No. 02-2528

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DESMOND CHRISTIAN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
Honorable Sarah Evans Barker

BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

PAGE

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

A. Procedural History 2

B. Facts 3

C. The District Court's Rulings 6

SUMMARY OF ARGUMENT 8

ARGUMENT:

I. CODEFENDANTS' GUILTY PLEAS TO LESSER INCLUDED MISDEMEANOR VIOLATIONS OF 18 U.S.C. 242 DO NOT BAR DEFENDANT'S CONVICTION FOR A FELONY VIOLATION OF 18 U.S.C. 242 10

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW DEFENDANT'S EXPERT TO CHARACTERIZE THE SEVERITY OF THE VICTIM'S INJURIES 16

III. THE EVIDENCE IS SUFFICIENT TO ESTABLISH THAT DEFENDANT ACTED UNDER COLOR OF LAW 19

CONCLUSION 24

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

PAGE

CASES:

Brown v. *Miller*, 631 F.2d 408 (5th Cir. 1980) 21

Cassady v. *Tackett*, 938 F.2d 693 (6th Cir. 1991) (per curiam) 21

Daubert v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) 3

Glasser v. *United States*, 315 U.S. 60 (1942) 20

Klobuchir v. *Pennsylvani*a, 639 F.2d 966 (3d Cir.), cert. denied,
454 U.S. 1031(1981) 14

Latuszkin v. *City of Chicago*, 250 F.3d 502 (7th Cir. 2001) 21

Layne v. *Sampley*, 627 F.2d 12 (6th Cir. 1980) 22

Levinson v. *United States*, 969 F.2d 260 (7th Cir.), cert. denied,
506 U.S. 989 (1992) 11

Monroe v. *Pape*, 365 U.S. 167 (1961) 20

New Hampshire v. *Maine*, 532 U.S. 742 (2001) 10, 11

Patterson v. *McClean Credit Union*, 805 F.2d 1143 (4th Cir. 1986),
modified on other grounds, 491 U.S. 164 (1989) 18

Pickrel v. *City of Springfield*, 45 F.3d 1115 (7th Cir. 1995) 20

Rodriguez v. *Peters*, 63 F.3d 546 (7th Cir. 1995) 15

Screws v. *United States*, 325 U.S. 91 (1945) 20, 22

Standefer v. *United States*, 447 U.S. 10 (1980) 11

CASES (continued): PAGE

United States for Use of Am. Bank v. *C.I.T. Constr., Inc.*, 944 F.2d 253 (5th Cir. 1991) 12

United States v. *$448,342.85*, 969 F.2d 474 (7th Cir. 1992) 14

United States v. *22 Santa Barbara Drive*, 264 F.3d 860 (9th Cir. 2001) 11

United States v. *Barker*, 681 F.2d 589 (9th Cir. 1982) 14, 15

United States v. *Bryza*, 522 F.2d 414 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976) 15

United States v. *Carraway*, 108 F.3d 745 (7th Cir.), cert. denied, 522 U.S. 891 (1997) 15

United States v. *Causey*, 185 F.3d 407, 415 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000) 21, 23

United States v. *Classic*, 313 U.S. 299 (1941) 20

United States v. *Colbert*, 172 F.3d 594 (8th Cir. 1999) 22, 23

United States v. *Coppola*, 526 F.2d 764 (10th Cir. 1975) 14, 15

United States v. *Crotteau*, 218 F.3d 826 (7th Cir. 2000) 16

United States v. *Delgado*, 903 F.2d 1495 (11th Cir. 1990), cert. denied, 498 U.S. 1028 (1991) 14, 15

United States v. *Hamm*, 13 F.3d 1126 (7th Cir. 1994) 13, 16

United States v. *Hook*, 195 F.3d 299 (7th Cir. 1999), cert. denied, 529 U.S. 1082 (2000) 10, 11

United States v. *Irorere*, 228 F.3d 816 (7th Cir. 2000) 19

CASES (continued): PAGE

United States v. *Johnson*, 26 F.3d 669 (7th Cir.), cert. denied, 513 U.S. 940 (1994) 15

United States v. *Levasseur*, 846 F.2d 786 (1st Cir.), cert. denied, 488 U.S. 894 (1998) 11

United States v. *Lundy*, 809 F.2d 392 (7th Cir. 1987) 19-20

United States v. *McCaskey*, 9 F.3d 368 (5th Cir. 1993), cert. denied, 511 U.S. 1042 (1994) 11

United States v. *Myers*, 972 F.2d 1566 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993) 13, 16-17

United States v. *Newell*, 239 F.3d 917 (7th Cir. 2001) 12

United States v. *Owens*, 301 F.3d 521 (7th Cir. 2002) 19

United States v. *Price*, 383 U.S. 787 (1966) 22-23

United States v. *Simmons*, 247 F.3d 118 (4th Cir. 2001) 12

United States v. *Stevens*, 935 F.2d 1380 (3d Cir. 1991) 18

United States v. *Sua*, 307 F.3d 1150 (9th Cir. 2002) 15

United States v. *Walton*, 217 F.3d 443 (7th Cir. 2000) 16

United States v. *Welch*, 945 F.2d 1378 (7th Cir. 1991), cert. denied, 502 U.S. 1118 (1992) 18

United States v. *Zendeli*, 180 F.3d 879 (7th Cir. 1999) 14

STATUTE: PAGE

18 U.S.C. 242 . . . . *passim*

RULES:

Fed. R. Evid. 403 15

Fed. R. Evid. 702 18

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether codefendants' guilty pleas to lesser included misdemeanor violations of 18 U.S.C. 242 bar the government from presenting evidence and convicting defendant of a felonious violation of 18 U.S.C. 242.

2. Whether the district court abused its discretion in refusing to allow defendant's expert to characterize the severity of the victim's injuries.

3. Whether the evidence is sufficient to establish that defendant acted under color of law.

STATEMENT OF THE CASE

A. Procedural History

On July 12, 2000, a federal grand jury from the Southern District of Indiana returned a one-count indictment charging defendant, Desmond Christian, an officer employed by the Kokomo, Indiana, Police Department, and two fellow police officers, Jason Hahn and Craig Smith, with a felonious violation of 18 U.S.C. 242 (deprivation of civil rights under color of law) (R. 1).[1] The indictment alleges that defendant and his two codefendants – Hahn and Smith – aided and abetted each other in knowingly using excessive force against Kenneth Kail at the Howard County Jail.

On September 6, 2002, the government filed separate informations charging Hahn and Smith with a misdemeanor violation of 18 U.S.C. 242 (Sup. App. 9-10, 24-25). On that same date, each codefendant pled guilty to the misdemeanor charge (Sup. App. 11-23, 26-38).

On March 4, 2002, a jury trial commenced, and three days later, the jury returned a verdict finding defendant guilty as charged (R. 94). On May 30, 2002, the district court sentenced defendant to 33 months' imprisonment (A. 15). On

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[1] "R. __ " refers to the number of the record entry on the district court docket sheet. "Br." refers to defendant's brief filed with this Court. "Tr." refers to the transcripts dated November 1, 2002, and March 1, 2002, which include argument and rulings as to certain pretrial motions. "T.Tr." refers to the trial transcripts dated March 4, 6, and 7, 2002. "A." refers to the Appendix attached to defendant's brief filed with this Court. "Sup. App." refers to the supplemental appendix filed under separate cover with this brief.

June 3, 2002, final judgment was entered and on June 7, 2002, defendant filed a timely notice of appeal (A. 15, R. 107).

B. Facts

On October 19 and 20, 1998, defendant Christian and his two codefendants, Hahn and Smith, uniformed officers with the Kokomo, Indiana, Police Department, worked the midnight shift, which extends from 10:00 p.m. to 6:00 a.m. the following day (T.Tr. 248, 340). Shortly after midnight, all three arrived at a bar, as a result of a fight involving Kenneth Kail, an intoxicated patron (T.Tr. 78, 127, 248, 340, 344). In the parking lot of the bar, codefendants Smith and Hahn wrestled Kail to the ground and arrested him (T.Tr. 249-253, 342-344). Codefendant Smith sprayed Kail with mace after he was handcuffed (T.Tr. 128, 250-251, 345).[2] Christian had no contact with Kail at the scene, but arrested Kail's half brother, Tony Chorruchi (T.Tr. 78, 129, 150, 280).

Officer Phillips drove Kail to the Howard County Jail (T.Tr. 74, 254). During the transport, Kail banged his head against the plexiglass divider in the squad car and Smith again sprayed him with mace (T.Tr. 130, 331, 347).

Immediately upon his arrival at the jail, Rodney Williams, a supervisory correctional officer, escorted Kail to the showers so he could wash off the pepper spray (T.Tr. 25, 72, 76-77, 131, 178, 255). Kail's lip was not cut and he had no

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[2] As a result of the incident at the bar, Kail was charged with public intoxication, resisting law enforcement, disorderly conduct and battery on a police officer (T.Tr. 346). Kail pled guilty to battery on a police officer (T.Tr. 138).

swelling or bruising to his face (T.Tr. 76-77, 142, 253-254, 330, 337). Although loud and verbally abusive at the jail about having been wrongly arrested and maced, Kail was not handcuffed because he was not considered physically threatening (T.Tr. 21, 27, 75-76, 77-78, 101, 179, 256, 270, 280, 394-396). Officer Phillips, concerned that something was going to happen because Christian was verbally taunting Kail, left the jail (T.Tr. 333).

After the shower, Williams escorted Kail, who remained uncuffed, to the processing area (T.Tr. 21, 79, 132). Christian, who was filling out paperwork, was present, as were Hahn and Smith, Chorruchi, and several correctional officers (T.Tr. 11-12, 21-22, 74, 132, 152, 176, 349, 402). As Kail walked past Christian, the two exchanged words and Kail called defendant, the only African American officer who was present, a "nigger" (T.Tr. 15, 25, 28-29, 83, 101-102, 134, 183, 262, 332, 351). Correctional officers Allen and Williams walked Kail over to a chair and stood in front of him (T.Tr. 25-28, 262). Neither correctional officer required assistance (T.Tr. 28, 50, 88, 184, 262, 264-265, 354).

As Kail continued to be verbally abusive, Christian, Hahn, and Smith pushed jailers Williams and Allen aside and Hahn sprayed mace at Kail (T.Tr. 25, 31, 33, 50, 87, 263, 265, 356). As Hahn and Smith held Kail down and pinned him to a chair, Christian forcefully kneed and punched him in the face several times (T.Tr. 34, 89, 134, 154, 266, 287-288, 357, 407). Christian then asked Kail, "Now you think I'm still a nigger now?" (T.Tr. 266, 40, 402). Prior to the incident, Kail did not assault anyone, did not exhibit threatening behavior, nor did

he do anything that required the use of force (T.Tr. 21, 28, 36, 50, 75, 78-79, 86-87, 92, 184, 186, 263-265, 267, 354, 361, 412).

Immediately after the beating, correctional officer Williams escorted Kail, who was uncuffed, to a holding cell. Kail requested medical attention for the injuries he had just received (T.Tr. 37-38, 94-95, 136-137, 139-140, 219, 271). An ambulance technician examined Kail, and when he asked to borrow Christian's flashlight, Christian said, "you're not going to use my flashlight to look at that piece of shit's mouth" (T.Tr. 273-274, 95, 218-219). Kail directed Christian to leave his cell and Christian responded that he could go anywhere in the jail he wanted (T.Tr. 96). Later in the morning, an officer took several photographs of Kail, which showed substantial facial bruising and swelling and a cut on his lip (T.Tr. 140-143).

Christian, Hahn, and Smith did not mention the assault in their official reports or when interviewed by the Internal Affairs Division of the Police Department (T.Tr. 274-275, 369). Appearing before the grand jury, Hahn and Smith testified falsely and denied the incident, believing that the "blue wall of silence" would allow them to get away with it (T.Tr. 274-276, 369). During the grand jury investigation, Christian threatened an officer about what would happen if he were indicted (T.Tr. 194).

Defendant Christian presented two witnesses. Jason Guest testified that he assisted codefendants Smith and Hahn in subduing Kail in the parking lot of the bar (T.Tr. 440-441). Dr. John E. Pless, a medical expert, testified that Kail's facial

injuries were consistent with hitting his face on the pavement and against a plexiglass divider in the police cruiser when he was transported (T.Tr. 501-502). He also explained that the victim's injuries were inconsistent with being forcefully kneed and punched in the face because they were not sufficiently serious (T.Tr. 502-503). Dr. Pless acknowledged that the victim's injuries caused pain (T.Tr. 509).

C. The District Court's Rulings

Prior to the trial, defendant filed a motion seeking to preclude the government from offering evidence establishing that the victim suffered bodily injury as a result of his use of force (R. 79). Relying on the doctrine of judicial estoppel and the Federal Sentencing Guidelines, defendant argued that since the government allowed his codefendants to plead guilty to lesser included misdemeanors, which did not require proof that bodily injury resulted, it was barred from presenting evidence at his trial that bodily injury occurred.

On March 4, 2002, the district court issued a written decision denying defendant's motion (A. 9-13). It explained that it found no precedent establishing that judicial estoppel applies to criminal prosecutions of multiple defendants (A. 10-11). The court also reasoned that the government's position of accepting codefendants' guilty pleas and prosecuting defendant for a more serious offense was not inconsistent since the "situations involv[e] * * * different litigants based on the defendants' disparate levels of involvement in the underlying offense" (A. 11). Relying on precedent from this Court, the district court further explained that

the government's acceptance of codefendants' pleas to a lesser included misdemeanor did not imply anything with regard to defendant's conduct since it often, as here, plea bargains to obtain the testimony of accomplices to convict another offender of a more serious crime (A. 12). In addition, the court stated that neither the language nor judicial interpretations of the Sentencing Guidelines supported defendant's position that the government was barred from prosecuting him for a charged offense after allowing codefendants to plead guilty to a lesser included crime (A. 11-12).

Prior to trial, the United States filed a motion requesting a *Daubert* hearing and the exclusion of the testimony of defendant's medical expert (R. 70).[3] On March 1, 2002, the court heard argument on the motion and on March 7, 2002, outside the presence of the jury, heard the expert's testimony (Tr. 28; T.Tr. 461-480). The district court granted the government's motion to exclude the expert's characterization of the severity of the victim's injuries as "mild" "with some moderate [features] only because of the swelling" since the testimony was irrelevant and thus unhelpful to the jury (A. 5). It also ruled that defendant's expert could offer his opinion as to the cause and whether the victim's injuries were consistent with the testimony of various witness, who stated that defendant

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[3] A *Daubert* hearing, named for the Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), requires a district court, prior to admitting expert testimony, to make a preliminary determination that the testimony's underlying reasoning is scientifically valid and will assist the trier of fact by being relevant to a pertinent issue to be decided in the case.

had repeatedly kneed and punched the victim in the face (A. 6-7).

At the conclusion of the evidence, the district court denied defendant's renewed motion for judgment of acquittal (Sup. App. 40). The court found that the evidence was sufficient to establish that defendant had acted under color of law and explained:

> when the alleged beating occurred [defendant] was on duty, * * * [and] was in uniform. He was in a location that was restricted to official purposes at the book-in area of the jail. He had engaged in the transportation and accompaniment of Mr. Kail who was an arrestee and a detainee to the jail facility. His alleged use of force, proper or not, came in response to the behavior of the detainee, Mr. Kail, who was by various forms of testimony agitated and resisting officers.
>
> [Defendant] was present in jail to carry out the duties encompassed by his official position. His use of force, excessive or not, was made possible because of his authority under law to assist in the transport and delivery of those detainees. And although the custody of Kail may have changed, [defendant's] duties as a police officer did not.

Sup. App. 41-42.

SUMMARY OF ARGUMENT

The district court correctly ruled that codefendants' guilty pleas to misdemeanor violations did not bar the government from prosecuting defendant for a felonious violation of 18 U.S.C. 242 under the doctrine of judicial estoppel or the theory that the pleas constituted admissions. The doctrine of judicial estoppel does not apply because the government's acceptance of a codefendant's plea to a lesser offense is not inconsistent with its prosecuting a defendant for the originally charged crime. In addition, it is well established that a codefendants'

guilty plea is neither a finding nor an admission regarding defendant's commission of the charged offense. Further, the explicit terms of codefendants' guilty pleas are fully consistent with the jury's verdict that defendant's conduct resulted in bodily injury.

The district court did not abuse its discretion in refusing to allow defendant's expert to characterize the severity of the victim's injuries. Testimony regarding the extent of the victim's injury could not have been helpful to the jury since it was irrelevant to the issues to be decided and to defendant's theory of the case. Even if the testimony had been relevant, it was properly excluded because the jury could easily determine, without an expert's opinion, the nature and extent of the victim's injuries. In any event, the district court's ruling was harmless because it could not have affected the outcome of the trial.

The evidence is sufficient to establish that defendant acted under color of law. After all, defendant does not dispute that the evidence establishes that he was on duty, in uniform, and performing official responsibilities when he kneed and beat a prisoner, to whom he had access because he was a police officer, and because his authority as a police officer was challenged. Contrary to defendant's claim, it is irrelevant that he did not personally arrest or transport the victim, who was being escorted by a correctional officer at the time of the attack. Precedent clearly establishes that such circumstances are not required in order for a police officer to be convicted of a violation of 18 U.S.C. 242 for using excessive force.

ARGUMENT

I

CODEFENDANTS' GUILTY PLEAS TO LESSER INCLUDED MISDEMEANOR VIOLATIONS OF 18 U.S.C. 242 DO NOT BAR DEFENDANT'S CONVICTION FOR A FELONY VIOLATION OF 18 U.S.C. 242

Defendant contends (Br. 6-12) that the government was not entitled to present evidence and convict him of a felonious violation of 18 U.S.C. 242, which requires proof that "bodily injury" resulted, since his codefendants pled guilty to lesser included misdemeanors, which do not require proof of that element.[4] The district court correctly ruled that the government was not barred from prosecuting defendant under the doctrine of judicial estoppel or on the theory that codefendants' plea agreements constituted admissions.

Judicial estoppel "is an equitable concept provid[ing] that a party who prevails on one ground in a lawsuit cannot turn around and in another lawsuit repudiate the ground." *United States* v. *Hook,* 195 F.3d 299, 306 (7th Cir. 1999) (internal quotation marks omitted), cert. denied, 529 U.S. 1082 (2000). The doctrine is intended "to protect the integrity of the judicial process." *New Hampshire* v. *Maine,* 532 U.S. 742, 749 (2001). To apply, a party's current

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[4] A deprivation of rights under color of law pursuant to 18 U.S.C. 242 is punishable either as a misdemeanor or felony depending on the circumstances of the offense. The statute states, "if bodily injury results from the acts committed in violation of this section," a defendant is guilty of a felony and may be imprisoned for ten years. Conversely, it also provides that if a defendant's acts do not result in bodily injury, he is guilty of a misdemeanor and may be imprisoned for no more than one year.

position must be "clearly inconsistent" with an earlier position. *Id.* at 750; *Hook*, 195 F.3d at 306; *Levinson* v. *United States,* 969 F.2d 260, 264 (7th Cir.), cert. denied, 506 U.S. 989 (1992).

1. Defendant has not cited a single case in which the doctrine of judicial estoppel has been successfully invoked against the government to bar it from going forward in a criminal proceeding. See *United States* v. *McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (noting an absence of such cases), cert. denied, 511 U.S. 1042 (1994). *Cf. Standefer* v. *United States*, 447 U.S. 10, 23-24 (1980) (doctrine of collateral estoppel generally does not apply to bar the government from relitigating issues decided in prior proceedings involving accomplices or codefendants to which defendant was not a party).

In the instant case, the doctrine of judicial estoppel is inapplicable because there is no inconsistency between the government's accepting codefendants' guilty pleas and prosecuting or proving that defendant committed a felony. The government agreed to plea bargain with codefendants; it did not admit that their conduct or defendant's did not constitute a felony. See *United States* v. *22 Santa Barbara Drive*, 264 F.3d 860, 873-874 (9th Cir. 2001); *Levinson*, 969 F.2d at 265. It also did not say that it was trading away its right to prosecute defendant for the original charged offense. See *United States* v. *Levasseur*, 846 F.2d 786, 793, 798 (1st Cir.), cert. denied, 488 U.S. 894 (1998). Rather, it accepted codefendants' plea in exchange for their promise to testify against defendant at his trial for the originally charged crime (Sup. App. 15, 30).

Likewise, the district court's acceptance of codefendants' misdemeanor pleas is not inconsistent with the government's prosecution of defendant for a felonious violation of 18 U.S.C. 242. When the district court accepted the codefendants' pleas, it did not find that a felony had not occurred. See *United States* v. *Simmons,* 247 F.3d 118, 124 (4th Cir. 2001) (noting that judicial estoppel does not apply absent judicial acceptance of the inconsistent position); *United States for Use of Am. Bank* v. *C.I.T. Constr., Inc.,* 944 F.2d 253, 258 (5th Cir. 1991) (same). Rather, it merely concluded that the evidence was sufficient to establish that codefendants' conduct constituted a misdemeanor violation. In addition, since a sentence and not a conviction is a "judgment in a criminal case," the substance of a plea agreement cannot constitute an "inconsistent position" that judicially estops the government from prosecuting a defendant. See *United States* v. *Newell*, 239 F.3d 917, 921 (7th Cir. 2001). Accordingly, the doctrine of judicial estoppel does not apply because neither the government nor the court's position was inconsistent with this prosecution.

Moreover, the explicit terms of codefendants' guilty pleas are fully consistent with the jury's verdict that defendant's conduct resulted in bodily injury. The codefendants' plea agreements do not include the term "bodily injury." They nonetheless specify that as a result of their conduct the victim suffered injuries. As defense counsel acknowledged below, the codefendants' plea agreements provide that the victim suffered a bloody lip and pain, as a result of defendant's kneeing and punching him in the face (Tr. 29-30, 37-39). See also

Sup. App. 19, 35, Plea Agreement and Statement of Facts Relevant to Sentencing. See *United States* v. *Hamm,* 13 F.3d 1126, 1128 (7th Cir. 1994) (explaining that "bodily injury" includes bumps, bruises, redness, swelling, or mere pain even though medical treatment is not required). See also *United States* v. *Myers*, 972 F.2d 1566, 1574 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993).

Further, even if the codefendants' plea agreements had not specified that certain injuries resulted from the incident, they nonetheless would be consistent with the government's proving that defendant's use of excessive force caused bodily injury. The plea agreements provide that the statement of "facts [is] not a detailed recitation, but merely an outline of what happened in relation to the charge to which [each co]Defendant is pleading guilty" (Supp. App. at 18, 33). Thus, nothing in codefendants' plea agreements is inconsistent with the government's proving that defendant's conduct resulted in bodily injury.

In addition, it is quite reasonable for the government to allow codefendants to plead to misdemeanors while prosecuting defendant for a felony. As the district court correctly noted, the "situations involv[e] * * * different litigants based on the defendants' disparate levels of involvement" and separate evidence (A. 11). Indeed, the trial evidence established that defendant acted as the principal in that he repeatedly punched and kneed the victim in the face and head while his codefendants merely restrained him.[5] Accordingly, here, the government's

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[5] Further, to conclude that the government's acceptance of a codefendant's (continued...)

decision to allow codefendants to plead guilty to misdemeanors in exchange for testimony at defendant's trial was entirely proper.[6]

2. It is also well established that codefendants' guilty pleas to lesser charges is neither a finding nor an admission by the government regarding defendant's commission of the crime originally charged. See *United States* v. *Delgado*, 903 F.2d 1495, 1498 (11th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *United States* v. *Coppola*, 526 F.2d 764, 776 (10th Cir. 1975). See also *United States* v. *$448,342.85*, 969 F.2d 474, 476 (7th Cir. 1992); *United States* v. *Barker*, 681 F.2d 589, 592 (9th Cir. 1982); *Klobuchir* v. *Pennsylvania*, 639 F.2d 966, 968-969 (3d Cir.), cert. denied, 454 U.S. 1031(1981). A plea is "not a forum for consideration of the factual basis of the abandoned charges." *Barker*, 681 F.2d at 592. It also is not an admission or "finding that the evidence supports * * *

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[5](...continued)
guilty plea bars prosecution of a defendant for a more serious offense encroaches upon its unbridled discretion to determine the charges and terms of plea bargains, *United States* v. *Zendeli,* 180 F.3d 879, 886 (7th Cir. 1999), and "would effectively put an end to the use of plea agreements to obtain the assistance of [co]defendants as witnesses against" more culpable offenders. *United States* v. *Delgado*, 903 F.2d 1495, 1499 (11th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

[6] To the extent that defendant cites (Br. 8) the Federal Sentencing Guidelines to support his argument, his reliance is misplaced. Nothing in the Guidelines implies that the government acts improperly when it plea bargains with certain codefendants and then prosecutes a defendant on the original charge. In any event, the Guidelines do not set rules or policy for conducting trials. They merely ensure that uniform policies and practices are applied to sentencing of defendants in federal court. Accordingly, the Sentencing Guidelines have no bearing on whether the government can prosecute a defendant for and/or present evidence regarding his commission of the charged offense.

[that] offense only" or that the evidence is "insufficient to convict" as to the dismissed charges. *Coppola*, 526 F.2d at 776. As this Court correctly noted, because "'a prosecutor is frequently put in the position of being forced to offer a plea bargain in order to obtain testimony which will aid the prosecution [in the presentation] of its case against the more culpable [defendant] in a criminal act,' a guilty plea has "no evidentiary value" (A. 12, quoting *Rodriguez* v. *Peters*, 63 F.3d 546, 563 (7th Cir. 1995)). See *Delgado*, 903 F.2d at 1499; *Barker*, 681 F.2d at 592; *Coppola*, 526 F.2d at 776. Thus, the codefendants' guilty pleas are not admissions and do not bar defendant's conviction for use of force resulting in bodily injury in violation of 18 U.S.C. 242.

3. Finally, the district court did not err in refusing to allow defense counsel to argue that codefendants' pleas constituted admissions by them that bodily injury did not result. As noted above, the codefendants' pleas do not constitute admissions nor do they have evidentiary value. *Delgado*, 903 F.2d at 1499. It is well established that a testifying codefendant's guilty plea is admissible solely for the purpose of assessing his credibility, *United States* v. *Johnson*, 26 F.3d 669, 677 (7th Cir.), cert. denied, 513 U.S. 940 (1994); *United States* v. *Bryza*, 522 F.2d 414, 424-425 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976). *Cf. United States* v. *Carraway*, 108 F.3d 745, 754 (7th Cir.), cert. denied, 522 U.S. 891 (1997). Its terms are properly excluded at a trial pursuant to Federal Rule of Evidence 403, as confusing and prejudicial. *United States* v. *Sua*, 307 F.3d 1150, 1153 (9th Cir. 2002); *Delgado*, 903 F.2d at 1499.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW DEFENDANT'S EXPERT TO CHARACTERIZE THE SEVERITY OF THE VICTIM'S INJURIES

Defendant contends (Br. 11-12) that the district court committed reversible error when it refused to allow a medical expert to characterize the severity of the victim's injuries. The district court did not abuse its discretion in excluding the testimony, and its ruling does not constitute reversible error.

The decision whether to allow expert testimony on a specific issue is committed to the sound discretion of the trial court. See *United States* v. *Crotteau*, 218 F.3d 826, 831 (7th Cir. 2000); *United States* v. *Walton,* 217 F.3d 443, 449 (7th Cir. 2000). A trial court's determination should be treated with "great deference" and thus sustained "unless the record contains no evidence on which [it] rationally could have based [its] decision." *Crotteau*, 218 F.3d at 831, 832.

The district court did not err in excluding an expert's testimony as to the severity of the victim's injury since it was irrelevant to any issue the jury had to decide. Recognizing the undisputed evidence acknowledged by defendant's expert that the victim's injuries included a cut lip, bruising, swelling, and pain, the court correctly ruled that the evidence was sufficient to satisfy the bodily injury element (T.Tr. 498, 502, 509-510). Thus, testimony regarding the *extent* of the victim's injuries would not assist the jury in deciding whether bodily injury resulted. See *United States* v. *Hamm*, 13 F.3d 1126, 1128 (7th Cir. 1994); *United States* v. *Myers*, 972 F.2d 1566, 1574 (11th Cir. 1992), cert. denied, 507 U.S. 1017

(1993).

Moreover, to the extent that defendant argues (Br. 11) that the expert's characterization of the victim's injuries "ha[d] a bearing on [his] intent," and specifically, whether he intended to use excessive force, he ignores both his theory of the case and the evidence. Throughout the trial, defendant contended that he was not guilty because he did *not* punch, knee, or strike the victim at the jail. During closing argument, defense counsel maintained that the victim "was injured before he came to the Howard County Jail," as a result of hitting his face on the squad car and pavement as he was arrested and/or banging his face against the plexiglass window in the cruiser while being transported to the jail (Sup. App. 54). See Br. 10 (asserting that the defense theory was that the victim suffered injuries as result of a "brawl with police * * * when he was arrested * * * or during transport").

Further, even if defendant had wanted to argue that he merely intended to use reasonable force, there was no evidence to support his claim. The witnesses to the incident unanimously testified that no physical force was either necessary or justified since the victim was not physically aggressive at the jail (T.Tr. 28, 35-36, 50, 75, 92, 179, 186, 255, 263-265, 267, 270, 361, 410-412). Thus, *any* force applied by defendant, and particularly blows to the head, which police officers testified was permissible only when deadly force is justified, had to have been intentionally excessive (T.Tr. 268, 287-288, 362). Consequently, testimony as to the severity of the victim's injury was both irrelevant to defendant's theory of the

case and inconsistent with the evidence.

Even if the severity of the victim's injuries were relevant, the district court's exclusion of the expert's testimony was proper. Expert testimony is generally not admissible on a factual issue that is within the knowledge and experience of lay persons, absent scientific, technical, or specialized training. See Fed. R. Evid. 702. See, *e.g.*, *United States* v. *Welch*, 945 F.2d 1378, 1382 (7th Cir. 1991) (testimony of defense expert about contents of tape recording inadmissible since jury heard recording and was fully amenable to jury's perception), cert. denied, 502 U.S. 1118 (1992); *United States* v. *Stevens*, 935 F.2d 1380, 1399-1400 (3d Cir. 1991) (psychiatrist could not testify about a point that was "rather pedestrian" and "susceptible to elucidation without * * * specialized knowledge"); *Patterson* v. *McClean Credit Union*, 805 F.2d 1143, 1147 (4th Cir. 1986) (expert in personnel administration unnecessary since qualifications of clerical employees not a highly complicated or technical issue), modified on other grounds, 491 U.S. 164 (1989).

In the instant case, the jury heard several witnesses testify that the victim's lip was cut and his face bruised and swollen (T.Tr. 38, 139, 142, 209, 211, 219, 271). It also viewed several photographs depicting the victim's facial injuries (T.Tr. 140-142). Given the common nature of the victim's injuries and the jury's ability to consider the photographs, it could easily determine, without an expert's characterization, the nature and extent of the injuries. Consequently, the district court did not abuse its discretion in excluding expert testimony as to the severity

of the victim's injury.

In any event, the district court's ruling was harmless. Given defendant's theory of the case, the irrelevance of the excluded testimony, and the existence of photographs depicting the extent of the victim's injuries, the exclusion of the testimony could not have affected the outcome of the case.[7]

III

THE EVIDENCE IS SUFFICIENT TO ESTABLISH THAT DEFENDANT ACTED UNDER COLOR OF LAW

A defendant seeking to reverse his conviction on the basis of insufficient evidence bears a heavy burden. In evaluating the sufficiency of the evidence, "an appellate court [should] not reweigh the evidence presented or second-guess the jury's credibility determinations." *United States* v. *Irorere*, 228 F.3d 816, 822 (7th Cir. 2000). Rather, a court must consider "the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor." *Ibid.* See *United States* v. *Owens*, 301 F.3d 521, 527 (7th Cir. 2002). Accordingly, a conviction should be reversed "'[o]nly when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.'" *Irorere,* 228 F.3d at 822, quoting *United States* v. *Lundy*, 809

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[7] The expert's characterization of the victim's injuries was not particularly favorable to defendant. Lay persons might assume that facial cuts, bruising and pain, which require no stitches, hospitalization, or medical treatment are minor injuries. Defendant's expert, outside the presence of the jury, however, testified that the victim's injuries, due to swelling and the effect on subcutaneous tissues, were mild with "*some features of moderate*" injuries (T.Tr. 466, 464 (emphasis added)).

F.2d 392, 396 (7th Cir. 1987). See *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

Defendant contends (Br. 12-15) that the evidence is insufficient to establish that he acted under color of law because he did not arrest, transport, or have control of the victim. Contrary to his claim, the evidence overwhelmingly establishes defendant acted under color of law when he knowingly used excessive force, punching and kneeing the victim in the face.

The "[m]isuse of power, possessed by virtue of * * * law and made possible only because the wrongdoer is clothed with the authority of * * * law, is action taken under color of * * * law." *United States* v. *Classic*, 313 U.S. 299, 326 (1941) (internal quotation marks omitted). "[T]hose who carry a badge of authority of a State and represent it in some capacity" act under color of law, "whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961). Consequently, "[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Screws* v. *United States*, 325 U.S. 91, 111 (1945) (opinion of Douglas, J.).

In the instant case, a combination of factors convincingly establishes that defendant acted under color of law. Defendant was on duty and in uniform when he attacked the victim. See, *e.g.*, *Pickrel* v. *City of Springfield*, 45 F.3d 1115, 1118-1119 (7th Cir. 1995) (color of law found in part because off-duty police officer was in uniform and parked his police cruiser at the scene of the incident).

More significantly, defendant committed the offense while he was performing official police duties. See, *e.g., Latuszkin* v. *City of Chicago*, 250 F.3d 502, 506 (7th Cir. 2001) (emphasizing importance of whether defendant "was engaged in police activity" when he committed act at issue). See also Sup. App. 59, Jury Instruction Number 8 (explaining that "[a]cts are performed under color of law when the defendant acts in his official capacity").

Defendant's status as a police officer was also essential to his committing the crime. Defendant's only contact with the victim resulted directly from his performance of official duties, and his position as a police officer provided him with access to the victim in the booking area of the jail. See, *e.g., United States* v. *Causey*, 185 F.3d 407, 415 (5th Cir. 1999) (defendant acted under color of law in part because his "status as a police officer put him in the unique position" to carry out the crime), cert. denied, 530 U.S. 1277 (2000); *Cassady* v. *Tackett*, 938 F.2d 693, 695 (6th Cir. 1991) (per curiam) (jailer acted under color of law where he used a weapon that he possessed "only because" of his official status); *Brown* v. *Miller*, 631 F.2d 408, 411 (5th Cir. 1980) (mayor acted under color of law in part because he "had the power to take the * * * action by virtue of his authority * * * [and that] act was accomplished by misuse of power") (internal quotation marks omitted).

Further, defendant's motivation for his crime related to and was the direct result of his performance of police duties. See, *e.g.*, *Causey*, 185 F.3d at 414-415 (police officer, who arranged to have victim murdered because she lodged a

complaint against him regarding his conduct while acting in his official capacity, acted under color of law); *Layne* v. *Sampley,* 627 F.2d 12, 13 (6th Cir. 1980) (off-duty police officer, who shot victim because of an argument while on duty three days earlier, acted under color of law since "the argument's genesis was unquestionably in the performance of police duties"). The victim, angry that he had been arrested and maced by defendants' fellow police officers, was verbally abusive and called defendant a "nigger" (Tr. 28, 83, 102, 134, 178, 183, 262, 333, 351-352, 358). Defendant, eager to demonstrate that a police officer need not tolerate such abuse, retaliated, repeatedly kneeing and punching the victim in the face and then inquired, "[n]ow you think I'm still a nigger now?" (Tr. 266, 410, 40). Accordingly, the evidence overwhelmingly establishes that defendant acted under color of law when while on duty, in uniform, and performing official responsibilities, he beat and kneed a prisoner, to whom he had access because he was a police officer and because his authority as a police officer was challenged. See *e.g.*, *United States* v. *Colbert*, 172 F.3d 594, 596-597 (8th Cir. 1999) (police officer, who was off-duty and used his official authority to gain access to a restricted area of city jail, acted under color of law when he beat a prisoner for personal reasons).

Defendant nonetheless argues that he was not acting under color of law because he did not himself actually arrest or transport the victim, who was under the control of a corrections officer when the beating occurred. It is well settled that a defendant can act under color of law when he neither arrests nor transports a

victim. See, *e.g., Screws*, 325 U.S. at 107 (arresting officer along with other police officers acted under color of law when they beat a man to death); *United States* v. *Price*, 383 U.S. 787, 795 (1966) (18 defendants, including two police officers and 15 private citizens, who did not transport the victim, acted under color of law when they killed three victims). In fact, a victim need not even be arrested or under a police officer's control for use of excessive force to be considered actionable under 18 U.S.C. 242. See, *e.g., Causey*, 185 F.3d 407. In any event, defendant acted along with his codefendants, who did arrest and transport the victim. Accordingly, because the trial evidence establishes that defendant's status as a police officer provided him with access to the victim, that he attacked the victim while carrying out his official responsibilities, and that he was responding to a challenge to his authority, it is clear that he abused the police power granted to him by the state and therefore acted under color of law. See *e.g.*, *Colbert*, 172 F.3d at 596-597.

CONCLUSION

The defendant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2002, two copies of the foregoing Brief For The United States As Appellee and one copy of the Supplemental Appendix, along with one 3-1/2" disk containing the brief's text in PDF format, were served by Federal Express on the following counsel of record:

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