Nos. 02-5180, 02-5213, 02-5220, 02-5244

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

CARL MANNS,

Defendant-Appellant

JERRY DEAN LEWIS,

Defendant-Appellant

and

CARL MCDOUGLE

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

FINAL BRIEF FOR THE UNITED STATES AS APPELLEE

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
KAREN L. STEVENS
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5504
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 353-8621

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument would be useful because the issues appellants raise can be resolved on the parties' briefs.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this criminal case under 18 U.S.C. 3231 following the indictments of defendants Carl Manns, Jerry Lewis, and Carl McDougle in the Western District of Tennessee.

This court has jurisdiction over the appeals under 28 U.S.C. 1291. The district court entered an order of judgment and commitment against Manns on January 28, 2002, and he timely filed a notice of appeal on February 4, 2002. The order of judgment and commitment for Lewis was filed January 28, 2002, and he timely filed a notice of appeal on February 5, 2002. The order of judgment and commitment for McDougle was filed January 30, 2002, and he timely filed a notice of appeal on February 8, 2002.

STATEMENT OF ISSUES

Whether the district court correctly used second degree murder as the underlying offense in calculating defendants Manns and Lewis's offense levels pursuant to Section 2H1.1(a) of the Sentencing Guidelines.

Whether the district court erred in denying defendant McDougle's pretrial motions to dismiss for pre-indictment delay, insufficiency, vindictive prosecution, and vagueness and duplicity.

Whether the district court erred in denying McDougle's motion for a judgment of acquittal or new trial.

STATEMENT OF THE CASE

These prosecutions arise out of events surrounding an eight-year conspiracy to use severe beatings and physical abuse to discipline the residents of a unit of the Arlington Development Center, a residential center for mentally retarded persons operated by the State of Tennessee. That conspiracy culminated in the death of Anthony Monds, a severely retarded, mute resident, on February 15, 1995. Monds was beaten by four of the center's employees, including these three defendants, and that beating resulted in his death.

Manns and McDougle were indicted by a federal grand jury on February 15, 2000, for two counts of violating 18 U.S.C. 242 and 2 by willfully assaulting Anthony Monds, resulting in bodily injury and death, while acting under color of state law, thereby depriving him of his civil right to be free from excessive and unreasonable force and depriving him of his right to necessary and appropriate medical care and treatment (R1. 1, Indictment, Apx. pp. 31-34).[1] On September 14, 2000, they were indicted on an additional count of conspiracy to deprive residents of Arlington of their civil rights under 18 U.S.C. 241 (R. 1, Indictment, Apx. pp. 86-88).

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[1] Citations to the record in *United States* v. *Lewis*, *et al.*, Case No. 00-CR-20170, are denoted "R." Citations to the record in *United States* v. *Manns, et al.,* Case No. 00-CR-20025, are denoted "R1." Citations to the Revised Presentence Investigation Report for Lewis (July 25, 2001) are denoted "Lewis PSR"; to the Revised Presentence Investigation Report for McDougle (July 17, 2001) are denoted "McDougle PSR"; to the Presentence Investigation Report for Manns (July 13, 2001) are denoted "Manns PSR." Citations to the briefs are denoted "Br."

Lewis was charged on September 14, 2000 with one count of willfully failing to provide necessary and appropriate medical care under 18 U.S.C. 242 and 2, and one count of conspiracy to deprive residents of Arlington of their civil rights under 18 U.S.C. 241 (R. 1, Indictment, Apx. pp. 86-89).

Defendants Manns and Lewis entered guilty pleas for violations of 18 U.S.C. 242 and 2, (R. 340, Judgment, Apx. p. 35; R. 313, Judgment, Apx. p. 90), and now appeal their sentences. They argue that the court erred in calculating their base offense levels under Section 2H1.1(a) of the Sentencing Guidelines by using second degree murder as the underlying offense rather than involuntary manslaughter.

Defendant McDougle, who was convicted by a jury of one count of conspiracy to violate civil rights resulting in death in violation of 18 U.S.C. 241 and one count of violating 18 U.S.C. 242 and 2, (R. 316, Judgment, Apx. p. 95), appeals his conviction on several grounds. He alleges the district court erred in denying his pretrial motions to dismiss the indictments on grounds of pre-indictment delay, insufficiency, vindictive prosecution, and vagueness and duplicity. He also alleges error in the district court's denial of his motion for judgment of acquittal, or in the alternative for a new trial.

STATEMENT OF FACTS

Background

The Arlington Development Center is a facility operated by the State of Tennessee to provide residential and out-patient services to adults and children with developmental disabilities (R. 352, Everett at Tr. 103-104). Manns, Lewis, and McDougle were employed by the State as "developmental technicians" (DTs) at Arlington, and were responsible for assisting residents with their daily needs – bathing, dressing, feeding – as well as their occupational training and developmental activities (Manns PSR ¶ 12).

For approximately eight years, several DTs, including these three defendants, engaged in a widespread conspiracy to use beatings and physical abuse to discipline virtually every resident of Mark Twain 3, one of Arlington's residential units for adult males (R. 352, Everett at Tr. 108, 110-112). The DTs used hitting and beatings to increase the residents' compliance with orders to stop behavior or to start certain tasks (R. 352, Everett at Tr. 111-112; R. 354, Lewis at Tr. 721-722). "Hitting" a resident involved giving him one or two blows, often with an open hand (R. 352, Everett at Tr. 108). Beatings were more severe.

To hide the beatings from their supervisors, the conspirator DTs typically led a resident away from the common areas of the unit to more secluded settings (R. 353, Manns at Tr. 520-521). One DT would restrain the resident by standing behind him and holding his arms back to expose his upper body, while another DT beat him forcefully in the abdomen with closed fists (R. 352, Everett at Tr. 108-

111, 117-119). Often, another DT served as a lookout to warn if anyone approached (McDougle PSR ¶ 16).

To thwart Arlington's requirement of body checks at the beginning of each shift, which was designed to detect and prevent such physical abuse, the conspirator DTs took measures to minimize the physical signs of the abuse. Residents were treated with ice or a cold towel after beatings to reduce swelling and bruising (R. 355, Lewis at Tr. 742). The DTs wrapped their knuckles with towels to avoid leaving distinguishing marks (R. 355, Lewis at Tr. 742-743). The DTs frequently hit residents in areas that were relatively less prone to bruising, such as the abdomen (R. 354, Lewis at Tr. 722). They were particularly careful to confine beatings of white residents to the stomach area because white residents bruised more easily than black residents (R. 353, Manns at Tr. 546). If there were visible injuries, the DTs filed false reports attributing the injuries to accidents or altercations with other residents (R. 355, Lewis at Tr. 743-744; R. 353, Manns at Tr. 548-549).

New employees received little formal training and were instead drawn into hitting and beating residents to gain compliance by following the example of DTs like Manns and Lewis, who both had been working on Mark Twain 3 for several years (R. 352, Everett at Tr. 104-108, 110-118, 167; R. 354, Lewis at Tr. 721-725). Manns and Lewis admitted hitting residents on numerous occasions, more than they could count (R. 352, Everett at Tr. 115; R. 353, Manns at Tr. 521, 523-524; R. 354, Lewis at Tr. 723-724; McDougle PSR ¶ 20).

This conspiracy ended tragically, with the death of Anthony Monds on February 15, 1995.

The Death of Anthony Monds

Monds was a 38-year-old resident of Arlington who lived in Mark Twain 3. He was severely retarded from birth and could not speak (Manns PSR ¶ 11).

On February 15, 1995, the defendants were assigned to Mark Twain 3, the residential unit where Monds lived with approximately 14 to 17 other residents (Manns PSR ¶¶ 12, 18). All were on the morning shift, which ran from 6:00 a.m. until 2:00 p.m. (R. 353, Manns at Tr. 488-489). Between 7:30 and 7:45 that morning, after Monds repeatedly refused to put on his shirt, Manns, McDougle, and Willie McCulley, another DT, led Monds to a bedroom (R. 353, Manns at Tr. 494-495). McDougle remained outside of the room as a lookout while Manns and McCulley entered with Monds (R. 352, Miller at Tr. 264-265; R. 353, Manns at Tr. 495-496). Lewis, who was in the room when they entered, held Monds's arms behind him, rendering him defenseless as Manns and McCulley took turns repeatedly punching Monds in the abdomen and chest (R. 355, Lewis at Tr. 749-751; R. 353, Manns at Tr. 492-493, 496-497). McDougle entered and dealt Monds several additional blows in the same areas (R. 355, Lewis at Tr. 751-752; R. 353, Manns at Tr. 499-501). The entire beating lasted several minutes, (Lewis Br. at 5; R. 355, Lewis at Tr. 764; Manns PSR ¶ 16), causing internal injuries analogous to those that would occur in a serious car accident or a fall from a two story building (R. 352, Smith at Tr. 215-216).

As Monds, Manns, and McCulley left the bedroom, Monds collapsed to the floor (Lewis PSR ¶ 12; R. 352, Miller at Tr. 268-269). Lewis and Manns helped him to his feet, and had to help him walk to the day room and then to the dining room for breakfast (R. 353, Manns at Tr. 502-504, 510-511; R. 355, Lewis at Tr. 753-754). Realizing he had not come by the nurses station, the nurse who gave Monds his daily medication went to find him in the dining room. She noticed he was not swallowing the food put in his mouth, and appeared to be drowsy and nauseous. She asked Lewis to help her take him back to the medical station (R. 353, Merriweather at Tr. 447-450). When she asked him directly if he knew what was wrong with Monds, Lewis told her he did not know (R. 353, Merriweather at Tr. 448-449, Lewis PSR ¶ 13).

The nurses who examined him at the medical station concluded that Monds, who could not tell them what happened, was suffering from a gastrointestinal ailment (Lewis PSR ¶ 8). Later that morning, while accompanied by Lewis, Monds vomited twice in the bathroom and again collapsed in the hallway (R. 353, Elkins at Tr. 405; R. 353, Merriweather at Tr. 452-453, 457-458). The nurses were summoned and gave him medication for nausea. Manns got a wheelchair and wheeled Monds back to the day room, where he spent the rest of the day and evening lying on a couch (R. 353, Merriweather at Tr. 451-453; R. 353, Manns at Tr. 514).

The defendants' regular shifts ended at 2:00 that afternoon. None of them ever told the nurses, their supervisors, or the DTs on the next shift that Monds had

suffered a prolonged beating that morning (R. 353, Merriweather at Tr. 452-454; Manns PSR ¶ 16).

At approximately 10:00 that evening, the night shift nurse checked on Monds, who was still lying on the couch in the day room. He was unresponsive, and attempts to revive him failed. He was pronounced dead shortly thereafter. The medical examiner conducted an autopsy and concluded that Monds had died of internal bleeding resulting from blunt force trauma to his abdomen (Manns PSR ¶ 11).

Upon hearing of Monds's death the next morning, Kenny Miller, a DT who normally worked on Mark Twain 4 but had been assigned to Mark Twain 3 for an overtime shift on February 15th, reported to his supervisor that he had heard Manns beating Monds while McCulley was in the room and McDougle stood in the hall as a lookout (R. 352, Miller at Tr. 264-268, 272-273). From his position down the hall, Miller heard the sounds of the blows and Monds moaning and groaning (R. 352, Miller at Tr. 266). Miller also saw Manns, McDougle, and McCulley escort Monds out of the room into the hall, where Monds collapsed twice (R. 352, Miller at Tr. 268-270). Miller reported that he could tell by looking at Monds's face that something was wrong (McDougle PSR ¶ 19; R. 352 Miller at Tr. 268-269).

State Prosecution

The State of Tennessee indicted McDougle and Manns on second degree murder charges on March 2, 1995, within three weeks of Monds's death. In or around September 1998, over three years later, the State dismissed the charges (R. 315, Order, pp. 2-3, Apx. pp. 117-118).

In accordance with its "*Petite* Policy," the Department of Justice did not pursue its own investigation or prosecution of Monds's death while the state prosecution was pending. The Department of Justice's "*Petite* Policy" disfavors federal prosecution of conduct prosecuted by a State, absent compelling federal interests in dual or successive prosecution. See U.S. Attorney's Manual § 9-2.031.

In April 1999, the U.S. Attorney's Office for the Western District of Tennessee and the Criminal Section of the Civil Rights Division were notified by the Civil Rights Division's Special Litigation Section, which was monitoring Arlington under a civil consent decree, that Tennessee had dismissed the indictments against Manns and McDougle. The Special Litigation Section first learned of the dismissals in March 1999, during a conversation with an agent of the Tennessee Bureau of Investigation (R. 319, French at Tr. 26). Monds's death was the first incident for which the Special Litigation Section had enough information to make a criminal referral. Other incidents which came to its attention seemed to indicate negligence, rather than willful and criminal misconduct (R. 319, French at Tr. 47-48).

Shortly thereafter, the Criminal Section and the U.S. Attorney's Office, together with the FBI, opened their own investigation into the death of Monds. In October 1999, the United States presented its first witness to the grand jury (R. 315, Order, p. 3, Apx. p. 118).

Proceedings Below

On February 15, 2000, ten months after the United States received notice of Tennessee's dismissal, the grand jury returned the first indictment in this case. Count one charged Manns, McDougle, and McCulley, while acting under color of law, with aiding and abetting each other to willfully assault Monds, thereby depriving him of his due process right to be free from unnecessary and excessive force while residing in a state-operated facility, in violation of 18 U.S.C. 242 and 2. Count two charged them with violating Sections 242 and 2 by depriving Monds of his right to receive necessary and appropriate medical care and treatment (R1.1, Indictment, Apx. pp. 33-34).

The federal investigation continued after the initial indictment. On September 14, 2000, the grand jury returned a second two-count indictment. The first count charged Lewis, Manns, McDougle, and Wendell Knight, another DT, with conspiracy to punish, discipline, and intimidate residents of Arlington through beatings and assaults to maintain order and compliance with employees' instructions beginning in April 1988 and ending with Monds's death in 1995, in violation of 18 U.S.C. 241. The second count charged Lewis with violating Sections 242 and 2 by willfully failing to provide necessary and appropriate

medical care and treatment for Anthony Monds on February 15, 1995 (R. 1, Indictment, Apx. p. 89).

On May 14, 2001, just before the scheduled start of the federal trial, Lewis entered a plea of guilty to the second count of the second indictment (R. 243, Plea, Apx. p. 144). On May 15th, Manns entered a guilty plea to the first count of the first indictment, which charged him with violating 18 U.S.C. 242 and 2 by willfully depriving Monds of his civil right to be free from unnecessary and excessive force (R1. 190, Plea, Apx. p. 110). The other charges against the two men were dismissed.

Both Manns and Lewis testified at the trial, which ultimately included only McDougle as a defendant. Manns and Lewis admitted not only to their participation, together with McDougle, in the beating of Monds, but that they and other DTs had conspired to use such beatings regularly since 1988 to obtain compliance from residents of Mark Twain 3, as charged in count one of the September indictment (Lewis PSR ¶ 10; Manns PSR ¶ 21; R. 353, Manns at Tr. 490, 492; R. 354, Lewis at Tr. 722-724). Lewis and Manns testified that they did not intend to cause Monds's death, and that they were unaware that his injuries were life threatening (Manns Br. at 5).

Lewis admitted participating in numerous beatings of six other residents, and admitted hitting, as opposed to beating, one additional resident on a regular basis (Lewis PSR ¶ 17; R. 354, Lewis at Tr. 722-724). Manns admitted that he had participated in the beatings of three other residents of Mark Twain 3, and that

he had hit seven other residents on a regular basis (Manns PSR ¶ 21; R. 353, Manns at Tr. 525, 533-546). Manns admitted teaming up with Lewis and Knight to beat other residents in the same manner that he beat Anthony Monds (R. 353, Manns at Tr. 519-520). He also testified that one beating that he and Lewis gave to resident Michael Forte resulted in injuries so severe Forte had to spend several days in the hospital (R. 353, Manns at Tr. 534-537; Manns PSR ¶ 21).

Bobby Hughes, a former DT, testified that he had reported an earlier incident of physical abuse in which McDougle acted as a lookout. That incident occurred in Mark Twain 4, the unit to which McDougle was assigned before moving to Mark Twain 3 (R. 355, Lewis at Tr. 807). A female DT who was having problems with a resident asked David Freeman, another DT, for assistance (R. 354, Hughes at Tr. 627-628, 630-31). Hughes heard Freeman beating the resident while McDougle acted as a lookout (R. 354, Hughes at Tr. 630-632). When McDougle saw Hughes, he warned Freeman that someone was coming (McDougle PSR ¶ 18; R. 354, Hughes at Tr. 631-632). Later, Hughes asked the resident to lift up his shirt, revealing several red marks on the resident's abdomen (R. 354, Hughes at Tr. 633).

The jury found McDougle guilty of count one of the first indictment, which charged him with deprivation of rights under color of law in violation of 18 U.S.C. 242 and 2 for willfully depriving Monds of the right to be free from the use of unnecessary and excessive force by state employees, and count one of the second indictment, which charged him with one count of conspiracy to violate civil rights

resulting in death in violation of 18 U.S.C. 241 by depriving Monds of the right to be free from excessive force and the right to receive necessary and appropriate medical care. He was acquitted of count two of the second indictment (R. 316, Judgment, Apx. p. 95).

The imprisonment range suggested by the Guidelines for Lewis was 262 to 327 months, and the range for Manns was 324 to 405 months (Lewis PSR ¶ 59; Manns PSR ¶ 136). Pursuant to their plea agreements and following government motions under Section 2K.1 of the Sentencing Guidelines for downward departure based on their cooperation, Lewis received a sentence of 60 months and Manns received a sentence of 135 months (R. 313, Judgment, Apx. p. 91; R. 340, Judgment, Apx. p. 35). The district court adopted the findings of the Presentence Investigation Reports and rejected Lewis's objection, joined by Manns, that involuntary manslaughter rather than second degree murder was the appropriate underlying offense pursuant to Section 2H1.1(a)(1) of the Guidelines (R. 331, Court at Tr. 24-25, 36-37, Apx. pp. 300-301, 308-309).

The recommended imprisonment range for McDougle was life in prison (McDougle PSR ¶ 83). McDougle moved for a downward departure based on aberrant behavior and post-offense rehabilitation. The United States joined in that motion (R. 349, Counsel at Tr. 14-15). The district court granted the request (R. 349, Court at Tr. 17-18, 20), and imposed a sentence of 15 years (R. 316, Judgment, Apx. p. 96).

SUMMARY OF THE ARGUMENT

The district court correctly used second degree murder instead of involuntary manslaughter as the underlying offense to sentence Manns and Lewis. Their participation in Monds's beating and their observation of its immediate effects on Monds were sufficient to support an inference that they were aware that Monds was at a substantial risk of serious bodily injury. This suffices to demonstrate the malice aforethought required to support the use of second degree murder. Furthermore, because both Manns and Lewis committed felonies in relation to the attack, their conduct falls outside of the statutory definition of involuntary manslaughter.

The district court also ruled correctly on McDougle's various pretrial motions to dismiss the indictments and his post-trial motion for a judgment of acquittal or a new trial. McDougle's claim of unconstitutional pre-indictment delay is groundless. The government demonstrated that its decision to defer to the state murder prosecution for the three years between Monds's death and the dismissal of state charges was based on its longstanding policy of avoiding dual prosecutions, and was not an intentional device to secure a tactical advantage. McDougle's claim that his indictment was insufficient because only sworn, commissioned state officers or those acting in concert with them act "under color of law" is unsupported by the statute and case law. A state employee discharging his official government duties at the state-operated facility where he works acts under color of law.

Nor did the district court abuse its discretion in denying McDougle's motions to dismiss for vindictive prosecution and vagueness and duplicity. The district court appropriately found that the second indictment was based on new evidence of a broader conspiracy that was discovered after the first indictment was returned, refuting any likelihood of vindictiveness. The district court also ruled correctly that the five types of acts listed in the "Means and Manner" section of the conspiracy count in the second indictment did not constitute separate offenses; rather it listed different ways that the conspirators carried out the single conspiracy charged.

Finally, the district court properly denied the motion for acquittal, or in the alternative for a new trial. Testimony that McDougle acted as a lookout and participated in beating Monds and that he participated in two other beatings was sufficient to support his convictions. None of his other claimed errors approach an abuse of the district court's discretion.

ARGUMENT

I.

MANNS AND LEWIS DEMONSTRATED THE MALICE AFORETHOUGHT REQUIRED TO SUPPORT SECOND DEGREE MURDER AS THE UNDERLYING OFFENSE FOR THEIR SECTION 242 CONVICTIONS

A. Standard of Review

Legal conclusions regarding applications of the Sentencing Guidelines are reviewed *de novo*. *United States* v. *Milton*, 27 F.3d 203, 206 (6th Cir. 1994), cert. denied, 513 U.S. 1085 (1995). Factual findings are reviewed for clear error. *United States* v. *Hover*, 293 F.3d 930, 933 (6th Cir. 2002).

B. Discussion

Section 242 is violated when anyone, "under color of any law * * * willfully subjects any person in any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * ." 18 U.S.C. 242. In relevant part, Section 2H1.1 of the Sentencing Guidelines sets the base offense level for convictions under Section 242 at the higher of 12 or "the offense level from the offense guideline applicable to any underlying offense." U.S.S.G. § 2H1.1(a)(1). "'Offense guideline applicable to any underlying offense' means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law." U.S.S.G. § 2H1.1 Application Note 1. The offense conduct includes all "relevant conduct" as defined in Section 1B1.3 of the guidelines. Relevant conduct includes "all acts and omissions committed, aided, or abetted

* * * by the defendant," and "all reasonably foreseeable acts and omissions of others taken in furtherance of a jointly undertaken criminal activity." U.S.S.G. § 1B1.3 (1)(A)-(B).

Manns and Lewis argue that the conduct underlying their offenses of conviction is insufficient to support a finding of malice aforethought, and that the court therefore erred in using second degree murder instead of manslaughter as the underlying offense. The facts, however, easily demonstrate the requisite malice and defy classification as involuntary manslaughter.

Federal law defines murder as "the unlawful killing of a human being with malice aforethought. Every murder perpetrated by * * * any [] kind of willful, deliberate, malicious and premeditated killing" is deemed first degree murder. "Any other murder is murder in the second degree." 18 U.S.C. 1111.

Second degree murder thus requires a finding of malice aforethought. *Milton*, 27 F.3d at 206. Malice aforethought may be found "[w]hen a defendant grossly deviates from the standard of care to such an extent that a jury could conclude that he must have been aware of a serious risk of death or serious bodily injury." *United States* v. *Sheffey*, 57 F.3d 1419, 1430 (6th Cir. 1995), cert. denied, 516 U.S. 1065 (1996); *Milton*, 27 F.3d at 208.

Manslaughter, in contrast, is "the unlawful killing of a human being without malice." 18 U.S.C. 1112(a). There are two kinds of manslaughter – voluntary and involuntary. Voluntary manslaughter is an unlawful killing that comes "upon a sudden quarrel or heat of passion." Involuntary manslaughter is an unlawful

killing "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. 1112(a).

Manns argues that he was not aware of a substantial risk of death because physical abuse had been used systematically to discipline residents of Mark Twain 3 for several years, and there is no evidence that any other resident died as a result of his injuries (Manns Br. at 10, 23-24, 26). But it is not necessary to show that Manns was aware of a substantial risk of death to prove malice. It is sufficient to show that a jury would have been able to conclude that Manns was aware that his conduct put Monds at a substantial risk of *serious bodily injury*. *Sheffey*, 57 F.3d at 1430; *Milton*, 27 F.3d at 208.

The Presentence Investigation Reports and their own testimony establish that Lewis and Manns were aware that Monds was at substantial risk of serious bodily injury. Lewis admitted that he held Monds defenseless as Manns, McDougle, and McCulley beat Monds in his abdomen for several minutes (Lewis PSR ¶ 13; Lewis Br. at 5). Manns admitted beating Monds, and that he was present as McDougle and McCulley continued to beat Monds (Manns PSR ¶ 16). Lewis and Manns both admitted that it was obvious shortly after the beating that Monds was hurt, and that as an immediate result of the beating Monds vomited, was visibly weakened, could not stand without help, and was not acting normally (Manns PSR ¶¶ 15-16; R. 355, Lewis at Tr. 767; R. 353, Manns at Tr. 493, 502-503).

Lewis admitted that he went with Monds to the nurses station but did not tell the nurses that Monds had been beaten severely and could be suffering from internal injuries; that the nurses incorrectly concluded Monds had a digestive ailment; and that this was one of the reasons Monds did not receive adequate medical care (Lewis PSR ¶¶ 13 & 22). Manns admitted he did not tell anyone what happened to Monds, and that he sat by Monds on the day room couch after Monds was given medication for nausea (Manns PSR ¶ 16).

Miller testified that the blows Manns, McDougle, and McCulley inflicted on Monds were so hard that they were audible down the hall (Lewis PSR ¶ 12). Manns testified that Monds appeared to be in pain, was doubled over holding his stomach, and was unsteady on his feet (R. 353, Manns at Tr. 502). Lewis testified that it was apparent to him that Monds was seriously hurt (R. 355, Lewis at Tr. 751, 767). The medical examiner testified that Monds's injuries were caused by force equivalent to a serious car accident or a fall from a two-story building (R. 352, Smith at Tr. 216).

Lewis, who held Monds back, and Manns were present for the duration of the attack. They necessarily saw and heard the entire beating. The facts clearly support the inference that a participant in or witness to this beating would have known Monds was at a substantial risk of serious bodily injury. That suffices to support the use of the second degree murder base offense level.

Lewis admitted further endangering Monds by denying him necessary medical care and treatment. Knowing the source of Monds's injuries, knowing the

severity of the beating, and knowing that Monds was mute and could not tell the nurses what had happened or describe his pain, Lewis took him to the medical station, denied that he knew what was wrong, and allowed the medical staff to treat Monds for a digestive illness (Lewis PSR ¶ 13). This is an extreme, gross deviation from the standard of care Lewis owed to Monds and increased the risk that Monds would suffer serious bodily injury. *Sheffey*, 57 F.3d at 1430 (malice aforethought may be established "[w]hen a defendant grossly deviates from the standard of care to such an extent that a jury could conclude that he must have been aware of a serious risk of death or serious bodily injury").

Lewis attempts to minimize this egregious conduct by arguing that other DTs beat residents over several years to discipline them without ever causing serious bodily injury (Lewis Br. at 9), and that if the nurse practitioners could not tell that Monds had severe internal injuries, he should not have been expected to realize that either (Lewis Br. at 10-11). But the first statement is simply not true, while the second is at best misleading and irrelevant.

Manns testified that at least two other men suffered serious injuries as a result of beatings by DTs. Manns admitted that he participated in beating Michael Forte, and that as a result, Forte had to spend several days in the hospital (Manns PSR ¶ 21, R. 353, Manns at Tr. 534-537).[2] In addition, in September 1994, David

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[2] Manns also testified that Lewis participated in beating Forte, but this was not included in Lewis's Presentence Investigation Report as conduct relevant to his offense.

King was beaten and suffered injuries "remarkably similar" to Monds. King was hospitalized and "almost died" (Manns PSR ¶ 19). Manns told a DT who cooperated in the investigation that Knight had "been on [King]" (Manns PSR ¶ 19). Manns admitted hitting David King, but denied beating him (Manns PSR ¶ 21). The court adopted the factual findings of the PSR (R. 331, Court at Tr. 24-25, 36-37, Apx. pp. 300-301, 308-309).

With respect to the incorrect medical diagnosis, Lewis had information that the nurses lacked. He knew that Monds had been severely beaten in the abdominal area for five minutes just before collapsing and vomiting. That the nurses did not appreciate the severity of Monds's internal injuries says nothing about Lewis's appreciation of that risk.

Finally, Lewis and Manns argue that involuntary manslaughter is the appropriate underlying offense (Lewis Br. at 7-8, 11; Manns Br. at 24-25). Their conduct, however, clearly lies outside the statutory definition. Involuntary manslaughter is an unlawful killing "in the commission of an unlawful act *not amounting to a felony*, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. 1112(a) (emphasis added). Manns's beating of Monds was a felony – aggravated assault – not a misdemeanor. Similarly, Lewis's aiding and abetting Monds's beating, and his failure to provide medical care, were felonies. See Tenn. Code. Ann. 39-13-102 (1995); Manns PSR ¶ 35. Accordingly, second

degree murder, not involuntary manslaughter, was the appropriate underlying offense for their sentences.

II.

THE DISTRICT COURT PROPERLY DENIED MCDOUGLE'S PRETRIAL MOTIONS TO DISMISS THE INDICTMENTS

A. Standard of Review

A district court's denial of a motion to dismiss an indictment generally is reviewed for abuse of discretion. *United States* v. *Middleton*, 246 F.3d 825, 841 (6th Cir. 2001). Where a district court's denial is determined by its conclusion regarding another claim, however, this Court applies the standard of review that would apply to the claim alleged as the basis for the dismissal of the indictment. *United States* v. *Butler*, 297 F.3d 505, 512 n.7 (6th Cir. 2001).

Constitutional issues regarding pre-indictment delay are reviewed *de novo*. See *United States* v. *Rogers*, 118 F.3d 466, 475-476 (6th Cir. 1997). Denial of a motion to dismiss an indictment on grounds of insufficiency is reviewed *de novo*. *United States* v. *DeZarn*, 157 F.3d 1042, 1046 (6th Cir. 1998). Denial of a motion to dismiss based on prosecutorial vindictiveness is reviewed for abuse of discretion. *United States* v. *Suarez*, 263 F.3d 468, 476 (6th Cir. 2001), cert. denied, 122 S. Ct. 1547 (2002). Denial of a motion based on grounds of duplicity is reviewed for clear error. See *United States* v. *Hixon*, 987 F.2d 1261, 1265 (6th Cir. 1993).

B. The Government Appropriately Deferred to the State Prosecution and did not Intentionally Delay Indictment to Gain a Tactical Advantage

McDougle contends the delay between Monds's death and McDougle's federal indictments violated his due process rights under the Fifth Amendment and his Sixth Amendment right to a speedy trial (McDougle Br. at 18-35). We first consider the Fifth Amendment claims.

1. Fifth Amendment

Statutes of limitation provide the primary guarantee against prosecution of overly stale criminal charges, but do not fully define an appellee's rights with respect to events that occur before indictment. *United States* v. *Marion*, 404 U.S. 307, 322-324 (1971). The Due Process Clause of the Fifth Amendment requires dismissal of an indictment if a defendant shows both that the delay caused "substantial prejudice" to a defendant's right to a fair trial and that the delay was "an intentional device to gain tactical advantage over the accused." *Id.* at 324. This Court has adopted this two prong test, *Rogers*, 118 F.3d at 474-75; *United States* v. *Brown*, 959 F.2d 63, 66 (6th Cir. 1992), noting that "the standard for pre-indictment delay is nearly insurmountable, especially because proof of actual prejudice is always speculative." *Rogers*, 118 F.3d at 477 n.10. In denying the motion, the district court ruled that McDougle failed to meet either prong of the test (R. 315, Order, pp. 4-6, Apx. pp. 119-121).

The United States presented evidence that, in accordance with its "*Petite* Policy," it did not initiate an investigation into Monds's death in 1995 because the

State of Tennessee indicted Manns and McDougle on state charges of second degree murder within weeks (R. 315, Order, p. 2, Apx. p. 117). The "*Petite* Policy" is a well-established policy of the Department of Justice that disfavors dual or successive federal-state prosecutions. See *Petite* v. *United States*, 361 U.S. 529, 530 (1960) (outlining general policy); U.S. Attorney's Manual § 9-2.031 (outlining limited circumstances when dual or successive federal-state prosecutions should be considered). Avoiding dual prosecutions serves the interests of both fairness to defendants and efficient and orderly law enforcement.

When the criminal prosecutors at the Civil Rights Division and the U.S. Attorney's Office for the Western District of Tennessee first learned in April 1999 that the State had, in September 1998, dropped the murder charges, they immediately began a federal investigation. The grand jury was convened in October 1999, and the first indictments in this complex, multi-defendant case were issued in February 2000 (R. 315, Order, p. 3, Apx. p. 118). The district court found that the United States relied on its *Petite* Policy and did not delay to seek a tactical advantage (R. 315, Order, p. 6, Apx. p. 121).

McDougle asks this court to "look behind" the government's assertion (McDougle Br. at 33-34), but offers nothing suggesting these findings are clearly erroneous. Rather, the State's prompt investigation and criminal indictment indicated, as outlined in the *Petite* Policy, that Tennessee was actively vindicating the federal interest in bringing Monds's attackers to justice in the criminal system. A federal investigation or prosecution was unwarranted so long as that continued.

The district court thus appropriately ruled that McDougle had not proven intentional delay or bad faith, and denied his motion to dismiss.

McDougle claims that the United States' initiation of civil proceedings against the State to correct the conditions at Arlington is inconsistent with any legitimate interest in the comity concerns that might otherwise justify deferring to a state criminal prosecution, implying that the government's asserted reliance on the *Petite* Policy was not in good faith (McDougle Br. at 25-26). McDougle, however, misunderstands the *Petite* Policy. That policy is founded in the Department of Justice's responsibility to control government litigation and its decision to disfavor dual state-federal criminal prosecutions, not on the judicial doctrines of comity and abstention cited in his brief (see McDougle Br. at 25-26 (citing *Rose* v. *Lundy*, 455 U.S. 509 (1982) (exhaustion requirements in cases of habeas corpus); *Younger* v. *Harris,* 401 U.S. 37, 44 (1971) (abstention)). Deferring to a pending state criminal prosecution that appears to vindicate the federal interest is entirely consistent with principles of federalism and conservation of federal resources.

Furthermore, pursuing civil charges against the State for its negligence in maintaining unconstitutional conditions at a facility housing over 300 residents is of an entirely different nature and requires meeting an entirely different evidentiary standard than initiating a criminal prosecution against specific individuals and proving beyond a reasonable doubt that they willfully used

unnecessary and excessive force against an institution's residents, resulting in death.

While the district court did not hold a hearing on prejudice because of its findings that the government did not delay to seek a tactical advantage, its order noted McDougle's claims and found them insufficient to demonstrate actual prejudice (R. 315, Order, pp. 4-5, Apx. pp. 119-120). McDougle again relies on two incidents of alleged prejudice: the unavailability of witness David Freeman, a former DT at Arlington who is now deceased; and lost or destroyed records that would have shown which staff members cared for which residents on a particular day and time (McDougle Br. at 28-29).

The death of a potentially material witness may prove prejudice, but it is not sufficient. The defendant must "demonstrate that exculpatory evidence was lost and could not be obtained through other means." *Rogers*, 118 F.3d at 475. A defendant cannot show actual prejudice from the death of a potential witness unless he indicates what the witness's testimony would have been and that the substance of the testimony is not otherwise available. *Ibid*.

McDougle did not meet this standard. Freeman pled guilty to assaulting an Arlington resident on or about August 1994. A government witness testified that McDougle stood outside the door during that assault. Whatever McDougle's hopes for Freeman's testimony, he did not offer any statement of Freeman that indicated he would have been a favorable witness. He merely made the general

assertion that Freeman would have contradicted the government's version of the facts and absolved McDougle of any role (McDougle Br. at 29). This is insufficient to show actual prejudice.

With respect to the allegedly lost records of staff assignments, McDougle again failed to state how these records would have aided his case, asserting only that the records were unavailable. But it is undisputed that McDougle was assigned to Mark Twain 3 on the morning of Monds's death.

2. Sixth Amendment

McDougle's Sixth Amendment claim of a violation of his speedy trial rights similarly lacks merit. The initiation of his right to a speedy trial in this federal case begins with his federal indictment on February 15, 2000, the point at which he became an "accused" for the federal charges, not the date of his indictment by the State of Tennessee for state murder charges. See *Marion*, 404 U.S. at 313. McDougle does not allege any post-indictment delay or prejudice, and would be hard pressed to do so. The interval between his indictment and his motion to dismiss on Sixth Amendment grounds was just six months. Further, as discussed *supra*, McDougle has not demonstrated actual prejudice.

For the same reason, McDougle's attempt to rely on *United States* v. *Doggett*, 505 U.S. 647 (1992), is unavailing (McDougle Br. 18-19). Where *Doggett* involved a delay of eight years between the federal indictment and the beginning of trial brought about by the United States' negligence in determining the defendant's whereabouts for over six years, see 505 U.S. at 652-653,

McDougle had a delay of just six months between his indictment and his trial and there was no finding of government negligence, pre or post-indictment.

C. As a State Employee, McDougle Acted Under Color of Law and the District Court Properly Denied his Motion to Dismiss the Indictments on Grounds of Insufficiency

McDougle argues that count one of the February 15, 2000 indictment alleging violations of 18 U.S.C. 242 and 2 and count one of the September 14, 2000 indictment alleging a conspiracy in violation of 18 U.S.C. 241 are insufficient because as a civilian employee of Arlington, he did not act "under color of law" and because the indictments did not allege that the victims were in the official custody of the State of Tennessee (McDougle Br. at 45-46). The district court ruled that a civilian employee of a state-operated facility who assaulted residents of the facility at that facility would act under color of state law and denied the motion (R. 140, Order, pp. 4-5, Apx. pp. 139-140). The district court's order did not explicitly address the "official custody" argument. Both issues are reviewed *de novo* for legal error.

The color of law element of Section 242, and where necessary of Section 241, is satisfied when a defendant abuses or misuses power he possesses by virtue of his government employment. *United States* v. *Classic*, 313 U.S. 299, 326 (1941); *Williams* v. *United States*, 341 U.S. 97, 99-100 (1951). McDougle suggests that state employees of a state-operated residential facility do not act under color of state law because they are "non-sworn, non-commissioned civilian

employees" (McDougle Br. at 46). Nothing in the text of Sections 241 or 242, however, limits their application to violations of federal rights by commissioned law enforcement officers. Sections 241 and 242 broadly protect all federal rights, including rights that arise outside of the law enforcement or corrections context. See *United States* v. *Price*, 383 U.S. 787, 800-802 (1966). The Supreme Court has held that residents at state-operated facilities for the mentally retarded like Arlington enjoy rights under the Fourteenth Amendment to safe conditions and freedom from undue bodily restraint. *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316, 319 (1982); cf. *Meador* v. *Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (Fourteenth Amendment protects children in state custody from abuse in state regulated foster care homes). Accordingly, courts of appeals have upheld the application of Section 242 to deprivations of federal rights by civilian government employees. See, *e.g.*, *United States* v. *Dise*, 763 F.2d 586 (3d Cir.), cert. denied, 474 U.S. 982 (1985) (state mental hospital employee).

McDougle incorrectly reads *Price* to hold that a defendant must be or act in concert with a sworn officer to act under color of state law (McDougle Br. at 45-46). *Price* held that private individuals who conspired with law enforcement officers to assault and kill victims the officers released from jail for that express purpose acted under color of state law and were covered by Section 242. 383 U.S. at 794-795. But it nowhere suggests that a civilian government employee carrying out his government duties at his place of employment acts under color of law only where a sworn officer is also involved.

McDougle also claims that the indictments were insufficient because they failed to allege that the victims were in the "official custody" of the State of Tennessee (McDougle Br. at 45). But "official state custody" is not an element of either provision. Even if it were, the indictments would be sufficient. Count one of the first indictment alleged that McDougle deprived Monds of his "right to be free from the use of unnecessary and excessive force by State employees while residing at a State operated facility" (R1. 1, Indictment, Apx. pp. 31-32). Count one of the second indictment alleged that McDougle conspired with others to deprive Arlington residents of their rights to be free from excessive force by, and to receive necessary and appropriate medical care from, employees at a state-operated mental health facility (R. 1, Indictment, Apx. pp. 86-87). This language is sufficient to inform the defendant that Monds was a resident in the custody of the State at the time of the offenses.

D. The District Court did not Abuse its Discretion in Denying the Pretrial Motions to Dismiss the Indictment on Grounds of Vindictive Prosecution or Commit Clear Error in Denying the Motion to Dismiss on Grounds of Duplicity

McDougle claims the court abused its discretion in denying two other pretrial motions. First, he argues that the government charged him with conspiracy in the second indictment to penalize him for declining to cooperate in the investigation of Monds's death and instead choosing to exercise his right to a trial (McDougle Br. at 36). The district court ruled that the mere fact that the second indictment followed McDougle's refusal to cooperate was insufficient

evidence of vindictiveness and that the government had offered a valid reason for the subsequent indictment. The court therefore denied his motion (R. 144, Order, Apx. pp. 142-143D).

Second, McDougle argues that the conspiracy charge in count one of the second indictment was duplicitous because it included several separate conspiracies (McDougle Br. at 41-42). The district court denied his motion, ruling that the five acts listed in the "Manner and Means" section of the indictment were steps allegedly undertaken by the defendants to effectuate a single conspiracy (R. 134, Order, p. 4, Apx. p. 135).

1. Vindictiveness

"A prosecutor vindictively prosecutes a person when he or she acts to deter the exercise of a protected right by the person prosecuted." *United States* v. *Anderson*, 923 F.2d 450, 453 (6th Cir.), cert. denied, 499 U.S. 980 (1991). While the Supreme Court has applied a presumption of vindictiveness in "post-trial" cases alleging retaliation for exercising the right to attack an original conviction, see *e.g., North Carolina* v. *Pearce*, 395 U.S. 711, 725 (1969), no such presumption applies in the pretrial setting. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." *United States* v. *Goodwin*, 457 U.S. 368, 382 (1982).

Accordingly, in the pretrial setting, a court must consider "whether, in the particular factual situation presented, there exists a 'realistic likelihood of

vindictiveness' for the prosecutors augmentation of the charges." *United States* v. *Andrews*, 633 F.2d 449, 453 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981). The defendant must make a prima facie case based on the prosecutor's stake in deterring the defendant from exercising his rights and the prosecutor's actual conduct. Only if the Court finds a realistic likelihood of vindictiveness must the government present evidence to disprove vindictiveness. *Id.* at 455. Moreover, this Court has held that there can be no due process violation for vindictive prosecution in the context of plea negotiations, for there a defendant retains the choice to accept or reject the plea. *Id.* at 456-457.

The district court did not abuse its discretion in denying McDougle's motion. McDougle showed nothing more than the obvious proposition that the prosecution had a stake in obtaining the cooperation of one or more defendants in order to strengthen its case. That showing is insufficient to establish a prima facie case. Nevertheless, the government offered a valid reason for the timing of the second indictment. New evidence, uncovered in investigations that continued after the initial February indictment, revealed that McDougle and other defendants were part of a long-running conspiracy to use excessive and unnecessary force that victimized almost every resident of Mark Twain 3 (R. 144, Order, p. 5, Apx. p. 143C).

McDougle claims, as he did in his motion for dismissal based on pre-indictment delay, that the government's asserted reliance on new evidence is not credible in light of the active civil case regarding the unconstitutional conditions

at Arlington (McDougle Br. at 39). The evidence required to substantiate a criminal conspiracy by specific individuals, however, is quite different than that needed to prove negligence on the part of the State in its operation of an institution. The district court did not abuse its discretion in accepting this justification.

2. Duplicity

"An indictment is duplicitous if 'it joins in a single count two or more distinct and separate offenses.'" *United States* v. *Shumpert Hood*, 210 F.3d 660, 662 (6th Cir. 2000) (quoting *United States* v. *Robinson*, 651 F.2d 1188, 1194 (6th Cir. 1981)).

Count one of the second indictment alleged that the object of the conspiracy was "to punish, discipline, and intimidate residents of [Arlington] through beatings and assaults so as to maintain order and gain compliance with employees' instructions" (R. 1, Indictment, Apx. p. 87). The "Manner and Means of the Conspiracy" section further alleged that

> In order to carry out the object of the conspiracy the defendants did
>
> 1. Routinely assault and beat residents, often in body parts that were not prone to bruising;
> 2. Frequently wrap towels around their knuckles or place sheets or fabric across residents when they beat residents so no distinguishing marks would be visible;
> 3. Shower residents or apply ice after beatings to reduce swelling or bruising;
> 4. Fail to report, report as accidents, and otherwise coverup beatings; and
> 5. Threaten residents with repeated beatings to obtain compliance.

(R. 1, Indictment, Apx. pp. 87-88).

This section, as the district court ruled, describes the different kinds of acts that the defendants used to carry out the conspiracy "to punish, discipline, and intimidate residents of [Arlington] through beatings and assaults so as to maintain order and gain compliance" defined in the preceding paragraph describing the object of the conspiracy. It does not charge or combine multiple conspiracies in one count (R. 134, Order at p. 4, Apx. p. 135).

III.

THE DISTRICT COURT PROPERLY DENIED MCDOUGLE'S MOTION FOR ACQUITTAL AND DID NOT ABUSE ITS DISCRETION IN DENYING THE REQUEST FOR A NEW TRIAL

A. Standard of Review

Denial of a motion for judgment of acquittal is reviewed *de novo* to determine the sufficiency of the evidence. A district court's denial of motion for new trial is reviewed for abuse of discretion. *United States* v. *Hartsel*, 199 F.3d 812, 815 (6th Cir. 1999), cert. denied, 529 U.S. 1070 (2000).

B. Discussion

McDougle appeals the denial of his motion for a judgment of acquittal, but does not identify any specific gap in the evidence supporting his convictions. Instead, McDougle lists several alleged errors that he claims undermined his right to a fair trial and should have led to a judgment of acquittal or a new trial (McDougle Br. at 48-49).

In reviewing the sufficiency of the evidence, a court must determine

"whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," "[d]rawing all inferences and credibility determinations in [the] light most favorable to the prosecution and in support of the verdict." *Hartsel*, 199 F.3d at 815. The evidence in this case easily satisfies that standard. Manns and Lewis testified that McDougle stood outside of the room as Manns began punching Monds, and that McDougle came into the room and beat Monds himself (McDougle PSR ¶ 21). Drawing all inferences and credibility determinations in favor of the verdict, this is sufficient to support the conclusion that McDougle assaulted Monds, heard or observed the entirety of Monds beating, and thus was guilty as charged.

The same evidence was sufficient to support McDougle's conviction on the conspiracy charge in the second indictment. In addition to that evidence, however, two former DTs testified that McDougle participated in other beatings. Bobby Hughes testified that McDougle served as a lookout while former DT David Freeman beat a resident for disobeying Perry (R. 354, Hughes at Tr. 627-634; McDougle PSR ¶ 18). Wendell Knight testified that McDougle abused residents of Mark Twain 3 (McDougle PSR ¶ 14). As the district court ruled, this evidence, together with the testimony about Monds, was sufficient to support the conspiracy conviction (R. 262, Order, Apx. pp. 148-149). It was not necessary to prove that he was part of the conspiracy from the beginning, or that he was the most culpable of the conspirators (R. 355, Court, Tr. at 868-870).

McDougle cites four other alleged errors in support of his motion for a new trial or judgment of acquittal: (1) inconsistency between his conviction for violating Monds's right to be free from unnecessary and excessive force and his acquittal on charges of depriving Monds of necessary and appropriate medical care and treatment; (2) denial of his motion for severance; (3) consolidating the indictments and allowing testimony about events throughout the conspiracy, even though McDougle worked at Arlington for approximately one year; and (4) denial of his motion for additional peremptory challenges (McDougle Br. at 48-55). The district court correctly found no error in the trial and denied his motion (R. 262, Order, Apx. p. 148).

None of McDougle's claims approaches an abuse of the district court's discretion. First, his conviction under count one of the first indictment – depriving Monds of his right to be free from unnecessary and excessive force – is not inconsistent with an acquittal on the charge of depriving Monds of necessary and appropriate medical care. The counts rely on different elements and different sets of facts (R. 262, Order, Apx. p. 148). Further, as McDougle acknowledges, even an inconsistent verdict would not necessitate an acquittal or new trial. *United States* v. *Powell*, 469 U.S. 57, 64-65 (1984). Denying his motion on this ground cannot amount to an abuse of discretion.

In order to demonstrate an abuse of discretion, a defendant must make a strong showing of prejudice. *United States* v. *Williams*, 711 F.2d 748, 751 (6th Cir.), cert. denied, 464 U.S. 986 (1983). McDougle's assertion of prejudice from

the denial of his severance motion and from the introduction of evidence related to the conspiracy charges under Section 241, (McDougle Br. at 51-53), however, overlooks the fact that McDougle himself was charged as a participant in the conspiracy. Evidence of the entire conspiracy was therefore relevant to the charges against him, and would have been relevant even if he had been tried alone. Similarly, testimony from his co-defendants, who ultimately pleaded guilty, about the conspiracy would have been admissible in a separate trial. The court did not abuse its discretion in making these rulings.

Finally, McDougle alleges prejudice from the denial of his motion for additional peremptory challenges. At the outset of the trial, the four defendants were collectively given ten peremptory challenges. McDougle sought additional peremptory challenges, and argued the alleged error was compounded after his co-defendants pled guilty. He now argues the he was denied the right of fully participating in choosing a jury (McDougle Br. at 51), but does not allege how he was prejudiced. It is not an abuse of discretion to decline to grant a mistrial when a co-defendant decides to plead guilty rather than proceed to trial.

CONCLUSION

This court should affirm the judgments of conviction and the sentences for the defendants in this case.

Respectfully submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

____
JESSICA DUNSAY SILVER
KAREN L. STEVENS
Attorneys
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 353-8621

CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a), I certify that the foregoing proof brief for the United States as appellee complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief has been prepared using WordPerfect 9 in proportionally spaced Times New Roman typeface in 14-point type and contains 9,190 words.

____
JESSICA D. SILVER
KAREN L. STEVENS
Attorneys
Department of Justice
Civil Rights Division
950 Pennsylvania Ave. NW, PHB 5504
Washington, D.C. 20350
(202) 353-8621

APPELLEE'S DESIGNATIONS OF RECORD FOR JOINT APPENDIX

Pursuant to Sixth Circuit Rule 28(d), Appellee United States designates the following items for the Joint Appendix, in addition to those previously designated in Appellants' opening briefs:

DESCRIPTION OF ENTRY	RECORD NO.	APPENDIX
Order Denying McDougle's Motion to Dismiss for Failure to State a Crime	R. 140	pp. 136-140
Order Denying McDougle's Motion to Dismiss for Vindictive Prosecution	R. 144	pp. 142-143D
Order Denying McDougle's Motion for New Trial or Judgment of Acquittal	R. 262	pp. 148

DESCRIPTION OF PROCEEDING OR TESTIMONY	TRANSCRIPT	APPENDIX
Proceedings for 5/15/01 O.C. Smith	R. 352 pp. 214-217	pp. 221-224
Kenny Miller	pp. 264-270	pp. 225-231
Proceedings for 5/16/01 Carl Manns	R. 353 pp. 490-497; 502-504; 510-511; 514; 521-524; 534-537	pp. 233-251
Proceedings for 5/21/01 Jerry Lewis	R. 355 pp. 722-724; 749-754; 764-767	pp. 277-289

JESSICA D. SILVER
KAREN L. STEVENS
Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2003, two copies of the foregoing Final Brief For The United States As Appellee were served by first-class mail, postage prepaid on the following persons:

Doris Randle-Holt
Assistant Federal Defender
Suite 200, 200 Jefferson Avenue
Memphis, TN 38103

Michael E. Scholl
Attorney At Law
The Scholl Law Firm
8 South Third Street, 4th Floor
Memphis, TN 38103

A. C. Wharton, Jr.
Attorney At Law
147 Jefferson Avenue, Suite 1205
Memphis, TN 38103

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JESSICA DUNSAY SILVER
Principal Deputy Chief