No. 11-2623

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

VERNON WILSON,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Vernon Wilson, who served as chief administer of the Washington County Jail, was convicted of several violations of federal law arising from assaults on four inmates and his attempts to avoid responsibility for those attacks. Wilson was convicted on four counts of deprivation of rights under 18 U.S.C. 242 and two counts of making false statements under 18 U.S.C. 1001. The court sentenced Wilson to 120 months for each of the Section 242 counts, and to 60 months for each of the false statements counts, with all the sentences to run concurrently. R. 109 at 71.

Wilson appeals his sentence, alleging that the district court erred in enhancing his sentence based on the victims' physical restraint. Wilson also argues that the court improperly applied the aggravated assault guideline for the attack on Gary Gieselman, and erred in finding Gieselman's injuries constituted serious bodily injury within the meaning of the guidelines.

The United States has no objection to oral argument in this appeal.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231 and entered judgment on July 13, 2011. R. 97.[1] Defendant filed a timely notice of appeal on July 18, 2011. R. 99. This Court has jurisdiction under 28 U.S.C. 1291.

[1] "R. _" refers to documents filed with the district court by docket number. "Br. _" refers to the defendant's opening brief.

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Did the court err in enhancing Wilson's sentence for the victims' "physical restraint," defined under the Sentencing Guidelines as being "bound, tied, or locked up," where the victims were confined to their cells in the county jail?

United States v. *Stevens*, 580 F.3d 718 (8th Cir. 2009)

United States v. *Clayton*, 172 F.3d 347 (5th Cir. 1999)

United States v. *Epley*, 52 F.3d 571 (6th Cir. 1995)

United States v. *Kirtley*, 986 F.2d 285 (8th Cir. 1993)

2. Given that victim Gary Gieselman's injuries required hospitalization, resulted in a broken orbital bone and dental damage, and left him bloody, swollen, and unrecognizable, did the court abuse its discretion in sentencing Wilson under guidelines governing aggravated assault and enhancing his sentence for causing serious bodily injury?

United States v. *Cozzi*, 613 F.3d 725 (7th Cir. 2010)

United States v. *Osborne*, 164 F.3d 434 (8th Cir. 1999)

United States v. *Thompson*, 60 F.3d 514 (8th Cir. 1995)

United States v. *Slow Bear*, 943 F.2d 836 (8th Cir. 1991)

STATEMENT OF THE CASE

Vernon Wilson, Chief Deputy Sheriff of Washington County, Missouri and chief administrator of the jail, was indicted on July 15, 2010, in the Eastern District of Missouri under 18 U.S.C. 242 and 18 U.S.C. 1001. R. 2. He was convicted on March 3, 2011, on four counts of deprivation of rights under 18 U.S.C. 242 for assaulting two inmates in his care (counts two and four) and orchestrating the assaults of two more inmates (counts one and three). R. 111 at 75-76. He was also convicted on two counts of making false statements under 18 U.S.C. 1001 for lying to an FBI agent (counts five and six). R. 111 at 76. On July 13, 2011, the court sentenced Wilson to 120 months for each of the Section 242 counts, and to 60 months for each of the false statements counts, with all the sentences to run concurrently. R. 109 at 71. Wilson's sentence included enhancements for beating the victims while they were physically restrained and for causing one victim serious bodily injury.

STATEMENT OF THE FACTS

Vernon Wilson was the Chief Deputy Sheriff of Washington County, Missouri, and the chief administrator of the county jail. R. 70 at 5. His employees called him "Major Wilson." R. 70 at 6. He was appointed chief deputy by his "best friend," Sheriff Kevin Schroeder, after working on Schroeder's campaign for sheriff. R. 72 at 115-116. Jail employees were not to report anything to Schroeder

before they went to Wilson. R. 70 at 35; R. 71 at 28, 79, 115-116. Wilson's daughter, Valeria Wilson, also worked as a corrections officer. R. 70 at 23.

1. The Jimmy Todd Incident (Count One)

Jimmy Todd was a "skinny," "spindly" pretrial-detainee in his fifties. R. 71 at 65, 115; R. 111 at 58. He was often loud and obnoxious. R. 71 at 65. On July 27, 2005, Todd was banging on his cell door "complaining, bitching, and moaning." R. 71 at 163-164. He was "annoying" but not dangerous or violent. R. 71 at 163. The corrections officers asked Wilson what to do to stop Todd's yelling. R. 71 at 66, 165. Wilson told them to move Todd into a cell block, known as the "rough[] tank," with Thomas Mackley. R. 70 at 14; R. 71 at 67-68. When the corrections officers questioned his orders, he pointed to his badge and said "I'm the f***ing Major." R. 71 at 165, 179.

Mackley, detained on a murder charge, "liked to fight" and was "known for beating the crap out of people." R. 71 at 69, 113, 205. He "r[a]n the tank." R. 71 at 113. One corrections officer explained she "wouldn't just put anybody in there" with Mackley and would consider whether a potential cellmate could defend himself. R. 71 at 113.

Wilson spoke with Mackley before the corrections officers moved Todd. R. 71 at 68-70. When they brought Todd to Mackley's tank, Wilson told Mackley and his tank-mates to "[h]ave fun, boys." R. 71 at 70. Wilson and the corrections

officers returned to the front of the jail, where they could watch the surveillance camera. R. 71 at 71, 168. Wilson said he would "give it five minutes." R. 71 at 167.

Soon the officers heard Todd beating on the door of the tank and begging, "Get me out of here." R. 71 at 72. Todd's face was bloody and swollen. The officers removed him from the tank. R. 71 at 73, 75. Wilson asked Todd, "Did I get my point across?" R. 71 at 74, 169.

After the beating, Mackley told Wilson that Todd fell off his bunk. R. 71 at 129; see also R. 71 at 168-169. Wilson said, "Bunks can get slippery." R. 71 at 75. He gave Mackley and his cellmates cigarettes. R. 71 at 75, 170. Normally, smoking was not allowed and inmates were punished if caught smoking. R. 71 at 19. One of Mackley's tank-mates explained that he understood "they were bringing [Todd] back to beat him up," and "[w]e were all getting basically paid. Tommy was getting paid to beat him up and we were getting paid to be quiet." R. 71 at 125, 130; see also R. 71 at 171.

Corrections officer Michael Hahn, who had seen what happened to Todd, eventually reported it to a detective for the Washington County Sheriff's Department. R. 71 at 78-80. He did not tell Sheriff Schroeder because he knew of his friendship with Wilson. R. 71 at 79-80. Hahn was fired a week or two after making the report. R. 71 at 79. At a subsequent staff meeting, Wilson explained

that Hahn was gone because he "jumped [the] chain of command" and the "same w[ould] happen" to anyone else who did. R. 71 at 115-116.

2. The Jonathan Garrett Incident (Count Two)

On August 14, 2005, pretrial detainee Jonathan Garrett was moved to the jail and put in the large holding tank. R. 70 at 23-24; R. 111 at 60-61. He was held over a weekend, awaiting transfer to St. Louis. R. 70 at 23-24; R. 111 at 60-61. Garrett was "small and thin" and looked "like a little high school kid." R. 70 at 24; R. 71 at 153. He began singing and "rapping" loudly, using profanity, and generally being "very obnoxious." R. 70 at 25-26; R. 71 at 9. Valeria Wilson and Jessica Reed, the corrections officers on duty that day, told Garrett to be quiet. R. 70 at 26. He stopped singing, but "got very upset" and began "rapping and yelling" again after Valeria Wilson called him an "asshole." R. 70 at 26-27.

Valeria Wilson then called her father, who was off duty. R. 70 at 28. The defendant was in the process of moving to a new house and had conscripted four officers to help him. R. 70 at 28-29; R. 71 at 29. When his daughter called, Wilson ordered the officers to accompany him to the jail. R. 70 at 28; R. 71 at 150. When they arrived, the jail was quiet. R. 71 at 33, 151.

One officer opened Garrett's cell and defendant walked in. R. 70 at 31. Four officers stood at the doorway. R. 71 at 56. Wilson put out his right hand, and said "Hello, I'm Major Vern Wilson. I run this jail." R. 70 at 31. Wilson pointed

out he had "the same last name as [Valeria Wilson]" and hit Garrett with the back of his hand across his cheek, knocking him over onto a bunk. R. 70 at 31; R. 71 at 152. Wilson struck with "a good deal of force." R. 70 at 31. He hit Garrett four, five, or six times in the head and face, and "almost after every strike [Garrett's] head bounced off the concrete wall that was behind him." R. 71 at 34-35. The defendant "cuss[ed] and scream[ed]." R. 71 at 34. Defendant put his knee on Garrett's chest and leaned towards him to yell in his face. R. 70 at 32. Garrett did not resist the attack, but "just kind of sat there" and "groan[ed]" and "moan[ed]." R. 71 at 23, 35, 153.

After the attack, the defendant told one of the officers, "What happens in the jail stays in the jail." R. 72 at 137.

3. The Gary Gieselman Incident (Count Three)

Valeria Wilson booked Gary Gieselman into the county jail on September 29, 2005. R. 70 at 36-37; R. 71 at 224. He was a pretrial detainee transferred from another jail. R. 111 at 58. He was complaining, yelling, and swearing at Valeria Wilson. R. 71 at 224, 227. She put Gieselman into Mackley's tank, although she knew he would likely be "roughed up." R. 71 at 228. The defendant was in the booking area and did not object to the placement. R. 71 at 230-231. At some point after placing Gieselman in Mackley's tank, Valeria Wilson looked at Mackley and told him to "have fun" or to "play nice." R. 71 at 132, 227-228; R. 72 at 36, 61.

When she returned to the booking area, Valeria Wilson complained to the defendant about how Gieselman had annoyed her. R. 71 at 232. The defendant became upset, went with Valeria Wilson to Mackley's tank, and called Gieselman over. R. 71 at 233-234. He told Gieselman in front of the other prisoners that he was the Major, Valeria Wilson was his daughter, and he was "not going to have any problems in his jail." R. 71 at 235-236. The defendant then looked at Mackley, nodded his head, and "smirked." R. 72 at 38. Valeria Wilson testified that Mackley had a "crush" on her and was "protective" of her, and that the defendant knew about Mackley's feelings. R. 71 at 228, 232.

After Wilson and his daughter left, Mackley told the others in the tank that if they beat up Gieselman, they would probably "be rewarded" and get to smoke. R. 72 at 38, 42, 61. The men in the tank talked it over for a half hour or so and agreed to attack Gieselman. R. 72 at 42-43. One prisoner testified that if the defendant had not come back to the tank after Valeria Wilson put Gieselman there, they would not have beaten him up. R. 72 at 65.

After the discussions, one of the prisoners hit Gieselman and he fell off the top bunk onto the bottom bunk. R. 71 at 136; R. 72 at 61. Then Mackley hit him in the face and another prisoner kneed him in the head. R. 71 at 136. The others in the tank eventually stopped hitting Gieselman and pulled Mackley away, "[b]ecause [Mackley] was killing him." R. 71 at 137; R. 72 at 44. Valeria Wilson

returned to Mackley's tank to find Gieselman covered in blood. R. 71 at 229. "He could barely stand up." R. 72 at 44.

Corrections officer Reed, who saw Gieselman after the attack, reported that "one side of his face was caved in, actually dented in" and "horribly distorted." R. 70 at 38-39. One eye was swollen shut. R. 70 at 38. "His face was purple and black," with "large welts and knots all over, the size of golf balls." R. 70 at 38. Reed had seen Gieselman when he was booked a few hours earlier. R. 70 at 37-38. But when an officer brought the bloodied inmate to the front and asked Reed to watch him, she did not recognize Gieselman and asked the officer who he was. R. 70 at 39.

Gieselman's medical records documented "gross swelling" in his face and eyes, a lacerated lip, multiple facial wounds, and a swollen ear. Exh. 60 at 51; Exh. 61 at 35. Gieselman's right eye was so swollen he could not open it, and he lost some range of movement in his jaw. Exh. 60 at 51. A CT scan showed a fractured orbital bone. Exh. 60 at 64. He also suffered damage to his teeth. R. 109 at 72.

The defendant went to Mackley's tank and asked what happened. Mackley told him Gieselman fell off his bunk. R. 72 at 45-46. The defendant smiled. R. 72 at 46. The next day he came to Mackley's tank and gave the prisoners cigarettes. R. 72 at 64-65, 72.

At least one prisoner, Chris Wallace, was later charged with beating Gieselman. R. 72 at 33, 48. He testified that the defendant approached him in the courthouse and told him he would "disappear" if he did not "keep [his] mouth shut." R. 72 at 48.

4. The Billy Hawkins Incident (Count Four)

In the early morning hours of November 6, 2005, corrections officer Jana Gillam called another officer, Keith Jackson, and asked for help with her 25-year-old son, Billy Hawkins. R. 71 at 186-187. Hawkins was drunk, fighting with his girlfriend, and "destroy[ing]" Gillam's house. R. 71 at 156-157, 175, 187. Jackson took Hawkins to the jail for 24-hour "safekeeping." R. 71 at 156, 189. Hawkins was placed in the large holding cell by himself and was "banging, clanging" on the cell door. R. 71 at 156.

Wilson went into Hawkins's cell, along with Jailer Lance Mason, and asked "Do you know who the f*** I am[?]" R. 71 at 157. Hawkins replied "Yeah, you're the Major." R. 71 at 157. Wilson hit Hawkins in the face two or three times, knocking him down onto a bench and beating his head against the concrete wall. R. 71 at 157-158. Lance Mason stated that Hawkins's head was "thudding" or "bouncing off the wall." R. 71 at 161. When Gillam picked Hawkins up the next day, he had "several large knots on his head." R. 71 at 191. Gillam did not

report the incident for fear of losing her job. R. 71 at 191. Afterwards, she was upset with Wilson and avoided talking to him. R. 71 at 197-198.

5. The Investigation

Based on Officer Hahn's complaints, FBI Special Agent Patrick Cunningham eventually began an investigation into the Washington County Jail. R. 72 at 77-79, 91. He went to the jail in late 2005 or early 2006 to interview Todd. R. 72 at 82-83. He told Wilson he was investigating possible abuse of Todd and Gieselman. R. 72 at 83.

a. False Statements Involving Gieselman (Count Six)

In December 2008, Wilson requested an interview with Cunningham to "state his side" of the story. R. 72 at 80. Cunningham met with Wilson and his attorney and informed Wilson that it was a violation of federal law to make false statements to an FBI agent. R. 72 at 80-81. When asked about Gieselman, Wilson replied that he could not remember him. R. 72 at 82-83. After Cunningham explained that Gieselman was assaulted at the jail and transferred to a hospital, Wilson said he remembered getting a phone call about the incident. R. 72 at 83-84. Wilson denied speaking to Gieselman before the attack and said he had not spoken to Valeria Wilson about Gieselman before the beating. R. 72 at 84.

b. False Statements Involving Todd (Count Five)

Cunningham asked Wilson to describe the incident involving Todd. R. 72 at 85-86. Wilson explained that while he was outside the jail smoking a cigarette with Sheriff Schroeder, two officers approached and asked what to do about Todd. According to Wilson, Schroeder spoke up and said to put him in Mackley's cell. R. 72 at 86-87. Wilson claimed he advised against the sheriff's plan. R. 72 at 86. Cunningham then interviewed Schroeder, who said he was not at the jail the day Todd was assaulted. R. 72 at 98.

6. The Trial

Several jailers, deputies, and inmates testified about the four assaults. Valeria Wilson testified as part of a plea agreement for a charge of obstruction of justice. R. 71 at 222-223; R. 72 at 5. Sheriff Schroeder also testified. He stated that Wilson never consulted him about where to house the jail's residents and never asked him what to do with Todd. R. 72 at 118-119.

In addition to the testimony, the jury reviewed photographs of Gieselman's injuries, some of his medical records, and surveillance camera footage showing Wilson's conversation with Gieselman. R. 51 at 3; R. 71 at 137-138; R. 72 at 38-41, 89; Exhs. 56, 57, 60, 61. After two hours of deliberation, the jury found Wilson guilty on all six counts. R. 111 at 73-75.

7. Sentencing

The court adopted the presentence report and applied Sentencing Guidelines § 2H1.1, applicable to violations of civil rights statutes, including 18 U.S.C. 242. The guideline states that a court should apply the base level for the underlying offense whenever that would result in a base level greater than 12. U.S.S.G. § 2H1.1(a)(1). Accordingly, the court applied the aggravated assault guideline for count three, the attack on Gieselman. R. 109 at 28-33. This provided a base level of 14. U.S.S.G. § 2A2.2; R. 109 at 33. The court added six levels because Wilson was acting under color of law or was a public official within the meaning of Section 2H1.1(b)(1) and five levels for serious bodily injury under Section 2A2.2(b)(3)(B). The court also added two levels, pursuant to Sentencing Guidelines § 3A1.3, because the victims were restrained. R. 109 at 15, 33. Under Sentencing Guidelines § 3C1.1, the court added two levels for obstruction of justice. R. 109 at 33. This yielded an offense level of 29 for count three. R. 109 at 33. Applying Sentencing Guidelines § 3D1.4, governing multiple-count adjustments, the court added one additional level for counts one and five. R. 109 at 33-34. No levels were added for counts two and four. R. 109 at 34. Wilson's combined offense level of 30 and criminal history category I yielded a guidelines range of 97 to 121 months. R. 109 at 34. The statutory maximums are ten years

for the civil rights violations and five years for the false statements counts. R. 109 at 34.

The court considered Wilson's objections to the enhancements. R. 109 at 15-19. The court found that the victims were restrained within the meaning of Section 1B1.1, and rejected Wilson's argument that the enhancement could not be applied because the victims were lawfully incarcerated. R. 79 at 2; R. 109 at 21-22. The court noted that Hawkins and Garrett were not only confined to a cell when Wilson assaulted them, but were virtually surrounded by Wilson and his deputies. R. 109 at 22-23. Gieselman and Todd, the court pointed out, were transferred and confined to Mackley's tank specifically so they would be assaulted by inmates from whom they could not escape. R. 109 at 19-22. The court noted that, had it not applied the two-level enhancement for restraint, it would have applied a two-level enhancement for vulnerable victims. R. 109 at 22-23.

The court also rejected Wilson's argument that the court improperly applied the aggravated assault guideline because he did not intend serious bodily injury. R. 109 at 27-29. The court found that, particularly in light of what had happened to Todd, Wilson did intend to inflict serious bodily injury by placing Gieselman in Mackley's tank. R. 109 at 29. Wilson "both knew and intended" that Gieselman be assaulted and knew he was "risking serious bodily harm." R. 109 at 29-30.

Wilson did nothing to limit Gieselman's injuries – other inmates, in fact, broke up the attack. R. 109 at 30.

The court also rejected Wilson's challenge to a 5-level enhancement to count three for Gieselman's serious bodily injury. The United States argued that an enhancement for serious bodily injury was appropriate because testimony at trial and medical records in evidence showed Gieselman sustained a broken orbital bone, was beaten beyond recognition, and was hospitalized. R. 71 at 229; R. 72 at 71, 89; R. 83 at 3-4. The United States sought restitution because damage to Gieselman's teeth required dental work. R. 109 at 72. The court noted, in answer to defendant's claim that evidence of injury was hearsay, that witnesses who saw Gieselman gave "specific testimony about the injuries" they observed. R. 109 at 32.

The court discussed the factors to be considered under 18 U.S.C. 3553(a). The court took into account Wilson's age, family, health, prior law enforcement work, and lack of criminal history. R. 109 at 70. It considered the seriousness of the offense and noted that, as the United States argued, although Wilson was convicted of four separate assaults on inmates, his guidelines range was virtually the same as if he had been convicted of only the Gieselman assault (count three). R. 83 at 8; R. 109 at 25, 70. The court found Wilson set "an improper tone * * * for those who worked under [him]." R. 109 at 70. Wilson's actions harmed not

only the victims but "the system of justice" and a higher sentence was appropriate for deterrence. R. 109 at 70-71. The court stated that Wilson had not shown any remorse for his actions. R. 109 at 70.

The court sentenced Wilson to 120 months on each of the civil rights counts (one through four), and 60 months on each false statements count (five and six), with all the sentences to run concurrently. R. 109 at 71.

SUMMARY OF ARGUMENT

The district court properly enhanced Wilson's sentence for physical restraint of his victims because they were confined to jail cells when the incidents occurred. The Guidelines provide for a two-level enhancement where victims are restrained, including where they are forcibly "tied, bound, or locked up." U.S.S.G. § 3A1.3, 1B1.1, cmt. (n.1(K)). Being imprisoned in a county jail cell is within the plain meaning of "locked up." Furthermore, this Court has determined that confinement in an enclosed space qualifies as physical restraint under the Sentencing Guidelines.

The Guidelines do not provide any special protection for police officers and jailers who commit crimes; nor do they exempt offenses occurring when the victim is otherwise lawfully in custody. In fact, in excessive force cases courts have rejected the argument that incarceration does not constitute physical restraint, because such an interpretation would undermine the Guidelines' purpose of

imposing a greater sentence for assaulting a victim who cannot flee than for attacking an unrestrained person. Because restraint is not an element of a 18 U.S.C. 242 offense and is not specifically incorporated under the offense guidelines of Sentencing Guidelines § 2H1.1, the enhancement does not "double count" Wilson's status as a corrections officer or his actions under color of law.

The court also properly applied the Guidelines' provisions for aggravated assault and enhanced Wilson's sentence for infliction of serious bodily injury. Under Section 2H1.1, when a base offense level for the underlying offense exceeds 12, that level is incorporated into and becomes the base offense level for Section 2H1.1. Thus it was appropriate here to apply the aggravated assault guideline. Both the aggravated assault guideline and a five-level enhancement apply where the defendant inflicts serious bodily harm. The district court did not clearly err in finding that Gary Gieselman's bloodied and swollen face, broken orbital bone, and damaged teeth amounted to serious bodily injury. His injuries required hospitalization, and his dental injuries will require additional reconstruction.

ARGUMENT

I

THE DISTRICT COURT PROPERLY APPLIED A TWO-LEVEL SENTENCING ENHANCEMENT BASED ON THE VICTIMS' PHYSICAL RESTRAINT

A. Standard Of Review

This Court reviews the district court's interpretation and application of the Sentencing Guidelines de novo, and factual findings for clear error. *United States* v. *Olson*, 646 F.3d 569, 572 (8th Cir.), cert. denied, No. 11-7015, 2011 WL 5059149 (2011). In the sentencing context, the government must prove facts supporting a sentencing enhancement by a preponderance of the evidence. *Ibid*. This Court must give "due deference to the district court's application of the guidelines to the facts." *United States* v. *Osborne*, 164 F.3d 434, 438 (8th Cir. 1999).

B. Confinement In An Enclosed Space, Such As A Cell, Qualifies As Physical Restraint Within The Meaning Of The Guideline

The Sentencing Guidelines provide for a two-level enhancement "[i]f a victim was physically restrained in the course of the offense." U.S.S.G. § 3A1.3. The guideline's application notes, U.S.S.G. § 1B1.1, cmt. (n.1(K)), define "[p]hysically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up." Wilson's victims were imprisoned and, therefore, physically restrained. All four inmates were confined in their cells when they were

beaten. Todd and Gieselman were locked in the rough tank, from which they could not escape. Garrett and Hawkins were in the large holding tank. The door to the holding tank may have been open during these attacks, but Wilson and his deputies blocked the entrance and effectively surrounded the victims. R. 71 at 157, 219; R. 109 at 22; see *United States* v. *Deluca*, 137 F.3d 24, 38-39 (1st Cir.) (finding physical restraint where codefendant stood at the hallway door during assault), cert. denied, 525 U.S. 874, and 525 U.S. 917 (1998).

Incarceration is an obvious example of being "locked up" within the meaning of the guideline. Defendant's assertion that "[t]he term 'locked up' should not be interpreted in slang vernacular" (Br. 16) is really an attempt to prevent this Court from giving the phrase its plain meaning.

This Court has held that the physical-restraint enhancement is proper where a victim is confined in an enclosed space, such as an unlocked bank vault. *United States* v. *Stevens*, 580 F.3d 718, 720 (8th Cir. 2009), cert. denied, 130 S. Ct. 1111 (2010); see also *United States* v. *Doubet*, 969 F.2d 341, 347 (7th Cir. 1992), abrogated on other grounds by *United States* v. *Dunnigan*, 507 U.S. 87, 94 (1993). Indeed, the enhancement applies to situations involving restraint falling far short of incarceration, such as when victims were secured in a vault with a chair wedged against the door, *United States* v. *Schau*, 1 F.3d 729 (8th Cir. 1993), or forced into a fireplace with a moveable screen, *United States* v. *Copenhaver*, 185 F.3d 178,

182 (3d Cir. 1999), cert. denied, 528 U.S. 1097 (2000). Wilson's victims faced significantly more formidable restraint when confined in the county jail guarded by Wilson and his deputies.

Contrary to Wilson's suggestion (Br. 16-17), hands-on restraint – such as being forcibly tied or bound – is not required where a victim is otherwise confined. Indeed, because physical restraint includes "being tied, bound *or* locked up," U.S.S.G. § 1B1.1, cmt. (n.1(K)) (emphasis added), a requirement of physical contact would read the phrase "locked up" out of the definition. As the Ninth Circuit has explained, "no actual touching is required, and one of the examples in the application note – 'locked up' – indicates that we are correct." *United States* v. *Thompson*, 109 F.3d 639, 641-642 (9th Cir. 1997). To make sense of the definition, it must be possible to be locked up without being tied or bound.

In any event, "[t]he use in the definition of the words 'such as' before those three terms indicates that the terms are merely illustrative examples and do not limit the type of conduct that may constitute a physical restraint." *Arcoren* v. *United States*, 929 F.2d 1235, 1246 (8th Cir.), cert. denied, 502 U.S. 913 (1991). Accordingly, "a defendant physically restrains persons if the defendant creates circumstances allowing the persons no alternative but compliance." *United States* v. *Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993). "[T]he essential character of conduct subject to the physical-restraint guideline is depriving a person of his freedom of

physical movement." *United States* v. *Hill*, 645 F.3d 900, 910 (7th Cir. 2011). Thus Wilson's argument that his victims' plight was "in no way comparable to being forcibly tied or bound" fails because his victims did not have freedom of movement. Br. 17. In fact, courts have found restraint within the meaning of the guideline where a defendant sprayed his victims with mace, *United States* v. *Robinson*, 20 F.3d 270, 279 (7th Cir. 1994), or rammed a victim's car, *United States* v. *Ivory*, 532 F.3d 1095, 1105-1106 (10th Cir. 2008).

C. The Enhancement Is Proper Even Where Victims Are Lawfully In Custody

Defendant also argues that because the victims were "lawfully incarcerated," they were not "locked up" within the meaning of the Guidelines. Nothing in the guideline's text or commentary indicates that it does not apply when the victim is lawfully in custody. Compare U.S.S.G. § 3A1.3 with U.S.S.G. § 2A4.1 (providing guidelines for "[k]idnapping, [a]bduction, [and] [u]nlawful restraint"). Wilson cites no support for this novel proposition.

Courts have rejected similar claims. The Fifth Circuit has stated that "the lawfulness of the defendant's restraint of the victim * * * is not a concern" under Section 3A1.3. *United States* v. *Clayton*, 172 F.3d 347, 353 (5th Cir. 1999). In *Clayton*, a police officer kicked the victim in the head after making a lawful arrest. *Id.* at 352. The court rejected the district court's reasoning that the enhancement

should not apply where the arrest was lawful and the restraint was not imposed to facilitate use of unreasonable force. *Id.* at 353.

In *United States* v. *Carson*, 560 F.3d 566, 588 (6th Cir. 2009), cert. denied, 130 S. Ct. 1048 (2010), the Sixth Circuit similarly rejected a district court's refusal to apply a restraint enhancement where several officers pinned a motorist to the ground and punched and kicked him. The district court concluded that "there was an ongoing arrest" and "some restraint was appropriate." *Ibid*. The Sixth Circuit held that "[t]o the extent that the district court thought that the lawfulness of the arrest precluded application of § 3A1.3, it committed legal error." *Ibid*.; see also *United States* v. *Gonzales*, 436 F.3d 560, 585-586 (5th Cir.) (finding restraint enhancement proper where officers pepper-sprayed a handcuffed arrestee), cert. denied, 547 U.S. 1180, and 549 U.S. 823 (2006).

Application of the enhancement where the victim is in lawful custody vindicates one of the purposes of the Guidelines, to ensure that more culpable or egregious conduct results in a greater sentence. See *United States* v. *Shumway*, 112 F.3d 1413, 1424 (10th Cir. 1997); *United States* v. *Gill*, 99 F.3d 484, 488 (1st Cir. 1996). As the *Clayton* court explained, defendant "took advantage" of an initially legitimate restraint and "the particular vulnerability of the victim," who "could not defend herself against an assault, and could not flee from harm." 172 F.3d at 353. Because beating someone who is restrained is more "wilful[,] * * *

inexcusable[,] and reprehensible[]" than beating someone who is not restrained, "both the letter and spirit of the guideline appl[y] to impose an additional sentence." *Ibid.* Here, as in *Clayton* and *Carson*, defendant's attacks were more blameworthy because the victims entrusted to his care were restrained and could not escape.

D. Application Of The Physical Restraint Guideline Does Not Result In Double Counting

Defendant argues (Br. 18-19) that application of the physical restraint guideline will result in "double counting" because his victims' incarceration was "already taken into consideration in the initial base offense level and the specific offense characteristic" where his status as an officer acting under color of law enhanced his sentence. U.S.S.G. § 2H1.1(b); Br. 19. Defendant's argument has no merit.

The restraint enhancement causes impermissible "double counting" if it punishes defendant for behavior that is an element of the offense or if the guideline for that offense specifically incorporates restraint. See § U.S.S.G. 3A1.3, cmt. (n.2).

In this case, physical restraint is not an element of an offense under 18 U.S.C. 242. The statute nowhere mentions restraint, and a defendant may violate it without restraining his victim.

Law enforcement officers are subject to sentencing enhancements for behavior otherwise inherent in police work, such as use of police equipment or authority. In *United States* v. *Shamah*, 624 F.3d 449, 458-460 (7th Cir. 2010), cert. denied, 131 S. Ct. 1529 (2011), the court rejected defendant's argument that he should not be punished through enhancements for the use of body armor, a gun, and handcuffs, because "all officers carry these tools as part of their uniform." The Sixth Circuit in *Carson* found no double-counting in applying the restraint enhancement to crimes an officer committed while making an arrest. The court rejected the lower court's reasoning that it would be "piling on" and "duplicative of the underlying offense" for deprivation of rights under color of law. *Carson*, 560 F.3d at 588. Similarly, the court in *United States* v. *Epley*, 52 F.3d 571, 583 (6th Cir. 1995), held that a restraint enhancement is proper where a police officer was charged under 18 U.S.C. 241 and 18 U.S.C. 242 for false arrest. The court explained that under those statutes "physical restraint [is not] an element of the offense" and the statutes apply to offenses other than false arrests. *Ibid.*

Nor is the enhancement duplicative of the guideline for Section 242. U.S.S.G. § 2H1.1; Br. 19. Section 2H1.1 is not restricted to cases involving a restrained victim; it applies to all cases involving criminal violations of statutory or constitutional rights. For example, in this Circuit, Section 2H1.1 has been applied to cases of cross-burning. *United States* v. *Weems*, 517 F.3d 1027, 1030 (8th Cir.

2008). The guideline covers all civil rights conspiracies charged under 18 U.S.C. 241, regardless of whether a victim is restrained. U.S.S.G. § 2H1.1, cmt.

Physical restraint is not mentioned in Section 2H1.1. As the Sixth Circuit noted in *Epley*, "the background to § 2H1.1 * * * assumes threatening or otherwise serious conduct," but nowhere is "restraint * * * likewise incorporated." *Epley*, 52 F.3d at 583 (internal quotation marks and citation omitted). In contrast, some guidelines sections explicitly discuss restraint. See U.S.S.G. § 2B3.1(b)(4)(B) (Robbery); U.S.S.G. § 2B3.2(b)(5)(B) (Extortion by Force or Threat of Injury or Serious Damage); U.S.S.G. § 2E2.1(b)(3)(B) (Making, Financing, or Collecting an Extortionate Extension of Credit). Although the Specific Offense Characteristics of Section 2H1.1 require a six-level increase for an offense committed under color of law, an officer may act under color of law without using physical restraint. *United States* v. *Causey*, 185 F.3d 407, 411 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000); *United States* v. *Perez-Perez*, 72 F.3d 224, 226 (1st Cir. 1995).

The fact that Wilson's victims were restrained and unable to flee makes this civil rights offense more serious than similar offenses which do not involve restraint, and the Section 3A1.3 enhancement exists to reflect that fact.[2]

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[2] Indeed, the district court explained that had it not applied the enhancement for restraint of a victim it would have applied an enhancement for a vulnerable victim. See *United States* v. *Lambright*, 320 F.3d 517, 518 (5th Cir. 2003) (enhancement proper where prison guards beat victim who was "dependent upon

(continued...)

II

THE DISTRICT COURT PROPERLY APPLIED THE AGGRAVATED ASSAULT GUIDELINE AND ENHANCEMENTS WHERE GIESELMAN SUFFERED SERIOUS BODILY INJURY

A. The Guidelines For Offenses Involving Individual Rights Require Application, Through Cross Reference, Of Guidelines For The Underlying Offense

The sentencing guideline for offenses involving individual rights, U.S.S.G. Section 2H1.1, states that a court should apply the base level for the sentencing guideline applicable to the underlying offense – be it assault, arson, or some other action – whenever that would result in a base offense level greater than 12. U.S.S.G. § 2H1.1(a)(1). A defendant "c[an] only violate [a victim's] civil rights by *doing* something. It is that something that constitutes the underlying offense for purposes of § 2H1.1." *United States* v. *Cozzi*, 613 F.3d 725, 734 (7th Cir. 2010), cert. denied, 131 S. Ct. 1472 (2011). So while Section 2H1.1 is always the starting point for a 18 U.S.C. 242 conviction, it often requires an increased base offense level through application of a separate guideline. *Id.* at 733 (noting "[t]he plain

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(...continued)
the care of the correction officers" and "could not protect himself from the assault"); *United States* v. *Hershkowitz*, 968 F.2d 1503, 1505-1506 (2d Cir. 1992) (upholding vulnerable victim enhancement for officer who beat detainee). Accordingly, even if the court erred in applying the restraint enhancement, the error would be harmless. *United States* v. *Bassett*, 406 F.3d 526 (8th Cir.), cert. denied, 546 U.S. 1024 (2005).

language of § 2H1.1" required application of an aggravated assault guideline). Section 2H1.1 provides "a floor, not a ceiling" for civil rights violations. *United States* v. *Byrne*, 435 F.3d 16, 27 (1st Cir. 2006). There is no requirement that a defendant be *convicted* of the underlying assault offense for the guideline to apply. See *United States* v. *Smith*, 997 F.2d 396, 397 (8th Cir. 1993) (applying similar cross-reference provision).

Application of the base offense level of the underlying offense serves an important goal of the Guidelines – uniformity in sentencing. "[W]here the defendant's conduct is more reprehensible than a civil rights violation that used a minor amount of force, the defendant's sentence should be on par with other defendants in federal court who committed similar conduct under federal jurisdiction." *Cozzi*, 613 F.3d at 733; see also *United States* v. *Newman*, 982 F.2d 665, 674 (1st Cir. 1992), cert. denied, 510 U.S. 812 (1993). To do otherwise would inexplicably place all excessive force crimes in the same base guidelines range, regardless of whether they involved a few punches or attempted murder.

B. The District Court Properly Applied The Guideline For Aggravated Assault

Here, the district court applied the base offense level of Sentencing Guidelines § 2A2.2, the guideline for aggravated assault, because it found that Gieselman suffered serious bodily injury. The application notes provide that

aggravated assault is "a felonious assault that involved" one or more aggravators, including "serious bodily injury." U.S.S.G. § 2A2.2, cmt. (n.1).

The Guidelines define "serious bodily injury" as "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1, cmt. (n.1(L)). In this case, Gieselman's fractured orbital bone, bloodied face, and dental damage easily qualify as serious injuries. R. 83 at 3-4; see *United States* v. *Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998) (pneumonia from exposure to mace is serious bodily injury), cert. denied, 525 U.S. 1093 (1999); *United States* v. *Slow Bear*, 943 F.2d 836, 837 (8th Cir. 1991) (skull fracture, lacerations, and bruises show serious bodily injury); *Byrne*, 435 F.3d at 27 (where victim suffered a fractured jaw, "suggestion that the assault * * * did not cause serious bodily injury is preposterous"). Gieselman's wounds required hospitalization. R. 71 at 229; R. 72 at 71, 89. After he was beaten, he was taken immediately to the local county hospital and then (presumably because he needed specialized care) transferred to St. Louis University Hospital. R. 72 at 89, Exhs. 60 & 61. In addition to hospital care, Gieselman needed dental work to restore his damaged teeth. R. 109 at 72.

Mackley's prolonged and brutal attack stunned even his companions in the rough tank, who pulled him away because "he was killing [Gieselman.]" R. 71 at

137; R. 72 at 44. Witnesses said Gieselman was covered in blood, could barely stand up, was purple and black, and had "large welts and knots all over" his face "the size of golf balls." R. 70 at 38; R. 71 at 229; R. 72 at 44. Officer Reed saw Gieselman after the attack but failed to recognize him because of his injuries as his face was distorted and caved in. R. 70 at 38-39. The district court did not clearly err in finding that graphic and "specific testimony about the injuries" showed serious bodily injury and, therefore, aggravated assault. R. 109 at 32.

Contrary to defendant's assertions (Br. 22), a court need not find that a defendant *intended* serious bodily injury in order to apply the guideline.[3] Instead, "assault resulting in a serious bodily injury requires only a general intent to commit the acts of assault, and not a specific intent to do bodily harm." *United States* v. *Osborne*, 164 F.3d 434, 439 (8th Cir. 1999) (guideline applied to driving under the influence); see also *United States* v. *Ashley*, 255 F.3d 907, 911 (8th Cir. 2001). For the purpose of applying the aggravated assault guideline, it does not matter

[3] Nor is a jury required to find facts necessary to apply the aggravated assault guideline and accompanying enhancements. "Under an advisory sentencing regime, the district court is entitled to determine sentences based upon judge-found facts and uncharged conduct where the defendant is not sentenced in excess of the statutory maximum." *United States* v. *Cruz-Zuniga*, 571 F.3d 721, 726 (8th Cir. 2009) (internal quotation marks and citation omitted); see also *Newman*, 982 F.2d at 671-672 (noting, in a Section 242 case, that the court properly found serious bodily injury supporting application of aggravated assault guideline at sentencing).

whether Wilson wanted Gieselman to suffer broken bones or to simply be shoved around a little.

In any case, the court found that Wilson "both knew and intended" for Gieselman to be assaulted and knew he was "risking serious bodily harm." R. 109 at 29-30. By putting Gieselman in the rough tank, Wilson presumably intended inmates to beat him, as they had (at Wilson's request) previously beaten Todd. Wilson rewarded the inmates for the severe attack, affirming that they had met his expectations. R. 72 at 46, 64-65, 72.

C. The District Court Properly Enhanced Wilson's Sentence Under U.S.S.G. § 2A2.2 For Causing Serious Bodily Injury

The Specific Offense Characteristics under Sentencing Guidelines § 2A2.2 (b)(3)(B) provide for a three-level increase where "the victim sustained bodily injury," and specifies a five-level increase for "[s]erious [b]odily [i]njury." A seven-level enhancement is required if there is "[p]ermanent or [l]ife-[t]hreatening [b]odily [i]njury." U.S.S.G. § 2A2.2(b)(3)(C). Where a court finds serious bodily injury as an aggravating factor justifying application of Section 2A2.2, enhancement for that injury is also appropriate. *United States* v. *Thompson*, 60 F.3d 514, 518 (8th Cir. 1995); *Newman*, 982 F.2d at 672-675. Under the guideline, "a victim's serious bodily injury both functions as a trigger for the application of the guideline as a whole *and* provides a basis * * * for an additional upward offense level adjustment." *United States* v. *Tavares*, 93 F.3d 10, 15 (1st Cir.), cert.

denied, 519 U.S. 955 (1996); see also *United States* v. *Johnstone*, 107 F.3d 200, 212 (3d Cir. 1997) (noting proper application of aggravated assault guidelines may require "counting a particular factor twice").

In this case, there is no clear error in the finding of serious bodily injury and in the application of the enhancement. As noted above, Gieselman suffered bleeding, swelling, hospitalization, a broken orbital bone, and damage to his teeth. R. 70 at 38; R. 71 at 229; R. 72 at 44, 89; Exhs. 60 & 61. This Court has sustained the enhancement for similar injuries, such as a concussion, abrasions, and black eyes from a blow to the head. *Thompson*, 60 F.3d at 518; see also *Slow Bear*, 943 F.2d at 837 (skull fracture, lacerations, bruises); *United States* v. *Bogan*, 267 F.3d 614, 624 (7th Cir. 2001) (lacerations, dental damage, and a fractured eye-socket); *United States* v. *Snider*, 976 F.2d 1249, 1252 (9th Cir. 1992) (broken jaw). Indeed, this Court has upheld a finding of "permanent or life-threatening injury" where a victim suffered a rape, a cut on the face (requiring stitches and causing a scar), a broken tooth, and bruises. *United States* v. *Cree*, 166 F.3d 1270, 1271 (8th Cir. 1999).

CONCLUSION

This court should affirm Wilson's sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 7,500 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: December 13, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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