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

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

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As the United States explained in its opening brief (US Br. 57-69),[1] this Court should vacate McQueen's and Dawkins's sentences and remand for resentencing because the district court abused its discretion in sentencing McQueen and Dawkins to sentences well-below their recommended Guidelines sentences of 151 months' and 12 months' imprisonment, respectively.

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[1] "US Br. __" indicates the page number of the government's opening brief. "Def. R. Br. __" refers to the page number of defendants' response/reply brief. Record citations are indicated by "R.__ at __."

Specifically, the district court erred in treating defendants McQueen and Dawkins, who were found guilty after trial of felony violations, as similarly situated to their co-defendant, Griffin, who accepted responsibility by pleading guilty to a single misdemeanor violation following his mistrial.

I

DEFENDANTS McQUEEN AND DAWKINS WERE NOT SIMILARLY SITUATED TO THEIR CO-DEFENDANT

As explained in the government's opening brief (US Br. 58-66), defendants McQueen and Dawkins were not similarly situated to their co-defendant, Griffin. Griffin was charged along with defendants McQueen and Dawkins with conspiring to violate the constitutional rights of inmates. Unlike McQueen and Dawkins, however, who were each convicted by a jury of at least one felony violation, Griffin was *not* convicted by a jury. Griffin was instead granted a mistrial after the jury was unable to agree upon a verdict. Griffin then accepted responsibility by pleading guilty to a single misdemeanor count, with a resulting statutorily-capped sentence of 12 months' imprisonment.

Section 3553(a)(6) of Title 18 directs sentencing courts, when fashioning a sentence that is sufficient, but not greater than necessary, to accomplish the sentencing goals set forth in 18 U.S.C. 3553(a)(2), to consider "the need to avoid unwarranted sentence disparities among defendants with similar records *who have been found guilty of similar conduct*." 18 U.S.C. 3553(a)(6) (emphasis added).

The plain language of Section 3553(a)(6) thus excludes Griffin as a point of reference for sentencing defendants McQueen and Dawkins, as Griffin, who pleaded guilty to a single misdemeanor offense, is *not* among those defendants who have been "found guilty of similar conduct" to that of McQueen and Dawkins. 18 U.S.C. 3553(a)(6).

Moreover, this Court has previously explained that defendants who plead guilty "*are not similarly situated*" to defendants who proceed to trial. *United States* v. *Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009) (emphasis added), cert. denied, 130 S. Ct. 2342 (2010). Defendants argue (Def. R. Br. 35 n.8) that this Court's decision in *Docampo*, as well as other cases cited by the government in footnote 15 of its principal brief, are inapposite because, in those cases, the district court's sentencing decisions were challenged by the defendant, rather than the government. This argument wholly misses the mark, as the cited cases do not turn on the identity of the appellant. Instead, they all recognize the central point that defendants who plead guilty are *not* similarly situated to those who proceed to trial. See, *e.g.*, *Docampo*, 573 F.3d at 1101 ("We have held that defendants who cooperate with the government and enter a written plea agreement *are not similarly situated* to a defendant who provides no assistance to the government and proceeds to trial.") (emphasis added). And because Section 3553(a)(6) focuses on the need to avoid unwarranted sentence disparities between similarly situated defendants

(*i.e.*, "defendants with similar records who have been found guilty of similar conduct"), the sentence received by Griffin, who pled guilty to a less serious offense, is an inappropriate point of reference for sentencing McQueen and Dawkins.

Indeed, this Court has previously held that comparing a defendant's recommended sentence to sentences received by defendants who pleaded guilty or had been convicted of less serious offenses was error, and resulted in a substantively unreasonable sentence. *United States* v. *Jayyousi*, 657 F.3d 1085, 1117-1118 (11th Cir. 2011), cert. denied, No. 11-1194, 2012 WL 1079567, No. 11-1198, 2012 WL 1106760, and No. 11-9672, 2012 WL 1145016 (2012); see also US Br. 59-60. The district court's erroneous sentencing decision in *Jayyousi* necessitated a remand and warranted an "admonish[ment]" from this Court that, on remand, the district court "should not draw comparisons to cases involving defendants" who pleaded guilty or who were convicted of less serious offenses. *Jayyousi*, 657 F.3d at 1118. Here, the district court expressly compared defendants McQueen and Dawkins to Griffin. As in *Jayyousi*, doing so was error, and resulted in an unreasonable sentence. *Ibid.*

Defendants' suggestion (Def. R. Br. 37) that this Court's *Jayyousi* decision is inapposite because there were other "independent reasons" to vacate the defendant's sentence in no way changes this Court's "independent" holding that

the district court erred, and consequently imposed a substantively unreasonable sentence, when it compared the defendant's sentence with those "who had either been convicted of less serious offenses, lacked extensive criminal histories, or had pleaded guilty." *Jayyousi*, 657 F.3d at 1118. Defendant further attempts (Def. R. Br. 37) to avoid *Jayyousi*'s clear holding on the ground that Griffin "did not plead guilty before trial." But of course he did: Griffin accepted responsibility and pleaded guilty after his mistrial and spared the government the time, effort, and resources associated with a retrial. Defendant's dismissive treatment (Def. R. Br. 37) of the benefits that flow to a defendant (and the government) after a defendant agrees to plead guilty does not change the holding of *Jayyousi*, or affect its applicability to the issue before this Court.

As explained in the government's opening brief (US Br. 61-62), the district court's decision to treat McQueen, Dawkins, and Griffin as similarly situated rested heavily on its determination that the government "altered the landscape" when it offered Griffin a plea agreement. R.252 at 18. The district court's reasoning and defendants' argument follow from the fact that Griffin originally proceeded to trial with the defendants. See, *e.g.*, R.287 at 7 (district court explaining that, in its opinion, to treat defendants McQueen and Dawkins differently from Griffin "is to ask [the court] to close [its] eyes to the truth and to what [it] know[s] from having presided over the trial"). To be sure, the

government charged all three defendants with committing similar criminal acts. But had the government offered Griffin a plea agreement *before* any defendant went to trial, neither the district court nor the defendants could plausibly argue that the government altered the landscape, or that Griffin was similarly situated to McQueen and Dawkins for sentencing purposes. See *Jayyousi*, 657 F.3d at 1117-1118; *United States* v. *Langston*, 590 F.3d 1226, 1237 (11th Cir. 2009); *Docampo*, 573 F.3d at 1101; see also cases cited in US Br. 58-59 n.15. The "truth" (R.287 at 7) of what happened at trial is that Griffin was not convicted, and he (and the government) stood in the same positions they did *before* trial. See US Br. 62-63. Thus, it cannot be that Griffin is similarly situated to McQueen and Dawkins simply because he went to trial – a trial at which he was not convicted of any criminal offense. The "landscape" that existed after the trials was the direct result of the juries' verdicts, not the government's actions.

Moreover, any disparity that results from the government's prosecutorial decisions is not unwarranted. See US Br. 65-66. This is because the government is free to choose between different statutory penalty schemes that apply to the same or similar conduct, as long as its selection is not "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *United States* v. *Batchelder*, 442 U.S. 114, 125 n.9, 99 S. Ct. 2198, 2205 n.9 (1979) (citation omitted). Defendants do not make any such allegation here, nor could they.

Defendants' reliance (Def. R. Br. 40-41 & n.14) on cases outside this Circuit to support its arguments is equally unavailing. First, defendants assert that the Tenth Circuit, in *United States* v. *Smart*, 518 F.3d 800 (10th Cir. 2008), addressed the issue raised in this appeal and rejected the government's position. As explained below, it did not. Second, defendants argue (Def. R. Br. 40) that courts addressing "this issue" have explained that district courts may consider disparities between co-defendants when making sentencing decisions. Of course they may, see *Gall* v. *United States*, 552 U.S. 38, 54-56, 128 S. Ct. 586, 599-600 (2007), and the government is not suggesting otherwise. The government's position, which is consistent with this Court's decision in *Jayyousi* and the plain language of Section 3553(a)(6), is that a district court may not consider potential disparities between defendants (co-defendants or not) *who are not similarly situated*. In *Gall*, 552 U.S. at 55, 128 S. Ct. at 600, the Supreme Court observed that the district court appropriately "considered the need to avoid unwarranted disparities, but also considered the need to avoid *unwarranted similarities* among other co-conspirators who were not similarly situated." (emphasis added). See also *Jayyousi*, 657 F.3d at 1118. The district court here, while explaining that it was sentencing defendants to avoid unwarranted disparities between their sentences and Griffin's, instead created "unwarranted similarities among * * * [co-defendants] who were not similarly situated." *Gall*, 552 U.S. at 55, 128 S. Ct. at 600.

The Tenth Circuit's decision in *Smart* does not help defendants' position. In that case, Smart (the appealing defendant) and his co-defendant were both charged with violating 18 U.S.C. 2251(a). 518 F.3d at 802. Smart's co-defendant pleaded guilty to two counts of violating 18 U.S.C. 2251(a) and was sentenced to the statutory minimum of 120 months' imprisonment. *Ibid.* Smart, who was only charged with one count of violating 18 U.S.C. 2251(a), was found guilty by a jury. *Ibid.* The district court, finding Smart to be less culpable than his co-defendant, varied downward from Smart's recommended sentence and sentenced him to 120 months' imprisonment to avoid an unwarranted disparity between Smart's sentence and his co-defendant's. *Ibid.*

In rejecting the government's challenge to Smart's sentence, the Tenth Circuit held, consistent with *Gall*, that a district court may consider co-defendant disparity when sentencing defendants, 518 F.3d at 804, and found that Smart's "lesser culpability, offset by his failure to accept responsibility, supported the same term of imprisonment as [the co-defendant's] greater culpability and acceptance of responsibility," *id.* at 810. This is an unremarkable holding, as Smart's co-defendant stood convicted of two felony charges and Smart stood convicted of just one. Under those circumstances, a district court would not err in considering the relative culpability of two defendants charged with – *and convicted of* – the same felony offense. While Griffin was *charged* with the same felony offense as

McQueen and Dawkins, a jury did not convict him of that offense, nor did he plead guilty to that offense. Thus, neither the decision in *Gall* nor *Smart* endorses a district court's practice of weighing the relative culpability of co-defendants convicted of *different* offenses by *different* means (*i.e.*, jury verdict v. plea agreement). Cf. *Jayyousi*, 657 F.3d at 1118.

Defendants' reliance on the Sixth Circuit's decision in *United States* v. *Presley*, 547 F.3d 625 (6th Cir. 2008), is equally unpersuasive. Both defendants in *Presley* were convicted by a jury on three identical felony counts and sentenced to 360 months' imprisonment; the sentences were vacated in light of *United States* v. *Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). The co-defendant subsequently filed a motion for a new trial on an evidentiary issue; he then entered into a plea agreement that vacated two of his three felony counts. *Presley*, 547 F.3d at 628. When sentencing Presley, the district court granted a downward variance to avoid a disparity between Presley's sentence and his now-cooperating co-defendant (although the court still sentenced Presley to a longer term of imprisonment than his cooperating co-defendant). *Id.* at 628-629.

In rejecting the government's challenge to Presley's sentence, the Sixth Circuit held that it was not unreasonable for the district court to have considered Presley and his co-defendant of having been found guilty of the same conduct when considering Section 3553(a)(6), because the two defendants *had* been found

guilty of the same conduct by the jury. *Presley*, 547 F.3d at 631 ("[T]here is no abuse of discretion in the district court considering conduct *that was found by a jury* in determining whether two defendants are similarly situated.") (emphasis added). That is simply not the case here.

II

THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT REASONABLY CONSIDERING OTHER SENTENCING FACTORS WHEN SENTENCING DEFENDANTS McQUEEN AND DAWKINS

As explained in the government's opening brief (US Br. 66-69), the district court gave too much weight to its (mis)understanding of what it considered an unwarranted sentencing disparity among Griffin, on the one hand, and defendants McQueen and Dawkins, on the other. The resulting sentences were thus substantively unreasonable under the totality of the circumstances.

The government recognizes that "[t]he weight to be accorded any given [Section] 3553(a) factor is a matter committed to the sound discretion of the district court," and that this Court will not substitute its judgment "in weighing the relevant factors." *United States* v. *Amedeo*, 487 F.3d 823, 832 (11th Cir.) (brackets in original; citation omitted), cert. denied, 552 U.S. 1049, 128 S. Ct. 671 (2007). But the district court in this case gave overwhelming weight to a *non*-relevant factor. As already explained (*supra*; US Br. 58-66), the statute directs a sentencing court to consider "the need to avoid unwarranted sentence disparities among

defendants with similar records who have been found guilty of similar conduct," *not* disparities that are the natural and expected result of defendants having been convicted of different crimes through different means.[2] 18 U.S.C. 3553(a)(6).

Defendants make much of the fact (Def. R. Br. 43-47) that the district court indicated at the sentencing hearing that it considered other factors under Section 3553(a) before sentencing defendants. The district court's statement that it considered the other factors does not salvage the court's decision, made days before the sentencing hearing, to sentence McQueen and Dawkins in accordance with that of a defendant who accepted responsibility and pleaded guilty to a single misdemeanor.

The simple facts are these: The district court made clear to the parties days before the sentencing hearing that it did "not intend to sentence" defendants "to time greater than that to which [it] can sentence * * * Griffin, that is, 12 months," and that the basis for doing so was "to avoid unwarranted disparity in sentencing." R.287 at 7. Then, at the sentencing hearing, the district court sentenced defendants exactly as it indicated it would in the earlier telephone conference, and its predominant justification for doing so was the need to avoid unwarranted disparities in sentencing. See discussions at R.252 at 15-20; R.253 at 17-18.

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[2] Defendants' suggestion (Def. R. Br. 38 n.12) that, while repeatedly discussing the need under "3553 to avoid unwarranted disparity in sentencing," the district court was not discussing 18 U.S.C. 3553(a)(6) specifically, but was instead discussing 18 U.S.C. 3553(a) generally, is unpersuasive.

Moreover, the *only* other defendant's sentence discussed at the hearings was that received by Griffin. See generally R.252 & R.253. The court did not engage in any effort to avoid unwarranted disparities in sentencing with other color-of-law defendants who had been found guilty of similar conduct. In light of these actions, any suggestion that the district court meaningfully considered other sentencing factors that influenced its sentencing decision is wholly unpersuasive.

As the government's opening brief explained (US Br. 67-68), the defendants' sentences are well outside the mainstream of sentences received by color-of-law defendants who have been found guilty of similar offenses (*i.e.*, felony civil rights and/or obstruction offenses). Defendants do not attempt to argue that the sentences received by the defendants in this case provide adequate deterrence to other officers who would engage in similar conduct. Nor do they respond to the government's argument that defendants' sentences here create an unwarranted disparity among defendants to whom they are *actually* similarly situated.

Finally, defendants do not respond to the government's argument (US Br. 68-69) that the district court's comments during the telephone conference and at the sentencing hearing reflect the court's dissatisfaction with Griffin's sentence, given the conduct of which he was accused (but not convicted). If the district court sentenced defendants in accord with Griffin's sentence, and if the court thought

that Griffin's sentence was unreasonable given Griffin's alleged criminal activity, then the district court (perhaps unintentionally, but no less unreasonably) sentenced defendants to an unreasonable sentence given their criminal convictions. Doing so was an abuse of discretion warranting reversal by this Court.

CONCLUSION

For the reasons set forth in this brief and in the United States' opening brief, this Court should vacate defendants' sentences and remand 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 REPLY BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT:

(1) complies with the type-volume requirements of Federal Rule of Appellate Procedure 28.1(e)(B) because it contains 2746 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font; and,

(3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

Dated: November 16, 2012

s/Angela M. Miller
ANGELA M. MILLER
Attorney

CERTIFICATE OF SERVICE

I certify that on November 16, 2012, I electronically filed the foregoing REPLY 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 November 16, 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 November 16, 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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