Nos. 10-6099 & 10-6106

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CLARENCE MCCOY and JOHN MCQUEEN,

Defendants-Appellants

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

CORRECTED BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument in this case.

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Nos. 10-6099 & 10-6106

UNITED STATES OF AMERICA,

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CLARENCE MCCOY and JOHN MCQUEEN,

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

____

CORRECTED BRIEF FOR THE UNITED STATES AS APPELLEE

____

JURISDICTIONAL STATEMENT

A federal grand jury charged the defendants John McQueen McQueen, Clarence McCoy McCoy, and others with violations of 18 U.S.C. 2, 241, 242, 1512(b)(3), and 1519. The district court had jurisdiction under 18 U.S.C. 3231. On May 13, 2010, a federal jury convicted McQueen and McCoy of all charges against them. The district court sentenced defendants on August 31, 2010 (R. 190, transcript), and the court entered judgments against both defendants on September

1, 2010. (R. 172, McQueen Judgment; R. 173, McCoy Judgment).[1] On September 7, 2010, McCoy filed a timely notice of appeal. (R. 174). On September 9, 2010, McQueen filed a timely notice of appeal. (R. 181). This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in ruling that counsel who sought to represent McCoy and McQueen had an actual conflict of interest when the government proposed a plea to McCoy that would provide him a favorable sentence in exchange for testimony against McQueen, and a potential conflict of interest at trial when witnesses, including potentially the defendants themselves, could provide testimony that was advantageous to one but detrimental to the other defendant.

2. Whether the district court's application of U.S. Sentencing Guidelines (Guidelines) § 2A2.2 for aggravated assault based on findings that differed from the jury's findings of guilt, yet did not increase the maximum sentence applicable based on defendants' convictions, was clearly erroneous.

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[1] R. _:__" refers to the docket entry on the district court docket sheet and the document's page number. "Tr.__:__" refers, respectively, to the volume and page number of the trial transcript. "D. Tr. __" refers to the page of the attorney disqualification hearing transcript. "S. Tr. __" refers to the page of the sentencing transcript. "GExh. __" refers to the number of the United States' exhibit at trial.

3. Whether the district court's enhancement for restraint under Guideline § 3A1.3 based on evidence that defendants assaulted victims who were handcuffed or restrained by other officers was clearly erroneous.

4. Whether the district court's sentence of ten years for each defendant, which was below the Guidelines range, was substantively reasonable when compared to codefendants who pled guilty to lesser crimes, cooperated with the United States, and received sentences that were 18 months or less.

STATEMENT OF THE CASE

On June 12, 2008, a federal grand jury in the Eastern District of Kentucky returned an eight-count indictment charging McQueen, McCoy, Scott Tyree, Anthony Estep, and Kristine Lafoe with conspiracy to violate civil rights under color of law; individual counts against McQueen, McCoy and/or others for deprivation of individuals' rights by use of excessive force; and obstruction of justice. (R. 1, Indictment). All of these charges stem from defendants, former detention officers at the Lexington-Fayette County Detention Center (FCDC), using excessive force against arrestees at the FCDC and falsifying reports, or not submitting reports, regarding such incidents.

More specifically, Count One charges that, between January 1, 2006 and October 1, 2006, at the FCDC, the five defendants, while acting under color of law, conspired with each other to injure pre-trial detainees by depriving them of their

right not to be deprived of liberty without due process of law, by subjecting detainees to excessive force, in violation of 18 U.S.C. 241. (R. 1:2-3, Indictment). The indictment sets forth numerous assaults committed by, *inter alia*, McCoy and McQueen against specific detainees. (R. 1:4-7, Indictment). Counts Two and Five allege that McQueen, acting under color of law, used excessive force that resulted in bodily injury to, respectively, L.E. (Lionel Embry), and S.H. (Scott Howe), in violation of 18 U.S.C. 242. (R. 1:7-9, Indictment). Count Three alleges that McQueen falsified an official document regarding the physical force he used against Embry, with the "intent to impede, obstruct, and influence the investigation and proper administration of that matter," in violation of 18 U.S.C. 1519. (R. 1:8, Indictment). Count Six alleges that McQueen ordered officers who witnessed his assault on Howe "not to write required reports about the incident," in violation of 18 U.S.C. 1512(b)(3). (R. 1:9-10, Indictment).

Count Seven alleges that on September 13, 2006, McCoy and Tyree, while acting under color of law, used excessive force against B.M. (Bruce Mulcahy), which resulted in bodily injury to Mulcahy, in violation of 18 U.S.C. 242 and 2. (R. 1:10, Indictment). Count Eight alleges that McCoy and Tyree, aiding and abetting one another, falsified official reports regarding the physical force each defendant used against Mulcahy, with the intent to impede the investigation of that matter, in violation of 18 U.S.C. 1519 and 2. (R. 1:10-11, Indictment).

A trial of McQueen and McCoy was held May 10-13, 2010, and a federal jury convicted both defendants of all charges on May 13, 2010.[2] (R. 137, Verdict form). On August 31, 2010, the district court sentenced both McQueen and McCoy to 120 months' imprisonment to be followed by 2 years of supervised release, and judgments were entered on September 1, 2010. (R. 172, McQueen; R. 173, McCoy). These appeals followed.

STATEMENT OF FACTS

1. Arrestee Intake Processing At The Fayette County Detention Center

The Lexington-Fayette County Detention Center (FCDC) is the county jail. (R. 183/Tr. 1:28, Chumbley). An arrestee's administrative processing upon arrival at the FCDC begins at the Intake Unit. (R.183/Tr. 1:30, Chumbley). McQueen, Lieutenant Lafoe, and Sergeant Estep were supervisors for the third shift of the Intake Unit, which ran from midnight to 8:00 a.m. (R.183/Tr. 1:30, Chumbley; R. 184/Tr. 3:222, McQueen; R. 185/Tr. 4:20, McCoy). All of the assaults at issue occurred during the third shift.

An arrestee is escorted into the jail by an officer assigned to the Intake Unit with the arrestee's arms in handcuffs behind his back. (R. 183/Tr. 1:33, Chumbley; R. 184/Tr. 3:135, Tyree). The Intake Unit has a triage counter made of

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[2] Defendants Estep, Lafoe, and Tyree pled guilty to various offenses prior to McCoy and McQueen's trial. See p. 47, *infra*.

stainless steel at approximately waist-height, four and one-half feet high. (R. 183/Tr. 1:48, Chumbley; R. 184/Tr. 3:155, Tyree). At the triage counter, an arrestee is questioned about current medical conditions and is subjected to a pat-frisk by an officer to remove any contraband and personal items. (R. 183/Tr. 1:33-34, Chumbley).

2. Overview Of The Defendants' Assaults

McQueen and McCoy, at times with the assistance of other officers, routinely used force against arrestees who were compliant or who posed no threat to the officers or others present. See pp. 13-26, *infra*. As a result of their actions, arrestees felt significant pain at the time of impact, lingering pain that lasted for weeks after the incident, and suffered injuries that required medical attention, including surgery and ongoing medication. (*E.g.*, R. 186/Tr. 2:98, 100, Howe (need for medication for ongoing headaches caused by McQueen's assault); R. 186/Tr. 2:217, Buchignani (lingering pain for two weeks and need for stitches after McCoy's assault)). The officers, at the direction of McQueen and other supervisors, routinely submitted reports that falsely described an arrestee's aggressive actions to justify the use of force, or falsely described the officer's passive actions so that it did not appear that he used force. See pp. 11-13, *infra*. At trial, the jury heard details of seven incidents where McQueen, McCoy or both

defendants used unnecessary force against arrestees and the false reports associated with those incidents.[3]

McQueen is 6'8" tall and weighs approximately 360 pounds. (R.184/Tr. 3:236-237, McQueen). McCoy is similar in size and stature to McQueen. (See McCoy PSR at 18). The defendants used force against arrestees who were handcuffed (*e.g.*, Howe, Powers, Johnson), (R. 186/Tr. 2:14-15, Stanger; R. 186/Tr. 2:92, 94, Howe; R. 186/Tr. 2:198-200, Johnson); significantly smaller in size than the defendants (*e.g.*, Pinkston, Howe, and Embry), (R. 186/Tr. 2:25, Stanger (Pinkston was "skinny," "weak," and about 60 years old); R. 186/Tr. 2:93, Howe (while of similar height, Howe weighed 150 pounds less than McQueen); R. 184/Tr. 3:160, Tyree (Embry weighed no more than 160 pounds)); and/or intoxicated (*e.g.*, Howe, Embry, and Buchignani), (R. 183/Tr. 1:40, 71, Chumbley; R. 186/Tr. 2:90, Howe; R. 186/Tr. 2:214, Buchignani).

McCoy and McQueen's use of force against arrestees included using wrist locks and knee strikes, slamming arrestees head-first into the stainless steel triage

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[3] The jury heard testimony from, *inter alia*, FCDC officers who witnessed the assaults, one codefendant who pled guilty to related charges, the arrestees, and the defendants. The jury also saw videotapes that recorded one assault in full, (R. 138, GExh. 3, Howe video), and portions or the aftermath of other assaults by McCoy and McQueen. (See R. 138, GExh. 6, Buchignani video; GExh. 9-B, Embry video; GExh. 20, Mulcahy video; GExh. 22, Johnson video). The videos are not available on the district court's electronic docket. The United States has submitted under separate cover dvds of the cited videos.

counter, pushing arrestees against walls, using body weight against detainees, and using pepper spray at close range. (*E.g.*, R. 183/Tr. 1:61, Chumbley (McCoy slammed Buchignani in to the triage counter); R. 183/Tr. 1:74, Chumbley (McQueen pushed Embry against the wall); R. 186/Tr. 2:14-15, Stanger (McCoy and McQueen used wrist locks against Powers); R. 184/Tr. 3:137-138, Tyree (McQueen slammed Howe in to the triage counter); R. 184/Tr. 3:153, 155, 157, 160-161, 164-165, Tyree (McQueen used wrist locks and knee strikes, full body weight, and pepper spray against Embry); R. 184/Tr. 3:172, Tyree (McCoy slammed Mulcahy to the ground after using pepper spray)).

An officer imposes a wrist lock by hyperextending a subject's arm and twisting his wrist inward and downward. (R. 183/Tr. 1:80, Chumbley; R. 186/Tr. 2:15, Stanger; R. 186/Tr. 2:143, Proffitt). When applied, a wrist lock causes intense, temporary pain, and the pain ceases almost immediately upon the officer's release. (R. 183/Tr. 1:80-81, Chumbley; R. 186/Tr. 2:143-144, Proffitt; see R. 184/Tr. 3:248, McQueen). Knee strikes, which are an officer's forceful hit with his knee into a victim's thigh, will cause the victim significant pain and temporary loss of motor skills in one's leg. (R. 183/Tr. 1:70, Chumbley; R. 186/Tr. 2:144, Proffitt). According to FCDC policy, wrist locks and knee strikes are one means by which a detention officer can respond to an arrestee who is physically resisting an officer's orders. (R. 183/Tr. 1:80-81, Chumbley; R. 186/Tr. 2:15, Stanger; R.

186/Tr. 2:143-144, Proffitt; see R. 184/Tr. 3:250, McQueen). However, McCoy and McQueen altered the technique taught to FCDC law enforcement officers for wrist locks and knee strikes and their method imposed a greater, more intense pain on the arrestee. (R. 186/Tr. 2:23-24, Stanger). In addition, McCoy and McQueen used wrist locks and knee strikes when an arrestee did not pose a threat, and instructed others to do the same. (R. 186/Tr. 2:14-15, 23-24, Stanger; see R. 184/Tr. 3:155, 157, Tyree (knee strikes imposed on Embry when he posed no threat and was held against the triage counter)).

Captain Brian Proffitt had more than 23 years experience with FCDC, including a post as captain of the Training Unit where he oversaw training for all new detention officers at the academy and in-service training of current officers. (R. 186/Tr. 2:107, Proffitt). Proffitt was qualified as an expert on a detention officer's use of force. (R. 186/Tr. 2:107, 110, Proffitt). Proffitt explained that pepper spray, sometimes referred to as OC spray, is an "intermediate weapon" that should be used only against an arrestee who is "active[ly] aggressi[ve]." (R. 186/Tr. 2:145, 159, Proffitt). An officer should only use pepper spray from a minimum distance of three feet from the target given its adverse effects. (R. 186/Tr. 2:145, Proffitt). Pepper spray is very painful; the area hit by the spray feels like it has been dipped in a "deep fryer" and it is an irritant to the respiratory system. (R. 183/Tr. 1:79, Chumbley; R. 186/Tr. 2:145, 159, Proffitt; see R.

184/Tr. 3:250, McQueen). When used at a distance of less than three feet, it has a "hydraulic needle effect" that causes extreme pressure and even more intense pain. (R. 183/Tr. 1:79, Chumbley; R. 184/Tr. 3:249, McQueen). "As a rule," pepper spray should not be used on someone who is handcuffed. (R. 186/Tr. 2:145, Proffitt). McQueen, however, was right next to arrestee Lonnell Embry, who was restrained and under control by several officers, when McQueen used pepper spray against Embry. See p. 19, *infra*. McCoy also used pepper spray against Mulcahy when he was in close proximity, and Mulcahy did not pose a threat. See p. 21, *infra*.

Officers who observed the beatings described at trial, including a codefendant who pled guilty to related offenses, consistently stated that the arrestees did not engage in or appear to engage in threatening action that warranted McCoy's or McQueen's use of force against them. (See, *e.g.*, R. 183/Tr. 1:79-80, Chumbley (re: Embry); R. 186/Tr. 2:15, Stanger (unnecessary use of wrist locks against Powers when Powers was handcuffed); R. 184/Tr. 3:156-157, 166-167, Tyree (McCoy and McQueen's knee strikes to Embry)). While arrestees were frequently verbally abusive and obnoxious, such action did not pose a threat to officers, and did not warrant the use of force, yet McCoy and McQueen used force against such victims, including Howe and Mulcahy. See pp. 13-14, 20-21, *infra*; (R. 186/Tr. 2:129-131, Proffitt). Thus, fellow officers testified that use of force in

those incidents was unnecessary. (*E.g.*, R. 183/Tr. 1:62-63, Chumbley (re: Buchignani); R. 183/Tr. 1:76, 79-82, Chumbley (re: Embrey); R. 184/Tr. 3:9, 12-13, Roberts (re: Mulcahy)).

McQueen and McCoy used unnecessary force against arrestees, including head slams into the triage counter, wrist locks, and knee strikes, not only in the specific instances described at trial, but on a routine basis. (R. 186/Tr. 2:34, Stanger; R. 184/Tr. 3:142, 176, Tyree). One officer estimated that McCoy used unjustified force against arrestees on a weekly basis (R. 184/Tr. 3:176, Tyree), and one officer estimated that she would see McQueen and McCoy use unjustified force against arrestees two-three times per night. (R. 184/Tr. 3:25, Roberts).

FCDC officers, including defendants, were instructed that they must write a report any time force is used against an arrestee. (R. 186/Tr. 2:148, Proffitt; R. 184/Tr. 3:140, Tyree). Officers also were instructed that all reports on use of force must be truthful, complete and accurate. (R. 186/Tr. 2:8, Stanger; R. 185/Tr. 4:59-60, McCoy). However, it was standard practice that the supervisor on duty of the Third Shift Intake Unit, including McQueen, would review and edit all officers' draft reports to ensure that the reports only included text that was approved, and that the officers' reports consistently described the incident. (R. 183/Tr. 1:52-53,

Chumbley; R. 186/Tr. 2:33, Stanger).[4] Specifically, McQueen and other Third Shift Intake supervisors directed staff officers to remove, alter, or add text to reports, which may have included false descriptions of arrestees' behavior as aggressive, in order to falsely describe or justify McCoy's or McQueen's use of force against arrestees. (See, *e.g.*, R. 183/Tr. 1:52-53, Chumbley (re: falsely described McQueen's passive behavior in Howe report); R. 183/Tr. 1:96, Chumbley; R. 186/Tr. 2:33, 62, Stanger; R. 184/Tr. 3:23-24, Roberts). These edits were made so that the report did not accurately describe the defendants' use of force and would not raise any concerns to a higher level supervisor who reviewed the report. (R. 183/Tr. 1:96, Chumbley).

For example, Tyree was instructed by commanders Lafoe and McQueen that certain words that described an officers' actual use of force, such as "slammed," "jacked up," or "kicked," could not be used because they reflected excessive force. (R. 184/Tr. 3:168, Tyree). Instead, Tyree was instructed by the commanders to use phrases like "secured on the counter," or "placed on the counter." (R. 184/Tr. 3:168-169, Tyree). If Tyree wrote that an arrestee was "placed" on the counter, the arrestee was probably "slammed" on the counter by an officer. (R. 184/Tr. 3:179, Tyree). McQueen and McCoy also admitted at trial that if their reports stated that

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[4] In one instance, McQueen advised officers not to write any report regarding his use of force against an arrestee. (R. 186/Tr. 2:11, Stanger (re: Howe incident); R. 184/Tr. 3:140-141, Tyree (re: Howe incident)).

they "placed" an arrestee on the counter, it was "likely" or "more than likely" that they "slammed" the arrestee into the counter. (R. 184/Tr. 3:261, McQueen; R. 185/Tr. 4:71, McCoy).

3. Specific Incidents Of Defendants' Use Of Force Against Arrestees

a. McQueen's Assault Of Scott Howe

Scott Howe was arrested for intoxication and brought to FCDC on June 17, 2006, during the third shift. (R. 183/Tr.1:40, Chumbley; R. 186/Tr. 2:90, Howe). Howe was approximately 6'4", and approximately 190 pounds. (R. 183/Tr. 1:104, Chumbley; R. 186/Tr. 2:93, Howe). McQueen was the supervisor that evening. (R. 183/Tr. 1:40, Chumbley). Howe was handcuffed behind his back when he entered the Intake Unit. (R. 183/Tr. 1:40, Chumbley; R. 186/Tr. 2:92, Howe). Howe was verbally abusive and obnoxious, yet three officers who were present did not believe Howe's comments or behavior was physically threatening. (R. 183/Tr. 1:41, 103, Chumbley; R. 186/Tr. 2:10, 68, Stanger; R. 184/Tr. 3:136-137, 139, Tyree; see R. 186/Tr. 2:91-92, Howe). McQueen conceded at trial that he did not feel threatened by Howe's words. (R. 184/Tr. 3:263, McQueen).

Holding Howe by the top of his shirt collar, behind his head, McQueen dragged Howe over to the triage counter and "slammed" Howe's head down into the counter. (R. 183/Tr.1:40, 42, Chumbley; R. 184/Tr. 3:137-138, Tyree; R. 184/Tr. 3:263, McQueen; see R. 186/Tr. 2:94, Howe). Howe's head made a loud

noise when it hit the counter, as if someone dropped a heavy object down on to the counter. (R. 183/Tr. 1:142, Chumbley). Howe stopped talking after this strike. (R. 186/Tr. 2:94-95, Howe).

Howe continued to be passive after the first strike; he did not fight back, kick, spit, hit, or make any threatening movements. (R. 183/Tr. 1:42-43, Chumbley; R. 186/Tr. 2:95, Howe; R. 184/Tr. 3:139, Tyree). McQueen then removed Howe's handcuffs and said, "let's see what you got, [h]ero." (R. 184/Tr. 3:265-266, McQueen; see R. 184/Tr. 3:139, Tyree). McQueen again grabbed Howe's shirt behind Howe's neck, raised Howe's head, and slammed Howe's head back into the triage counter at least two more times. (R. 183/Tr. 1:42, Chumbley; R. 186/Tr. 2:94, Howe ("it hurt, real good"); R. 184/Tr. 3:139, Tyree; R. 184/Tr. 3:266-267, McQueen).

In addition, McQueen and other officers repeatedly kicked Howe's feet into a concrete wall while Howe was held at the triage counter. (R. 186/Tr. 2:94, 101, 104, Howe; R. 184/Tr. 3:267, McQueen). Howe had injured his foot prior to coming to the FCDC, but this injury was exacerbated by the officers' kicking. (R. 186/Tr. 2:102, Howe). After the head strikes and feet kicks, Howe could not walk independently; he was dragged to a holding cell by McQueen and other officers. (R. 186/Tr. 2:95, Howe; see R. 184/Tr. 3:268, McQueen (Howe was "playing dead while he was walked to his cell")).

As a result of McQueen's and the officer's actions, Howe suffered cuts and bruises on his head and neck, and cuts on his feet. (R. 186/Tr. 2:97, Howe). A few days after the attack, Howe passed out and he was diagnosed with a mild concussion. (R. 186/Tr. 2:97-98, Howe). Since the attack, Howe has been prescribed medication for headaches that occur on a daily basis. (R. 186/Tr. 2:98-100).

Officers who witnessed McQueen's actions or observed the videos of his assault concluded that McQueen had no reason to slam Howe's head into the triage counter because Howe did not pose a threat. (R. 183/Tr.1:43, Chumbley; R. 186/Tr. 2:10-11, Stanger; R. 184/Tr. 3:139, Tyree; see R. 186/Tr. 2:282-283, Kammer (he was "sickened" to watch McQueen's use of force on the video)). Captain Proffitt, the expert qualified on the use of force, saw the video of McQueen's assault on Howe and opined that there was no legitimate reason for McQueen's use of force against Howe. (R. 186/Tr. 2:110, 150, 152, Proffitt). At trial, McQueen initially denied that he used force and stated that he was "playing with" Howe and did not intend Howe to hit the counter face-first. (R. 184/Tr. 3:263, 268, McQueen). At one point, McQueen conceded at trial that his actions could be perceived as a use of force. (R. 184/Tr. 3:244, McQueen).

Chumbley wrote a report that did not address McQueen's use of force against Howe. (R. 183/Tr. 1:52-53, Chumbley). McQueen, as his supervisor,

reviewed Chumbley's draft report and directed Chumbley to remove any mention of McQueen's use of force against Howe. (R. 183/Tr. 1:52-53, Chumbley). McQueen told Chumbley that he would "take care of" Chumbley's silence on this issue. (R. 183/Tr. 1:53, Chumbley). McQueen also told three officers who were present during the Howe incident not to write reports of the incident. (R. 186/Tr. 2:11, Stanger; R. 184/Tr. 3:140, Tyree; see R. 184/Tr. 3:270-271, McQueen).

b. McQueen And McCoy's Assaults On Lonnell Embry

On April 29, 2006, in separate incidents, McQueen, McCoy, and other officers used unnecessary force against arrestee Lonnell Embry, who was then 31 years old. (R. 183/Tr. 1:71-84, Chumbley; R. 184/Tr. 3:152-157, Tyree). Embry had been arrested for intoxication. (R. 183/Tr. 1:71, Chumbley).

During the first incident, Embry initially was not fully compliant with officers' instructions, but he was not violent or aggressive. (R. 184/Tr. 3:153, Tyree). When McQueen, McCoy, and Tyree had control of Embry, McQueen slammed Embry's head into the triage counter. (R. 184/Tr. 3:154, Tyree; see R. 184/Tr. 3:261, McQueen). McQueen or McCoy ordered Embry to place his feet on the floor yet, given the position that he was held in by the officers over the triage counter, Embry could not comply. (R. 184/Tr. 3:155-156, Tyree). McCoy, McQueen, and Tyree each delivered three knee strikes to Embry even though

Embry was under control and not kicking at any of the officers. (R. 184/Tr. 3:154-155, 157, Tyree).

Later in the shift, at Officer Chumbley's request, Embry voluntarily left a holding cell in order to take a breathalyzer test. (R. 183/Tr. 1:72, Chumbley). Embry initially was "very calm" when he was talking with Officer Chumbley and Corporal Tyree. (R. 184/Tr. 3:158, Tyree; see R. 183/Tr. 1:73, Chumbley). While they were talking, Embry became "agitated" when he saw McQueen coming towards them. (R. 184/Tr. 3:159, Tyree). Embry started to back away from McQueen, he balled his hands into fists, and he said to McQueen, "[if] you guys lay your hands on me, I'm going to take a charge," suggesting that he would fight back if he was struck by an officer. (R. 184/Tr. 3:159, Tyree; R. 183/Tr. 1:73-74, Chumbley). Notwithstanding Embry's "defensive" actions, neither Tyree nor Chumbley felt threatened by Embry. (R. 184/Tr. 3:166, Tyree; R. 183/Tr. 1:74-75, Chumbley). However, McQueen "lit up" at this comment, came around the counter, grabbed Embry and slammed him into a wall. (R. 184/Tr. 3:160, Tyree; see R. 183/Tr. 1:74, Chumbley). McQueen attempted to do a straight-arm take-down of Embry, but McQueen did not follow the proper technique for this move and, instead, he and Embry fell to the floor. (R. 183/Tr.1:75-76, Chumbley). Chumbley saw no reason for McQueen taking Embry down to the floor. (R. 183/Tr. 1:76, Chumbley).

Several officers placed Embry in handcuffs and leg restraints. While Embry was being handcuffed, McQueen dropped down to his knee and pressed his entire body weight into Embry. (R. 184/Tr. 3:161, Tyree). McQueen also hyperextended Embry's shoulders. (R. 183/Tr. 1:82, Chumbley; R. 186/Tr. 2:154, Proffitt). Embry was crying out that he was having difficulty breathing and was in pain. (R. 184/Tr. 3:162, Tyree). Pressing a knee in Embry's back is not part of police training; in fact, officers are trained *not* to apply body weight and knees to an individual's back since such action can cause injury. (R. 183/Tr. 1:82, Chumbley; R. 186/Tr. 2:155, Proffitt). At this point, Embry posed no threat to officers. (R. 184/Tr. 3:161-162, Tyree). There was no need for McQueen to press his knee in Embry's back or hyperextend Embry's shoulder. (R. 183/Tr. 1:82, Chumbley; see R. 186/Tr. 2:155, Proffitt).

Officers dragged Embry back to a holding cell. Once Embry was in the cell, he was compliant and there was no need for any use of force. (R. 183/Tr. 1:81-82, Chumbley). Inside the cell, standard procedure would be to place the inmate in a prone position, face down, and place his hands near his side to remove the handcuffs. (R. 184/Tr. 3:163, Tyree). Tyree released one of Embry's arms so the handcuffs could be removed yet McQueen continued to put pressure on Embry's other arm by a wrist lock. (R. 184/Tr. 3:163-164, Tyree; see R. 184/Tr. 3:254-255, McQueen). Given Tyree's release of Embry, and the pain caused by McQueen's

wrist lock and pressure on Embry's arm, Embry tried to twist into a position that would relieve the pressure caused by McQueen. (R. 184/Tr. 3:163-164, Tyree; R. 184/Tr. 3:257-258, McQueen). In response to Embry's movement, four or five other officers, including McCoy, immediately came back in to the cell. (R. 184/Tr. 3:164-165, Tyree).

Four officers were on top of or holding Embry and, as McQueen conceded at trial, Embry was under control. (R. 186/Tr. 2:158-159, Proffitt; R. 184/Tr. 3:259-260, McQueen). However, when standing right next to Embry, McQueen sprayed OC spray, a very strong pepper spray, directly into Embry's eyes and face. (R. 183/Tr. 1:78-79, Chumbley; R. 184/Tr. 3:165-166, Tyree; R. 184/Tr. 3:260, McQueen). McQueen had no reason to use OC spray on Embry. (R. 183/Tr. 1:79-80, Chumbley; R. 184/Tr. 3:166, Tyree; see R. 186/Tr. 2:111, 158-159, Proffitt). While Embry's initial actions were not captured on the video, such action would not change Captain Proffitt's opinion that McQueen's actions were not "within [FCDC] policies * * * or training and appeared unnecessary and excessive * * * because [Embry] was not resisting [and the officers] had control." (R. 186/Tr. 2:163, Proffitt; see R. 183/Tr. 1:83, Chumbley).

Chumbley, Tyree, McCoy, and McQueen prepared reports of McQueen's use of force against Embry. (R. 183/Tr. 1:83, 85-87, Chumbley; R. 184/Tr. 3:167, Tyree). Chumbley's and McQueen's report falsely described Embry's actions as,

inter alia, "active aggression," "argumentative," and "actively resistant" to justify McQueen's use of force against Embry. (R. 183/Tr. 1:85, 87, 91, 95, Chumbley). As the supervisor on duty, McQueen approved Chumbley's and the other officers' reports. (See R. 183/Tr. 1:96, Chumbley).

c. McCoy's Assault Of Brian Mulcahy

On September 13, 2006, Brian Mulcahy was arrested for driving with a suspended license and no insurance. (R. 184/Tr. 3:88, Mulcahy). While in a holding cell, he was loud, obnoxious, and yelling at the officers. (R. 184/Tr. 3:170, Tyree). McCoy told Tyree that he wanted assistance to "jump" Mulcahy and described his plan of assault. (R. 184/Tr. 3:170, Tyree; see R. 184/Tr. 3:6-8, Roberts ("I also understood that [McCoy's assault] was premeditated.")). McCoy told Tyree that he planned to bring Mulcahy to the property room, push him from behind, spray him with OC spray, and forcibly take Mulcahy down to the floor. (R. 184/Tr. 3:169-170, Tyree).

McCoy removed Mulcahy from a holding cell and made disparaging remarks to Mulcahy as he was frisked at the property counter. (R. 184/Tr. 3:8, Roberts). Mulcahy was not aggressive; he responded that he was not going to get upset at McCoy's comments. (R. 184/Tr. 3:9, Roberts; see R. 184/Tr. 3:90-91, Mulcahy). McCoy then brought Mulcahy to the property room, opened the door, and pushed Mulcahy from behind. (R. 184/Tr. 3:171, Tyree; see R. 184/Tr. 3:8,

10, Roberts). Mulcahy turned to McCoy and asked something akin to, "what's going on?" or "why are you pushing me?" (R. 184/Tr. 3:10, Roberts; R. 184/Tr. 3:171, Tyree). Although Mulcahy did not pose a threat to McCoy, Tyree, or anyone else present (R. 184/Tr. 3:11, Roberts; R. 184/Tr. 3:172, Tyree), McCoy immediately sprayed pepper spray at Mulcahy's face. (R. 184/Tr. 3:10, Roberts; R. 184/Tr. 3:172, Tyree). McCoy then grabbed Mulcahy and slammed Mulcahy to the floor. Mulcahy hit face-first and his nose split open. (R. 184/Tr. 3:172, Tyree; R. 184/Tr. 3:89, Mulcahy (the officers "worked me over pretty good"); see R. 184/Tr. 3:11, Roberts (stated that Mulcahy was slammed to the counter by McCoy and Tyree)). There was no reason for any of McCoy's actions against Mulcahy. (R. 184/Tr. 3:8, 12-13, Roberts; R. 184/Tr. 3:173, Tyree). An FCDC nurse cleaned the wound and put on a bandage. (R. 184/Tr. 3:173, Tyree). However, Mulcahy's nose was broken, but because he was unemployed and uninsured, he did not go to the hospital after he was released from FCDC. (R. 184/Tr. 3:90, Mulcahy).

Tyree wrote a false report of this incident to protect McCoy. (R. 184/Tr. 3:174, Tyree). Roberts also wrote a false report that described Mulcahy as the aggressor in order to justify McCoy's use of force because she knew her supervisors required such a response. (R. 184/Tr. 3:13-14, Roberts).

d. McCoy's Assault Of Barry Buchignani

On May 19, 2006, Barry Buchignani, Jr., then 24 years old, was arrested for intoxication. (See R. 186/Tr. 2:212-214, Buchignani). When Buchignani arrived at the jail, he was loud, verbally "belligerent," and swearing at the officers, but he was not aggressive or threatening to the officers. (R. 184/Tr. 3:143, Tyree; see R. 183/Tr. 1:62-63, Chumbley; R. 186/Tr. 2:216-217, Buchignani). Buchignani was handcuffed behind his back. (R. 184/Tr. 3:143, Tyree; see R. 183/Tr. 1:62, Chumbley). Tyree and McCoy were on each side of Buchignani when they entered the Intake Unit and they had Buchignani under control. (R. 183/Tr. 1:62-63, Chumbley; R. 184/Tr. 3:146-147, Tyree). McCoy, however, immediately slammed Buchignani face-first into the triage counter. (R. 183/Tr. 1:61, Chumbley; R. 184/Tr. 3:146-147, Tyree; R. 185/Tr. 4:71, McCoy). Buchignani's chin was cut as a result of McCoy's actions and Buchignani was transported to a hospital where he received five or six stitches to close the wound. (R. 186/Tr. 2:217, Buchignani). Buchignani's jaw and shoulder also hurt him for a few weeks after this incident. (R. 186/Tr. 2:217, Buchignani).

Chumbley's report falsely stated that Buchignani resisted during the pat-frisk and he did not describe McCoy's use of force before and during the pat-frisk. (R. 183/Tr.1:66-67, Chumbley). Chumbley's and McCoy's statements that Buchignani was, respectively, "secured against the counter" and "placed against

the counter" failed to report McCoy's use of force to slam Buchignani into the counter. (R. 183/Tr.1:67, 69, Chumbley). Finally, McCoy's statement in his report that Buchignani attempted to back away from the triage counter was false. (R. 183/Tr. 1:69, Chumbley).

e. Other Assaults

The United States presented evidence of McCoy and/or McQueen's unnecessary use of force against three other arrestees – Mark Johnson, Beau Powers, and Douglas Pinkston – that followed the same pattern of behavior described above; arrestees posed no threat, defendants used force, and the defendants and other officers wrote false reports to justify the defendants' use of force.

Detention officers and others testified that Johnson, Powers, and Pinkston posed no threat to McCoy, McQueen, or other officers. (R. 186/Tr. 2:26, 29-30, Stanger (re: Pinkston); R. 184/Tr. 3:19-20, Roberts (re: Powers); see R. 186/Tr. 2:163, 165, Proffitt (no lawful reason for McCoy's knee strikes against Pinkston); R. 186/Tr. 2:198-200, Johnson (he swore at officers but did not resist physically); R. 185/Tr. 4:31, McCoy (Johnson was "belligerent"; no authorization to use force against an angry arrestee)). Notwithstanding the absence of a threat, however, McCoy slammed Pinkston, who was handcuffed behind his back, face-first into the triage counter and gave Pinkston multiple knee strikes (R. 186/Tr. 2:26, 28, 59, 66,

Stanger); McQueen slammed Powers into a wall (R. 184/Tr. 3:21, Roberts); McCoy and McQueen used wrist locks against Powers that were not necessary because Powers was handcuffed (R. 186/Tr. 2:14-15, Stanger); and McCoy gave knee strikes and raised Johnson's arms above his head while Johnson was handcuffed (R. 186/Tr. 2:198-201, Johnson). Finally, at their supervisors' direction, officers prepared reports that falsely justified the defendants' use of force by, *inter alia*, stating that arrestees engaged in aggressive or threatening conduct. (R. 186/Tr. 2:15-16, 29-30, 32-33, 67, Stanger (re: Powers and Pinkston); R. 184/Tr. 3:23-24, Roberts (re: Powers)).

4. Disqualification Of Counsel For Conflicts Of Interest

McCoy and McQueen were initially represented by the same law firm, Franklin & Rapp, and in June 2008, defendants filed waivers of any potential conflict of interest. (R. 31, McQueen waiver; R. 32, McCoy waiver). In August 2009, the United States moved to disqualify counsel's dual representation of McCoy and McQueen based on an actual and potential conflict of interest. (R. 108, United States' motion for disqualification).

At the Rule 44(c) hearing, the district court gave extensive warnings to the defendants on the potential conflicts of interest if they proceeded with shared counsel and appointed each defendant temporary counsel to advise him on this issue. (R. 115/D. Tr. 9-14). Despite defendants' waivers of their right to conflict-

free counsel, (R. 115/D. Tr. 17, McCoy, 19, McQueen), the district court disqualified Franklin and Rapp. (R. 115/D. Tr. 29, court). The court found that counsel had an actual conflict of interest with respect to potential plea negotiations and a serious potential for a conflict of interest at trial. (R. 116, Order; R. 115/D. Tr. 29). At the time of the hearing, the government had offered to negotiate a plea with McCoy in return for his testimony against McQueen. (See R. 115/D. Tr. 6-7). The district court found that counsel could not simultaneously protect the interest of both clients given the plea offer. (R. 115/D. Tr. 29). The district court also found that there was a serious potential for conflict of interest that could arise at trial over deciding whether to present a defense, who would testify (including one or both defendants), and how to introduce or challenge evidence since in each decision action that may be advantageous to one client could be harmful to the other client. (R. 115/D. Tr. 29). Defendants subsequently retained separate counsel of their choosing.

5. Sentencing

On August 31, 2010, the district court held a sentencing hearing for McQueen and McCoy. (R. 190/S. Tr. 1-61). Both defendants raised numerous objections to the calculations of their sentences under the U.S. Sentencing Guidelines (Guidelines), as set forth in their respective PSRs. (R. 190/S. Tr. 4-29;

see McCoy PSR; McQueen PSR).[5] The district court considered and rejected defendants' objections based on the analysis and calculations set forth in the PSRs and the evidence at trial. (R. 190/S. Tr. 4-29).

For violations of 18 U.S.C. 241 and 242, the starting point for calculating the sentence is Guidelines § 2H1.1. Guidelines § 2H1.1 instructs that the calculation begin with the greatest level from a list of options, including the offense level from the Guideline applicable to any underlying conduct. Here, for the conspiracy and the excessive force counts, the PSRs used Guidelines § 2A2.2, Aggravated Assault, based on McQueen's assaults on Lionel Embry and Scott Howe (see McQueen PSR at 10-14), and McCoy's assaults on Brian Mulcahy, Beau Powers, and Barry Buchignani. (McCoy PSR at 10-13). The PSR grouped offenses that involved the same victim, identified the highest offense level for that grouping, and made multiple adjustments pursuant to Guidelines § 3D1.4 to reach a total offense level for the various charges against each defendant.

For McQueen, the PSR combined the offense levels for Counts One, Two, and Three, all of which involved his assault on Embry and obstruction of justice relating to the assault. The highest offense level for these three counts was 31, based on the conspiracy and excessive force charges. (McQueen PSR at 11, 13).

[5] Defendants' sentences were calculated based on the 2009 edition of Guidelines.

Starting with the base offense level under Guidelines § 2A2.2 of 14, four levels were added for use of a dangerous weapon (pepper spray), Guidelines § 2A2.2(b)(2)(B), and three levels were added because Embry sustained bodily injury, Guidelines § 2A2.2(b)(3)(A). The PSR added six levels because the offense was committed under color of law, Guidelines § 2H1.1(b)(1)(B), two levels because Embry was restrained, Guidelines § 3A1.3, and two levels because McQueen obstructed justice, Guidelines § 3C1.1. (McQueen PSR at 11, 13).

Using the highest offense level of 31 and adding two points for the grouping of offenses, see Guidelines § 3D1.4, the district court found that McQueen's total offense level was 33, Criminal History Category I, with a Guidelines range of 135-168 months. (R. 190/S. Tr. 13; See McQueen PSR at 16).

The Guidelines calculation for McCoy followed a similar pattern that led to three groupings based on his assaults of Powers, Mulcahy, and Buchignani. The highest offense level applied to McCoy's assault on Mulcahy: 31. (McCoy PSR at 12-13). For both the conspiracy and excessive force charges, beginning with a base of 14, two levels were added because the assault involved more than minimal planning, Guidelines § 2A2.2(b)(1), four levels were added for use of a dangerous weapon (pepper spray), Guidelines § 2A2.2(b)(2)(B), and three levels were added because Mulcahy sustained bodily injury, Guidelines § 2A2.2(b)(3)(A). (McCoy PSR at 12-13). The calculation included an additional six levels because the

offense was committed under color of law, Guidelines § 2H1.1(b)(1)(B), and two levels because McCoy obstructed justice, Guidelines § 3C1.1. (McCoy PSR at 13).

Pursuant to Guidelines § 3D1.4, three points were added to 31 for grouping. Thus, the district court found that McCoy's total offense level was 34, Criminal History Category I, with a Guidelines range 151-188 months. (R. 190/S. Tr. 29). The statutory maximum for Counts One, Two, Five, Six and Seven was 120 months. (R. 190/S. Tr. 29).

Counsel for McCoy briefly argued a request for leniency, yet did not request a particular sentence. (R. 190/S. Tr. 39-44, counsel for McCoy). Counsel for McQueen also briefly argued for leniency, requested a sentence that fell below ten years, and acknowledged that his sentence would be greater than those imposed on defendants who pled guilty. (R. 190/S. Tr. 32-38, counsel for McQueen).

The district court queried the United States about the potential disparity in sentences imposed on defendants who pled guilty compared with McCoy and McQueen. (R. 190/S. Tr. 45). The United States responded that disparate sentences were warranted because: 1) Lafoe, while a supervisor with authority to stop defendants' actions, never used force against any victim; 2) Tyree fully accepted responsibility for his actions and cooperated with the United States; 3) the evidence at trial established the intentional use of force against victims who were

restrained or posed no risk to the officers; 4) both defendants refused to take responsibility for their conduct when they testified at trial; 5) disparate sentences are warranted when defendants plead guilty and others go to trial; and 6) a longer sentence for McCoy and McQueen is not a punishment for choosing to go to trial. (R. 190/S. Tr. 46-54). The United States requested a sentence within the Guidelines range for both defendants. (R. 190/S. Tr. 49, 54, United States).

The district court sentenced both defendants to the statutory maximum of ten years of incarceration for all counts to run concurrently. (R. 190/S. Tr. 55). The district court held that this punishment was "sufficient but not greater than necessary to comply with the purposes set forth in the sentencing statute," it reflected the seriousness of the offenses of conviction, and was a deterrent for similarly situated defendants. (R. 190/S. Tr. 55). The defendants are also subject to two years of supervised release. (R. 190/S. Tr. 56).

SUMMARY OF ARGUMENT

A defendant does not have an unfettered right to counsel of his choice. *Wheat* v. *United States*, 486 U.S. 153 (1988). Even if a defendant waives his right to conflict-free counsel, a court may reject that waiver in order to protect the integrity of the proceedings, the specter of fairness, and to ensure full protection of a defendant's rights. *Id*. at 160, 162. Here, the district court correctly found that counsel who sought to represent McQueen and McCoy had an actual conflict of

interest when the government proffered a plea to only McCoy. Cf. *United States* v. *Hall*, 200 F.3d 962, 966 (6th Cir. 2000). In addition, given the potential for decisions that could benefit one defendant to the detriment of the other defendant, the district court appropriately concluded there was a serious potential for conflict of interest at trial. See *United States* v. *Brock*, 501 F.3d 762, 772 (6th Cir. 2007). Given the actual and potential conflicts of interest, disqualification was warranted. Cf. *Wheat*, 486 U.S. at 164; *Brock*, 501 F.3d at 772.

The district court's sentences were procedurally and substantively reasonable. Defendants cite no cases to support their assertion that the district court cannot make independent factual findings to support a sentence. In fact, it is well established that a district court may make factual findings based on the preponderance of the evidence to support its sentence as long as such findings do not increase the sentence beyond the statutory penalty for the crime found by the jury. *United States* v. *Stewart*, 628 F.3d 246, 256 (6th Cir. 2010) (citing *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)). When, as here, the sentence does not exceed the statutory maximum, there is no error when the court finds facts to support its calculation of an advisory Guidelines range. See *Stewart*, 628 F.3d at 256.

The district court appropriately enhanced the calculations under Guidelines § 3A1.3 because the victims were assaulted by defendants when they were restrained

by handcuffs or by several other officers. There is no exception to this enhancement for actions by a law enforcement officer in a detention facility. See *United States* v. *Carson*, 560 F.3d 566, 588 (6th Cir. 2009), cert. denied, 130 S. Ct. 1048 (2010).

Finally, the below-Guidelines sentences for McCoy and McQueen were substantively reasonable. Disparate sentences are warranted for McCoy and McQueen and the defendants who pled guilty to lesser crimes of conviction and cooperated with the United States by virtue of their plea and cooperation. See *Carson*, 560 F.3d at 586. 18 U.S.C. 3553(a)(6) addresses national consistency between defendants who commits similar crimes and have similar histories, and does not require consistency among codefendants. *Ibid*. Finally, comparison of codefendants' sentences is a discretionary factor, which the district court considered here when it imposed sentences that were below the Guidelines. *United States* v. *Conatser*, 514 F.3d 508, 521 (6th Cir.), cert. denied, 129 S. Ct. 450 (2008).

ARGUMENT

I

THE DISTRICT COURT CORRECTLY CONCLUDED THAT COUNSEL REPRESENTING CODEFENDANTS HAD AN ACTUAL CONFLICT OF INTEREST FOR PLEA NEGOTIATIONS AND A SERIOUS POTENTIAL FOR A CONFLICT OF INTEREST AT TRIAL

A. Standard Of Review

This Court reviews a district court's decision to disqualify counsel based on conflicts of interest for abuse of discretion. *United States* v. *Brock*, 501 F.3d 762, 771 (6th Cir. 2007). This review is a "generous one"; a district court's ruling to disqualify counsel "is to be given wide latitude" and "upheld unless 'arbitrary' or 'without adequate reasons.'" *United States* v. *Swafford*, 512 F.3d 833, 839 (6th Cir.) (quoting *United States* v. *Mays*, 69 F.3d 116, 121 (6th Cir. 1995), cert. denied, 517 U.S. 1246 (1996)), cert. denied, 129 S. Ct. 329 (2008); see *Wheat* v. *United States*, 486 U.S. 153, 163 (1988) (a reviewing court must give "substantial latitude" to a district court's disqualification of counsel for conflicts of interest).

B. Discussion

Defendants assert (Br. 14-17), that the district court abused its discretion in disqualifying their original counsel because the defendants' negotiation and trial strategy did not change with the appointment of new counsel. Defendants' argument is flawed and should be rejected. The district court correctly concluded that the same law firm's representation of both defendants created an actual

conflict of interest in plea negotiations and a "serious likelihood of a conflict" of interest at trial that warranted disqualification. (R. 116:2, district court order).

In *Wheat*, 486 U.S. at 159, the Supreme Court explained that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Therefore, "the right to choose one's own counsel is circumscribed" when it presents an actual or potential conflict of interest. *Ibid*. Dual representation of codefendants raises "special dangers" that requires a court to examine the possible conflicts of interest and consider disqualification. *Id*. at 159, 164. Federal Rule of Criminal Procedure 44 reflects that judgment.

In addition, a defendant may waive his right to conflict-free counsel, but a court need not accept the waiver. *Wheat*, 486 U.S. at 160; see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (a defendant may not "demand that a court honor his waiver of conflict-free representation"). A court has an "independent interest" in ensuring that a trial is fair, that the integrity of the proceedings is maintained, and that the trial is "conducted within the ethical standards of the profession." *Wheat*, 486 U.S. at 160. Thus, a court may decline a defendant's waiver of counsel's conflict of interest not only when there is an "actual conflict of interest," but also "in the more common cases where a potential

for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Id*. at 162-163; see *id*. at 164.

Following the principles set forth in *Wheat*, this Court has upheld the disqualification of counsel who sought to simultaneously represent codefendants when such action would create an actual or serious potential for a conflict of interest. See *United States* v. *Brock*, 501 F.3d 762 (6th Cir. 2007); *Mays*, 69 F.3d at 121; *Serra* v. *Michigan Dep't of Corr.*, 4 F.3d 1348 (6th Cir. 1993), cert. denied, 510 U.S. 1201 (1994); see also *Swafford*, 512 F.3d at 839-841. In *Brock*, 501 F.3d at 772, this Court upheld the district court's disqualification of counsel who had a "serious conflict of interest" in representing two defendants charged with a "common scheme to bribe" an individual and with "interlocking proof" against each defendant because it may have been in the interests of one defendant to plead and testify against the other. The district court also noted that if both clients were found guilty, counsel would be improperly constrained from arguing that one defendant warranted a lesser sentence than the other due to the other's purported, greater culpability. *Id*. at 766; see *Serra*, 4 F.3d at 1352-1354 (counsel had a conflict in questioning a prior client awaiting sentencing who would testify at the trial of a second client, who sought to shift blame to the codefendant).

Here, the district court held a hearing pursuant to Federal Rule of Criminal Procedure 44(c) to assess whether defendants' representation by the same law firm

created a conflict of interest. (See R. 115, Transcript of Rule 44(c) hearing). The district court properly rejected the defendants' waivers and accurately concluded that counsel had an actual conflict of interest due to the government's then-pending offer to negotiate a plea with McCoy. See *Wheat*, 486 U.S. at 160, 163-164; *Brock*, 501 F.3d at 772; *United States* v. *Hall*, 200 F.3d 962, 966 (6th Cir. 2000); *Thomas* v. *Foltz*, 818 F.2d 476, 481-482 (6th Cir.), cert. denied, 484 U.S. 870 (1987); (R. 115/D. Tr. 29). The plea offer to McCoy would have resulted in a lesser sentence than if he was convicted in return for testimony against the firm's other client, McQueen. Thus, counsel faced an inherent, unavoidable conflict because he could not simultaneously advocate and protect the interests of both clients. Cf. *Brock*, 501 F.3d at 772; *Hall*, 200 F.3d at 966; *Thomas*, 818 F.2d at 481-482. When a court "justifiably finds an actual conflict of interest," as it did here, "there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented." *Wheat*, 486 U.S. at 162; see *Mays*, 69 F.3d at 122.

In addition, the district court correctly identified various ways in which the defendants' shared representation at trial created a "serious likelihood of a conflict" of interest due to the clients' potentially divergent interests. (R. 116:2, Order; see R. 115/D. Tr. 11-12, 29). The conspiracy charge against both defendants (Count One), the excessive force charge against both defendants (Count

Seven), and the fact that McCoy witnessed at least one of McQueen's assaults are situations where a witness's testimony could be more prejudicial to one defendant than another. Cf. *Brock*, 501 F.3d at 772 ("interlocking proof" for conspiracy to bribe created a "classically 'suspect situation'" for counsel seeking to represent codefendants).[6] Counsel also would have a conflict in arguing defendants' varying culpability at sentencing since an effort to minimize the guilt of one client raises the specter that the other client was more deserving of punishment. (See R. 115/D. Tr. 12, court). Because the fairness and integrity of the proceedings could not be ensured through defendants' shared representation, disqualification was warranted. See *Wheat*, 486 U.S. at 164; *Brock*, 501 F.3d at 772; *Serra*, 4 F.3d at 1352-1354.[7]

Defendants appear to assert (Br. 15 n.2, 16), that since McCoy did not plead guilty, and since their trial strategy did not change with new, separate counsel, the district court abused its discretion in disqualifying original counsel. The appropriateness of the district court's ruling is not dependent on subsequent events, but is assessed based on the context and information known to the district court *at*

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[6] While the Indictment does not identify defendants' joint participation in any of the Overt Acts, McCoy and McQueen participated in the assaults on Powers and Embry and McCoy observed McQueen's assault on Howe.

[7] The defense theories need not be "intrinsically antagonistic," as asserted in *Serra*, 4 F.3d at 1351, for a court to find that dual representation raises the serious potential for a conflict of interest at trial. Knowledge of confidential information can have an undue influence at trial. See *id*. at 1352. Moreover, unknown evidence or "unforeseen testimony" can also change the relationship between codefendants. *Wheat*, 486 U.S. at 163.

the time the district court made its decision. See *Wheat*, 486 U.S. at 162-163 ("substantial latitude" that must be given to a trial court's assessment of conflicts is due, in part, to its need to assess the potential for conflict when the "likelihood and dimension of nascent conflicts of interest are notoriously hard to predict"); *Serra*, 4 F.3d at 1352-1354. McCoy's subsequent declination of the government's offer to enter into a plea bargain does not eliminate the conflict that existed during the pendency of the plea offer. Cf. *Wheat*, 486 U.S. at 163-164. In addition, defendants' assertion that their trial "strategy" did not change (Br. 16) is not amenable to examination or scrutiny by the United States or this Court. A counsel's strategy regarding its presentation of a defense and cross-examination of adverse witnesses cannot be known with certainty prior to trial nor can it be measured or compared post-hoc.

Finally, there is no support for defendants' suggestion (Br. 16) that disqualification is only warranted when there is a "power differential" between defendants. To be sure, a difference in defendant's respective culpability can influence the conflicts assessment as different culpabilities may influence a defendant's interest in a plea. See *Hall*, 200 F.3d at 965-966. However, that is not the only situation in which dual representation creates an actual or serious potential for a conflict of interest. Accordingly, the district court had ample grounds to conclude that disqualification was warranted here based on the actual conflict with

plea negotiations and the potential conflicts at trial. Cf. *Wheat*, 486 U.S. at 163-164; *Brock*, 501 F.3d at 772.

II

DEFENDANTS' SENTENCES ARE PROCEDURALLY AND SUBSTANTIVELY REASONABLE

A. Standard Of Review

Sentences must be procedurally and substantively reasonable, and this Court reviews timely objections to reasonableness for an abuse of discretion. *United States* v. *Brooks*, 628 F.3d 791, 795 (6th Cir. 2011). However, if a defendant has a "meaningful opportunity" to raise an objection based on procedural reasonableness immediately after the sentence is rendered, yet does not, challenges raised for the first time on appeal will be reviewed for plain error. See *United States* v. *Vonner*, 516 F.3d 382, 385 (6th Cir.) (en banc) (quoting *United States* v. *Bostic*, 371 F.3d 865, 873 n.6 (6th Cir. 2004)), cert. denied, 129 S. Ct. 68 (2008). Finally, this Court may not consider the merits of a claim that a defendant has waived or conceded in district court. See *United States* v. *Olano*, 507 U.S. 725, 733 (1993); *United States* v. *Denkins*, 367 F.3d 537, 542-544 (6th Cir. 2004).

When timely objections are raised, this Court first must evaluate whether the district court committed procedural error, including a failure to calculate the appropriate range under the U.S. Sentencing Guidelines. *Brooks*, 628 F.3d at 795. This Court reviews the district court's legal interpretation of the Guidelines *de*

novo and factual determinations for clear error. *Id*. at 796; *United States* v. *Stewart*, 628 F.3d 246, 256 (6th Cir. 2010). "A sentencing explanation is adequate if it allows for meaningful appellate review," which means the court's decision shows that the court considered the parties' arguments and had a reasoned basis for its decision. *Brooks*, 628 F.3d at 796.

A sentence may be substantively unreasonable if it is arbitrary, based on impermissible factors, fails to consider all of the factors identified in 18 U.S.C. 3553(a), or unreasonably weighs a particular statutory factor. *Brooks*, 628 F.3d at 796; *United States* v. *Simmons*, 501 F.3d 620, 625 (6th Cir. 2007). Sentences within and, as here, below the Guidelines range are presumed to be reasonable. *Brooks*, 628 F.3d at 796; *United States* v. *Vassar*, 346 F. App'x 17, 28 (6th Cir. 2009), cert. denied, 130 S. Ct. 2243 (2010); *United States* v. *Curry*, 536 F.3d 571, 573 (6th Cir.), cert. denied, 129 S. Ct. 655 (2008).

B. The District Court Had Authority To Find Facts To Support Its Determination That Defendants' Base Offense Level Is The Level For Aggravated Assault

Defendants assert (Br. 18-19), without citation, that the district court incorrectly calculated their base offense level for aggravated assault under Guidelines § 2A2.2. Defendants argue (Br. 18-19), that the jury verdict does not support "serious bodily injury" because the jury was instructed only that a felony violation of 18 U.S.C. 242 requires "bodily injury." This claim is without merit.

In applying the Guidelines, the district court may find facts based on the preponderance of the evidence. *Stewart*, 628 F.3d at 256; *United States* v. *Mayberry*, 540 F.3d 506, 516-517 (6th Cir. 2008). The limitation on a district court's factual findings at sentencing is that it may not find facts that "increase[] the penalty for a crime beyond the prescribed statutory maximum." *Stewart*, 628 F.3d at 256 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)). Here, the district court sentenced defendants to the statutory maximum penalty for violation of 18 U.S.C. 242 resulting in "bodily injury." Thus, nothing bars the district court from finding facts as part of its calculation of a Guidelines advisory range, including findings that defendants committed aggravated assault as defined in Guidelines § 2A2.2. See *Mayberry*, 540 F.3d at 516-517.

C. The District Court Properly Applied The Enhancement For Unlawful Restraint Under Guidelines § 3A1.3 Because The Arrestees Were Handcuffed Or Otherwise Restrained During Defendants' Assaults

McCoy and McQueen do not challenge the sufficiency of the evidence supporting an enhancement for restraint. Instead, they argue (Br. 19-20), that the district court inappropriately double-counted the victims' restraint under Guidelines § 3A1.3 because restraint is implicitly covered by the defendant's actions under color of law and in a detention facility pursuant to Guidelines § 2H1.1(b). The district court appropriately increased the offense level for both defendants pursuant to Guidelines § 3A1.3 because there is no exception to the

restraint enhancement for action that takes place in a detention facility. See *United States* v. *Carson*, 560 F.3d 566, 588 (6th Cir. 2009), cert. denied, 130 S. Ct. 1048 (2010); see also *United States* v. *Epley*, 52 F.3d 571, 583 (6th Cir. 1995).

Guidelines § 3A1.3 states that a two-level enhancement applies when a victim is "physically restrained." "Physically restrained means the forcible restraint of the victim such as by being tied, bound, or locked up." Guidelines §1B1.1, comment. (n.1(k)). In *Epley*, 52 F.3d at 583, this Court held that an officer's authority to detain an individual, whether or not lawfully exercised, does not include acts of physical restraint that would trigger an enhancement under Guidelines § 3A1.3. Thus, in *Epley*, *ibid*., the district court appropriately enhanced a defendant officer's Guidelines' level under Section 3A1.3 for the officer's use of handcuffs on a victim, even though the victim was placed under false arrest.

In *Carson*, 560 F.3d at 588, this Court held that an officer's lawful detention of an individual by an arrest does not prevent an enhancement for physical restraint under Section 3A1.3 when the evidence supports the enhancement. This Court agreed with the Fifth Circuit that "an underlying consideration" for the enhancement under Section 3A1.3, including in the excessive force context, "is that the physical restraint of the victim during an assault is an aggravating factor that intensifies the willfulness, the inexcusableness and reprehensibleness of the crime and hence increases the culpability of the defendant[s]." *United States* v.

Clayton, 172 F.3d 347, 353 (5th Cir. 1999); see *Carson*, 560 F.3d at 588 ("*Clayton* sets out the appropriate interpretation of § 3A1.3."). Accordingly, an enhancement under Section 3A1.3 for an officer's assault while the victim was handcuffed was not "piling on." *Carson*, 560 F.3d at 588.

Indeed, defendants acknowledged that circuit precedent rejects their position that an enhancement for physical restraint is inherently covered by charges of excessive force against a law enforcement officer. (R. 190/S. Tr. 9 (counsel's argument on behalf of McQueen), 25 (counsel's argument on behalf of McCoy)). Thus, the district court properly rejected defendants' arguments and ruled that there is no exception for the application of Guidelines Section 3A1.3 in a detention setting. (See R. 190/S. Tr. 10, 25). Cf. *Carson*, 560 F.3d at 588; *Clayton*, 172 F.3d at 353.

Defendants also briefly assert (Br. 19-20), that they did not "restrain[] the victims for the purpose of violating the civil rights of pretrial detainees."[8] This specific intent, however, is not a criterion for application of the § 3A1.3 enhancement. Nothing in the Guidelines or commentary supports such a requirement. In *Clayton*, 172 F.3d at 353, the Fifth Circuit held that the

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[8] Given the brevity with which defendants make this assertion, this Court may conclude that the argument does not warrant this Court's review on the merits. See *Barr* v. *Lafon*, 538 F.3d 554, 577 (6th Cir. 2008), cert. denied, 130 S. Ct. 63 (2009).

government need not prove that individual restraints such as handcuffs were used "to facilitate the commission of the offense," as this Court should here. This enhancement under Guidelines § 3A1.3 is consistent with this Court's precedent and should be affirmed. See *Carson*, 560 F.3d at 588; *Clayton*, 172 F.3d at 353; *Epley*, 52 F.3d at 583.

D. McCoy's And McQueen's Sentences Are Substantively And Procedurally Reasonable When Compared To Codefendants Who Pled Guilty To Different Charges Than McCoy And McQueen, And Who Cooperated With the United States

1. McQueen Has Forfeited Any Challenge Based On A Comparison To Codefendants' Sentences

This Court cannot consider the merits of McQueen's claim that his sentence is substantively unreasonable based on the sentences imposed on codefendants who pled guilty because he conceded this distinction during the sentencing hearing. See *Olano*, 507 U.S. at 733; *United States* v. *Denkins*, 367 F.3d 537, 542-544 (6th Cir. 2004) (no appellate jurisdiction to consider a defendant's challenge to his plea when the defendant expressly raised the issue by motion and subsequently abandoned that issue in district court); (R. 190/S. Tr. 37, counsel for McQueen). If a defendant abandons an argument in district court, "that challenge is forever foreclosed, and cannot be resurrected [in an] appeal." *Denkins*, 367 F.3d at 544 (quoting *United States* v. *Saucedo*, 226 F.3d 782, 787 (6th Cir. 2000), cert. denied, 531 U.S. 1102 (2001)); see *United States* v. *Beard*, 394 F. App'x 200, 204 (6th Cir.

2010) (affirmance based on defendant's waiver at trial of a challenge to the introduction of evidence pursuant to Federal Rule of Evidence 404(b)).

At sentencing, counsel for McQueen specifically acknowledged that the district court could impose a longer sentence than that given to other defendants who had entered guilty pleas. (R. 190/S. Tr. 37). In arguing for a just sentence, McQueen's counsel conceded, "[l]et this be clear, however, those convicted by a jury *do not have the right to expect sentences as low as those who pled guilty,* and [McQueen] understands and accepts that." (*Ibid*. (emphasis added)). Given this concession, McQueen's current challenge based on the disparity between his and other codefendants' sentences is waived or forfeited and this Court does not have jurisdiction to consider it. See *Denkins*, 367 F.3d at 542-544; *Saucedo*, 226 F.3d at 787.

Even if considered on the merits, McQueen's claim should be rejected, as discussed below.

2. McCoy's And McQueen's Sentences Are Substantively And Procedurally Reasonable

McCoy and McQueen assert (Br. 21-24), that their 10-year sentences are substantively unreasonable due to the disparity between those and the 12- and 18-month sentences given to, respectively, codefendants Kristine Lafoe and Scott Tyree. This claim is without merit.

18 U.S.C. 3553(a)(6) states that a court should consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." This Court has repeatedly held that Section 3553(a)(6) addresses the *national* disparities among defendants with similar criminal histories who are convicted of similar conduct. *Carson*, 560 F.3d at 586; *United States* v. *Conatser*, 514 F.3d 508, 521 (6th Cir.), cert. denied, 129 S. Ct. 450 (2008); *United States* v. *Simmons*, 501 F.3d 620, 623-624 (6th Cir. 2007); *United States* v. *LaSalle*, 948 F.2d 215, 218 (6th Cir. 1991). Section 3553(a)(6) does *not* require a court's consideration of disparities between codefendants. *Conatser*, 514 F.3d at 521; *Simmons*, 501 F.3d at 623. A district court, however, has the *discretion* to consider the disparity in sentences between codefendants. *United States* v. *Presley*, 547 F.3d 625, 631 (6th Cir. 2008) (citing *Simmons*, 501 F.3d at 624) (affirmed court's discretion to reduce a defendant's sentence on remand based on the disparity with a codefendant who pled guilty); *Conatser*, 514 F.3d at 521.

Codefendants' disparate sentences are "legitimate" and "perfectly reasonable" when one defendant cooperates with the government and enters a guilty plea and another defendant proceeds to trial and asserts his innocence. *Carson*, 560 F.3d at 586; see *Conatser*, 514 F.3d at 522; *United States* v. *Dexta*, 470 F.3d 612, 616 n.1 (6th Cir. 2006), cert. denied, 551 U.S. 1171 (2007). A

disparity alone does not establish that a district court has punished a defendant for proceeding to trial. See *United States* v. *Frost*, 914 F.2d 756, 774 (6th Cir. 1990). Moreover, the distinction between defendants who plead guilty to lesser offenses of conviction and defendants who go to trial and are convicted are "valid reason[s]" for significant disparities in sentences among codefendants. *Conatser*, 514 F.3d at 522; see *Vassar*, 346 F. App'x at 17, 28 ("an important difference justifies the disparity" in Vassar's and codefendants' sentence: "Vassar's coconspirators accepted responsibility for their criminal conduct and cooperated with law enforcement; Vassar did not."). In *Conatser*, 514 F.3d at 522, this Court rejected claims that Conatser's sentence of 70 months was substantively unreasonable because, in part, codefendants received probationary sentences after they pled guilty.[9] See *United States* v. *Stewart*, 628 F.3d 246, 251-252, 260 (6th Cir. 2010) (Stewart's post-trial sentence of 720 months was not substantively unreasonable in light of three other codefendants who were sentenced to 60 months, 162 months, and 211 months because Stewart engaged in more aggravated conduct, the three other codefendants pled guilty, and two codefendants testified at

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[9] In *Conatser*, 514 F.3d at 526, this Court also rejected claims that defendant Marlowe's life sentence was substantively unreasonable when compared to codefendant Hale's sentence of 108 months. The two defendants were not similarly situated in various respects, including different actions that contributed to a detainee's death. *Id*. at 525-526. In addition, while Marlowe went to trial, Hale's "decision to plead guilty and cooperate with the government may be a valid reason for such sentencing disparity." *Id*. at 526.

Stewart's trial). Thus, the disparity in sentences between a defendant who pleads guilty and cooperates with the government and a defendant who proceeds to trial is warranted because these defendants are not similarly situated. See *Conatser*, 514 F.3d at 522, 526.

Here, codefendants Kristine Lafoe, Scott Tyree, and Anthony Estep pled guilty to various charges pretrial. Lafoe pled guilty to conspiracy to commit falsification of records, 18 U.S.C. 371, and she was sentenced to 12 months' incarceration. (See Lafoe Information; Lafoe Minutes of Arraignment and Plea at 1; Lafoe Judgment at 2, Case No. 5:09CR00084 (E.D. Ky.)).[10] Tyree pled guilty to conspiracy to violate rights, 18 U.S.C. 241, and he was sentenced to 18 months' incarceration. (R. 103, plea agreement; R. 147, Tyree judgment). Tyree cooperated with the United States and testified at trial. (R. 184/Tr. 3:120-200, Tyree). Tyree's testimony was significant in addressing McQueen's and McCoy's assaults on

[10] On February 22, 2011, McCoy filed a Motion To Take Judicial Notice Of Court Documents And Records, which attached copies of the cited pleadings for Lafoe. In addition, McCoy's motion included copies of the following pleadings for Estep: the Information, Minutes of Estep's Arraignment and Plea, and Estep's Judgment. Estep pled guilty to one count of deprivation of rights under color of law, 18 U.S.C. 242, and obstruction of justice, 18 U.S.C. 1512(d)(2), and he was sentenced to 12 months and one day's incarceration. (See Estep Information; Estep Minutes of Arraignment and Plea at 1; Estep Judgment at 2, No. 5:09CR00083 (E.D. Ky.)). Defendants have not challenged a comparison of their sentences to Estep's.

Howe, Buchignani, Embry, and Mulcahy, and the preparation of false reports regarding these incidents. (R. 184/Tr. 135-179, Tyree).

Lafoe and Tyree are not similarly situated to McCoy (or McQueen, if his claims are considered on the merits). Lafoe was a supervisor who witnessed some of the assaults at issue and who "set the tone" for acceptable behavior for the Third Shift Intake Unit. (See R. 184/Tr. 3:188, 190-191, Tyree). Lafoe directed staff officers to alter their reports to falsely describe or falsely justify McQueen's and McCoy's use of force against arrestees. (R. 183/Tr. 1:66-67, Chumbley; R. 186/Tr. 2:67, Stanger; R. 184/Tr. 3:23-24, Roberts). Unlike McCoy and McQueen, however, Lafoe never used force against any of the detainees. (See R. 190/S. Tr. 46, counsel for United States).

Defendants assert, (Br. 22), that Tyree "was involved in exactly the same activity as the Appellants." Tyree admitted he used excessive force against some detainees (*e.g.*, R. 184/Tr. 3:135, 147-148, Tyree), yet the evidence at trial did not reflect that Tyree engaged in the same degree of violence or routine use of force as McQueen or McCoy. (See R. 184/Tr. 3:141-142, 176-177, Tyree); see generally, pp. 6-24, *supra*. More significantly, unlike McCoy and McQueen, Tyree fully accepted responsibility for his unlawful conduct, pled guilty, and cooperated extensively with the United States. Thus, the differences in Lafoe and Tyree's conduct, the different offenses that underlie Tyree and Lafoe's guilty pleas, their

pleas, and Tyree's cooperation with the United States individually and collectively are "valid reasons" and "legitimate co-defendant disparities" that warrant the different sentences imposed on McCoy and McQueen. Cf. *Carson*, 560 F.3d at 586; *Conatser*, 514 F.2d at 522; see *Stewart*, 628 F.3d at 251-252, 260.

Defendants assert that the district court should have imposed a lower sentence that reduced the difference in codefendants' sentences, yet they fail to explain how an appropriate sentence should be calculated, or how the current sentences are an abuse of discretion. Because the district court imposed sentences that already are below the Guidelines range, McCoy and McQueen stand on "especially shaky ground" to assert that their sentences should be even lower because of the disparity with sentences for codefendants who entered pleas and cooperated with the government. *Vassar*, 346 F. App'x at 29.[11]

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[11] In addition, defendants' suggestion (Br. 24-25), that there will always be a five-level disparity under the Guidelines between defendants who go to trial and defendants who plead guilty is erroneous. Two points of the five-point differential addressed by defendants was an enhancement for obstruction of justice; an enhancement that, to be sure, is not included in every calculation of a sentence for a defendant who goes to trial. See Guidelines § 3C1.1. Similarly, not all defendants who plead guilty receive a three-point reduction in their offense level for accepting responsibility. See Guidelines § 3E1.1, comment. (n.3) (a defendant who pleads guilty does not have a right to an adjustment under this Guideline "as a matter of right"). Guidelines § 3E1.1(a) permits a two-level reduction for acceptance of responsibility when certain criteria are met, and a third point is given only when additional factors are present, including a defendant's admission of guilt "particularly early" in the criminal proceedings. Guidelines § 3E1.1(b), comment. (n.6).

Finally, defendants' assertion (Br. 24-25), that the district court abused its discretion because it did not make more specific findings regarding the sentencing disparities among codefendants as part of its Section 3553 analysis should be rejected.[12] As this Court explained, a district court's sentencing determination must provide enough detail to allow for "meaningful appellate review." *Brooks*, 628 F.3d at 796; *Dexta*, 470 F.3d at 615. This Court does not require that a district court provide a specific level of detail in its sentencing decisions. See *Brooks*, 628 F.3d at 796 (citing *Rita* v. *United States*, 551 U.S. 338, 356 (2007)).

Here, as the defendants note (Br. 29), the district court heard argument on the issue of a sentencing disparity among codefendants and requested argument by the United States. (See R. 190/S. Tr. 45). The district court's reduction of McCoy's and McQueen's sentences below the Guidelines range implicitly reflects its consideration of all of the factors it addressed during the hearing, including the sentences imposed on the other codefendants. Where, as here, the record shows that the district court considered all of the Section 3553(a) factors, and further considered the *discretionary* factor of the differences in codefendants' sentences, the defendants fail to show that the court's sentences are procedurally unreasonable

[12] Defendants' argument fails whether it is reviewed for plain error, see *Vonner*, 516 F.3d at 385-386, (190/S. Tr. 57), or abuse of discretion. See *Dexta*, 470 F.3d at 614-615.

because of the lack of additional detail. Cf. *Dexta*, 470 F.3d at 615. Accordingly, defendants' sentences are procedurally and substantively reasonable.

CONCLUSION

McCoy and McQueen's respective convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Corrected Brief For The United States As Appellee does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). This brief has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font and contains 11,064 words.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Dated: March 17, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2011, I electronically filed the foregoing Corrected Brief For The United States As Appellee with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

ADDENDUM

DESIGNATION OF RELEVANT RECORD DOCUMENTS

DOCKET NUMBER	DOCUMENT DESCRIPTION
1	Indictment
31	Conflict of Interest Waiver by John McQueen
32	Conflict of Interest Waiver by Clarence McCoy
103	Plea Agreement for Scott Tyree
108	Government's Motion for Hearing Pursuant to Fed. R. Crim. P. 44(c) and to Disqualify Counsel
109	McQueen's Response to Government's Motion for Hearing and to Disqualify Defense Counsel
110	McCoy's Response to Government's Motion for Hearing and to Disqualify Defense Counsel
115	Transcript of Attorney Disqualification Hearing, August 24, 2009
116	Order re: Disqualification of Counsel, August 26, 2009
137	Verdict form
138	Exhibit and Witness List: Government Exhibit 3: Howe Video Government Exhibit 6: Buchignani Video Government Exhibit 9b: Embry Video Government Exhibit 20: Mulcahy Video Government Exhibit 22: Johnson Video
	Government Exhibit
147	Judgment for Scott Tyree
172	McQueen's Judgment
173	McCoy's Judgment
174	McCoy's Notice of Appeal
176	McCoy's Presentence Report (Sealed)
178	McQueen's Presentence Report (Sealed)
181	McQueen's Notice of Appeal
183	Trial Transcript, Volume 1 of 4, May

	10, 2010
184	Trial Transcript, Volume 3 of 4, May 12, 2010
185	Trial Transcript, Volume 4 of 4, May 13, 2010
186	Trial Transcript, Volume 2 of 4, May 11, 2010
190	Sentencing Transcript for McCoy and McQueen, August 31, 2010