." *United States* v. *Carter*, 236 F.3d 777, 788 (6th Cir. 2001). Here, defendants have *not* identified a series of improper comments made throughout the trial such that the trial was so "permeated by prosecutorial misconduct" that a reversal is warranted. *United States* v. *Meyers*, 952 F.2d 914, 917 (6th Cir.), cert. denied, 503 U.S. 994 (1992). Defendants have instead identified as potentially improper only three, related comments made during an hour-long closing argument after a two-week trial.

(Rosenthal, Tr. Vol. 10 at 5-46, Apx. __). Such isolated comments do not warrant a reversal. *United States* v. *Driscoll*, 970 F.2d 1472, 1484 (6th Cir. 1992) (concluding that improper statements made during closing argument were isolated where "all the statements in question represented only a few comments in the course of a trial that took several days"), cert. denied, 506 U.S. 1083 (1993); *United States* v. *Modena*, 302 F.3d 626, 635 (6th Cir. 2002) (concluding that prosecutor's two, unrelated statements during closing argument were isolated where "the prosecutor did not make an extensive series of improper statements"), cert. denied, 537 U.S. 1145 (2003); *United States* v. *Galloway*, 316 F.3d 624, 633 (6th Cir. 2003) (concluding that improper comments during closing argument were not flagrant in part because defendant raised only one issue of prosecutorial misconduct); see also *Driscoll*, 970 F.2d at 1484 (concluding that improper statements made during closing argument were isolated where there was "no evidence of misconduct at any other stage of trial").

3. The Prosecutor's Comments Were Not Deliberate Attempts To Divert The Jury's Attention

While the prosecutor's comments were deliberate in the sense that they were presented to the jury as a means for the jury to determine Poucher's motivation for pleading guilty, "there is no indication that they stemmed from a deliberate plan to

inflame the jury." *United States* v. *Shalash*, 108 F. App'x 269, 281 (6th Cir. 2004), cert. denied, 544 U.S. 978 (2005). Rather, as indicated above, the prosecutor's rhetorical questions were presented to the jury in response to the vigorous cross-examination of Poucher by defense counsel concerning Poucher's motivation for entering into a plea agreement. A fair reading of the transcript simply does not show "a series of improper remarks deliberately placed before the jury." *United States* v. *Stover*, 474 F.3d 904, 917 (6th Cir. 2007), petition for cert. filed (U.S. May 30, 2007) (No. 06-11714).

4. The Evidence Against The Defendants Was Strong

The government's case against Carson, Peter Jacquemain and Robert Jacquemain was sufficiently strong that, even if improper, the prosecutor's comments "likely had no impact on the outcome of the trial." *Modena*, 302 F.3d at 635. Numerous eyewitnesses testified that Paxton was beaten during his arrest, thus establishing the basis for Carson's substantive civil rights conviction. (See, *e.g.*, Pike, Tr. Vol. 7 at 85, Apx. __ (testifying that he saw officers' arms moving in a punching and grabbing motion); Anderson, Tr. Vol. 2 at 69, Apx. __ (testifying that police were "punching and kicking [Paxton] while he was on the ground"); Lane, Tr. Vol. 3 at 12-13, Apx. __ (testifying that she saw officers' arms moving back and forth accompanied by "thudding sound[s]," and saw officers

kicking Paxton); Burkhardt, Tr. Vol. 4 at 130, Apx. __ (testifying that officers were bending over Paxton with their arms bent in a manner that indicated "somebody was getting their butt beat")).

Moreover, a simple comparison of the officer's police reports (which state that Paxton got out of his vehicle and charged at the officers) with the eyewitnesses' descriptions of the incident (which describe Paxton as being forcibly pulled from his vehicle and immediately thrown to the ground) support Carson's and Peter Jacquemain's convictions on obstruction of justice. (Compare GX 20 (Carson's Report), Apx. __ (indicating that Paxton "exited the pick up," "ran at the" police car, had his "fist clenched" and was "threatening") and GX 22 (Peter Jacquemain's Report), Apx. __ (indicating that Paxton "exit[ed] the vehicle" and ran toward the police car "in a threatening manner (i.e. fist clenched)") with Pike, Tr. Vol. 7 at 83, Apx. __ (describing Paxton being taken out of his pickup truck and down to the ground in one fluid motion); Lane, Tr. Vol. 3 at 10-11, Apx. __ (testifying that she saw officers congregate around Paxton's truck and that she never saw Paxton in a standing position outside his truck); Paxton, Tr. Vol. 4 at 162-163, Apx. __ (testifying that the officers opened his door, pulled him out of the car, spun him around, and took him to the ground)).

Finally, the combination of (1) the eyewitnesses' testimony of the arrest; (2) the need to justify the extent of Paxton's injuries; (3) the police reports of the arrest all falsely stating that Paxton charged at the officers in order to justify their use of force; and (4) Poucher's *testimony* – not his plea agreement, established the conspiracy between (at the very least) himself, Carson and Robert Jacquemain. (See, *e.g.*, Poucher, Tr. Vol. 3 at 89, Apx. __ (testifying that Robert Jacquemain told him "we're going to say that [Paxton] got out of the car, we're going to say that he came at us"); Poucher, Tr. Vol. 3 at 93, 96, Apx. __ (testifying that he was given a copy of Carson's completed report so that his report would coincide with the other officers'); Poucher, Tr. Vol. 3 at 101, Apx. __ (testifying that Robert Jacquemain spoke with him about the need "to stick to the story about [Paxton] getting out of his vehicle"); Poucher, Tr. Vol. 3 at 107, Apx. __ (testifying that prior to his interview with Krutell, both Carson and Robert Jacquemain approached him and confirmed that he was still on board with the story that Paxton got out of his truck and came toward the officers)). The defendants' convictions thus resulted from the overwhelming evidence of their guilt, *not* the prosecutor's isolated comments during closing argument.

5. The Prosecutor's Comments Do Not Warrant A Reversal

Even if the prosecutor's comments were improper, this Court will not order a new trial unless the prosecutor's comments "meet[] the high standard for plain errors, which are limited to those harmful ones that are so rank that they should have been apparent to the trial judge without objection, or that strike at the fundamental fairness, honesty, or public reputation of the trial." *Driscoll*, 970 F.2d at 1485. Defendants bear this burden, and must show that the prosecutor's comments were so "exceptionally flagrant that [they] constitute plain error." *Modena*, 302 F.3d at 635. Defendants have failed to meet this burden: there is no evidence that the prosecutor's comments misled the jury or prejudiced the defendant; the isolated comments were not deliberately made to inflame the jury; and the evidence against the defendants was strong. *Stover*, 474 F.3d at 917.

Moreover, "[i]nappropriate remarks by the prosecutor do not alone justify reversal of a criminal conviction in an otherwise fair proceeding, as long as the jury's ability to judge the evidence fairly remains intact." *United States* v. *Castro*, 908 F.2d 85, 89 (6th Cir. 1990). Here, there is no evidence to suggest that the jury was unable to judge the evidence fairly. *Ibid.* The jury's verdicts – *which included a total of seven acquittals on charges identical to those included in Poucher's plea agreement* – indicate that it weighed the evidence against each

defendant and reached an independent verdict as to each defendant. Under such circumstances, a reversal is unwarranted.

II

THE DISTRICT COURT'S INSTRUCTION ON 18 U.S.C. 242 COMPORTED WITH *GRAHAM* V. *CONNOR*

Carson argues (Carson Br. 21-24) that the district court abused its discretion by declining to use his proposed language in its jury charge on Count I (18 U.S.C. 242) and giving an instruction that did not conform to the requirements the Supreme Court established in *Graham* v. *Connor*, 490 U.S. 386 (1989). Specifically, he argues that the district court's instruction on determining reasonable force was improper in that it did not include specific wording from *Graham* (*i.e.*, "In determining whether the force was reasonable, you must consider the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation."). See 490 U.S. at 397. This argument is without merit.

A. Standard Of Review

This Court reviews a refusal to give a requested jury instruction for abuse of discretion. *United States* v. *Jamieson*, 427 F.3d 394, 414 (6th Cir. 2005), cert. denied, 126 S. Ct. 2909 (2006). Rather than considering a requested instruction in

isolation, however, this Court is "required to examine the instructions in their entirety to determine whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury." *Ibid.* (citations omitted).

B. The District Court Correctly Instructed The Jury On Determining Whether Carson's Actions Were Objectively Reasonable

A district court's refusal to deliver a specific instruction warrants reversal only if the requested instruction is: "(1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." *United States* v. *Daniel*, 329 F.3d 480, 489 (6th Cir. 2003). Carson's claim fails on the second and third prongs. That is, the substance of the requested instruction was "substantially covered" by the charge the jury received, and Carson's defense was in no way impaired by that charge. For these reasons, Carson's argument fails.

1. Carson's Requested Charge Was Substantially Covered By The Charge Given To The Jury

Carson's requested jury charge, which included explanatory language from *Graham* v. *Connor*, was substantially covered by the actual charge given to the jury. *Graham*, which involved a civil action under 42 U.S.C. 1983 arising from a beating by a police officer, requires that the "reasonableness of a particular use of

force * * * be judged from the perspective of a reasonable officer on the scene," and that this inquiry be an objective one. 490 U.S. at 396-397. *Graham* cautions that the "[t]est of reasonableness * * * is not capable of precise definition or mechanical application," but that "its proper application requires careful attention to the facts and circumstances of each particular case." *Id.* at 396. These facts and circumstances include "whether the suspect poses an immediate threat to the safety of the officers or others" and whether the suspect "is actively resisting or attempting to evade arrest by flight." *Ibid.*

This Court has recently recognized that the import of *Graham* is determining whether an officer's actions are objectively reasonable under the totality of circumstances. See, *e.g.*, *Fox* v. *DeSoto*, 489 F.3d 227, 236-237 (6th Cir. 2007) ("The question we must ask is whether, under the totality of the circumstances, the officer's action were objectively reasonable."); see also *Bing ex rel. Bing* v. *City of Whitehall*, 456 F.3d 555, 569 (6th Cir. 2006) ("*Graham* requires this court to determine the reasonableness of [an officer's use of force] by performing a 'careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'"). Reading the instructions the district court gave on Count I as a whole demonstrates that the jury was properly directed to apply an objectively

reasonable standard when considering Carson's use of force, and to consider the totality of circumstances when doing so. The court stated:

> The term unreasonable force means force that has no legitimate law enforcement purpose. A law enforcement officer is justified in using only that amount of force which is *reasonably necessary to arrest someone, prevent escape, or defend himself or another from bodily harm. He may not, however, use more force than is reasonably necessary to accomplish these purposes*.
>
> In this case, you must determine whether the government has proved beyond a reasonable doubt that the force used against Robert Paxton was unreasonable *under all of the circumstances*. In other words, you must determine whether a defendant used an amount of force *reasonably necessary to arrest Robert Paxton, prevent escape, or defend himself or another against bodily harm, or whether instead the defendant used more force than reasonably necessary to accomplish those purposes*.
>
> In determining whether the government has proven beyond a reasonable doubt that the use of force was unreasonable, the defendant's use of force is reviewed *from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight*.

(Jury Instructions, Tr. Vol. 9 at 112-113, Apx. __) (emphasis added).

While the court did not invoke the formulaic language Carson requested, it was not required to do so. See *United States* v. *Schatzle*, 901 F.2d 252, 255 (2d Cir. 1990) (rejecting defendant's request to include "a litany of passages from *Graham*" in its instruction on reasonable force because a court "cannot place the talismanic weight urged by [the defendant] on *Graham*'s exact wording").

Graham merely requires a district court to inform the jury that it must assess whether the force used was reasonable in light of the particular situation and dangers facing the defendant. 490 U.S. at 396-397. By instructing the jury to determine whether Carson's use of force was "reasonably necessary" to arrest Paxton, prevent his escape, or defend himself or another from harm, and to do so "from the perspective of a reasonable officer on the scene" (Jury Instructions, Tr. Vol. 9 at 112-113, Apx. __), the court's instruction "fairly and adequately submit[ted] the issues and applicable law to the jury." *Jamieson*, 427 F.3d at 414.

2. Carson's Defense Was Not Impaired

Carson's defense was in no way impaired by the district court's refusal to provide his requested instruction to the jury, much less "substantially" so. *Daniel*, 329 F.3d at 489. Counsel was certainly not precluded from arguing that Carson was reacting to a quickly evolving arrest scene following a high speed chase. (Carson Closing, Tr. Vol. 10 at 122-123, Apx. __ (discussing reasonable force instruction)). Carson's defense throughout trial and as summarized in his closing argument, however, was *not* that Carson assaulted Paxton during a quickly evolving situation wherein Carson needed to make split-second decisions and that his use of force was reasonable, but rather that Paxton was lying about the assault for purposes of financial gain (see, *e.g.*, Paxton (Carson cross), Tr. Vol. 4 at 186-

198, Apx. __; Carson Closing, Tr. Vol. 10 at 126-133), and that Poucher was lying to gain favor at sentencing (see Poucher (Carson cross), Tr. Vol. 4 at 47-50, Apx. __; Carson Closing, Tr. Vol. 10 at 133-138, Apx. __). The omitted instruction thus could not have substantially impaired Carson's defense – *as the instruction was largely unrelated to his defense*. Because the jury instructions appropriately informed the jury about the applicable law and in no way impaired Carson's defense, the district court did not abuse its discretion in refusing to include Carson's requested charge to the jury. *Daniel*, 329 F.3d at 489; see also *Jamieson*, 427 F.3d at 414 ("[A]n omitted or incomplete instruction is * * * less likely to justify reversal [than an improper instruction], since such an instruction is not as prejudicial as a misstatement of the law.") (quoting *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977)).

III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANTS' CONVICTIONS

A. Standard Of Review

This Court reviews a challenge to the sufficiency of the evidence supporting a criminal conviction *de novo*, see *United States* v. *Kelley*, 461 F.3d 817, 825 (6th Cir. 2006), and must affirm if the evidence, when viewed in the light most

favorable to the government, would permit any reasonable jury to find guilt beyond a reasonable doubt. See *United States* v. *Talley*, 164 F.3d 989, 996 (6th Cir.), cert. denied, 526 U.S. 1137 (1999); see also *United States* v. *Gresser*, 935 F.2d 96, 100 (6th Cir.), cert. denied, 502 U.S. 885 (1991). This standard applies "whether the evidence is direct or circumstantial." *Gresser*, 935 F.2d at 100. With a court reviewing the evidence in this manner, a defendant challenging the sufficiency of the evidence bears a heavy burden. *United States* v. *Spearman*, 186 F.3d 743, 746 (6th Cir.), cert. denied, 528 U.S. 1033 (1999).

B. Sufficient Evidence Supports Peter Jacquemain's 18 U.S.C. 1512 Conviction

Section 1512 of Title 18 provides, in pertinent part: "Whoever * * * engages in misleading conduct toward another person, with intent to * * * hinder, delay, or prevent the communication to a law enforcement officer * * * of the United States of information relating to the commission or possible commission of a Federal offense * * * shall be fined * * * or imprisoned * * * or both." 18 U.S.C. 1512(b)(3). The statute further provides that "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. 1512(f)(1). To obtain a conviction under 18 U.S.C. 1512(b)(3), the government must prove that a defendant: (1) knowingly engaged in misleading conduct

toward another person, (2) with the intent to hinder, delay or prevent the communication of information to a federal official, (3) about the commission or the possible commission of a federal crime. See *United States* v. *Ronda*, 455 F.3d 1273, 1284 (11th Cir. 2006), cert. denied, 127 S. Ct. 1327 (2007).

Peter Jacquemain concedes (Peter Jacquemain Br. 17) that the evidence was sufficient to establish the first and third elements of the offense. That is, Peter Jacquemain concedes that a reasonable jury could have found that he knowingly engaged in misleading conduct about the possible commission of a federal offense. His argument, then, is that the evidence was insufficient to show he had the requisite intent to hinder, delay or prevent the communication of information about the possible commission of a federal offense to a federal law enforcement officer. Although presented as an insufficiency of the evidence argument, his argument rests, in large part, on his insistence that *Arthur Anderson, LLP* v. *United States*, 544 U.S. 696 (2005), imposed new evidentiary requirements on prosecutions under 18 U.S.C. 1512(b)(3), and that the jury instructions failed to include these new evidentiary requirements concerning the appropriate "federal nexus" that must be proven (see Peter Jacquemain Br. 18-21). Whether viewed as an insufficiency of the evidence argument or an erroneous jury instruction argument, Peter Jacquemain's challenge to his conviction fails.

1. The Record Contained Ample Evidence That Peter Jacquemain Intended To Hinder, Delay Or Prevent Truthful Information From Reaching Federal Officials

When viewed in the light most favorable to the government, the record contains ample evidence from which a jury could reasonably infer that Peter Jacquemain's intent, in providing misleading information in his police report, was to prevent the communication of truthful information about Paxton's beating to federal law enforcement officers tasked with investigating allegations of excessive force. Peter Jacquemain does not contest that his police report was misleading, nor could he. He wrote that Paxton attempted to run at the responding police officers in a threatening manner, with his fists clenched. (GX 22, Apx. __). This portion of his report was directly contradicted by testimony from Poucher (Poucher, Tr. Vol. 3 at 66-67, Apx. __), Pike (Pike, Tr. Vol. 7 at 79-80, Apx. __), Paxton (Paxton, Tr. Vol. 4 at 162-163, Apx. __) and Lane (Lane, Tr. Vol. 3 at 10-12, Apx. __). Moreover, nowhere in his report does it mention that officers struck Paxton. This portion of his report was directly contradicted by testimony from Poucher (Poucher, Tr. Vol. 3 at 81-83, Apx. __), Pike (Pike, Tr. Vol. 7 at 85-86, Apx. __), Paxton (Paxton, Tr. Vol. 4 at 165-166, Apx. __), and civilian witnesses (Anderson, Tr. Vol. 2 at 69-70, Apx. __; Lane, Tr. Vol. 3 at 12-13, Apx. __; Burkhardt, Tr. Vol. 4 at 129-130, Apx. __).

The jury was instructed – without objection – that to satisfy the second element of 18 U.S.C. 1512(b)(3), the government must prove "that a defendant intended to foreclose the possibility, either temporarily or permanently, that truthful information might be transferred to law enforcement officers who investigate[] federal crimes, or courts where such crimes are prosecuted." (Jury Instructions, Tr. Vol. 9 at 119, Apx. __). Peter Jacquemain argues (Peter Jacquemain Br. 20-21) that because his report was prepared "virtually contemporaneously" with the incident, and because the actual federal investigation did not commence until several months later, the government failed to establish the requisite federal nexus to sustain his conviction. He further argues that the "mere possibility" of a federal investigation is insufficient to support his conviction. These arguments plainly fail.

Other courts have held that "1512(b)(3) does not require a specific intent to mislead federal officials"; rather, "it is sufficient if the misleading information is *likely* to be transferred to a federal agent." *United States* v. *Veal*, 153 F.3d 1233, 1251 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999); *Ronda*, 455 F.3d at 1285; see also *United States* v. *Baldyga*, 233 F.3d 674, 680 (1st Cir. 2000) (recognizing that the statute requires only a possibility that defendant's conduct will interfere with communication to a federal agent), cert. denied, 534 U.S. 871

(2001). In *Veal*, the defendants misled only state investigators, but there existed "the *possibility* or *likelihood* that their false and misleading information would be transferred to federal authorities irrespective of the governmental authority represented by the initial investigators." 153 F.3d at 1251-1252. Similarly, in *Ronda*, police officers planted evidence and filed false reports to cover up a series of illegal shootings – conduct that was routinely investigated by the department and often in consultation with federal officials. 455 F.3d at 1286. The court noted that "even before [the defendants] planted the guns at the scenes of the shootings, [the defendants] knew that any police shooting incident would be investigated by state officers. Indeed, [the defendants'] knowledge that the shootings assuredly would be investigated *was precisely what motivated them to plant evidence and to conspire to lie about the shootings*." *Ibid.* (emphasis added).

Here, the government established that all police officers in Michigan receive training regarding the potential consequences of the use of excessive force. (Stipulation, Tr. Vol. 8 at 26, Apx. __). That training includes the instruction that "if officers use excessive force they could be prosecuted in state *or federal court*." (Stipulation, Tr. Vol. 8 at 25-26, Apx. __) (emphasis added). The government introduced Peter Jacquemain's training records which showed that he had, in fact, attended a course which included instruction in the consequences of the use of

excessive force. (GX 46A and B, Tr. Vol. 8 at 26, Apx. __). Based on this evidence, a reasonable jury could easily conclude that he wrote a misleading report because he knew from his training that *had* he written an *accurate* report, he and his fellow officers would be at risk of being investigated by federal officers for violating a federal offense. See *Ronda*, 455 F.3d at 1286; *United States* v. *Guadalupe*, 402 F.3d 409, 414 (3d Cir. 2005) (reasoning that because of prison employee's position and experience, he had knowledge, "or should have had knowledge, that [his unjustified beating of an inmate] may be considered a federal civil rights violation"), cert. denied, 547 U.S. 1123 (2006); cf. *United States* v. *Byrne*, 435 F.3d 16, 26 n.7 (1st Cir. 2006) (dismissing defendant's argument that nexus requirement was not met because his witness tampering occurred prior to a federal investigation on the ground that it was well-known within the police department that allegations of excessive force are investigated by federal officers, and jury "could have found that the defendant specifically contemplated that the investigation into his conduct likely would include federal agents, even before the FBI actually became involved").[10]

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[10] The jury's reasonable conclusion is fully supported by Poucher's testimony. Poucher testified that he understood the reason for writing the false reports concerning Paxton's arrest, after being approached by Robert Jacquemain, was so that the officers did not "get in trouble for beating [Paxton] up." (Poucher, Tr.

(continued...)

As explained in *Veal*, "federal jurisdiction under * * * 1512(b)(3) is based on the federal interest of protecting the integrity of *potential* federal investigations by ensuring that transfers of information to federal law enforcement officers and judges relating to the *possible* commission of federal offenses be truthful and unimpeded." 153 F.3d at 1250 (emphasis added). Thus, 1512(b)(3) does not depend on the existence of a federal investigation, but rather on the *possible* existence of a federal *crime* and a defendant's intention to thwart an inquiry into that crime. *Ibid.*

Here, the jury was correctly instructed that to satisfy the second element of 1512(b)(3), the government must prove "that a defendant intended to foreclose the possibility * * * that truthful information might be transferred to law enforcement officers who investigate[] federal crimes." (Jury Instructions, Tr. Vol. 9 at 119, Apx. __). All that was required to prove the second element of 1512(b)(3) was the

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[10](...continued)
Vol. 3 at 90, Apx. __). Poucher explained that he learned during his police training that it was a federal offense to use excessive force as a police officer. (Poucher, Tr. Vol. 3 at 90, Apx. __). Poucher further explained that he needed to include in his report that Paxton was the aggressor so that the officers would have been justified in using force during the arrest. (Poucher, Tr. Vol. 3 at 92, Apx. __). Specifically, Poucher testified that "[i]f [Paxton] got[] out of the car and charged and was actually the aggressor in the situation, force and physical injuries to Paxton to an extent probably would have been justified." (Poucher, Tr. Vol. 3 at 92, Apx. __).

possibility or likelihood that Peter Jacquemain's false and misleading information would be transferred to federal authorities. *Veal*, 153 F.3d at 1251. The district court's instructions correctly stated the applicable law, and the evidence of Peter Jacquemain's intention in writing a misleading report – to prevent truthful information from reaching federal officers who investigate possible federal offenses – was more than sufficient to sustain his conviction. See, *e.g.*, *Ronda*, 455 F.3d at 1285-1287.

2. The Supreme Court's Decision In Arthur Andersen *Is Inapposite*

Peter Jacquemain also argues (Peter Jacquemain Br. 18-20) that the Supreme Court's decision in *Arthur Andersen, LLP* v. *United States*, 544 U.S. 696 (2005), "changed the landscape of cases brought and tried under 18 U.S.C. 1512, including 1512(b)(3)." Specifically, he argues that *Arthur Andersen* requires, in 1512(b)(3) prosecutions, that a nexus exist between a defendant's misleading conduct and a "particular government proceeding" impeded by that misleading conduct. This argument has no merit, and has been rejected by two other courts of appeals.

In *Arthur Andersen*, the Supreme Court reversed a corporation's conviction for corruptly persuading its employees (1) to withhold testimony and documents from "an official proceeding," in violation of 18 U.S.C. 1512(b)(2)(A), and (2) to

destroy documents and other records with intent to impair their integrity or availability for use in "an official proceeding," in violation of 18 U.S.C. 1512(b)(2)(B). 544 U.S. at 702. In reversing these convictions, the Court found in part that the jury's instructions could have led the jury to believe it did not have to find "*any* nexus between the persuasion to destroy documents and any particular [official federal] proceeding." *Id.* at 707. The Court held that to be found guilty of violating 18 U.S.C. 1512(b)(2), "[a] knowingly corrupt persuader cannot be someone who persuades others to shred documents * * * when he does not have in contemplation any particular official proceeding in which those documents might be material." *Id.* at 708.

Arthur Andersen has no application to the present case. As other courts have recently held, *Arthur Andersen*'s reach is limited to 1512(b)(2), which explicitly requires that the acts of obstruction relate to *an official proceeding*. See *Ronda*, 455 F.3d at 1288; *Byrne*, 435 F.3d at 24; see also 18 U.S.C. 1512(b)(2). "Unlike * * * 1512(b)(2), * * * 1512(b)(3) makes no mention of an official proceeding and does not require that a defendant's misleading conduct relate in any way either to an official proceeding or even to a particular ongoing investigation." *Ronda*, 455 F.3d at 1288; see also *Byrne*, 435 F.3d at 24. *Arthur Andersen* thus does not require a court to "graft onto * * * 1512(b)(3) 'an official

proceeding' requirement based on statutory language in * * * 1512(b)(2) that does not appear in * * * 1512(b)(3)." *Ronda*, 455 F.3d at 1288. The district court properly instructed the jury on the elements of 18 U.S.C. 1512(b)(3); Peter Jacquemain's arguments in favor of an acquittal should be rejected.

C. Sufficient Evidence Supports Hey's Obstruction Of Justice Conviction

Hey argues (Hey Br. 28-33) that there was insufficient evidence to support his conviction for obstruction of justice under 18 U.S.C. 1512(c)(2). Specifically, Hey argues that the government failed to prove sufficient evidence of a "nexus" between his misleading conduct and an official proceeding. This argument fails.

Section 1512(c)(2) of Title 18 subjects to criminal liability a person who "corruptly * * * obstructs, influences, or impedes any official proceeding, or attempts to do so." 18 U.S.C. 1512(c)(2).[11] Even assuming that a "nexus requirement" applies to 1512(c)(2) prosecutions, cf. *United States* v. *Reich*, 479 F.3d 179, 185-186 (2d Cir. 2007) (applying "nexus requirement" of 18 U.S.C. 1503 prosecutions established in *United States* v. *Aguilar*, 515 U.S. 593, 601 (1995) to 18 U.S.C. 1512(c)(2) prosecutions), Hey's argument has no merit. Hey's

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[11] In his brief (Hey Br. 28), Hey sets out the elements for a conviction under 18 U.S.C. 1503. Hey was charged in Count VII with obstruction of justice in violation of 18 U.S.C. 1503, but that Count was dropped before the case went to the jury. The jury convicted Hey of obstruction of justice in violation of 18 U.S.C. 1512(c)(2) (Count IX).

false and misleading testimony took place *at the grand jury proceeding*. No further nexus need be shown. See *Aguilar*, 515 U.S. at 601 (characterizing false statements provided to an investigator as "fall[ing] on the other side of the statutory line from that of one who delivers false * * * testimony *to the grand jury itself*") (emphasis added). False testimony made directly to the grand jury, like Hey's, "all but assures that the grand jury will consider the material in its deliberations." *Ibid.*

Hey next questions (Hey Br. 30) the sufficiency of the evidence because, according to Hey, if the government could not prove that he was "in a position to see, or to actually see, how then can the inference be drawn that he did see and that he lied about what he saw thereby obstructing the grand jury?" Hey asserts (Hey Br. 30) that "[i]f there is no proof he actually saw anything, there can be no proof sufficient to convict on the obstruction count." While Hey concedes (Hey Br. 32) that circumstantial evidence can arguably support an inference that he was in a position to see because Pike was sitting next to him and could see what happened, he argues that "a line must be drawn between valid inference evidence and circumstantial evidence which requires the jury to perform a leap of faith in order to support a conviction."

Viewing the evidence in the light most favorable to the government, and drawing all reasonable inferences in favor of the government, the evidence introduced at trial showed that: (1) following the police chase, Hey parked his car on the left-hand side of the street behind a police car (Pike, Tr. Vol. 7 at 74, Apx. __); (2) the position of Hey's car provided an unobstructed view of Paxton's truck and the police car to its left (Pike, Tr. Vol. 7 at 75, Apx. __); (3) street lights illuminated the scene of the truck and the police cars (Pike, Tr. Vol. 7 at 76, Apx. __); (4) Hey's passenger clearly saw Paxton being pulled from his vehicle and taken to the ground by police officers (Pike, Tr. Vol. 7 at 79, Apx. __), and then clearly saw officers' arms moving up and down in a punching motion (Pike, Tr. Vol. 7 at 85, Apx. __); (5) several other witnesses, all positioned further away from Hey's vehicle, clearly saw what appeared to be officers punching and kicking Paxton while he was on the ground (see, *e.g.*, Anderson, Tr. Vol. 2 at 69, Apx. __; Lane, Tr. Vol. 3 at 12-13, Apx. __; Burkhardt, Tr. Vol. 4 at 130, Apx. __); and (6) while watching the events unfold, Pike told Hey that the officers and Paxton were fighting (Pike, Tr. Vol. 7 at 89, Apx. __). This evidence was more than sufficient for a reasonable jury to conclude that Hey was in a position to see the officers pull Paxton from his truck, take him immediately to the ground, and assault him. This is especially so given that his passenger – who was sitting just inches away from

him – had an unobstructed view of the incident. (See Pike, Tr. Vol. 7 at 75, Apx. __). From this evidence, a reasonable jury could easily infer that Hey saw the events surrounding Paxton's assault and then lied to the grand jury when asked about what he saw. See *Talley*, 164 F.3d at 996.

Finally, Hey claims (Hey Br. 31) that the evidence was insufficient to support his conviction because "the fact that he said he saw nothing neither adds to nor detracts from the government's case." This argument is wholly without merit. The statute criminalizes whoever "corruptly * * * obstructs, influences or impedes" an official proceeding or "*attempts* to do so." 18 U.S.C. 1512(c)(2) (emphasis added). Thus, a defendant need not successfully obstruct, influence or impede an official proceeding to be found guilty of violating the statute. *Reich*, 479 F.3d at 186 (rejecting defendant's argument that because the fairness of the proceeding was not affected, no obstruction under 18 U.S.C. 1512(c)(2) occurred). By testifying falsely before the grand jury as to what he did and did not see during Paxton's arrest, Hey corruptly attempted to obstruct the grand jury proceeding. The evidence was more than sufficient to prove that Hey violated 18 U.S.C. 1512(c)(2) in doing so.

D. Sufficient Evidence Supports Hey's Perjury Conviction

Defendant Hey also challenges (Hey Br. 19-27) the sufficiency of the evidence supporting his conviction for perjury, in violation of 18 U.S.C. 1623. That statute requires the government to prove that the defendant knowingly made a materially false declaration, under oath, in a proceeding before or ancillary to a court of the United States. *United States* v. *Lee*, 359 F.3d 412, 419 (6th Cir. 2004). The false testimony charged in this count focused on Hey's statements that until the events surrounding the beating were over, he did not see a single person at the scene, including the driver of the pickup truck and each of the officers charged with using excessive force. (R. 84 at 8-10, Apx. __). Hey does not dispute that he provided sworn testimony and that it was in a proceeding ancillary to a court of the United States; rather, he challenges the jury's conclusion that his testimony was false, and that it was material to the proceeding. His argument rests upon a mischaracterization of the government's case and a misunderstanding of the relevant legal standard.

First, Hey claims (Hey Br. 21) that he could not be guilty of perjury because he willingly identified the officers who were present at the scene of the beating after Paxton had been taken into custody. The grand jury inquiry, however, was not about who was there when the incident was over, but who did what, and to

whom, and in what sequence. Testifying about who was present at the scene after the fact does not relieve Hey of his obligation to truthfully disclose what happened during the incident. This included, most importantly, a description of how Paxton came to be out of his pickup truck and on the ground, in handcuffs. Similarly, the grand jury was trying to ascertain what force was applied to effectuate the arrest of Paxton, by whom, and whether the force used was reasonable under the circumstances. To answer these questions, the grand jury needed as full a description of events as possible. Hey's willingness to identify the officers present after the fact simply does not relieve him of his obligation to describe truthfully what he saw.

In a related argument, Hey asserts (Hey Br. 25) that since he gave truthful testimony about some subjects (*e.g.,* the earlier road rage incident), it was incumbent upon the prosecutors to "flush out" his answers, rather than merely characterize them as false. But the government tried to do exactly that, and it was Hey's false answers to these questions that formed the basis of his perjury charge. (R. 84 at 8-10, Apx. __). The prosecutor asked Hey broad, open-ended questions, as well as specific inquiries about individual officers, asking Hey whether he had witnessed each officer at the scene prior to Paxton's departure. (GX 40, Apx. __; Tr. Vol. 8 at 15-24, Apx. __). The grand jury foreperson then followed up,

summarizing as broadly as possible Hey's testimony that he could not see a single person, and Hey again insisted that he saw no one. (GX 40, Apx. _; Tr. Vol. 8 at 24-25, Apx. __). Hey cannot now credibly claim that he should have been given more opportunity to expand on what he saw, or that the questions asked did not give him adequate notice as to what was being asked of him.

Hey next claims (Hey Br. 22-23) that no reasonable juror could conclude that his grand jury testimony that he did not see anything during Paxton's arrest was false. He bases this argument upon the notion that there must be direct evidence as to what he saw, *i.e.*, testimony from someone in the same seat, under the same conditions, or a later admission to Pike that he saw something. This is simply incorrect and ignores the instructions given to the jury that they may base decisions on circumstantial evidence. (Jury Instructions, Tr. Vol. 9 at 104-105, Apx. __; cf. Jury Instructions, Tr. Vol. 9 at 114, Apx. __ (instructing jury that determining a defendant's state of mind "can be proven by circumstantial evidence," and it is difficult to determine a person's intent directly because "there is no way of directly scrutinizing the workings of the human mind")). The fact that Hey did not later admit to seeing everything does not mean that a rational juror could not conclude that he saw something.

Hey also appears to argue (Hey Br. 22) that because the government only had circumstantial evidence to prove his statements were false, no rational juror could rely on it. This argument also fails. First, the jury was specifically instructed that "[t]he law makes no distinction between the weight that [it] should give to either [direct or circumstantial evidence], or says that one is any better evidence than the other." (Jury Instructions, Tr. Vol. 9 at 105, Apx. __). Second, as already explained in greater detail, see Part III.C., *supra*, just as a reasonable juror could conclude that Hey's testimony obstructed justice (given the numerous eyewitnesses near and around Hey who witnessed Paxton's arrest), so too could a reasonable juror conclude that Hey testified falsely when he denied seeing any person during Paxton's arrest. In light of the strong motive Hey had to falsely deny seeing anything, the jury's verdict was more than reasonable. See *United States* v. *Arnold*, 486 F.3d 177, 180-183 (6th Cir. 2007) (en banc).

Had Hey testified before the grand jury that he could see various persons engaged in some form of struggle, but without appreciable detail, perhaps his claim might have some merit. But Hey testified that he did not see a single person at the scene until after Paxton was secured in a police car. (Hey, Tr. Vol. 8 at 22-24, Apx. __ ("You didn't see any person? No, I did not."). His after the fact explanations that it was dark, the lights were flashing, etc., were offered to – and

rejected by – the jury. Because those factors did not preclude numerous civilian witnesses from observing in great detail the events surrounding Paxton's arrest, the jury was entitled to conclude that Hey also saw at least some detail, but falsely testified that he did not. Hey simply cannot meet his heavy burden of showing that no rational trier of fact would rely on these circumstantial facts.

Finally, Hey also purports (Hey Br. 24-26) to challenge the materiality of his false statements, on the ground that they could not have been materially false, so long as the grand jury was able to obtain truthful testimony from other witnesses and was ultimately able to return an indictment. This argument misapprehends the nature of materiality. A statement is material if "a truthful statement might have assisted or influenced the grand jury in its investigation." *Lee*, 359 F.3d at 417 (quoting *United States* v. *Swift*, 809 F.2d 320, 324 (6th Cir. 1987)). The fact that Hey's false statements did not ultimately derail the grand jury investigation is simply irrelevant. If Hey had described what he saw, his testimony might have assisted or influenced the grand jury in its assessment of whether the force used against Paxton was reasonable. Moreover, because materiality is measured at the time the false statement is made, the fact that the grand jury ultimately returned an indictment is of no consequence. *Lee*, 359 F.3d at 417. Hey's arguments have no merit, and his conviction for perjury should be

affirmed.

IV

THE DISTRICT COURT DID NOT ERR IN DENYING HEY'S REQUEST FOR AN EVIDENTIARY HEARING

Following his conviction, Hey moved for a new trial, arguing that newly discovered evidence showed that Paxton had signed a restitution request prior to trial that detailed his alleged injuries, damages and costs. (R. 125, Apx. __). According to Hey, this restitution request could somehow prove that Paxton lied to the jury, and therefore a new trial was warranted. The district court denied the new trial motion and denied the accompanying request for an evidentiary hearing. (R. 141, Apx. __). Hey now appeals only the denial of his request for an evidentiary hearing. This court reviews that decision for an abuse of discretion. *United States* v. *Bass*, 460 F.3d 830, 838 (6th Cir. 2006), cert. denied, 127 S. Ct. 2959 (2007). Here, there was no abuse of discretion because Hey's new trial motion was fatally deficient on its face.

To warrant a new trial based upon newly discovered evidence, a defendant must establish that the new evidence: (1) was discovered after trial; (2) could not have been discovered earlier with due diligence; (3) is material and is not merely cumulative or impeaching; and (4) likely would produce an acquittal. *United States* v. *Seago*, 930 F.2d 482, 488 (6th Cir. 1991). No hearing was warranted in

the district court because Hey cannot satisfy the third or fourth requirements under *Seago*. Indeed, Hey does not even argue that he can, and instead simply ignores the rule of *Seago*.

The alleged newly discovered evidence was, at best, relevant only to impeach Paxton's trial testimony that he had not fully determined what his injuries and damages were from the incident. The question of whether Paxton had or had not quantified his injuries was explored exhaustively at trial, with Paxton generally insisting that although his attorneys might have done so for purposes of his civil lawsuit against the officers, he personally had not come up with any number. (See, *e.g.*, Paxton, Tr. Vol. 4 at 181-184, Apx. __; Paxton (Carson Cross), Tr. Vol. 4 at 186-189, Apx. __). Presumably, counsel for Hey would have used the restitution request to show that Paxton had indeed quantified his damages and that Paxton had testified falsely when he denied having done so. But this testimony would have been repetitive of Paxton's cross-examination and would at best have been for the purpose of impeaching Paxton. Because newly discovered impeachment evidence does not warrant a new trial, the motion was clearly without merit.

More fundamentally, the new trial motion had merit only if the newly discovered evidence "likely would produce an acquittal." *Seago*, 930 F.2d at 488. Nothing in Paxton's testimony shed any light on the charges against Hey – indeed, during the time in which Hey either was or was not able to see what was happening to Paxton, Paxton was for the most part face down on the ground with several large officers on top of him, and he could not see whether Hey was present at all. (Paxton, Tr. Vol. 4 at 166, Apx. __). As the district court concluded, Paxton's testimony was not central to Hey's convictions; rather, it was the testimony of Poucher, Pike, and the civilian witnesses who *did* see what happened that supported Hey's convictions. (R. 141 at 12; Apx. __). A new trial in which Paxton was further impeached on a collateral issue offers no likelihood of acquittal for Hey. Therefore, there was no abuse of discretion in denying the new trial motion without granting an evidentiary hearing.

V

CARSON'S SENTENCE IS REASONABLE; ROBERT JACQUEMAIN'S SENTENCE IS UNREASONABLE

A. Standard Of Review

This court reviews sentences for reasonableness. *United States* v. *Booker*, 543 U.S. 220 (2005). Reasonableness review consists of two components, procedural and substantive. *United States* v. *Davis,* 458 F.3d 491, 495 (6th Cir.

2006), petition for cert. filed (U.S. Nov. 13, 2006) (No. 06-7784). A sentence may be procedurally unreasonable if the district court fails to consider the correct advisory Guidelines sentencing range as required by 18 U.S.C. 3553(a)(4), or neglects to consider the other factors listed in 18 U.S.C. 3553(a). *Davis*, 458 F.3d at 495; *United States* v. *Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005); *United States* v. *Webb*, 403 F.3d 373, 383 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006).

Review for substantive unreasonableness generally means review for abuse of discretion. *Rita* v. *United States*, 127 S. Ct. 2456, 2465 (2007). A sentence may be substantively unreasonable if the sentencing court "fail[s] to consider pertinent § 3553(a) factors, or give[s] an unreasonable amount of weight to any pertinent factor." *Webb*, 403 F.3d at 385. If a district court sentences a defendant within the applicable advisory Guidelines range, this Court may afford that sentence "a rebuttable presumption of reasonableness." *United States* v. *Richardson*, 437 F.3d 550, 553 (6th Cir. 2006); see also *Rita*, 127 S. Ct. at 2462. Although a sentence outside the applicable Guidelines range is not presumed to be unreasonable, "the farther the judge's sentence departs from the guidelines sentence * * * the more compelling the justification based on factors in section 3553(a) must be." *Davis*, 458 F.3d at 496 (quoting *United States* v. *Dean*, 414

F.3d 725, 729 (7th Cir. 2005)).

B. Carson's Sentence Is Reasonable

Carson does not challenge the procedural reasonableness of his sentence, nor could he. The record shows that the district court (1) calculated and considered the applicable Guidelines range,[12] (2) considered the relevant factors listed in 18 U.S.C. 3553(a), and (3) considered (and rejected) Carson's arguments for a sentence below the advisory range. See *Webb*, 403 F.3d at 383. Carson's sentence is thus credited with a rebuttable presumption of reasonableness. *Rita*, 127 S. Ct. at 2474.

Carson attempts (Carson Br. 24-31) to rebut this presumption by arguing that his within-Guidelines sentence results in an unreasonable sentencing disparity between himself and his co-defendants, and that the district court failed to give appropriate weight to this disparity. This argument is without merit. This Court has previously noted that "[t]he objective * * * is not to eliminate sentence disparities between defendants of the same case who have different criminal records; rather, the objective is to eliminate unwarranted disparities nationwide."

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[12] The government objected to the district court's refusal to apply a two-level enhancement under U.S.S.G. 3A1.3 (Restraint of Victim). While the government maintains that failing to do so was error, the government is not appealing Carson's sentence as unreasonable.

United States v. *LaSalle*, 948 F.2d 215, 218 (6th Cir. 1991) (explaining that "to reduce a defendant's sentence because of a perceived disparity between the sentences of one defendant and that of his co-defendant in the same case creates a new and unwarranted disparity between that first defendant's sentence and the sentences of all defendants nationwide who are similarly situated").

In addition, this Court recently explained that even in cases where co-defendants engaged in similar criminal conduct, the record may "show[] that there are good reasons" for a district court to sentence co-defendants differently. *United States* v. *Keller*, Nos. 05-6562, 05-6725, slip op. at 8 (6th Cir. August 8, 2007). This Court further explained that in a situation where a defendant, like Carson, alleges a disparity between his sentence and that of a co-defendant who received a reduced sentence, "that disparity, if it exists, should be addressed at [the other co-defendant's] re-sentencing."[13] *Id.* at 10. Moreover, this Court has recognized that a disparity between "co-conspirators [who] chose to plead guilty and cooperate with the prosecution" is reasonable. *United States* v. *Dexta*, 470 F.3d 612, 616 n.1 (6th Cir. 2006), cert. denied, 127 S. Ct. 3066 (2007).

Here, only one other defendant charged in the indictment was convicted of

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[13] As set out in Part V.C., the government is appealing Robert Jacquemain's sentence as both procedurally and substantively unreasonable.

deprivation of rights *and* conspiracy *and* obstruction of justice: Duane Poucher. Poucher pleaded guilty and was sentenced to two years' probation on each count, to run concurrently. (R. 172, Apx. __). Carson was thus the only defendant convicted by a jury of all three offenses (*i.e.*, Peter Jacquemain was convicted only of obstruction of justice; Robert Jacquemain was convicted only of conspiracy; and Hey was convicted of perjury and obstruction). While true that at least one of Carson's co-defendants was convicted of at least one of the crimes of which Carson was convicted, no other defendant (except Poucher) was convicted *of all three offenses*. Based on these facts, there is no basis for Carson to argue that an unreasonable sentencing disparity exists between his sentence and that of similarly situated co-defendants. Cf. *Dexta*, 470 F.3d at 616 n.1.

The district court, after calculating the advisory Guidelines range and considering all of the 18 U.S.C. 3553(a) sentencing factors, concluded that "a sentence within the guidelines range is, in fact, the appropriate way to go in this case." (6/8/2005 Carson Sentencing Tr. at 22, Apx. __); cf. *Rita*, 127 S. Ct. At 2468 (explaining that "when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation"). Carson has failed to show that it was unreasonable to do so.

C. Robert Jacquemain's Sentence Is Unreasonable

1. Robert Jacquemain's Sentence is Procedurally Unreasonable

Although errors in calculating the correct advisory Guidelines range make a sentence procedurally unreasonable, this court employs its traditional standards of review for individual guideline determinations – fact determinations are reviewed for clear error, and both questions of law and mixed questions of law and fact are reviewed *de novo*. *United States* v. *Davidson*, 409 F.3d 304, 310 (6th Cir. 2005). The district court here committed three errors in determining the correct advisory Guidelines range.

a. Because The Victim Was Restrained, An Enhancement Under U.S.S.G. 3A1.3 Should Have Applied

At the July 26, 2005, sentencing hearing, the district court first correctly determined that, because he was convicted of an offense involving obstruction of justice, Robert Jacquemain's offense level should begin with U.S.S.G. 2J1.2. (R. 195 at 22, Apx. __). Because the obstructive activity involved obstructing the investigation of a completed offense, the cross-reference under 2J1.2(c) applied and directed the court to determine the guideline range as if Jacquemain had been convicted of being an accessory after the fact to the criminal activity that was covered up. U.S.S.G. 2J1.2(c)(1). Offense levels for accessories after the fact are set six levels lower than that for the principal. U.S.S.G. 2X3.1; *United States* v.

Shabazz, 263 F.3d 603, 607 (6th Cir. 2001). Because Jacquemain was convicted of conspiring to cover up Carson's and Poucher's substantive civil rights offenses, his base offense level as an accessory should therefore be six levels lower than the correct offense level for Carson and Poucher. Here, however, the district court failed to calculate the correct level for Carson and refused to correct that error when setting the starting offense level for Jacquemain as an accessory. (R. 195 at 18, Apx. __ ("You're arguing two for the [restraint of victim] which I've already said I don't believe applies.")).[14]

At the sentencing of Carson, the government had urged the court to apply a two level enhancement for restraint of victim, under U.S.S.G. 3A1.3. The district court rejected the recommendation of the Probation Department and refused to apply the enhancement (6/8/2005 Carson Sentencing Tr. at 10, Apx. __), which by its terms applies "[i]f a victim was physically restrained in the course of the offense." U.S.S.G. 3A1.3. There is no factual dispute that Paxton was physically restrained when Carson beat him and when Poucher kicked him. The district court reasoned, however, that applying this enhancement to a situation where the victim

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[14] When formally stating its refusal to apply the restraint of victim enhancement, the district court actually referenced its earlier refusal to apply the enhancement to Robert Hey's sentence, but the decision at Hey's sentencing was based upon the original calculation at Carson's sentencing. (R. 195 at 22, Apx. __).

was otherwise subject to arrest was "kind of piling on." (6/8/2005 Carson Sentencing Tr. at 10, Apx. __). The district court concluded that the restraint of victim enhancement under 3A1.3 was "duplicative of the underlying offense" and addressed conduct that was already incorporated into the guideline applicable to civil rights offenses. (6/8/2005 Carson Sentencing Tr. at 10, Apx. __). Therefore, according to the district court, the enhancement should only be available where some additional restraint of the victim occurred. (6/8/2005 Carson Sentencing Tr. at 10-11, Apx. __). This is incorrect as a matter of law.

Guideline U.S.S.G. 2H1.1 does not apply only to cases involving a restrained victim; it applies to *all* cases involving a violation of someone's rights, regardless of whether the victim is restrained. For example, this court has concluded that 2H1.1 is the correct guideline applicable to cross burnings, in violation of 18 U.S.C. 242. *United States* v. *Johnson*, 116 F.3d 163 (6th Cir. 1997). And all civil rights conspiracies charged under 18 U.S.C. 241 are referenced to 2H1.1, regardless of whether a victim is restrained. U.S.S.G. 2H1.1, comment.

Moreover, many excessive force cases do not involve restrained victims, see, *e.g.*, *United States* v. *Schatzle*, 901 F.2d 252, 255 (2d Cir. 1990), yet all are covered by 2H1.1. U.S.S.G. 2H1.1, comment. The district court was simply

wrong to conclude that the offense level for 2H1.1 already reflected an enhancement for this dimension of Carson's offense conduct. The fact that the victim here was restrained, therefore, makes this civil rights offense more serious than similar offenses which do not involve restraint, and the 3A1.3 enhancement exists to reflect that fact.

The Fifth Circuit has recognized as much, finding 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." *United States* v. *Clayton*, 172 F.3d 347, 353 (5th Cir. 1999). In *Clayton*, a police officer kicked the victim in the head after making a lawful arrest. The district court did not apply the restraint of victim enhancement because it reasoned the underlying arrest was lawful, and the restraint was not for the purpose of facilitating the unreasonable force. *Ibid.* The Fifth Circuit reversed, recognizing that beating someone who is restrained is more "wilful[,] * * * inexcusable[,] and reprehensible[]" than beating someone who is not restrained, and therefore the defendant who does so is more culpable. *Ibid.* The Fifth Circuit thus held that the enhancement applied, without regard to the extent or lawfulness of the restraint originally imposed. *Ibid.*; see also *United States* v. *Evans*, No. 95-5714, 1996 WL 233056 (4th Cir. May 8, 1996) (rejecting defendant's claim that the enhancement should not apply because

the restraint was incidental to a lawful arrest).

The same analysis should apply here. Carson's offense level should have included an enhancement for restraint of victim and therefore should have been 22. The district court should have then used 22 as the baseline from which it subtracted 6 levels under U.S.S.G. 2X3.1 for Robert Jacquemain. Under a correct calculation of the Guidelines, Jacquemain's base offense level should have been 16.

b. Defendant's False Trial Testimony Warranted An Enhancement For Obstruction Of Justice

The district court next erred by refusing to apply an enhancement to Robert Jacquemain's offense level for obstruction of justice, under U.S.S.G. 3C1.1, based upon his false trial testimony. Although Jacquemain's underlying conviction was itself for a crime of obstruction of justice, the enhancement is available in cases where there is a significant further obstruction which occurs during the investigation, prosecution, or sentencing of the obstruction case itself. U.S.S.G. 3C1.1, comment (n.7); see also *United States* v. *Sabino*, 274 F.3d 1053 (6th Cir. 2001), as amended, 307 F.3d 446 (6th Cir. 2002), cert. denied, 540 U.S. 811 (2003). Here, there was a significant further obstruction – Robert Jacquemain's false trial testimony about material issues.

Robert Jacquemain falsely testified that: (1) Paxton got out of the truck on his own, before defendant had even gotten out of his police car (Robert Jacquemain, Tr. Vol. 8 at 44, Apx. __); (2) he did not pull Paxton out of the truck (Robert Jacquemain, Tr. Vol. 8 at 47-48, Apx. __); (3) Paxton was waving clenched fists and yelling at the officers (Robert Jacquemain, Tr. Vol. 8 at 45, Apx. __); (4) he only tackled Paxton after Paxton had taken a few steps towards him, and exhibited an irate manner (Robert Jacquemain, Tr. Vol. 8 at 45-46, Apx. __); and (5) he never spoke with anyone about falsely portraying Paxton as the aggressor (Robert Jacquemain, Tr. Vol. 8 at 61, Apx. __). All of these statements were offered to influence the jury's determination of whether unreasonable force was used against Paxton, and whether Poucher was telling the truth when he testified that the defendants conspired to create the false "Paxton came at us" story. These statements were clearly material, and they were clearly false.

When the jury convicted Robert Jacquemain of Count II (conspiracy), it had to conclude that the "we're going to say he came at us" story was false. When the jury convicted Carson of Count III and Peter Jacquemain of Count V (*i.e.*, the substantive obstruction of justice counts based on the police reports), it had to conclude that the reports were false when they stated that Paxton got out of his truck and "came at" the officers. (GX 20 (Carson's Report), Apx. __ ("the driver

(Paxton) exited the pick up, and ran at [defendant's] scout car, passenger side, with his fist clenched."); GX 22 (Peter Jacquemain's Report), Apx. __ ("I observed Paxton exit his vehicle and start running towards [the scout car], in a threatening manner (i.e. fists clenched).")). That was the crux of the government's case for all of the obstruction convictions – that Robert Jacquemain and the other officers intentionally created a false story of "he got out of his car" and "he came at [them]" in order to cover up the use of excessive force. Jacquemain's testimony to that same effect, therefore, had to have been rejected by the jury.

It is true that the jury acquitted Robert Jacquemain on the obstruction count based upon his own report (Count IV), but it convicted Carson and Peter Jacquemain based upon nearly identical reports. The fact that the jury showed leniency (or compromised) as to the substantive count cannot take away from the fact that the story was false. And, of course, at sentencing the district court should apply a preponderance of the evidence standard, rather than the beyond a reasonable doubt standard used by the jury.

Moreover, in denying Hey's motion for an acquittal, the district court specifically credited the testimony of Brian Pike. (R. 141 at 7-9, Apx. __). Pike had testified at trial that he saw the officers standing at the side of the pickup truck, yelling for the driver to get out, and when the driver did not get out, the

officers opened the door and reached in, pulled him out and took him straight to the ground. (Pike, Tr. Vol. 7 at 82-83, Apx. __ ("[I]t didn't look like he was getting out right away, so finally they opened the door and got him out."). Thus, Robert Jacquemain's trial testimony that Paxton was already getting out of the pickup truck as his own vehicle was coming to a stop, and that he only tackled Paxton after Paxton came towards him with clenched fists, is simply false, and it went to the central issues in the case. The U.S.S.G. 3C1.1 enhancement should have applied.

In refusing to apply the enhancement, the district court apparently concluded that the testimony was not false and that it did not obstruct the trial. The court stated: "I didn't find his testimony in court to be obstructive in any way. I think he told what he recalled and did it as best he could, and I don't believe an enhancement is appropriate based on his testimony." (R. 195 at 23, Apx. __). The district court clearly erred in finding that the testimony was not false – the fact that defendant was consistent in his version of events does not make it true, and the testimony of Poucher and Pike that the jury relied upon shows it to have been false. Moreover, the fact that defendant did not successfully obstruct the trial does not preclude application of the enhancement, for it applies to attempts to obstruct as well as completed schemes. U.S.S.G. 3C1.1. Once the testimony is found to be

intentionally false and material, then application of the enhancement is mandatory. *United States* v. *Hurst*, 228 F.3d 751, 762 (6th Cir. 2000). There is no room for the district court to decline to apply it under the Guidelines as not "appropriate." (R. 195 at 23, Apx. __). Robert Jacquemain's adjusted offense level should therefore have been 18.

c. Defendant's Conduct Does Not Qualify As "Aberrant Behavior"

Finally, the district court abused its discretion in granting a downward departure under U.S.S.G. 5K2.20 for "aberrant behavior." By its terms, such a departure is appropriate only in an extraordinary case, and only where the defendant committed a single criminal act or transaction that was committed without significant planning, was of limited duration, and represented a marked deviation from an otherwise law abiding life. U.S.S.G. 5K2.20, comment (n.1). Here, the conspiracy that Robert Jacquemain was convicted of participating in spanned almost two years, and he was shown to have been one of the ringleaders.

Robert Jacquemain initially recruited Duane Poucher to join the conspiracy, showing consciousness of wrongdoing and planning. (Poucher, Tr. Vol. 3 at 89, Apx. __). He then made false statements on at least four distinct occasions, punctuated by long intervals in which he could and should have reconsidered. He wrote a false report on the night of the incident, in July 2002. (GX 21, Apx. __).

He then testified falsely at Paxton's state court examination in October, 2002. (Sabaugh, Tr. Vol. 6 at 123, Apx. __; Stipulation, GX 32 at 12, Apx. __). He then made false statements to an FBI agent in March, 2003, (Foltz, Tr. Vol. 6 at 145, Apx. __), and he finally repeated the false story at trial in this case, in an effort to secure acquittals, in June 2004 (Robert Jacquemain, Tr. Vol. 8 at 44-55, Apx. __). During this period, defendant also took deliberate steps to ensure that the conspiracy succeeded, such as by trying to reinforce Poucher in sticking to the false version of events. (Poucher, Tr. Vol. 3 at 107, Apx. __). These deliberate, repeated and strategic acts over such an extended period are simply not the sort of conduct to which the departure should apply, and granting the departure was an abuse of discretion.

Other circuits have recognized as much, finding that conduct that spanned much shorter time periods, or involved similar levels of intentional planning, do not warrant a departure. For example, the Fourth Circuit held that a defendant was ineligible for a 5K2.20 departure because, among other reasons, the conduct was not of limited duration and instead spanned roughly ten days. *United States* v. *Hillyer*, 457 F.3d 347, 352 (2006); see also *United States* v. *May*, 359 F.3d 683, 693 n.17 (2004) (reversing district court's departure under 5K2.20 where defendant's offense conduct lasted a month). Similarly, the Eighth Circuit has

stated that a defendant is ineligible for the departure if the conduct required considerable planning and was carried out over a number of days. *United States* v. *Bueno*, 443 F.3d 1017, 1023 (2006). The Tenth Circuit has applied a similar analysis, and reached the same result. See *United States* v. *McClatchey*, 316 F.3d 1122, 1135 (2003) (18 month participation in kickback conspiracy "simply lasted too long" to warrant departure); *United States* v. *Bayles*, 310 F.3d 1302, 1314 (2002) (reversing departure in part because offense conduct lasted one year).

In an unpublished opinion, this Court has reached the same conclusion. In *United States* v. *Lepird,* 142 F. App'x 880 (6th Cir. 2005), the district court refused to grant a departure under 5K2.20 to a defendant whose offense conduct had included multiple acts of depositing and withdrawing items from bank accounts over a forty-five day period. This Court affirmed, noting that "such repetitive acts involving significant planning do not constitute aberrant behavior." 142 F. App'x at 881 n.1. Although Robert Jacquemain's acts here may not have been as complicated, they were no less intentional, and they spanned a significantly longer period of time. The offense conduct here simply does not qualify as "aberrant behavior," and this is not "an extraordinary case" in this regard. U.S.S.G. 5K2.20.

Moreover, the commentary to 5K2.20 makes clear that this case is unsuited for this departure. In determining whether the conduct at issue is truly an aberration, the district court is instructed to consider not only the defendant's prior employment and record of good deeds, but also the defendant's motivation for committing the offense and any efforts to mitigate the effects of the offense. U.S.S.G. 5K2.20, comment (n.2). Here, the sole motivation was for a police officer to succeed in obstructing the investigation of a very serious crime committed by his fellow officers. And not only did Robert Jacquemain fail to mitigate the effects of his lies, he exacerbated the effects by affirmatively supporting false charges of resisting arrest against Paxton in state court, as part of the conspiracy to cover up the beating. This conduct simply should not be minimized by awarding a departure under 5K2.20, and to do so is an abuse of discretion.

The district court made several errors in calculating Jacquemain's offense level, and it is therefore procedurally unreasonable. Under these circumstances, this Court must remand his case to the district court for resentencing. 18 U.S.C. 3742(f)(1). This is especially so because his sentence is also substantively unreasonable. See *infra*.

2. A Sentence Of Probation For This Police Officer, Who Was Convicted Of Conspiring To Obstruct Justice, Is Substantively Unreasonable

Although district courts are now free to impose sentences outside of the advisory Guidelines range, this Court can and must reverse sentences that do not accomplish the sentencing objectives of 18 U.S.C. 3553(a)(2), do not accord proper weight to pertinent sentencing factors, conflict with congressional policies, or are not supported by substantial reasons, commensurate with the degree of the variance from the applicable guideline range. *United States* v. *Davis*, 458 F.3d 491 (6th Cir. 2006), petition for cert. filed (U.S. Nov. 13, 2006) (No. 06-7784); see also *United States* v. *Poynter*, No. 05-6508, 2007 WL 2127353 (6th Cir. July 26, 2007) (reversing an upward variance because, among other reasons, the justifications offered were not sufficient to support the degree of the variance). The sentence here must be reversed on each of these grounds.

First, Congress has mandated that each sentence in a criminal case be sufficient to reflect the seriousness of the offense and to promote respect for the law. 18 U.S.C. 3553(a)(2)(A). Robert Jacquemain's sentence of probation, with not a single day of imprisonment, simply does not promote respect for the law. He was convicted of conspiring to cover up a criminal beating by testifying falsely in court and encouraging other officers to write false reports. Police officers are

sworn to uphold the law, and lies told by them to cover up the crimes of their partners (which lies also serve to support false charges against a victim of a beating) display a blatant contempt for the rule of law. As the district court stated in sentencing defendant Carson, lies such as these are insidious and present a corrosive and very real danger to our system of justice. (6/8/2005 Carson Sentencing Tr. at 21-22, Apx. __). Imposing no incarceration at all upon Robert Jacquemain, a police officer convicted of such crimes, promotes disrespect for the law and minimizes the seriousness of the offense. Robert Jacquemain's sentence is therefore substantively unreasonable.

Jacquemain's sentence of probation is also unreasonable for its failure to afford adequate deterrence to criminal conduct. See 18 U.S.C. 3553(a)(2)(B). This court has noted that certain types of crimes (and criminals) are especially susceptible to the congressional goal of general deterrence. *Davis*, 458 F.3d at 498-499 (noting that economic and fraud based crimes are prime candidates for general deterrence) (quoting *United States* v. *Martin*, 455 F.3d 1227, 1239 (11th Cir. 2006). Like the white collar offenders described in *Davis*, police officers are prime candidates for general deterrence, but only if a sentence of some consequence is imposed. Failing to sentence Jacquemain to any term of imprisonment therefore fails to provide adequate deterrence, and is thus

unreasonable.

The district court here purported to consider deterrence, but its comments make clear that the court was not giving proper weight to the need to deter other persons, and especially other police officers, and instead focused exclusively on Jacquemain's risk of future criminal conduct. The court stated that, under its analysis of 18 U.S.C. 3553(a)(2)(B) (adequate deterrence): "I do not believe there is any chance this defendant would engage in additional criminal conduct." (Judgment, Statement of Reasons, R. 164 at 3, Apx. __). But that statement addresses the need to incapacitate the defendant, a different statutory objective,[15] and does not address at all the imperative that the sentence provide adequate deterrence to other police officers who might be tempted to lie to cover up serious criminal conduct. By giving this statutory objective no apparent weight at all, the district court's sentence of probation is unreasonable.

Finally, the district court's sentencing analysis failed to give proper weight to the congressional imperative to reduce unwarranted sentence disparities. 18 U.S.C. 3553(a)(6). This applied both among the defendants in this case, as well as across similarly situated defendants from other districts.

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[15] 18 U.S.C. 3553(a)(2)(C).

In this case, the unwarranted disparities arose when the district court failed to consistently weigh the relative culpability of each defendant, and the relative seriousness of the criminal conduct. For example, when sentencing Carson, the district court stated that it would have been inclined to be extremely lenient, but because the obstruction of justice component lasted for many months and was so serious, a 33-month term of imprisonment was warranted. (6/8/2005 Carson Sentencing Tr. at 10, Apx. __). Yet, when sentencing Robert Jacquemain, who was a ringleader of the obstructive conduct and convicted of the same conspiracy, the court imposed no prison time at all. This is an unwarranted disparity.[16]

Similarly, when sentencing defendant Hey, the court noted, as a ground for leniency, that Hey's conduct did not involve actually portraying a false version of events; rather, Hey simply refused to admit seeing the beating. (Judgment, Statement of Reasons, R. 153 at 3, Apx. __) ("Defendant never joined in the untrue description of the incident, but merely maintained that he did not see what

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[16] Defendant Carson raises exactly this point in his brief. His argument has potential force, but the proper remedy is not an unjustified variance for his sentence (which the district court has already declined to award), but instead an increase in the sentence of Robert Jacquemain. Cf. *United States* v. *Keller*, Nos. 05-6562, 05-6725, slip. op. at 10 (6th Cir. Aug. 8, 2007) (where disparity exists because one defendant received a much greater variance than another, the proper remedy would lie in increasing the first sentence, rather than decreasing an otherwise reasonable sentence solely to lessen the discrepancy).

happened."). Yet, when sentencing Robert Jacquemain, who did join in the untrue description of the incident (and in fact, created it, repeated it and used it to support false charges against Paxton), the district court stated that she considered Robert Jacquemain to be less culpable than defendant Hey. (R. 195 at 39, Apx. __) ("I see Robert and Peter Jacquemain as slightly less culpable than Robert Hey in this case."). It is true that Hey suffered two convictions, but both convictions were based upon a single appearance before the grand jury. And it is also true that Hey's lies did not go nearly as far as Jacquemain's, and they were not repeated over the course of months, nor were they used to support false charges against the victim. The district court's erroneous assessment of the relative culpabilities in this case, in conjunction with the contradictory statements in that regard, leads to unwarranted disparities and makes this sentence unreasonable.[17]

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[17] It appears at times that the district court simply failed to differentiate between Robert and Peter Jacquemain. For instance, in the Statement of Reasons in Robert Jacquemain's Judgment, the court described his offense as having been limited to "writing a false police report about what happened," and that his offense conduct "occurred in a highly charged atmosphere and appears to have been influenced by the duress of pressure from fellow officers." (R. 164 at 3, Apx. __). This may well have been true for Peter Jacquemain, but it simply cannot apply to Robert Jacquemain, whose offense conduct in the conspiracy spanned more than a year, and was in no way impulsive. And the only testimony about peer pressure from fellow officers established that it was Robert Jacquemain putting pressure on the others. (See, *e.g.*, Poucher, Tr. Vol. 3 at 89, 107, Apx. __). Especially when considered in conjunction with Robert Jacquemain's false state court testimony

(continued...)

By granting such an extreme variance without legitimate foundation, the district court also exacerbated unwarranted disparity among defendants convicted in other districts of similar conduct. For example, the district court found it significant that Jacquemain lost his job as a police officer, and considered that to be punishment enough. (R. 164 at 3, Apx. __) ("This defendant has lost his job and his career in law enforcement. Imprisonment for any period seems excessive."). Yet every police officer who is convicted of an obstruction of justice offense will, presumably, lose his job and his career in law enforcement. Granting Jacquemain a 100% variance on the basis of a factor which is universal among defendants convicted of similar conduct serves only to promote unwarranted disparity, not to reduce it. *Davis*, 458 F.3d at 496-497 (holding that circumstances did not warrant a 99.98% variance from 30-37 months' imprisonment to a single day's imprisonment). Doing so is therefore unreasonable.

It is true that a sentence within the correct Guidelines range of 27-33 months for obstructing the investigation of a very serious offense is a significant sentence, especially for a defendant with the law enforcement and military record emphasized by the district court. Yet, the Supreme Court recently upheld as

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[17](...continued)
and his false trial testimony here, the brothers were not equally culpable, and their sentences should have reflected that.

reasonable a sentence of 33 months' imprisonment for Victor Rita, whose offense conduct involved obstruction of justice and whose military and law enforcement background were no less compelling. *Rita*, 127 S. Ct. at 2470. This is not to say that Jacquemain must receive a sentence of 33 months – it is only to say that a sentence of probation for Robert Jacquemain's conviction produces an unwarranted disparity with other defendants convicted of similar obstruction of justice offenses in other districts. Although some variance may be warranted, the extreme variance granted here simply fails the proportionality test used by this Court to reduce unwarranted disparity. Cf. *Davis,* 458 F.3d at 500 (explaining that the district court's sentence of one day "represents the most extreme variance possible, leaving no room to make reasoned distinctions between [the defendant's] variance and the variances that other, more worthy defendants may deserve"); *Poynter,* 2007 WL 2127353, at *7-10.

CONCLUSION

For the foregoing reasons, this Court should (1) affirm the defendants' convictions; (2) affirm Carson's sentence; and (3) vacate Robert Jacquemain's sentence and remand his case for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 28.1(e)(2), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 12 software, the brief contains 21,416 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

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DATED: August 20, 2007

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2007, a copy of the foregoing PROOF BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT was served by prepaid, overnight delivery on each of the following counsels of record:

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DESIGNATION OF APPENDIX CONTENTS

Pursuant to Sixth Circuit Rules 10(d) and 11(b), appellee-cross-appellant, United States of America, designates the following items to be contained in the Joint Appendix.

RECORD DOCUMENTS

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PSR (P. Jacquemain)	
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Sentencing Transcript (Carson) (pp. 10-11, 21-24)	6-8-2005
Government Exhibit 17	6-14-2004
Government Exhibit 18	6-14-2004
Government Exhibit 19	6-10-2004
Government Exhibit 20	6-10-2004
Government Exhibit 21	6-16-2004
Government Exhibit 22	6-16-2004
Government Exhibit 24	6-17-2004
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Government Exhibit 30	6-17-2004
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Government Exhibit 46A	6-21-2004
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