Nos. 12-10840-CC, 12-10841, 12-11379

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant

v.

ALEXANDER McQUEEN,
STEVEN DAWKINS,

Defendants-Appellants-Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1, Federal Rule of Appellate Procedure, and Rule 26.1-1, Eleventh Circuit Rules, counsel for Appellee-Cross-Appellant United States of America certifies that, in addition to those persons identified in appellants' opening brief, the following person may have an interest in the outcome of this case:

1) Perez, Thomas E., Assistant Attorney General, Civil Rights Division, Department of Justice, counsel for Appellee-Cross-Appellant.

Dated: September 6, 2012

s/Angela M. Miller
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STATEMENT REGARDING ORAL ARGUMENT

The government respectfully requests oral argument in this case.

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BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231 and entered final judgment against defendants on January 30, 2012. R.249-250.[1] Defendants filed timely notices of appeal on February 9, 2012. R.254-255. The government filed a timely

[1] Citations to "R.__" refer to filed district court documents. Citations to "GX __" refer to government exhibits admitted at trial.

notice of a cross-appeal of the defendants' sentences on March 9, 2012. R.266. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742(b).

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports McQueen's conspiracy conviction.

2. Whether defendants' obstruction convictions are supported by sufficient evidence.

3. Whether the district court correctly instructed the jury on the elements of conspiracy, and whether the district court properly declined to give defendants' requested jury instructions on (a) accomplice/informer/witness with immunity and (b) multiple conspiracies.

4. Whether the district court abused its discretion in denying defendants' motions for new trials based upon their allegation that the government improperly bolstered the testimony of a witness.

5. Whether the district court abused its discretion in denying defendants' motions for new trials based upon the court's evidentiary rulings.

6. Whether defendants' sentences are substantively unreasonable where the district court significantly departed from defendants' recommended Guideline ranges to avoid creating what the court considered an unwarranted sentencing disparity with a co-defendant who pleaded guilty to a misdemeanor violation. (Cross-appeal)

STATEMENT OF THE CASE

1. Course Of Proceedings And Dispositions Below

Alexander McQueen, a Sergeant at the South Florida Reception Center (SFRC), and Steven Dawkins, a SFRC correctional officer, were jointly charged with Guruba Griffin and Scott Butler, two SFRC officers, in a three-count superseding indictment with conspiring to deprive inmates of their rights to be free from cruel and unusual punishment, in violation of 18 U.S.C. 241 (Count 1). R.121. McQueen (Count 2) and Dawkins (Count 3) were also charged with obstruction of justice, in violation of 18 U.S.C. 1519, after writing false reports about the events giving rise to Count 1. R.121.

A jury found McQueen guilty on Counts 1 and 2 (R.198); that same jury found Dawkins not guilty on Count 1 but guilty on Count 3 (R.199). A separate jury acquitted Butler (R.200) and failed to reach a verdict with respect to Griffin (R.278 at 19). The court ordered a mistrial with respect to Griffin, who subsequently pleaded guilty to a misdemeanor violation of 18 U.S.C. 242. R.229.

McQueen and Dawkins were sentenced to 12 months' and one month's imprisonment, respectively. R.249-250. These appeals followed. R.254-255; R.266.

2. Standards Of Review

This Court reviews *de novo* the sufficiency of the evidence supporting a criminal conviction. It must examine the evidence in the light most favorable to the government and resolve all reasonable inferences and credibility issues in favor of the guilty verdicts. *United States* v. *Suba*, 132 F.3d 662, 671 (11th Cir. 1998). (Issues 1 and 2)

This Court reviews for abuse of discretion:

a. a district court's decision not to give a requested jury instruction, *United States* v. *Carrasco*, 381 F.3d 1237, 1242 (11th Cir. 2004) (Issue 3);

b. a district court's decision denying a defendant's motion for a new trial, *United States* v. *Anderson*, 326 F.3d 1319, 1326 (11th Cir. 2003) (Issue 4); and,

c. a district court's evidentiary rulings, *United States* v. *Walker*, 59 F.3d 1196, 1198 (11th Cir. 1995) (Issue 5).

This Court reviews a district court's sentencing decision for procedural and substantive reasonableness, and applies a deferential abuse of discretion standard. *Gall* v. *United States*, 552 U.S. 38, 41, 128 S. Ct. 586, 591 (2007); *United States* v. *Talley*, 431 F.3d 784, 785 (11th Cir. 2005) (Issue 6/cross-appeal).

STATEMENT OF FACTS

1. Background

The South Florida Reception Center (SFRC) is an "intake and processing" correctional facility that houses, among other inmates, "youthful offenders." R.272 at 38, 71. Youthful offenders, or YOs, include inmates who committed felony offenses at a young age and were sentenced to over a year in prison. R.272 at 85-86, 127. YOs are housed in SFRC's Bravo Dorm and are separated from the rest of the inmate population. R.272 at 72-74. By most accounts, YOs are impulsive, irrational, and prone to fighting. R.272 at 74; R.281 at 110, 131; R.284 at 76-77. Correctional officers are nonetheless responsible for providing for the care, custody, and control of YOs. R.272 at 75. This includes protecting YOs from themselves, other YOs, adult offenders, and officers. R.272 at 75, 87-88. In fact, officers have a duty to protect YOs from other officers, intervene if another officer is abusing a YO, and report any incident involving harm toward a YO. R.272 at 88-91; R.274 at 163; R.281 at 142; R. 284 at 39-41.

All correctional officers at SFRC must complete training at the Miami-Dade Academy. R.272 at 96. There, officers are taught that using excessive force against inmates can violate the inmates' Eighth Amendment right to be free from cruel and unusual punishment. R.272 at 96-97. They are also taught that violations of federal law, such as using excessive force against an inmate, are

investigated by federal agencies. R.272 at 96. These principles are repeated during in-service training at SFRC. R.272 at 97.

Officers receive mandatory training on report writing (R.272 at 66-67; R.281 at 92), and are taught both at the academy and through in-service training that they are obligated to report to their supervisors any use of force on, or injury to, an inmate (R.272 at 91, 100-101; R.274 at 162; R.281 at 80, 142; R.284 at 40-41). Officers are also taught that they are never allowed to use force as punishment. R.272 at 99; R.274 at 162; R.284 at 40-41.

SFRC officers are required to maintain a Housing Unit Log, which is a 24-hour log of all activities that take place in the dorm. R.272 at 102; R.281 at 94. The log is supposed to contain current and accurate information as events unfold. R.272 at 120. Routine entries include an equipment inventory, the identity of the officer who conducts the master roster count, and the time and the results of the count. R.272 at 103. Mandatory entries include "events" such as inmate fighting, uses of force, and inmate injuries. R.272 at 103-104, 183; R.281 at 94-95, 142-143. These "events" should also be communicated to SFRC's control room, which maintains its own log. R.272 at 104-105. Any events recorded on the Housing Unit Log, such as an inmate fight, should be mirrored on the control room log. R.272 at 105. The purpose of the Housing Unit Log is to create a "paper trail" in the event "there's ever questions about what happened." R.272 at 104.

2. February 25, 2009

On February 25, 2009, Sergeant Alexander McQueen and Officer Steven Dawkins were assigned to work the evening shift at SFRC's Bravo Dorm. R.272 at 69, 108-109; R.281 at 83. Officers Guruba Griffin and Scott Butler were also working that night. R.272 at 108-109. Griffin, like defendants, was assigned to the Bravo Dorm; Butler was not. R.272 at 69, 108-109; R.281 at 75-77, 83.

Officers working the evening shift must conduct a "master roster count" of all inmates to verify that each inmate assigned to SFRC is physically present in his assigned cell. R.272 at 70, 87. Shortly before the master roster count that evening, inmates J.B. and M.W. fought in an empty cell on the second floor of the Bravo Dorm.[2] R.273 at 41, 166-168; R.274 at 54-55, 120-121, 191; R.284 at 141-142; R.281 at 14. J.B. won the fight and returned to his cell when the master roster count was announced. R.273 at 43, 168. M.W. remained in the empty cell, bleeding from a cut to his forehead. R.273 at 43-44, 168-169.

Griffin conducted the master roster count that evening. R.272 at 124. He saw M.W. in the empty cell, noticed his injury, and asked who he had been fighting. R.274 at 56; R.281 at 18. When M.W. refused to answer, Griffin ordered

[2] The fight followed an accusation that M.W. ate J.B.'s honeybun. It may also have been the result of J.B. finding personal pictures of M.W. R.281 at 30.

all inmates in Bravo Dorm's third wing[3] to report to the dayroom. R.273 at 44-45; R.273 at 169; R.281 at 17. Griffin demanded to know who had been fighting, but none of the inmates responded. R.274 at 57, 191; R.284 at 143. Griffin left to finish the count, but told the inmates he would be back and expected an explanation. R.273 at 169.

Griffin returned with defendants.[4] R.273 at 46, 171; R.274 at 58. When the inmates failed to give an explanation, Griffin took a piece of broomstick that McQueen had broken in two and ordered inmate R.L., the dorm's "houseman,"[5] to place his hands on the back of a bench. R.273 at 172-173, 193. Griffin demanded that R.L. disclose who had been fighting, but R.L. did not. R.273 at 174. Griffin then repeatedly struck R.L.'s hands with the broken broomstick – hard enough to cause R.L. to scream – as defendants watched. R.273 at 174; R.274 at 62-63; R.284 at 146-147.

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[3] The Bravo Dorm has three wings; inmates are assigned to a particular wing and cannot move freely among the wings. R.272 at 78, 132-133.

[4] Some inmates testified that Butler was also present. The testimony relating to Butler's presence and involvement, however, was inconsistent across witnesses. As Butler was acquitted of the civil rights conspiracy, his role is not highlighted.

[5] A houseman cleans up after a shift change and does most of the work inside the dorm. R.273 at 34, 160.

The officers called M.W. down to the dayroom and demanded to know who he had fought. R.273 at 48, 171-172; R.274 at 60, 124. M.W. would not answer, so McQueen hit him multiple times with the broken broomstick. R.274 at 60, 125, 195; R.281 at 18-19. McQueen then grabbed M.W. and slammed him to the floor. R.273 at 49; R.274 at 61, 196; R.281 at 19; R.284 at 145. When M.W. stood up, "blood [was] squirting out of his head." R.284 at 145; see also R.274 at 125, 197; R.281 at 19. Although Griffin and Dawkins were present, they did not stop the assault; instead, they "were going along with it." R.273 at 50. M.W. was eventually taken outside the dayroom. R.274 at 126, 198; R.284 at 53.

Griffin then asked if any inmate had a problem with another inmate. R.273 at 50; R.284 at 147. Inmate B.P. indicated he wanted to fight J.B. (R.273 at 172; R.274 at 65-66, 128), so Griffin directed them to fight three, three-minute rounds (R.273 at 53-54, 175; R.274 at 66, 128, 199; R.284 at 149). Griffin told them that they would not be allowed to wrestle, and that they had to break up when he directed them to do so. R.273 at 54; R.274 at 128, 199; R.284 at 149.

B.P. and J.B. began fighting. B.P., who was losing, quickly broke the "rules" by repeatedly grabbing onto J.B. R.274 at 68; R.284 at 150. McQueen and Griffin would then slap J.B. and B.P. in the head and hit them with broomsticks. R.273 at 175-177; R.274 at 199-200; R.284 at 149-150. At one point, B.P. slammed J.B. to the ground. R.273 at 177. One of the officers grabbed B.P. from

behind, told him that wrestling was not allowed, and choked him until he fell to the ground. R.273 at 177; R.274 at 68-69, 129. B.P. was then ordered to continue fighting, which he did, even though he said he wanted to stop. R.274 at 69-70, 200. Dawkins announced the end of the fight after the third round; J.B. and B.P. separated. R.273 at 177. J.B., however, hit B.P. with a "sucker punch." R.273 at 178. Dawkins responded by charging at J.B., kicking and punching him as he lay in a ball on the ground. R.273 at 178. When J.B. stood up, Griffin choked him until he lost consciousness. R.273 at 58-59, 179; R.284 at 152. Officers continued to kick and hit J.B. with broomsticks after he regained consciousness. R.273 at 179-180

The officers then passed around the broomsticks and turned their attention to other inmates in the dayroom. R.273 at 61-62; R.274 at 129-130, 201-203; R.284 at 152-154. For example, Griffin held K.S. as Dawkins hit him for being disrespectful earlier in the day (R.273 at 182-183, 189-190; R.274 at 201, 203; R.284 at 152-153), then Griffin choked K.S. until he lost consciousness (R.273 at 62, 190). Officers also hit C.J. and L.M. with broomsticks. R.272 at 110, 112; R.273 at 181-182; R.274 at 129-130, 201-202; R.284 at 154. Throughout the events of the evening, none of the officers present attempted to stop what was going on. R.273 at 49-52, 174-175; R.274 at 79, 128, 195, 203; R.284 at 57, 147.

At some point after the master roster count was announced, officer Shalisa Rolle came to Bravo Dorm's officer's station. R.284 at 43. According to Rolle, Dawkins was inside the station filling out the count slip while McQueen, Griffin and Butler were in the dayroom, yelling at the inmates. R.284 at 44-46. She saw M.W. holding a cloth to his head outside the dayroom (R.284 at 46-47, 53), and later saw two inmates fighting inside the dayroom (R.284 at 53-56). She did not see any of the officers attempt to stop the fight between the inmates. R.284 at 57. Rolle told the officers they needed to take M.W. to the medical center (R.284 at 54-55); she then left because she did not want "to get involved" (R.284 at 57).[6]

All inmates except J.B., R.L., and M.W. were eventually sent back to their rooms. R.273 at 63; R.274 at 76, 131, 145. J.B. and R.L. were ordered to clean up the dayroom – to include mopping up the blood and disposing of the bloodied, broken broomsticks and the cloth M.W. held to his head (R.273 at 63, 191; R.281 at 21-22); M.W. was taken to the medical unit (R.281 at 24). Griffin instructed

[6] Rolle's testimony was both supported and contradicted by the inmates' testimony. Many inmates testified they saw a female officer present for some portion, but not all, of the events of February 25. R.273 at 61; R.274 at 67, 130-131; R.284 at 150. One inmate testified that Butler instructed Rolle to act as a lookout during the fight. R.284 at 150; cf. R.281 at 41. This same inmate testified that Rolle entered the dayroom when the officers were hitting J.B. and B.P. during their fight, spoke with McQueen, and then left. R.284 at 150-151. Another inmate testified that he heard a female officer say something like, "[W]hat are you guys doing?" or "[Y]ou all should stop." R.273 at 180.

M.W. to tell the nurse that he fell while cleaning the shower; M.W. did so. R.281 at 24.

McQueen later informed his supervisor, Captain Hjardemaal, that an inmate had fallen while cleaning the shower. R.281 at 84. McQueen brought M.W. to Hjardemaal, and Hjardemaal noticed injuries to M.W.'s face. R.281 at 89. Hjardemaal, who did not think the injuries were consistent with a fall, directed McQueen to write an incident report. R.281 at 90. In that report, McQueen stated that he saw M.W. "picking himself up off of the shower floor" with a bleeding "gash" on his head. GX 40. McQueen also reported that M.W. told McQueen he "just fell" while cleaning the shower. GX 40.

Dawkins maintained the Housing Unit Log for Bravo Dorm that night. R.272 at 123; see also GX 6. Dawkins did not include any entries for inmate fighting, injuries, or officers' use of force; rather, he indicated in the log that things were "all secure" throughout the evening. GX 6.

Captain Todd Sharpe learned of allegations of prisoner abuse the next day. R.272 at 106. As part of his initial investigation, he interviewed inmates J.B., K.S., M.W., C.J., L.M., and R.L., and observed their injuries. R.272 at 110-112, 137; GX 5.1, 5.2, 5.3, 5.4, 5.5. Sharpe had received many complaints from prisoners alleging abuse over the course of his career. R.272 at 185. These particular allegations were different, according to Sharpe, given the number of inmates

involved and the nature of their injuries. R.272 at 185-186. Inmates in Bravo Dorm, according to Sharpe, typically receive "[a] black eye" or a "busted lip" from fighting. R.272 at 186. In this case, Sharpe noted a similar bruising pattern to the inmates' injuries. See, *e.g.*, R.272 at 117-119; see also R.272 at 159 (describing the injuries as "repetitive and mirrored on a lot of inmates"), 186 ("[T]he bruising patterns looked the same on one or two inmates or on multiple inmates."). During his time at SFRC, Sharpe had never seen injuries like the ones on these inmates. R.272 at 186.

3. Sentencing

A few days before sentencing defendants, the district court held a telephone conference with parties' counsel to provide counsel "the benefit of [the court's] preliminary views." R.287 at 4. The court indicated that it could not

> in good conscience sentence [defendants], as the guidelines suggest for them, knowing that Mr. Griffin, by the [g]overnment's [plea] agreement, is facing a maximum of 12 months for his conduct and his participation in the acts in question.

R.287 at 5-6. The court invited the government to provide authority indicating whether what the court was contemplating constituted clear error or abuse of discretion. R.287 at 6. The court made clear to the government, however, that it did "not intend to sentence" defendants "to time greater than that to which [it] can sentence Mr. Griffin, that is, 12 months." R.287 at 7.

a. McQueen's Sentencing

Probation calculated McQueen's offense level as 34, with a corresponding advisory Guidelines range of 151-188 months' imprisonment.[7] PSR-McQueen 8-14, 20. The offense level included a base of 14 for the aggravated assault on M.W. See U.S.S.G. § 2A2.2(a). Probation then added: four levels for using a dangerous weapon, U.S.S.G. § 2A2.2(b)(2)(B); three levels for causing bodily injury to M.W., U.S.S.G. § 2A2.2(b)(3)(A); six levels for committing the offense under color of law, U.S.S.G. § 2H1.1(b)(1)(B); and two levels for obstructing justice, U.S.S.G. § 3C1.1; PSR-McQueen 8-9. McQueen's offense level was then adjusted upward five levels for the assaults on J.B., C.J., R.L., B.P., and K.S. U.S.S.G. § 3D1.4; PSR-McQueen 14.

At McQueen's hearing, the district court repeated its intent to sentence defendants in accordance with Griffin's sentence. R.252 at 4. Government counsel argued that a departure was not appropriate because a disparity between defendants' sentences, on the one hand, and Griffin's, on the other, was warranted in this case because Griffin, unlike defendants, pleaded guilty to a misdemeanor. R.252 at 4-5.

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[7] McQueen objected to various factual assertions in the PSR, the application of an adjustment for obstruction, the use of aggravated assault as the underlying offense, and a multiple count adjustment. R.235.

The district court concluded that the PSR correctly calculated McQueen's offense level and advisory Guidelines range. R.252 at 14. The court then explained that it believed McQueen and Griffin were similarly situated, even though Griffin's offense of conviction was "technically" different from McQueen's, because it was merely "fortuitous for Mr. Griffin that the government elected to offer him" the opportunity to plead guilty to a misdemeanor. R.252 at 16. The court reasoned that Griffin was "conveniently in [the] position" of having pleaded to a misdemeanor "because the government gave him the offer to plead to a different offense even though [the court] saw and heard evidence pertaining to the charged acts." R.252 at 15-16. The court indicated that it sought "to formulate an appropriate sentence that, at the end of the day, is fair to all three defendants." R.252 at 16.

The district court rejected the government's argument that McQueen and Griffin were not similarly situated because Griffin ultimately accepted responsibility for his actions. R.252 at 17. The court reasoned that because McQueen was never offered a misdemeanor plea, it was not "a valid comparison." R.252 at 17. The court also asserted that Griffin "never accepted" responsibility because "[h]e went to trial." R.252 at 17. When government counsel argued that Griffin ultimately accepted responsibility by pleading guilty after the mistrial, the court explained that the government "altered the landscape" by charging three

defendants with the same conspiracy and "yet the one * * * that had all of the 404(b) evidence that was so prejudicial it warranted a second jury, that [defendant now] faces the lesser sentence." R.252 at 18.

Thereafter, the district court sentenced McQueen to concurrent terms of 12 months' imprisonment on each count of conviction. R.252 at 25. In reaching this sentence, the court explained that it "focused certainly on the need to avoid unwarranted sentencing disparity among those who are similarly situated," but also considered the defendant's history and characteristics, the seriousness of the offense, and the need for deterrence. R.252 at 24; see 18 U.S.C. 3553(a)(6).

b. Dawkins's Sentencing

Probation calculated Dawkins' offense level at 16, with a corresponding advisory Guidelines range of 21-27 months' imprisonment.[8] The offense level included a base of 14 for obstruction of justice. U.S.S.G. § 2J1.2(a). Probation added two levels because Dawkins abused a position of trust in committing the offense. U.S.S.G. § 3B1.3.

Dawkins' hearing took place immediately after McQueen's. The district court agreed with defense counsel and the government that the two-level abuse of

[8] Dawkins objected to various factual assertions in the PSR and a two-level upward adjustment for his role in the offense under U.S.S.G. § 3B1.3, and argued he was entitled to a four- or two-level decrease for his minor role in the offense. R.236.

trust enhancement was not applicable, and set Dawkins's total offense level at 14, with a corresponding advisory Guidelines range of 15-21 months' imprisonment. R.253 at 10, 12. The court then sentenced Dawkins to one month's imprisonment. R.253 at 18. The court indicated that it gave "careful consideration" to the factors set forth in Section 3553, noting in particular "the defendant's history and personal characteristics," the need to avoid unwarranted sentencing disparities, and the need for the sentence to "reflect upon the seriousness of the offense and provide deterrence to others." R.253 at 17-18. The court stated that it did not "articulate[] as well on this record [its] view with regard to the sentencing disparity issue," but indicated that it made its "remarks known at [the telephone] status conference, as well as in" McQueen's hearing. R.253 at 18.

SUMMARY OF ARGUMENT

1. The evidence was more than sufficient to support McQueen's conviction for conspiracy to violate the rights of inmates at SFRC. Numerous eyewitnesses testified that McQueen and other officers personally attacked inmates and/or stood by and failed to intervene while other officers attacked inmates, despite their duty to protect inmates from other officers. A jury could reasonably conclude from this concert of action among the officers that a conspiracy to violate the rights of inmates existed and that McQueen knowingly joined it.

2. Defendants' convictions for obstruction of justice are supported by sufficient evidence. All courts of appeals to have considered the issue agree that knowledge of a pending or contemplated federal investigation is not an element of Section 1519; rather, the government must prove that the defendant falsified a document with the intent to impede an investigation or matter that happens to be within the jurisdiction of a federal agency. The government proved that here. A jury heard evidence from which it could conclude that an officer was required to record instances of inmate fighting in the Housing Unit Log, and that Dawkins knowingly failed to do so with the intent to impede an investigation into the events of February 25, which clearly fell within federal jurisdiction.

3. The district court correctly charged the jury on the elements of a Section 241 violation, as the instructions mirrored the language of controlling Supreme Court precedent. The district court did not abuse its discretion in denying defendants' requested instructions on (1) inmates who had been granted immunity in exchange for testifying, and (2) multiple conspiracies, as there was no evidence to support either instruction.

4. The district court did not abuse its discretion in denying defendants' motion for a mistrial based upon an allegation of prosecutorial misconduct. The prosecutor's comments concerning witness Rolle's reasons for providing multiple

versions of the events of February 25 were not improper. Even if they were, defendants cannot establish that they were prejudiced by the comments.

5. The district court's evidentiary rulings were not grounds for a mistrial because they were correct. First, Government Exhibit 5 was properly authenticated and admitted as a photographic exhibit, not a testimonial statement, and therefore did not implicate the Confrontation Clause. Even if the Confrontation Clause was implicated, defendants cannot establish prejudice from the exhibit's admission, as numerous other witnesses provided testimony of defendants' guilt. Second, defendants fail to identify any instance in which the district court limited their right to cross-examine witnesses. In any event, defense counsel effectively cross-examined inmates on their character, criminal history, and bias. Third, the Code of Conduct was not admitted to prove the truth of the content of the Code; it was admissible as non-hearsay. Finally, defense counsel admitted at trial that the district court's response to the violation of the sequestration order was correct. A mistrial was therefore not warranted.

6. Cross Appeal. The district court abused its discretion in granting defendants significant downward variances to avoid what it considered an unwarranted disparity in sentencing with a co-defendant who pleaded guilty to a misdemeanor. Defendants were not similarly situated to their co-defendant, as defendants were convicted after trial of felony offenses, and their co-defendant's

sentence reflected the benefit of having pleaded guilty to a lesser offense. Moreover, the district court focused almost exclusively upon the need to avoid unwarranted sentencing disparities when fashioning defendants' sentences, giving too little weight to other sentencing factors.

ARGUMENT

I

SUFFICIENT EVIDENCE SUPPORTED THE JURY'S FINDING THAT A CRIMINAL CONSPIRACY EXISTED AND THAT McQUEEN KNOWINGLY JOINED IT

The district court correctly denied McQueen's motion for a judgment of acquittal on his conspiracy conviction because the jury's guilty verdict was supported by ample evidence. To sustain a conviction for conspiracy, the government must prove (1) "the existence of an agreement to achieve an unlawful objective," here, an agreement to deprive inmates at SFRC of their right to be free from cruel and unusual punishment, and (2) "the defendant's knowing and voluntary participation in the conspiracy." *United States* v. *U.S. Infrastructure, Inc.*, 576 F.3d 1195, 1203 (11th Cir. 2009), cert. denied, 130 S. Ct. 1918 (2010). McQueen argues (Def. Br. 20-23) that there was no evidence of a plan or agreement among McQueen and the other officers to interfere with the inmates' civil rights, nor was there evidence that McQueen joined such a conspiracy. This argument fails.

The government is not required to introduce evidence of a *formal* agreement between McQueen and the other officers present in the dayroom on February 25. *United States* v. *Moore*, 525 F.3d 1033, 1040 (11th Cir. 2008). The government may instead prove that an agreement existed through circumstantial evidence, including proof the defendant committed an act which furthered the purpose of the conspiracy. *Ibid.* An agreement may also be inferred from defendants' "overt acts and concert of action." *United States* v. *Schwartz*, 541 F.3d 1331, 1361 (11th Cir. 2008). The government easily proved that here.

The evidence established, *at a minimum*, that an agreement existed between McQueen and Griffin on the night of February 25 to violate the rights of inmates at SFRC to be free from cruel and unusual punishment. McQueen and Griffin joined in a common plan to use force (and to fail to intervene when others used force) against inmates as a means of punishing them for not following orders. Specifically, the evidence showed that Griffin, in the presence of McQueen, repeatedly hit R.L.'s hands with a broomstick when R.L. would not divulge who had fought with M.W. R.273 at 173-174. And despite McQueen's duty to intervene, he did nothing to stop this assault. R.273 at 174; R.284 at 146-147. The evidence also established that McQueen assaulted M.W. with a broomstick and threw him to the ground, injuring him, when M.W. refused to tell the officers who he had been fighting. R.273 at 48-49; R.274 at 60-61, 124-125, 195-196; R.281 at

18-19; R.284 at 145. Neither Griffin nor Dawkins intervened to stop McQueen's assault on M.W. R.273 at 50.

The evidence further established that Griffin, McQueen, and other officers sanctioned a fight between J.B. and B.P. R.273 at 53-54, 175; R.274 at 66, 128, 199; R.284 at 149. In the presence of McQueen (and others), Griffin set the "rules" for the fight. R.273 at 54, 68; R.274 at 128, 199; R.284 at 149. When the inmates broke the "rules," McQueen stepped in, assaulted the inmates, and ensured that they fought in conformity with the "rules" Griffin had established. R.273 at 175-177; R.274 at 199-200; R.284 at 149-150. McQueen also participated in additional assaults on other inmates in the dayroom. R.273 at 61-62, 181-182; R.274 at 129-130, 201-203; R.284 at 152-154. Although McQueen did not participate in all of these assaults, he nonetheless failed to protect the inmates from the other officers' assaults. R.273 at 49-52, 174-175; R.274 at 79, 128, 195, 203; R.284 at 57, 147.

A reasonable jury could easily infer from this evidence that an agreement existed between McQueen and Griffin (and others) to violate the inmates' civil rights. Moreover, McQueen's overt actions – ensuring (through physical violence) that J.B. and B.P. adhered to the "rules" of the fight, assaulting M.W. for not divulging whom he had fought, and reporting falsely the events of the evening – furthered the purpose of the conspiracy. *Moore*, 525 F.3d at 1040. A reasonable

jury could easily infer from McQueen's and Griffin's concerted actions that McQueen knowingly joined and participated in the conspiracy. *Schwartz*, 541 F.3d at 1361.

McQueen's arguments (Def. Br. 21-22) that the evidence was insufficient to support his conviction because: (1) there was no physical evidence corroborating an assault on M.W.; (2) some of the alleged victims of the assaults did not testify; and, (3) no other defendants were convicted of conspiracy, are easily dismissed. First, the government was not required to present physical evidence of an assault on M.W. – or any other victim.[9] Physical evidence is not needed when numerous eyewitnesses testified to the events that took place in the dayroom, in general, and to McQueen's attack on M.W., in particular. And M.W. himself testified to the details of McQueen's attack.

Second, the fact that some of the victims did not testify is irrelevant. The victims who did testify provided sufficient evidence to support McQueen's conviction for conspiring to deprive inmates of their civil rights. Finally, the fact that no other defendant was convicted of conspiracy does not provide a basis for overturning McQueen's verdict, as this Court has rejected a requirement of

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[9] In any event, the government *did*, in fact, introduce photographs depicting injuries sustained by J.B., R.L., L.M. and C.J. See GX 5. Moreover, J.B. and R.L. disposed of the weapons used in the assault and the shirt M.W. used to stem his bleeding *upon direction of the officers*. R.273 at 63, 191; R.281 at 21-22.

consistent verdicts in conspiracy cases. *United States* v. *Andrews*, 850 F.2d 1557, 1561 (11th Cir. 1988) (en banc) ("Consistent verdicts are unrequired in joint trials for conspiracy: where all but one of the charged conspirators [is] acquitted, the verdict against the one can stand."). In addition, the "inconsistent" verdicts were returned by *separate* juries, and while Griffin was not convicted of conspiracy, neither was he *acquitted* of it. The evidence, however, was more than sufficient to establish that McQueen entered into, and acted in furtherance of, a tacit agreement with (*at least*) Griffin to violate the rights of inmates at SFRC.

II

DEFENDANTS' CONVICTIONS FOR FALSIFYING REPORTS WERE SUPPORTED BY SUFFICIENT EVIDENCE

A. Section 1519 Does Not Require The Government To Prove Knowledge Of A Federal Investigation

Defendants contend that this Court should read Section 1519 to require, as an element of the offense, that a defendant know that his conduct would impede or obstruct a matter that is within federal jurisdiction. Their constitutional,[10]

[10] Defendants' constitutional argument (Def. Br. 26-31) asks this Court to ignore the language of the statute and construe Section 1519 to require knowledge that their actions could obstruct or impede a federal investigation. This argument is unclear. To the extent defendants seem to argue that there must be knowledge of a potential federal matter because the absence of such a requirement raises Federalism concerns, defendants do not explain how such knowledge would affect Congress's authority to enact the statute. To the extent defendants are making a fair warning argument, their argument fails because the language of the statute is

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sufficiency, and jury instruction arguments all appear to be based on that premise. This argument fails, however, because the underlying premise is incorrect, as Section 1519 contains no such requirement.

The Supreme Court has interpreted the phrase "within the jurisdiction of any department or agency of the United States" as a jurisdictional requirement, rather than a fact of which a defendant must be aware. In *United States* v. *Yermian*, 468 U.S. 63, 68, 104 S. Ct. 2936, 2939 (1984), the Supreme Court addressed whether knowledge of federal-agency jurisdiction was required for conviction under 18 U.S.C. 1001, which at the time provided that "[w]hoever, *in any matter within the jurisdiction of any department or agency of the United States* knowingly and willfully … makes any false, fictitious or fraudulent statements or representations, … shall be fined." *Id.* at 68, 104 S. Ct. at 2939 (emphasis added). The Court concluded that the emphasized phrase was "a jurisdictional requirement," whose "primary purpose" was "to identify the factor that makes the false statement an appropriate subject for federal concern," and that the statute "unambiguously dispenses with any requirement" that the government prove that false statements "were made with actual knowledge of federal agency jurisdiction." *Id.* at 68-70, 104 S. Ct. at 2939-2940.

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clear. Defendants' as applied challenge cannot be based upon the effect of the statute in other situations.

The Court explained that this conclusion would be "equally clear" if – as is the case with Section 1519 – the "jurisdictional language *** appeared as a separate phrase at the end of the description of the prohibited conduct." Yermian, 468 U.S. at 69 n.6, 104 S. Ct. at 2940 n.6. The predecessor to Section 1001, which prohibited "knowingly and willfully" making "any false or fraudulent statements or representations, … in any matter within the jurisdiction of any department or agency of the United States," *ibid.*, was worded nearly identically to the present Section 1519. The Court stated that the "most natural reading of this version of [Section 1001] also establishes that 'knowingly and willfully' applies only to the making of false or fraudulent statements and not to the predicate facts for federal jurisdiction." *Ibid.*; cf. *United States* v. *Feola*, 420 U.S. 671, 676-686, 95 S. Ct. 1255, 1259-1265 (1975) (knowledge that victim is federal officer not required for conviction of assaulting federal officer in violation of 18 U.S.C. 111).

Section 1519 should be given the same reading. Section 1519 was enacted nearly 20 years after *Yermian*. Congress's adoption in Section 1519 of language and structure similar to that of Section 1001 (and its predecessor) demonstrates that Congress intended a similar interpretation. "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents ... and that it expect[ed] its enactment[s] to be interpreted in conformity

with them." *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34, 115 S. Ct. 1927, 1930 (1995) (alterations and citation omitted; brackets in original).

The legislative history confirms this interpretation. The Senate Report accompanying the relevant legislation indicates that the intent requirement is independent of the federal jurisdiction requirement. The report explained that, under Section 1519, "[d]estroying or falsifying documents to obstruct any of [various] types of matters or investigations, *which in fact are proved to be within the jurisdiction of any federal agency* are covered by this statute." S. Rep. No. 146, 107th Cong., 2d Sess. 15 (2002) (emphasis added); see *id.* at 14 ("Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, *and such matter is within the jurisdiction of an agency of the United States*.") (emphasis added).

Senator Patrick Leahy, who authored the legislation, explained Congress's intent. 148 Cong. Rec. S7418-S7419 (daily ed. July 26, 2002). "The fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant." *Id.* at S7419. "Rather, the intent required is the intent to obstruct, not some level of knowledge about the agency processes [or] the precise nature of the agency [or] court's jurisdiction." *Ibid.*; see *id.* at S7418 ("[T]his section would create a new

20-year felony which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is, *as a factual matter*, within the jurisdiction of any federal agency or any bankruptcy.") (emphasis added).

The statute unambiguously targets for prosecution a defendant's act of knowingly falsifying a document with the intent to impede or influence an investigation or matter that *happens to be* within a federal agency's jurisdiction. See *supra*. Because the statue is unambiguous in what it prohibits, the rule of lenity (Def. Br. 32-33) does not apply. See *Dean* v. *United States*, 556 U.S. 568, 577, 129 S. Ct. 1849, 1856 (2009) (explaining that a court "must conclude that there is a *grievous ambiguity or uncertainty* in the statute" before invoking the rule of lenity) (emphasis added; citation omitted).

Every court of appeals to have expressly addressed this issue agrees that Section 1519 does *not* require the government to prove the existence, or a defendant's knowledge, of a federal proceeding or investigation. Relying upon the plain language of the statute, the Third Circuit recently held that Section 1519 did not require the government to prove that a defendant police officer "actually knew the 'matter' at issue was within the jurisdiction of the federal government when he falsified documents." *United States* v. *Moyer*, 674 F.3d 192, 208 (3rd Cir. 2012) (stating elements of Section 1519 violation), petitions for cert. pending, Nos. 11-

10507 & 11-10604. Rather, the government "need only prove that [the defendant] knowingly falsified" the documents. *Id.* at 208-209. Rejecting the same arguments defendants make here, the Third Circuit concluded that the government "was required only to prove that (1) [the defendant] intended to impede an investigation into 'any matter' and (2) the matter at issue was ultimately proven to be within the federal government's jurisdiction." *Id.* at 210.

The Second Circuit and the Sixth Circuit similarly "decline[d] to read any such nexus requirement into the text of § 1519." *United States* v. *Gray*, 642 F.3d 371, 378 (2d Cir. 2011); see also *ibid.* ("By the plain terms of [Section] 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime."); see also *United States* v. *Kernell*, 667 F.3d 746, 752-756 (6th Cir. 2012) (same), petition for cert. pending, No. 11-1537; see also *id.* at 754-755 (disagreeing with and rejecting district court decisions that have applied a nexus requirement to Section 1519). This Court, moreover, has upheld under plain error review an instruction that the government was not required to prove that the defendant knew his conduct would obstruct a federal investigation, provided the government proved the investigation the defendant intended to obstruct did, in fact, concern a matter within a federal agency's jurisdiction. *United States* v. *Fontenot*, 611 F.3d 734, 736-738 (11th Cir. 2010), cert. denied, 131 S. Ct. 1601 (2011).

Defendants' related argument (Def. Br. 31-32) that the district court incorrectly instructed the jury on the elements of Section 1519 is unpersuasive for the same reasons.

B. Sufficient Evidence Supported The Jury's Verdict That Dawkins Knowingly Falsified A Report

Dawkins argues (Def. Br. 23-24) that the evidence was insufficient to support his conviction because "there was no established criteria as to what Correctional Officers are required to include in a Housing Unit Log" and, therefore, the evidence did not establish that Dawkins knowingly filed a "*false*" report.[11] This argument should be rejected.

The jury heard evidence that officers are required to maintain a Housing Unit Log (R.272 at 102; R.281 at 94), and that this log is expected to contain current and accurate information as events unfold within the dorm (R.272 at 120). Ranking officers testified that reporting certain "events," such as inmate fighting, an officer's use of force, and inmate injuries, are required to be included in the log (R.272 at 103-104, 183; R.281 at 94-95, 142-143) *and* communicated to SFRC's control room for entry into *its* log (R.272 at 104-105). See, *e.g.*, R.281 at 94 ("Whenever there's a fight, they need to document. They need to call. They need to make sure it is on the log.").

[11] McQueen's challenge to his conviction is limited to whether Section 1519 requires a defendant to have knowledge of a federal investigation.

Dawkins's reliance on the lack of a *written* rule does not help him. Captain Sharpe specifically testified that officers receive on-the-job training as to what must be included in a Housing Unit Log. Sharpe testified that, for 15 years, he has taught people that "you always put any event in your log" (R.272 at 183), and that "events" include "any type of an emergency" such as "if inmates are fighting" (R.272 at 103). Sharpe also testified that the written Post Orders include a directive to maintain a chronological chain of events in the log. R.272 at 141. In addition, Captain Hjardemaal testified that even though the Post Orders do not specifically state that inmate fighting must be included in the log, an officer is expected to "record anything that is unusual if it happened in the dorm." R.281 at 97. According to Hjardemaal, the expectations of what should be included in the log are made "very clear." R.281 at 143.

The jury thus heard sufficient evidence from which it could reasonably conclude that Dawkins knew he was supposed to record any instance of inmate fighting, an officer's use of force, and inmate injuries in the log, and that he knowingly failed to do so.[12] "Material omissions of fact can be interpreted as an

[12] Even if it was necessary to prove defendants knew the matter they were concealing (*i.e.*, unjustified acts of excessive force upon inmates and deliberate indifference to a substantial risk of serious harm) fell within federal jurisdiction, the government proved that here. The evidence demonstrated that correctional officers were instructed at the academy what acts could violate an inmate's Eighth

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attempt to 'cover up' or 'conceal' information," and "[a] reasonable fact-finder could conclude that [the defendant who did so] falsified his report." *United States* v. *Lanham*, 617 F.3d 873, 887 (6th Cir. 2010), cert. denied, 131 S. Ct. 2443 (2011); cf. *Langford* v. *Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1312 (11th Cir. 2000) ("Intent to defraud need not be shown through active misrepresentation – material omissions can be fraudulent if they are intended to create a false impression.").

III

THE DISTRICT COURT'S JURY INSTRUCTIONS WERE CORRECT

A. The District Court Correctly Instructed The Jury On The Elements Of 18 U.S.C. 241

The district court instructed the jury on the elements of a violation of Section 241, in pertinent part:

> Count One requires the United States to prove that the purpose of the conspiracy was to "injure, oppress, threaten, or intimidate" inmates in the enjoyment or free exercise of their right to be free from cruel and unusual punishment.
>
> * * *
>
> The official use of force against convicted prisoners violates the Eighth Amendment if it involves the unnecessary and wanton infliction of pain. Force used in order to retaliate, seek retribution, or punish an inmate constitutes force that has no legitimate law

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Amendment rights, and that such violations are investigated by federal agencies. R.272 at 96-97.

> enforcement purpose. The essence of this inquiry is whether force was applied in a good faith effort to maintain or restore discipline, or instead for the purpose of causing harm.
>
> The Eighth Amendment is violated when a corrections officer, acting with deliberate indifference, exposes an inmate to a substantial risk of serious harm. A corrections officer acts with deliberate indifference when he knows of and disregards a substantial risk of serious harm to an inmate. A substantial risk of serious harm includes a substantial risk of violent physical assault.
>
> Thus if you find that the purpose of the conspiracy was to subject the inmates to cruel and unusual punishment, through either or both manner and means discussed above -- that is, by subjecting them to a bad-faith use of force or to the unnecessary and wanton infliction of pain, and/or by knowingly disregarding a substantial risk of violent assault to an inmate at the hands of another inmate or corrections officers, then you may find that this element of the offense is satisfied with respect to Count One.

R.190 at 6-7. This instruction was a complete and correct statement of the law.

As set forth in the instruction, the Eighth Amendment's prohibition against cruel and unusual punishment protects an inmate from both the "unnecessary and wanton infliction of pain," *Estelle* v. *Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976) (citation omitted), *and* "[a] prison official's deliberate indifference to a substantial risk of serious harm to an inmate," *Farmer* v. *Brennan*, 511 U.S. 825, 828, 114 S. Ct. 1970, 1974 (1994) (citations and internal quotation marks omitted). See also *Hale* v. *Tallapoosa Cnty.*, 50 F.3d 1579, 1582 (11th Cir. 1995) (describing as "well settled" an inmate's Eight Amendment right to be free from deliberate indifference to a substantial risk of harm). The Supreme Court has explained that a

prison official must act with a "sufficiently culpable state of mind" to violate the Eighth Amendment, and that such a state of mind includes "one of deliberate indifference to inmate health or safety." *Farmer*, 511 U.S. at 834, 114 S. Ct. at 1977 (citations and internal quotations marks omitted). A prison official acts with deliberate indifference, the Court explained, where "the official knows of and disregards an excessive risk to inmate health [and] safety." *Id.* at 837, 114 S. Ct. at 1979. That is precisely how the district court instructed the jury here. See R.190 at 7 ("A corrections officer acts with deliberate indifference when he knows of and disregards a substantial risk of serious harm to an inmate.").

McQueen argues (Def. Br. 34-36) that the court's instruction permitted the jury to convict him under an improper standard because the jury was not instructed that the defendants must have had a specific intent to interfere with federal rights to be found guilty. McQueen ignores the fact that the district court gave the jury this precise instruction. The court instructed the jury that, for the Section 241 conspiracy charged in Count 1, the government must prove beyond a reasonable doubt that "two or more persons in some way agreed to try to accomplish a shared and unlawful plan *with the specific intent to deprive inmates at the South Florida Reception Center of the right to be free from cruel and unusual punishment*." R.190 at 6 (emphasis added). McQueen fails to explain how a standard taken directly from Supreme Court precedent is an improper one.

A district court's exercise of discretion in refusing a defendant's requested instruction is error only if the requested instruction: is correct; is not adequately covered by the instructions given; and, involves a point so important that failure to give the instruction seriously impaired the defendant's ability to present an effective case. *United States* v. *Svete*, 556 F.3d 1157, 1161 (11th Cir. 2009) (en banc). McQueen cannot make that showing here. First, the instructions given were correct, as they were drawn directly from Supreme Court precedent. Second, McQueen does not specifically identify in his brief the specific instruction he requested. He notes generally (Def. Br. 35) that his requested instruction would have explained "that mere deliberate indifference is insufficient to convict and that there must be a specific intent to interfere with federal rights." As explained above, acting with deliberate indifference to a known, substantial risk of serious harm to a prisoner's safety *is* a violation of the Eighth Amendment. *Farmer*, 511 U.S. at 828, 837, 114 S. Ct. at 1974, 1979; *Hale*, 50 F.3d at 1582. To instruct the jury otherwise would have been an incorrect statement of the law. Moreover, the jury *was* instructed that the government must prove McQueen possessed the specific intent to violate inmates' Eighth Amendment rights. R.190 at 6. McQueen cannot establish that his requested instruction was either correct or not adequately covered by the instructions given, and therefore cannot show that the

district court's refusal to give his requested instruction seriously impaired his ability to present an effective case. *Svete*, 556 F.3d at 1161.

B. The District Court Correctly Exercised Its Discretion In Denying Defendants' Requested Instructions On (1) Accomplices, Informers, Or Witnesses With Immunity, And (2) Multiple Conspiracies

1. The District Court Correctly Rejected Defendants' Requested Instruction On Accomplices, Informers, Or Witnesses With Immunity

Defendants argue that a new trial is warranted because the district court refused their request to instruct the jury on the testimony of accomplices, informers, or witnesses with immunity. See Eleventh Circuit Pattern Jury Instructions, Special Instruction No. 1.1 (2010). Defendants argue (Def. Br. 37) that (1) the "inmate witnesses were given immunity from their admitted disciplinary violations" and (2) "Rolle was either an accomplice, informer, or witness with immunity because she was not prosecuted" for conspiracy. Defendants fail, however, to support these arguments with any record evidence.

The jury heard testimony that YOs often fight in prison and, if caught, are placed in administrative segregation and lose time credited toward an early release. But there was absolutely no evidence introduced at trial indicating that any of the YOs who testified were subject to pending disciplinary charges, much less criminal prosecution, and received immunity from the government in exchange for their cooperation. Similarly, defendants assert, without any record support, that Rolle

was an accomplice, informer, or witness with immunity because she was not prosecuted for her role in the conspiracy. Defendants again fail to point to any evidence indicating that Rolle testified pursuant to a grant of immunity.

To have a jury instructed on a defendant's theory of defense, there must be "*some* evidence adduced at trial relevant to that defense." *United States* v. *Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995) (emphasis added). Defendants, however, offered *no* evidence supporting their theory of defense. In any event, defendants cannot show that the instructions given failed to cover the point of their requested instruction, or that the requested instruction addressed a point so important that failure to give it seriously impaired their ability to defend themselves. *Svete*, 556 F.3d at 1161. The district court instructed the jury that it was to question the credibility of all the witnesses who testified by asking whether the witness had "any particular reason not to tell the truth," or "a personal interest in the outcome of the case." R.190 at 2. The district court also instructed the jury that they could "consider the fact that the witness has been convicted of a felony" in deciding whether to believe that witness. R.190 at 3. Moreover, defense counsel in closing arguments vigorously attacked the credibility and character of the inmate witnesses. See, *e.g.*, R.276 at 63-64, 67-71, 95-99, 101-109, 111-112 .

A district court is entrusted with "wide discretion as to the style and wording employed in the instructions." *Goldsmith* v. *Bagby Elevator Co., Inc.*, 513 F.3d

1261, 1276 (11th Cir. 2008). Reversal is warranted only if the instruction was improper, and then only if this Court is "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *United States* v. *Hill*, 643 F.3d 807, 854 (11th Cir. 2011) (citation and internal quotation marks omitted), cert. denied, 132 S. Ct. 1988 (2012). Because the district court's instructions were correct and properly guided the jury in its deliberations, reversal is unwarranted.

2. The District Court Correctly Rejected Defendants' Requested Instruction On Multiple Conspiracies

McQueen argues (Def. Br. 38-40) that reversal is warranted because the district court refused to instruct the jury on multiple conspiracies. See Eleventh Circuit Pattern Jury Instruction, No. 13.3 (2010). McQueen further argues that the district court's response to a question from the jury misstated the law of conspiracy. Both arguments fail.

First, an instruction on multiple conspiracies is appropriate where the evidence supports the potential finding of *multiple conspiracies*. *United States* v. *Woodard*, 459 F.3d 1078, 1085 (11th Cir. 2006) ("Generally, a multiple conspiracy instruction is required where the indictment charges several defendants with one overall conspiracy, but the proof at trial indicates that a jury could reasonably conclude that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment.") (citation omitted).

A multiple conspiracies instruction is not required where the evidence at trial only supports a finding of the single conspiracy charged. *Ibid.*

The indictment here charged a single conspiracy among officers to deprive inmates of their Eighth Amendment rights. R.121. The evidence at trial supported a finding of that single conspiracy, and no others. In fact, defendants have never identified a credible, second conspiracy to support their requested charge – despite an opportunity to do so at the charge conference (R.276 at 21-26) and in their brief to this Court. See *United States* v. *Moore*, 525 F.3d 1033, 1044 (11th Cir. 2008) ("The issue of whether the defense produced sufficient evidence to sustain a particular instruction such as a multiple conspiracy instruction, is generally a question of law subject to *de novo* review.") (citation omitted). Because defendants cannot establish a basis in the evidence for their requested instruction, no such instruction was required. *United States* v. *Dean*, 487 F.3d 840, 847 (11th Cir. 2007) (defendant's requested instruction must have some basis in the evidence and legal support).

Defendant nonetheless argues (Def. Br. 39-40) that the district court's response to a jury question during deliberations misstated the law of conspiracy, and that the requested instruction on multiple conspiracies would have corrected the alleged error. The argument finds no support in the evidence or law.

During deliberations, defendants' jury asked:

> As to Count 1. Since I am being asked to say all 4 defendants conspired and I am being asked to pass a verdict on only 2 (McQueen & Dawkins) and I honestly feel that if he (McQueen) conspired only with Butler and Griffin I cannot pass an honest judgment since I did not hear all the evidence – Do I have to consider McQueen to be part of the conspiracy with Griffin and Butler and not Dawkins.

R. 196.[13] In response, the district court instructed the jury:

> Each count of the Indictment charges a separate crime against one or more of the Defendants. You must consider each crime and the evidence relating to it separately. And you must consider the case of each Defendant separately and individually. If you find a Defendant guilty of one crime, that must not affect your verdict for any other crime or any other Defendant. I caution you that each Defendant is on trial *only* for the specific crimes charged in the indictment. You are here to determine from the evidence in this case whether each Defendant is guilty or not guilty of those specific crimes.
>
> You do not have to find that all Defendants joined the charged conspiracy in order to find Defendants McQueen or Dawkins guilty on count One. As I instructed you previously, a "conspiracy" is an agreement by two or more people to commit an unlawful act. The Government does not have to prove that all the people named in the Indictment were members of the plan. However, in order to find either Defendant guilty on Count One you must find beyond a reasonable doubt that two or more persons conspired to deprive inmates at the SFRC of their civil rights and that the Defendant willfully joined the conspiracy.
>
> Furthermore, you have heard all of the evidence that pertained to Defendants Griffin and Butler's involvement in the conspiracy charged in Count One.

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[13] The jury's question likely arose from the fact that defendants' jury was excused from the courtroom during certain presentations of evidence against Griffin and/or Butler.

> Again, you are instructed to follow all of my instructions as a whole. You must not single out or disregard any of the Court's instructions on the law.

R.196 at 2. This instruction was a correct statement of the law. The district court repeatedly referenced the "charged conspiracy" set forth in Count One, and therefore the instructions cannot be read to suggest that the jury could find defendants guilty of a different conspiracy than the one identified in the indictment. See, *e.g.*, R.196 at 2 ("I caution you that each Defendant is on trial *only* for the *specific crimes charged in the indictment*. You are here to determine from the evidence in this case whether each Defendant is guilty or not guilty *of those specific crimes*.") (emphasis added); R.196 at 2 ("You do not have to find that all Defendants joined the *charged conspiracy* in order to find Defendants McQueen or Dawkins guilty on *Count One*. ") (emphasis added); R.196 at 2 ("[Y]ou have heard all of the evidence that pertained to Defendants Griffin and Butler's involvement in *the conspiracy charged in Count One*.") (emphasis added).

Moreover, the district court instructed the jury that it must follow all of the court's instructions. R.196 at 2. These instructions plainly directed the jury that they could not convict defendants of conspiracy unless the government proved beyond a reasonable doubt that the conspiracy charged in Count One existed, and that defendants willfully joined it. R.190 at 5-8. Defendants take an isolated sentence from the district court's instruction, strip it of context, and argue that the

district court's instruction somehow permitted the jury to convict defendants of an uncharged conspiracy. That argument should be rejected.

IV

THE DISTRICT COURT PROPERLY DENIED DEFENDANTS' MOTIONS FOR A NEW TRIAL BECAUSE THE GOVERNMENT DID NOT IMPROPERLY BOLSTER THE CREDIBILY OF ITS WITNESS

The prosecutor did not improperly bolster the credibility of a government witness. Even so, a reversal based on alleged prosecutorial misconduct, such as improperly vouching for a witness, is necessary only when misconduct exists that may have prejudiced the substantial rights of the accused. *United States* v. *De La Cruz Suarez*, 601 F.3d 1202, 1218 (11th Cir.), cert. denied, 130 S. Ct. 3532, and 131 S. Ct. 393 (2010). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome would be different." *United States* v. *Hall*, 47 F.3d 1091, 1098 (11th Cir. 1995).

Shalisa Rolle testified on direct examination that she did not initially tell investigators what she knew about the events of February 25 because she did not want "to be involved." R.284 at 63. She explained, without objection, that she eventually told the FBI what she knew "after they was going to polygraph me and told me I could be facing 10 years." R.284 at 63. Prompted by her answer, the prosecutor asked, without objection, if she "told [the FBI] what you testified to

today as a result of [the FBI] telling you that they would polygraph you?" R.284 at 63. Rolle responded, without objection, "Yes." R.284 at 63.

Defendants continued this line of questioning on cross-examination, eliciting from Rolle that she felt threatened by the FBI "when they told [her] that they was going to give [her] the polygraph and if they found out [she] was lying [she] could be facing 10 years" of imprisonment. R.284 at 65; see also R.284 at 78. Rolle made clear, however, that she never actually took a polygraph examination. R.284 at 112-113.

On re-direct, the prosecutor asked Rolle if she eventually told the truth "[b]ecause [she] knew [she was] going to fail that polygraph if [she] took it." R.284 at 130. Defendants objected and moved for a mistrial on the ground that "[a] polygraph should never come in front of the jury." R.284 at 131. The district court denied the motion, reasoning that the witness "never took one, she was threatened with" one (R.284 at 131), and that the government could lead the witness because "[s]he's obviously a hostile witness to the Government" (R.284 at 132).

Defendants rely on this Court's decision in *United States* v. *Hilton*, 772 F.2d 783 (11th Cir. 1985), to support their argument that the prosecutor improperly bolstered the credibility of Rolle. In *Hilton*, the three witnesses who provided testimony against the defendants agreed to take polygraph examinations as part of

their plea agreements, and the specifics of those agreements – including their willingness to take polygraph examinations – were disclosed to the jury. 772 F.2d at 785. In granting new trials for the defendants, this Court explained that a prosecutor improperly bolsters a witness's credibility if it introduces evidence of plea agreements in which a witness has agreed to take a polygraph examination to verify his trial testimony. *Id.* at 786. "The harm from such evidence is likely to arise from a jury's lending special credence to these witnesses because of the binding force of the plea agreements." *Ibid.* This Court held that the evidence was prejudicial because the witnesses subject to the plea agreements in *Hilton* "furnished the only direct evidence" of the defendants' guilt. *Ibid.*

Hilton is easily distinguishable. First, Rolle never indicated a willingness to take a polygraph examination. *Id.* at 785. Far from it. Rolle explained that she was afraid that if she took a polygraph examination, the FBI would learn that she had been untruthful. R.284 at 62-65. Rolle thus mentioned the *threat* of the polygraph examination as the reason for her varied accounts to investigators. R.284 at 63. Second, Rolle was not testifying pursuant to a plea agreement. *Hilton*, 772 F.2d at 786. Nor was she testifying pursuant to "an apparent non-prosecution agreement." Def. Br. 41. Thus, the risk that the jury might infer "that the agreement itself assures the honesty of the witness[]" was not present. *Hilton*, 772 F.2d at 786. Third, the jury knew that Rolle had never, in fact, taken a

polygraph. *Ibid.* The "test for improper bolstering" is "whether the prosecutor's words might reasonably have led the jury to believe that the government possessed extrinsic evidence, not presented to the jury, that convinced the prosecutor of the defendant's guilt." *Id.* at 787. Unlike in *Hilton*, the jury here was not led to believe that Rolle took a polygraph and that the government possessed the results. *Ibid.*; see also *id.* at 785 (explaining that the prosecutor revealed to the jury the details of witnesses' plea bargain agreements and the fact that they had agreed to take polygraph examinations, "*though they did not actually do so*") (emphasis added); see also *ibid.* (one of the witnesses testified on direct that he agreed to take a polygraph examination). Rolle made clear in her testimony that she did *not* submit to a polygraph examination. The risk of the jury being misled into believing that such results existed was simply not present here. Finally, the prosecutor never argued to the jury that the threat of the polygraph was a basis for the jury to believe Rolle's testimony. *Id.* at 785-786. The prosecutor instead referenced the potential polygraph examination as the reason Rolle eventually implicated her co-workers after previously denying any knowledge of what had happened:

> You recall Ms. Rolle didn't want to be involved in this case. She testified that these were her friends and her colleagues, that she had been called a snitch at work, a snitch. She only told about Butler and McQueen and Griffin allowing those inmates to fight to avoid a polygraph that she knew she would fail.

R.276 at 44. For all of these reasons, *Hilton* is inapplicable to this case.

Even assuming that the prosecutor inappropriately elicited testimony concerning a threatened (but never administered) polygraph, defendants cannot establish prejudice. This Court found prejudicial error in *Hilton* because the witnesses subject to the plea agreements provided "the only direct evidence" of the defendants' guilt. 772 F.2d at 786. Here, Rolle was not the only witness to provide evidence against the defendants,[14] as numerous witnesses testified that defendants tolerated, used, and threatened force against YOs. See *ibid.* ("[W]hen the bolstering testimony goes to the character for truthfulness of the *only witnesses to repudiate the defendants' claim*, admission of such testimony is also reversible error.") (emphasis added); see also *United States* v. *Vigliatura*, 878 F.2d 1346, 1350 (11th Cir. 1989) (finding no prejudice from witness's testimony that he submitted to polygraph examination in part because defendant's guilt "was established by overwhelming evidence through the testimony of a number of witnesses other than" the witness who submitted to polygraph). The fact that Rolle was "the only non-inmate witness" (Def. Br. 40) who testified against defendants is irrelevant. Defendants cannot establish that they were prejudiced by Rolle's or

[14] In fact, Rolle's testimony was *favorable* to Dawkins.

the prosecutor's mention of the (rejected) polygraph examination. The district court acted well within its discretion in denying their motion for a new trial.

V

THE DISTRICT COURT'S EVIDENTIARY RULINGS WERE CORRECT

A. The Photographic Evidence Was Properly Admitted

The district court properly admitted GX 5, a composite of photographs taken of several inmates. See GX 5.1 (K.S.); 5.2 (C.J.); 5.3 (L.M.); 5.4 (J.B.); 5.5 (R.L.). Defendants argue (Def. Br. 45-48), however, that the exhibit was unduly prejudicial, in part because the identity of the individuals in the pictures was not clear to the jury and could not be linked to the testimony at trial, and because the exhibit was admitted in violation of their Sixth Amendment rights. These arguments fail.

Captain Sharpe testified that when allegations of prisoner abuse surface, he conducts a fact-finding process by recording witness statements, taking photographs of visible injuries, obtaining medical evaluations, and forwarding the information to the Office of the Inspector General. R.272 at 67-68. When he learned of the February 25 allegations, Sharpe interviewed several inmates, including K.S., C.J., L.M., J.B., R.L., and M.W. R.272 at 109-110, 112, 137. He noted and photographed their injuries (R.272 at 109-110, 112, 137), and testified that the photographs in GX 5 were fair and accurate depictions of those injuries

(R.272 at 112-113, 117). The exhibit was then admitted, without objection. R.272 at 117. Defendants thus waived any objection they may have had to its admission. Fed. R. Evid. 103.

Defendants nonetheless argue, as they did at the close of the government's case-in-chief when seeking a mistrial (R.281 at 163-166), that the exhibit was prejudicial because the inmates' identities were not known to the jury, and because some of the inmates included in GX 5 were not subject to cross-examination, in violation of the Sixth Amendment's Confrontation Clause. These arguments ignore the trial testimony and suggest a misunderstanding of the Confrontation Clause.

The government plainly established the identity of the inmates depicted in GX 5. Sharpe testified that he interviewed K.S., C.J., L.M., J.B., R.L., and M.W., photographed their injuries, and that the injuries depicted in GX 5 were a fair and accurate representations of their injuries. R.272 at 109-110, 112-113, 117, 137. Nothing else was necessary to establish the identity of the inmates. In any event, many of the photographs included the identification card of the inmate depicted in the photograph. GX 5.

Moreover, the jury could easily infer that the inmates in the photographs were the inmates who were assaulted on February 25. Eyewitnesses testified that K.S., C.J., L.M., J.B., and R.L. were assaulted by either the defendants or by other

officers while defendants were present. See, *e.g.*, R.273 at 61, 182-183, 189-190; R.274 at 74-76, 201; R.284 at 153 (K.S.); R.273 at 182; R.284 at 154 (C.J.); R.273 at 181-182; R.274 at 201-202; R.284 at 154 (L.M.); R.273 at 58, 175, 178-179; R.274 at 70-71, 74, 131, 199-201; R.284 at 149-150, 152 (J.B.); R.273 at 51-52, 62, 174; R.274 at 62-63, 127-128, 194-195; R.284 at 146-147 (R.L.). And the testimony plainly established the identity of each non-testifying inmate included in GX 5. See, *e.g.*, R.273 at 182-183; R.284 at 153 (J.B. and J.H. identified K.S. as "Slug"); R.273 at 35, 160; R.274 at 188 (L.S., J.B., and I.G. identified R.L., aka "Junkie Jit," as the houseman); R.274 at 201; R.284 at 154 (I.G. and J.H. identified L.M. as I.G.'s roommate); R.273 at 182; R.284 at 154; GX 5 (J.B. and J.H. described "Carrot Top" as a white male with red hair, and C.J. was the only white male depicted in GX 5). Defendants' argument ignores this testimony.

Defendants' argument also suggests a misunderstanding of the Confrontation Clause. The Supreme Court has held that the Sixth Amendment guarantees a defendant's right to confront those "who 'bear testimony'" against him. *Crawford* v. *Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364 (2004) (citation omitted). This right applies to "testimonial statements," examples of which include:

> affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements * * * contained in formalized testimonial

> materials, such as affidavits, depositions, prior testimony, or confessions; [and] statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52, 124 S. Ct. at 1364 (citations and internal quotation marks omitted). In *Melendez-Diaz* v. *Massachusetts*, the Supreme Court held that "certificates of analysis" containing the results of forensic analyses also constituted "testimonial statements" of the analysts who conducted the analyses, and were therefore subject to the Confrontation Clause. 129 S. Ct. 2527, 2531-2532 (2009).

Notably absent from the examples of "testimonial statements" subject to the Confrontation Clause are photographs. *Crawford*, 541 U.S. at 51-52, 124 S. Ct. at 1364; *Melendez-Diaz*, 129 S. Ct. at 2531-2532; see also *United States* v. *Lopez-Moreno*, 420 F.3d 420, 436 (5th Cir. 2005) (introduction of photograph of voter identification card did not violate Confrontation Clause because it "in no way involves a witness bearing testimony"); *Amparo* v. *McDonald*, No. C 09-0801, 2012 WL 1094291, at *10 (N.D. Cal. Mar. 30, 2012) (introduction of surveillance video does not violate Confrontation Clause because "a camera is not a witness that is amenable to cross-examination, and because a photograph * * * is not a testimonial statement") (citation omitted). To the extent the photographs can somehow be analogized to the certificates of analysis in *Melendez-Diaz*, Sharpe – the "analyst" who prepared the evidence – testified and was cross-examined extensively. 129 S. Ct. at 2531-2532.

Even if the Confrontation Clause did apply to GX 5, its admission was harmless, and this Court will not reverse a conviction based upon a violation of the Confrontation Clause where it is "clear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States* v. *Candelario*, 240 F.3d 1300, 1307 (11th Cir. 2001) (citation and internal quotation marks omitted). Here, J.B., one of the inmates depicted in GX 5, testified about the injuries he received, discussed his injuries depicted in the photographs, and was subjected to extensive cross-examination. R.273 at 192-193, 203-265. Thus, the photographs of his injuries are not vulnerable to any argument based upon unknown identity or the Confrontation Clause. Because photographs of J.B.'s injuries were unquestionably admissible, and because J.B. provided powerful testimony (subject to cross-examination) against defendants that was sufficient in itself to support a guilty verdict, defendants cannot argue that admission of the other photographs of inmates' injuries included in GX 5 was prejudicial.

B. Cross-Examination Was Properly Limited

Defendants argue (Def. Br. 48) that the district court "repeatedly refus[ed] to allow defense counsel to cross-examine the inmate witnesses in regard to their numerous other bad acts, their disciplinary violations at various correctional facilities, their bias and prejudice against law enforcement, and their motivation for making allegations against the defendants in this case." Defendants, however, do

not identify a single, specific instance in which the district court denied their efforts to introduce a "bad act[]," "disciplinary violation," or evidence of "bias and prejudice," much less an instance in which they noted an objection for the record. Thus, reviewing for plain error, as this Court must, it is impossible to identify what error in particular the district court committed, much less that it was plain – as the defendants themselves have not identified it.

Regardless, the district court did not err, plainly or otherwise, in limiting defendants' cross-examination of the inmate witnesses' prior bad acts, biases and motivations. "A defendant is entitled to cross-examine government witnesses as to any possible motivation for lying or bias." *United States* v. *De Parias*, 805 F.2d 1447, 1452 (11th Cir. 1986), overruled on other grounds by *United States* v. *Kaplan*, 171 F.3d 1351 (11th Cir. 1999) (en banc). The right to cross-examine, however, is not unlimited. *United States* v. *Barrington*, 648 F.3d 1178, 1188 (11th Cir. 2011), cert. denied, 132 S. Ct. 1066 (2012). A defendant does not have the right to cross-examine "in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985). Nor may a defendant conduct unlimited inquiry into a witness's potential bias. *Barrington*, 648 F.3d at 1188. So long as cross-examination "exposes the jury to facts sufficient to evaluate the credibility of the witness and enables defense counsel to establish a record from which he properly can argue why the witness is

less than reliable," the Sixth Amendment is satisfied. *United States* v. *Baptista-Rodriguez*, 17 F.3d 1354, 1371 (11th Cir. 1994).

The Sixth Amendment was not violated here. Defense counsel were able to cross-examine the inmates on their extensive criminal histories (R.273 at 76, 215-217; R.274 at 85, 140, 226), their willingness to lie to correctional officers, in general (R.273 at 103, 258), and to lie about fighting with other inmates, in particular (R.273 at 103; R.274 at 92, 150-151). Defense counsel also elicited from specific inmates that they had chosen "a life of crime" (R.273 at 76), received disciplinary charges for lying (R.273 at 107-108), believed correctional officers lied about inmate conduct (R.273 at 109), failed to report inmate fights to avoid disciplinary repercussions (R.274 at 104-105), disliked correctional officers (R.274 at 206-207), and possibly harbored racial bias against the defendants (R.274 at 207-209). Moreover, defense counsel argued to the jury at length about the inmate witnesses' questionable credibility, character, criminal history, and dislike of correctional officers. R.276 at 64, 67-68, 70-71, 95-96, 101-102, 107-109, 112.

"The test for the Confrontation Clause is whether a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." *United States* v. *Orisnord*, 483 F.3d 1169, 1179 (11th Cir. 2007). Because defense counsel exposed effectively the inmate witnesses' questionable character, including their

propensity to lie and their dislike of correctional officers, the jury would not have received a significantly different impression had the defense counsel engaged in additional cross-examination. *Ibid.* "As long as the sufficient information is elicited from the witness from which the jury can adequately assess possible motive or bias, the Sixth Amendment is satisfied." *Ibid.* (citation omitted). Such was the case here.

C. The "Code Of Conduct" Was Properly Admitted

The district court properly admitted GX 53, a printout of the Florida Department of Corrections's Code of Conduct, over defendants' hearsay objection. Captain Sharpe testified that the printout was a fair and accurate depiction of the Florida Department of Corrections's mission statement, Code of Conduct, and oath of allegiance. R.272 at 95. He testified that the document is reviewed at in-service trainings, discussed at supervisors' meetings, presented to officers during their academy training, and posted on the walls of the SFRC. R.272 at 95-96. The document, however, was introduced as evidence of the defendants' awareness of the content included in the document, not to prove the truth of that content. As such, the document was not hearsay, and the district court did not abuse its discretion in admitting it into evidence. See Fed. R. Evid. 801(c) ("'Hearsay' means a statement that * * * [is offered] to prove the truth of the matter asserted in the statement.").

D. The District Court Properly Denied Defendants' Motion For A Mistrial Based Upon A Violation Of The Sequestration Order

The district court acted well within its discretion in denying defendants' motion for a mistrial based upon a violation of its sequestration order. This Court has identified three available sanctions where a sequestration order has been violated: (1) citing the guilty party for contempt; (2) permitting cross-examination as to the nature of the violation; or (3) striking testimony already given and/or disallowing further testimony. *United States* v. *Blasco*, 702 F.2d 1315, 1327 (11th Cir. 1983). The last option is a "serious sanction," and available only "where the defendants have suffered actual prejudice, and there has been connivance by the witness or counsel to violate the rule." *Ibid.*; see also *United States* v. *Jimenez*, 780 F.2d 975, 980 (11th Cir. 1986).

The parties learned during direct examination of J.B. that he had spoken to L.S. while they were waiting to testify, in violation of the court's sequestration order. R.274 at 38-39, 44-46. Defendants moved to strike their testimony; the court, however, permitted counsel to research the issue and the prosecutors spoke with the Marshal's Office to ensure additional violations of the order did not occur. R.274 at 44-46.

After the next inmate witness testified, the district court provided all counsel with case law governing violations of sequestration orders. R.274 at 72. At the end of the day, the court discussed the issue with counsel:

> Court: I think, based on the kinds of questions I heard from defense counsel, you read the case law and you know that you have been allowed to examine about violations of the Rule of Sequestration and that's an appropriate response by the Court when that issue appears and it is rather drastic to strike the testimony or exclude it. So, that's how I'm inclined to go and deny the motion.
>
> Counsel for McQueen: That's why we didn't bring it up again. I was familiar with the Eleventh Circuit case. Thank you, because I reread it and *you did give us the remedy of exploring it, which we did at length. I don't believe we have a right to ask that they be stricken. You have to prove actual prejudice.* Maybe [counsel for Dawkins] disagrees with me.
>
> We may * * * [ask for a jury instruction]. Whether or not we want that, we can do it during the jury charge. We're not right now asking for one outside the jury charge, but we may.

R.274 at 240-241 (emphasis added). Counsel for Dawkins did not indicate any disagreement with that position, and neither counsel asked for a specific instruction on the issue.

The district court acted well within its discretion in permitting defense counsel to cross-examine the inmate witnesses about their conversations with one another. See *Blasco*, 702 F.3d at 1327. This Court upheld a district court's decision to disallow further testimony from a particular witness, rather than grant a mistrial, where government counsel exhibited a "contemptuous" "attitude and lack of respect for the court's authority" for knowingly and repeatedly violating the court's sequestration order. *Id.* at 1326-1327. The court nonetheless found that the defendants were not so prejudiced by the violations that a mistrial was warranted.

Id. at 1327. Here, where neither defense counsel nor the court suggested that the violation was intentional, and where defense counsel *agreed* with the court's remedy and *acknowledged* that there was no prejudice from the violation, a decision *granting* a mistrial would have been an obvious abuse of discretion.

VI

THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING DEFENDANTS SIGNIFICANT DOWNWARD VARIANCES TO ALIGN THEIR SENTENCES WITH A CO-DEFENDANT'S WHO PLEADED GUILTY TO A SINGLE MISDEMEANOR CHARGE (CROSS-APPEAL)

The district court granted defendants significant downward variances from their advisory Guidelines sentences to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). Specifically, the court reasoned that because Griffin had received the maximum sentence of 12 months for pleading guilty to a misdemeanor violation of 18 U.S.C. 242, McQueen and Dawkins should receive reduced sentences. The district court therefore sentenced McQueen to 12 months' imprisonment and Dawkins to one month's imprisonment. McQueen's sentence reflected a 92% reduction from his (low end) recommended sentence of 151 months' imprisonment; Dawkins's sentence reflected a 93% reduction from his (low end) recommended sentence of 15 months' imprisonment. While avoiding unwarranted disparities between similarly situated defendants may be a permissible

factor upon which to grant a variance, the district court abused its discretion in granting variances in this case because McQueen and Dawkins were *not* similarly situated to Griffin. Moreover, the district court focused almost exclusively upon this factor, giving too little weight to other important sentencing factors.

A. A Disparity Between Defendants' Sentences And Griffin's Sentence Was Warranted

A disparity between Griffin's maximum sentence of one year and defendants' recommended sentences under the Guidelines is entirely warranted. Section 3553(a)(6) is limited, on its face, to *unwarranted* sentencing disparities between defendants who are *similarly situated*. Contrary to the district court's reasoning, a defendant who is convicted of a more serious offense after a trial is not similarly situated to a defendant who pleads guilty to a lesser offense. This Court has repeatedly held that "there is no unwarranted disparity when a cooperating defendant pleads guilty and receives a lesser sentence than a defendant who proceeds to trial."[15] *United States* v. *Langston*, 590 F.3d 1226, 1237 (11th

[15] Every other Circuit agrees. See *United States* v. *Flores-De-Jesus*, 569 F.3d 8, 38 (1st Cir. 2009); *United States* v. *Frias*, 521 F.3d 229, 236 (2d Cir. 2008); *United States* v. *King*, 604 F.3d 125, 145 (3d Cir. 2010); *United States* v. *Perez-Pena*, 453 F.3d 236, 243 (4th Cir. 2006); *United States* v. *Perkins*, 287 F. App'x 342, 346 (5th Cir. 2008); *United States* v. *Conatser*, 514 F.3d 508, 526 (6th Cir. 2008); *United States* v. *Doe*, 613 F.3d 681, 690-691 (7th Cir. 2010); *United States* v. *Brunken*, 581 F.3d 635, 638 (8th Cir. 2009); *United States* v. *Winters*, 278 F. App'x 781, 783 (9th Cir. 2008); *United States* v. *Zapata*, 546 F.3d 1179, 1194 (continued…)

Cir. 2009); *United States* v. *Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009), cert. denied, 130 S. Ct. 2342 (2010). Here, a jury convicted defendants of felony offenses. Griffin, in contrast, pleaded guilty to a misdemeanor following his mistrial. Under these circumstances, a disparity between defendants' advisory sentences, on the one hand, and Griffin's statutorily-capped sentence, on the other, results from legitimate differences in how their convictions were obtained. Thus, a "disparity" between their sentences is not only permissible, but clearly warranted.

This Court has previously vacated a sentence as substantively unreasonable where a district court sentenced the defendant, who had been found guilty after trial, to a term of imprisonment similar to those received by other offenders who had pleaded guilty. In *United States* v. *Jayyousi*, 657 F.3d 1085 (11th Cir.), cert. denied, 2012 WL 1079567, 2012 WL 1106760, and 2012 WL 1145016 (2012), defendant Jose Padilla was convicted of supporting and conspiring to support terrorist activities abroad. Padilla's advisory Guidelines range was 360 months' to life imprisonment; the district court sentenced him to 208 months' imprisonment. *Id.* at 1115-1116. The court reached this sentence by lowering Padilla's offense level and then varying downward. *Ibid.* In holding that Padilla's sentence was substantively unreasonable, this Court explained that in trying to avoid

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(…continued)
(10th Cir. 2008); *United States* v. *Mejia*, 597 F.3d 1329, 1344 (D.C. Cir.), cert. denied, 131 S. Ct. 586 (2010).

unwarranted disparities pursuant to 18 U.S.C. 3553(a)(6), "the district court unreasonably failed to consider the significant distinctions between Padilla's circumstances and the sentences of other offenders" referenced at the sentencing hearing. *Id.* at 1117. This Court explained that some of the offenders the district court used for comparative purposes "had pleaded guilty," and concluded that by comparing Padilla to those offenders, "the district court erred." *Id.* at 1118. This Court then "admonish[ed]" the district court on remand to "not draw comparisons to cases involving defendants who were *convicted of less serious offenses [or] pleaded guilty*." *Ibid.* (emphasis added).

The reason for treating defendants who cooperate with the government and/or plead guilty differently from defendants who exercise their right to go to trial is clear: "On a practical level, it would seem patently unreasonable to endorse a regime in which a defendant could steadfastly withhold cooperation from the authorities and then cry foul when a coconspirator benefits from rendering substantial assistance to the government." *Docampo*, 573 F.3d at 1101 (quoting *United States* v. *Mateo-Espejo*, 426 F.3d 508, 514 (1st Cir. 2005)); see also *United States* v. *Hill*, 643 F.3d 807, 848 (11th Cir. 2011) (explaining that, unlike the defendant who receives a longer sentence after trial, the defendant who "cooperated by pleading guilty" often receives a "carrot" in the form of a shorter sentence, "and there is nothing wrong with doling them out"), cert. denied, 132 S.

Ct. 1988 (2012); *United States* v. *Rodriguez*, 162 F.3d 135, 152 (1st Cir. 1998) (recognizing that plea bargains may result in an "enormous sentencing disparity for the defendants who chose to put the government to its burden in proving its case," but explaining that "the law allows the government to do this, even if it results in sentences of such disparity as would strike many as unfair"). The maximum one-year sentence faced by Griffin, who pleaded guilty to a single misdemeanor offense, did not provide an appropriate point of comparison for the sentences to be imposed upon defendants, who were each convicted after trial of at least one felony offense. *Jayyousi*, 657 F.3d at 1117-1118; *Docampo*, 573 F.3d at 1101; *Hill*, 643 F.3d at 848.

To be sure, Griffin did not provide assistance to the government before trial or testify against his co-defendants; rather, he accepted responsibility and agreed to plead guilty to a misdemeanor only after the government went through the expense and effort of trying his case to a jury. The fact that all three defendants engaged in similar criminal conduct and initially went to trial seemed to form the basis of the district court's decision to treat the three defendants as similarly situated for sentencing purposes. R.252 at 18-19 (asserting that the government "altered the landscape" by offering Griffin a plea bargain after his mistrial and expressing concern that "we'll never know if Mr. McQueen and Mr. Dawkins would have accepted the same deal [the government] offered Mr. Griffin if their jury had

similarly hung"). The court's reasoning, however, is fundamentally flawed because the court ignored: (1) the positions of the parties following Griffin's mistrial, and (2) the fact that McQueen, at least, did not accept responsibility for his actions when he had an opportunity to do so.

Following Griffin's mistrial, both Griffin and the government stood in the same positions they had *before* trial: the government had to decide whether to expend the time and effort to try Griffin before a jury, and Griffin had to decide whether to take his chances with a trial or accept certain resolution with a plea bargain. Griffin's decision to plead guilty provided substantial benefits to him and the government. See, *e.g.*, *Santobello* v. *New York*, 404 U.S. 257, 261, 92 S. Ct. 495, 498 (1971) (explaining that disposition of charges after plea discussions is "highly desirable"); *Blackledge* v. *Allison*, 431 U.S. 63, 71, 97 S. Ct. 1621, 1627 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."). When defendants plead guilty and save the government the expense of time, effort, and resources associated with a trial *or re-trial*, a sentencing benefit understandably follows. The Supreme Court has recognized that a plea bargain provides a defendant with "the possibility or certainty * * * [not only of] a lesser penalty than the sentence that could be imposed after a trial and a verdict of

guilty," *Brady* v. *United States*, 397 U.S. 742, 751, 90 S. Ct. 1463, 1470 (1970), "but also of a lesser penalty than that *required* to be imposed after a guilty verdict by a jury," *Corbitt* v. *New Jersey*, 439 U.S. 212, 220, 99 S. Ct. 492, 498 (1978); see also *Brady*, 397 U.S. at 752, 90 S. Ct. at 1471 (explaining the "mutuality of advantage" arising from guilty pleas and recognizing that a "great many of them [are] no doubt motivated * * * by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to a judge or jury"); see also U.S.S.G. § 3E1.1.

The fact that Griffin was, in the district court's opinion, more culpable than defendants (even though a jury reached no finding on Griffin's guilt) does not mean there should be no disparity in their sentences. In *United States* v. *Mejia*, for example, the District of Columbia Circuit rejected a defendant's argument that his longer sentence resulted in an unwarranted sentencing disparity with that of a more culpable co-defendant. 597 F.3d 1329, 1343-1344 (D.C. Cir.), cert. denied, 131 S. Ct. 586 (2010). The court of appeals concluded that there was not an unwarranted disparity between the two sentences because the disparity was "entirely explained by [the co-defendant's] three-level acceptance-of-responsibility reduction for his *having pleaded guilty after his jury hung*." *Id.* at 1344 (emphasis added).

Moreover, the record reflects that the government had preliminary conversations with McQueen's defense counsel about a plea agreement, but a plea

deal was never offered to McQueen given McQueen's disinterest in accepting responsibility for his actions.[16] R.252 at 17. McQueen's failure to accept responsibility at the first opportunity to do so should not entitle him to benefit from his *co-defendant's* plea agreement simply because the government was unable to secure a conviction against the co-defendant at its first opportunity. Cf. *United States* v. *Barner*, 441 F.3d 1310, 1320 (11th Cir. 2006) (This court "cannot hold that one who declines to plead guilty with a recommended sentence acceptable to the Court should nevertheless be given the benefits of a bargain available to, but rejected by, him.") (citation and internal quotation marks omitted).

The district court's conclusion that defendants were similarly situated to Griffin even though Griffin's count of conviction was "a different one technically" finds no support in this Court's precedent. R.252 at 16. This Court explained that there is no unwarranted disparity even when the defendant who cooperated with the government by pleading guilty receives a sentence that is "substantially shorter" than that of the defendant who proceeded to trial. *Docampo*, 573 F.3d at 1101 (citation omitted); see also *United States* v. *Mateos*, 623 F.3d 1350, 1367 (11th Cir. 2010) (no unwarranted disparity where co-defendants received "only a fraction of the sentence" defendant received, even though co-defendants were

[16] The record does not reflect discussions between the government and Dawkins regarding a plea deal.

"more deeply involved" in the criminal conduct than defendant, because co-defendants pleaded guilty), cert. denied, 131 S. Ct. 1540 (2011); *United States* v. *(Joya) Williams*, 526 F.3d 1312, 1323 (11th Cir. 2008) (co-defendant's shorter sentence reflected the beneficial effects of pleading guilty).

The circumstances of the present case are somewhat unusual, in that Griffin originally proceeded to trial with defendants. But the government's decision to offer Griffin the opportunity to plead to a misdemeanor after having failed to convict him on a felony charge falls comfortably within the government's broad prosecutorial discretion. *United States* v. *LaBonte*, 520 U.S. 751, 762, 117 S. Ct. 1673, 1679 (1997) (explaining that the discretion exercised by a prosecutor to decide "what, if any, charges to bring" against a defendant "is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors"). This Court has recognized that, "in selecting which charge to file, a prosecutor may be influenced by the penalties available on conviction." *United States* v. *Cespedes*, 151 F.3d 1329, 1332 (11th Cir. 1998) (alterations, citation and internal quotation marks omitted). This exercise of prosecutorial discretion, however, should not provide a legitimate basis for a sentencing court to reduce *other* defendants' sentences after a jury has found them guilty of more serious charges. *Barner*, 441 F.3d at 1320 ("[I]t is commonplace that a defendant can expect to get a more favorable sentence from a plea bargain than from

proceeding to trial and losing; were it otherwise, few defendants would forego their right to trial."). Indeed, "[t]he efficacy of [plea bargaining] would surely decrease if every time the government exchanged a plea bargain for a witness' cooperation it took the risk that the plea would water down the sentences imposed on the other defendants." *United States* v. *(Patrick) Williams*, 980 F.2d 1463, 1467 (D.C. Cir. 1992).

B. The District Court Gave Too Much Weight To Section 3553(a)(6)

The district court also abused its discretion by giving too much weight to Section 3553(a)(6) and too little weight to the other sentencing factors. At the sentencing hearings, the district court did state that it had considered other factors besides the need to avoid unwarranted disparities. See R.252 at 24; R.253 at 17-18. The only factor discussed in any depth, however, was the need to avoid a disparity with Griffin's sentence. Indeed, at the outset of the first sentencing hearing – *before even hearing argument from counsel* – the court stated that it would "go forward and * * * sentence Mr. McQueen as [the court] had indicated [it] probably would [in the telephone conference]" unless the prosecutor "want[ed] to make a fuller record." R.252 at 4. And the court made clear during that telephone conference that it intended to reduce defendants' sentences pursuant to Section 3553(a)(6). R.287 at 7.

Consideration of other factors makes clear that defendants' sentences are unreasonable. Section 3553(a) demands a sentence that is substantively reasonable under the totality of the circumstances, *United States* v. *Livesay*, 525 F.3d 1081, 1091 (11th Cir. 2008), and a reviewing court must consider whether the sentence imposed "fail[ed] to achieve the purposes of sentencing as stated in section 3553(a)," *United States* v. *Barrington*, 648 F.3d 1178, 1204 (11th Cir. 2011) (brackets in original; citation omitted), cert. denied, 132 S. Ct. 1066 (2012). Here, the district court's sentence is unreasonable because it does not reflect the totality of the Section 3553(a) factors, and it fails to achieve the purposes of those factors. The district court's near-exclusive focus on the need to avoid unwarranted sentencing disparities was improper, as it did not properly take into consideration other sentencing factors.

McQueen was convicted of conspiring to deprive the rights of multiple individuals; both McQueen and Dawkins were convicted of obstructing justice. Given their criminal conduct and the recommended sentences for that conduct, their sentences of 12 months' and one month's imprisonment do not reflect the seriousness of their offenses. Nor do their sentences provide adequate deterrence to other officers who would engage in such conduct, particularly when color-of-law defendants routinely receive much greater sentences for that conduct. See, *e.g.*, *United States* v. *Conatser*, 514 F.3d 508 (6th Cir. 2008) (70 months'

imprisonment for Section 241 violation); *United States* v. *Owens*, 437 F. App'x 436 (6th Cir. 2011) (63 months' imprisonment after guilty plea to Section 241 violation); *United States* v. *Fontenot*, 611 F.3d 734 (11th Cir. 2010) (15 months' imprisonment for Section 1519 violation), cert. denied, 131 S. Ct. 1601 (2011); *United States* v. *Hunt*, 526 F.3d 739 (11th Cir. 2008) (10 months' imprisonment for Section 1519 violation, which reflected downward departure for aberrant behavior); *United States* v. *Morris*, No. 07-442 (S.D. Tex.) (24 months' imprisonment for Section 1519 violation), aff'd, 404 F. App'x 916 (5th Cir. 2010); *United States* v. *Melgoza*, No. 09-900 (W.D. Tex.) (27 months' imprisonment for Section 1519 violation), aff'd, 469 F. App'x 357 (5th Cir. 2012) and petition for cert. pending, No. 12-5058.

Finally, the district court's comments at sentencing reflect the court's view that the maximum sentence available to Griffin, given his criminal conduct, was too lenient. R.252 at 15 (noting Griffin was "conveniently in [the] position [of facing a maximum sentence of 12 months] because the government gave him the offer to plead to a different offense even though I saw and heard evidence pertaining to the charged acts"); R.252 at 18 (finding the government "altered the landscape" by presenting to the court three defendants who were charged with the same crime under the indictment "yet the one * * * that had all of the 404(b) evidence that was so prejudicial that it warranted a second jury, that one faces the

lesser sentence"). By suggesting that Griffin's maximum sentence of 12 months' imprisonment was unreasonable given the extent of his criminal conduct, the district court itself recognizes that the 12 months' and one month's imprisonment defendants received for their conduct were not reasonable.

CONCLUSION

For the reasons stated, this Court should affirm defendants' convictions, vacate defendants' sentences, and remand this case to the district court for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rules of Appellate Procedure 28.1(e)(3) and 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT:

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Dated: September 6, 2012

s/Angela M. Miller
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CERTIFICATE OF SERVICE

I certify that on September 6, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I also certify that on September 6, 2012, seven paper copies, identical to the brief filed electronically, were sent to the Clerk of the Court by U.S. mail.

I also certify that on September 6, 2012, counsel of record identified below will receive the foregoing brief either as a registered CM/ECF user, or by first class U.S. mail, postage prepaid:

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