No. 07-5825

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

DONALD R. WILSON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE AT COOKEVILLE

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to defendant's waiver of oral argument.

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SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a judgment of conviction and sentence under the laws of the United States. The district court had jurisdiction pursuant to 18 U.S.C. 3231. The court sentenced defendant on June 25, 2007, and entered final judgment two days later. Defendant filed a timely notice of appeal on July 3, 2007. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the evidence viewed in the light most favorable to the government is sufficient to sustain the jury's verdict that "bodily injury" resulted from defendant's confining an inmate for approximately three weeks to a small, cold holding cell without a toilet, running water, blanket, mattress, or clothing, other than boxer shorts, while constantly restrained in a straightjacket, shackles, leg irons, and/or handcuffs.

2. Whether the district court's denial of defendant's motion for severance constituted plain error because defendant argues, for the first time on appeal, that a joint trial allowed the jury to conclude that "bodily injury" resulted when his co-defendant complied with his orders and placed an inmate in a straightjacket.

STATEMENT OF THE CASE

1. Prior Proceedings

On June 5, 2006, a federal grand jury sitting in the Middle District of Tennessee returned a two-count indictment charging defendant Donald R. Wilson (defendant) and co-defendant Stanley C. Hawkins (co-defendant) each with a single count of willfully depriving Joshua Roberson, a former inmate at the White County Jail, of rights secured by the Constitution in violation of 18 U.S.C. 242. R.

1; ROA, pp. 17-18.[1] Count One charged that from May 6 through May 29, 2004, defendant Wilson confined Roberson to conditions that willfully subjected him to cruel and unusual punishment and resulted in bodily injury. Indictment, R. 1, p. 1; ROA, p. 17. Count Two charged that on May 6, 2004, co-defendant Hawkins, in violation of Roberson's constitutional rights to be free from cruel and unusual punishment, sprayed a chemical agent at and beat Roberson, resulting in bodily injury and including the use of a dangerous weapon. Indictment, R. 1, p. 2; ROA, p. 18.

On October 19, 2006, defendant filed a Motion for Severance of Defendants pursuant to Rule 14 of the Federal Rules of Criminal Procedure without a legal memoranda or citation to any caselaw. R. 34; ROA, pp. 44-46. At a hearing on November 9, 2006, the district court noted that defendant's motion was defective due to an absence of legal authority, denied the motion without prejudice, and invited defendant to renew his request for severance "properly supported by factual

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[1] "R. __" refers to the record number listed on the district court docket sheet. "ROA" refers to the unnumbered volume that is part of the record on appeal filed with this Court and contains the district court's docket sheet and pleadings filed below. "Vol. 1-9" refers to numbered volumes that are part of the record on appeal filed with this Court and contain the trial transcript. In citations to the transcript, the name of person testifying is in parentheses. "Vol. 11" refers to that number volume that is part of the record on appeal filed with this Court and contains the transcript of a September 6, 2006, district court hearing pertaining to defendant's pretrial motion for severance. "Br." refers to the brief filed by defendant with this Court.

assertions and a memorandum of law." Order, R. 50; ROA, p. 68; R. 146; Vol. 11, pp. 9, 14.

On March 6, 2007, a jury trial commenced. Clerk's Resume of Court Proceedings, R. 84; ROA, p. 246. After presentation of all the evidence, co-defendant's counsel requested the court to instruct the jury on the lesser included offense of a misdemeanor violation of 18 U.S.C. 242 as to Count Two. R. 147; Vol. 9, p. 3. The district court agreed and stated that it would not give a lesser included instruction as to Count One because defendant's counsel objected to it. R. 147; Vol. 9, p. 4. When government counsel questioned whether it was proper to give a lesser included instruction as to one defendant and not the other, defendant's counsel stated, "[t]hen I'm going to move for a severance." R. 147; Vol. 9, p. 6. Following closing arguments, the district court, as promised, gave a lesser included instruction as to Count Two, but not Count One. R. 147; Vol. 9, pp. 42-43. After the court charged the jury, defendant's counsel stated that she was satisfied with the instructions. R. 147; Vol. 9, p. 53.

On March 16, 2007, the jury sent a note to the court and inquired, "Does pain alone constitute bodily injury?" R. 147; Vol. 9, p. 54. The court, without objection, referred the jury to the definition of "bodily injury" contained in its original instructions. R. 147; Vol. 9, p. 54. Slightly more than an hour later, the

jury returned its verdict and found defendant guilty as charged and co-defendant Hawkins guilty of the lesser included offense of a misdemeanor violation of 18 U.S.C. 242. R. 147; Vol. 9, pp. 54-55.

On June 25, 2007, the district court sentenced defendant to 33 months' imprisonment. Clerk's Resume of Court Proceedings, R. 112; ROA p. 322; Judgment, R. 115, p. 1; ROA, p. 324. Defendant filed a timely notice of appeal and co-defendant Hawkins did not appeal.

2. Statement Of The Facts

Defendant's conviction stems from his confining a convicted inmate at the White County Jail (Jail) in Sparta, Tennessee, for approximately three weeks to a very small, cold holding cell without a toilet, running water, mattress, blanket, or clothing, other than boxer shorts, while constantly restrained in a straightjacket, shackles, leg irons, and/or handcuffs. R. 141; Vol. 2, pp. 117 (Ferrell), 242-243 (Weldon); Vol. 6, pp. 63 (Case), 155, 161 (Daniels); R. 170; Vol. 7, pp. 79, 170 (defendant).[2] At the time of the charged offenses, defendant was the Jail

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[2] Lou Ferrell (Ferrell), Michael Weldon (Weldon), Carolyn Garrett (Garrett), Travis Bryant (Bryant), Deanna Michaelson (Michaelson), Phuong Ngoc Hardy (Hardy), Ronald Miller (Miller), Shannon Harvey (Harvey), Barry Suttles (Suttles), Charles Dennis (Dennis), Melisa O'Brien (O'Brien), James Case (Case), Michael Blaylock (Blaylock), Stephen Daniels (Daniels), and Barry Suttles (Suttles) were officers at the Jail and at the Tennessee Corrections Institute and Katina Padgett and David Broyles (Broyles) were employed at the Jail. Stacy Crawford

(continued...)

Administrator and Chief of Corrections, responsible for day-to-day operations at the Jail. Co-defendant, who had a close working relationship with him, was second-in-command. R. 141; Vol. 2, pp. 32, 46-48 (Ferrell).

Cell 107 is a small holding cell located in the intake area of the Jail that is intended exclusively for short-term confinement, isolation, or observation. R. 141; Vol. 2, pp. 40, 105-106 (Ferrell); R. 123; Vol. 3, p. 242 (Crawford); R. 124; Vol. 5, p. 67 (Miller). The cell is 6 feet by 8 feet. It is entirely barren, but for a two foot concrete bench at the rear, and has no toilet, running water, drain, sink, or bed. R. 140; Vol. 1, pp. 197-198, 202-203 (Swallows); R. 141; Vol. 2, pp. 40, 105 (Ferrell). The cell's steel door has a "pie flap" that allows a prisoner to extend his arms and be handcuffed before the door is unlocked. R. 140; Vol. 1, pp. 200, 204-205 (Swallows). Because cell 107 has cinder block walls, a concrete floor, and an air conditioning vent, "after a few minutes" it "start[s] getting cold." R. 124; Vol. 5, p. 101 (Harvey). See R. 140; Vol. 1, pp. 198, 202-203 (Swallows); R. 123; Vol. 3, pp. 52-53 (Garrett), 245 (Crawford); R. 145; Vol. 6, p. 156 (Daniels); R. 142; Vol. 7, pp. 147, 150 (defendant).

(...continued)
(Crawford) was an inmate at the Jail. Scott Swallows (Swallows) was the FBI Agent assigned to the instant case.

In November 2002, when defendant began working at the Jail, Joshua Roberson was an inmate serving a sentence for two misdemeanor convictions. R. 142; Vol. 7, pp. 11, 24, 29-30 (defendant). The Jail's staff, including the defendant, knew Roberson was mentally ill and had been diagnosed as suffering from bi-polar disorder and schizophrenia. R. 141; Vol. 2, p. 128 (Ferrell); R. 128; Vol. 4, pp. 66-67, 90 (Padgett); R. 144; Vol. 5B, pp. 117, 119 (O'Brien); R. 145; Vol. 6, p. 266 (Broyles); R. 142; Vol. 7, pp. 26-27, 130-134 (defendant). Because of his mental condition and refusal to take medication, Roberson had been involved in a handful of minor altercations with corrections officers. R. 141; Vol. 2, p. 128-129 (Ferrell); R. 128; Vol. 4, p. 89 (Padgett). None of these incidents resulted in any serious injuries and the majority occurred in July 2003, around the time Roberson was hospitalized for several days at a mental health facility. R. 142; Vol. 7, pp. 132, 137-141 (defendant).

Early on the morning of May 6, 2004, defendant, upon his arrival at work, learned of an incident the night before that did not result in any injuries, in which Roberson had grabbed a correction officer's arm and tried to pull him down the stairs. R. 141; Vol. 2, pp. 208-210, 215 (Weldon). As a result, defendant ordered Roberson to be stripped down to his boxer shorts, placed in a straitjacket, and transferred from cell 139, a maximum security cell that has a bed, toilet, sink and

shower and is intended for long-term isolation, to cell 107. R. 140; Vol. 1, p. 193 (Swallows); R. 141; Vol. 2, pp. 106 (Ferrell), 215-216 (Weldon); R. 123; Vol. 3, pp. 12, 76-78 (Garrett); R. 124; Vol. 5, p. 68 (Harvey). Defendant's orders were carried out without incident. R. 141; Vol. 2, pp. 216-217 (Weldon); R. 123; Vol. 3, pp. 12-13, 78 (Garrett).

Approximately two hours later, officers took Roberson out of the straightjacket so that he could use the bathroom down the hall from cell 107. R. 123; Vol. 3, p. 7, 78 (Garrett); R. 142; Vol. 7, p. 77 (defendant). As Roberson was being escorted back from the bathroom, he and defendant began "mouthing back and forth at each other." R. 123; Vol. 3, p. 17 (Garrett). Defendant, who was angry about the incident the night before, quickly stepped towards Roberson with both hands raised and appeared as if he was going to grab and push Roberson against the wall. R.123; Vol. 3, pp. 18 (Garrett), 229 (Crawford); R. 145; Vol. 6, pp. 234, 238-239 (Broyles). Roberson punched defendant in the face with his fist, a fight ensued, and several officers intervened. R. 123; Vol. 3, pp. 19 (Garrett), 154 (Bryant), 229 (Crawford). Defendant sustained a cut above his eyebrow that required stitches and an officer, who hit Roberson over the head with a radio, broke her finger. R. 123; Vol. 3, pp. 18-19, 30, 86 (Garrett), 240 (Crawford); R. 142; Vol. 7, pg 74 (defendant). After Roberson was shackled, handcuffed, and secured

in cell 107, defendant opened the cell door and yelled, "You are going to fucking pay." I'm going to "keep [your] ass in []here 24 hours a day" "until hell freezes over or you get out of jail." R. 123; Vol. 3, pp. 18-21 (Garrett); R. 141; Vol. 2, p. 102 (Ferrell); R. 142; Vol 7, p. 55 (defendant).

Immediately after the incident, co-defendant Hawkins was contacted and directed to report to the Jail. R. 141; Vol. 2, pp. 31, 47-48, 55 (Ferrell); R. 123; Vol. 3, p. 155 (Bryant). After co-defendant Hawkins met defendant in the sallyport, he went directly to his office, retrieved a 7-ounce cannister of Clear Out, a chemical agent intended for riot control, and donned protective gear, including a gas mask. R. 123; Vol. 3, pp. 23-25 (Garrett), 166 (Bryant), 232 (Crawford); R. 128; Vol. 4, p. 150 (Hardy); R. 143; Vol. 8, pp. 13-14 (co-defendant). Co-defendant Hawkins then activated the can of Clear Out, threw it through the pie flap of Roberson's locked cell and stuffed a blanket under the crack between the cell door and floor. R. 123; Vol. 3, pp. 25-26 (Garrett), 156-157, 166 (Bryant), 232 (Crawford); R. 124; Vol. 5, pp. 59-61 (Miller); R. 145; Vol. 6, pp. 142-144 (Daniels), 244-245 (Broyles); R. 143; Vol. 8, pp. 16, 19, 61, 65 (co-defendant). As a result of the Clear Out, everyone was forced to evacuate the intake area for at least 30 minutes as Roberson, who was shackled, handcuffed, and locked inside

cell 107, was left crying and coughing. R. 123; Vol. 3, pp. 26-27 (Garrett), 157, 161, 165 (Bryant), 233 (Crawford); R. 143; Vol. 8, pp. 65-66 (co-defendant).

Once co-defendant Hawkins reported to defendant, who was in the sallyport, that "everything [was] taken care of," a fellow officer drove defendant to the hospital. R. 145; Vol. 6, p. 246 (Broyles); R. 143; Vol. 8, p. 71 (co-defendant). Shortly thereafter, co-defendant, accompanied by another officer, went back to the intake area, reentered Roberson's cell, and hit Roberson, who was shackled and handcuffed, several times with a baton. R. 123; Vol. 3, pp. 160 (Bryant), 235 (Crawford); R. 128; Vol. 4, pp. 25-27 (Crawford).

Meanwhile, defendant relayed orders from the hospital to co-defendant Hawkins at the Jail to place Roberson in a straight jacket and have him remain in that state 23 hours a day, and be allowed out of cell 107 only when escorted by three male officers armed with a baton. R. 141; Vol. 2, pp. 80, 95-97 (Ferrell); R. 142; Vol. 7, pp. 76, 143-144 (defendant). Pursuant to those orders, Hawkins placed Roberson in a straightjacket, "tucked it up real * * * tight," and pulled the strap that goes under the groin area and out the back, so that Roberson came off the ground. R. 141; Vol. 2, p. 76 (Ferrell); R. 143; Vol. 8, pp. 30, 32, 34 (co-defendant).

Defendant returned to the Jail within a couple of hours and reissued his orders in more detail. R. 141; Vol. 2, pp. 98-99 (Ferrell); R. 123; Vol. 3, pp. 171 (Bryant), 240 (Crawford); R. 128; Vol. 4, p. 113 (Michaelson); R. 124; Vol. 5, p. 64 (Miller); R. 144; Vol. 6, p. 116 (Blaylock); R. 142; Vol. 7, p. 144 (defendant). He directed that Roberson remain restrained in a straightjacket 23 hours a day and be allowed out of cell 107 only to go to the bathroom, shower, and eat, and then only when handcuffed and escorted by three male officers armed with batons. R. 123; Vol. 3, pp. 47-49 (Garrett), 171 (Bryant), 240-241 (Crawford). Defendant also specified that Roberson should not have a mattress, blanket, or any clothing, other than his boxer shorts. R. 123; Vol. 3, pp. 47-49, 52 (Garrett), 240-241 (Crawford).

Initially, day-shift officers, who worked alongside defendant, strictly complied with his orders. R. 123; Vol. 3, pp. 7 (Garrett), 172, 176 (Bryant), 248 (Crawford); R. 124; Vol. 5, pp. 111-112 (Harvey). Due to a lack of personnel at the Jail, three male officers were often unavailable to escort Roberson when he needed to use the bathroom or eat. R. 141; Vol. 2, pp. 113, 153-154 (Ferrell); R. 123; Vol. 3, pp. 55 (Garrett), 173-174 (Bryant); R. 124; Vol. 5, p. 102-104 (Harvey). Consequently, Roberson was left in his cell without being fed and was repeatedly forced to urinate and defecate on himself. R. 141; Vol. 2, pp. 113-114

(Ferrell), 232-233 (Weldon); R. 123; Vol. 3, pp. 55 (Garrett), 173-174 (Bryant), 247-248 (Crawford); R. 128; Vol. 4, p. 124 (Michaelson); R. 124; Vol. 5, pp. 65-66, 68-69 (Miller), 104-105, 113 (Harvey).

Officers on the night shift initially followed defendant's orders, but after about a week, many began to feel sorry for Roberson. R. 141; Vol. 2, p. 232 (Weldon); R. 128; Vol. 4, pp. 121-122 (Michaelson); R. 124; Vol. 5, pp. 65, 70 (Miller), 99-100 (Harvey). Several witnesses explained that all officers, including defendant and co-defendant, had received training that it is unconstitutional to expose an inmate to human waste, deny an inmate access to a toilet, mattress, blanket or adequate clothing, or use restraints as punishment, or restrain an inmate who is not a threat to himself once he is locked in a cell. R. 141; Vol. 2, pp. 115, 187 (Ferrell), 234-235 (Weldon); R. 123, Vol. 3, pp. 52, 58-59 (Garrett); R. 128; Vol. 4, pp. 121 (Michaelson), 147-148 (Hardy); R. 124; Vol. 5, p. 71 (Miller); R. 144; Vol. 5B, pp. 30-49 (Suttles); R. 142; Vol. 7, pp. 171-174 (defendant). As a result, officers on the night shift let Roberson out of the straightjacket, gave him food and a blanket, allowed him to shower, and made an effort to clean his cell. R. 141; Vol. 2, pp. 231-232 (Weldon); R. 123; Vol. 3, pp. 175-176 (Bryant), 246-247 (Crawford); R. 128; Vol. 4, pp. 121-122 (Michaelson); R. 124; Vol. 5, pp. 70-71 (Miller), 98-102, 107-108 (Harvey); R. 144; Vol. 5B, p. 5 (Harvey). When

defendant discovered that night shift officers had disobeyed his orders, he became angry and posted a handwritten notice that directed, *inter alia*, that Roberson be kept in a straightjacket from 6 p.m. to 6 a.m. and that three male officers, one armed with a baton, be present whenever his cell door was opened and he was escorted from cell 107. R. 141; Vol. 2, p. 98 (Ferrell); R. 124; Vol. 5, pp. 110-113 (Harvey).

Numerous witnesses testified that defendant's treatment of Roberson was "cruel" and "inhumane." R. 141; Vol. 2, pp. 116-117 (Ferrell), 236 (Weldon); R. 123; Vol. 3, pp. 60 (Garrett), 249 (Crawford); R. 128; Vol. 4, p. 122 (Michaelson); R. 124; Vol. 5, p. 71 (Miller); R. 145; Vol. 6, pp. 158, 160 (Daniels). Several individuals, including senior staff and shift supervisors, complained to defendant that there was no justification for holding Roberson in cell 107, restraining him in a straightjacket, shackles, and/or handcuffs, or denying him use of a bathroom or recreation. R. 141; Vol. 2, pp. 115-116 (Ferrell); R. 123; Vol. 3, pp. 48, 60-65 (Garrett); R. 124; Vol. 5, pp. 71-72 (Miller); R. 144; Vol. 5B, p. 136 (O'Brien). Officers also repeatedly told defendant that the conditions of Roberson's cell were horribly unsanitary and that the ever-present stench of excrement and urine was so noxious it "would almost gag you." R. 123; Vol. 3, p. 134 (Garrett). See R. 141; Vol. 2, pp. 116-118 (Ferrell), 236 (Weldon); R. 123; Vol. 3, pp. 60, 63 (Garrett); R.

128; Vol. 4, p. 125 (Michaelson); R. 144; Vol. 5B, p. 138 (O'Brien); R. 145; Vol. 6, p. 158 (Daniels). Defendant ignored the complaints and remarked that Roberson "needed to learn a lesson," "this [was] punishment," and that his orders were to remain in effect "till hell freezes over, or [Roberson] gets out of jail." R. 141; Vol. 2, p. 119 (Ferrell); R. 124; Vol. 5, p. 72 (Miller); R. 123; Vol. 3, p. 49 (Garrett). See R. 128; Vol. 4, p. 114 (Michaelson); R. 144; Vol. 5B, pp. 139-140 (O'Brien).

As a result of his confinement, Roberson became withdrawn, pale, and thin, and appeared "dazed" and "not altogether there." R. 144; Vol. 5B, p. 66 (Dennis); R. 124; Vol. 5, p. 105 (Harvey). One officer, who described Roberson's condition, stated that Roberson "was just sort of limp. He didn't have much life at all. * * * I mean, he would just lay down and not move. * * * I would walk over, and he would be just laying on the floor of the cell." R. 141; Vol. 2, p. 116 (Ferrell). Another officer testified that he observed red welts in Roberson's groin area where the straightjacket's strap went front-to-back and was cinched between Roberson's legs. R. 144; Vol. 5B, pp. 65, 69-70 (Dennis); R.124; Vol 5, p. 69 (Miller).

At the end of May, Roberson's father, accompanied by the Sheriff of White County, visited Roberson while he was still restrained and confined in cell 107. R. 141; Vol. 2, p. 147 (Ferrell); R. 123; Vol. 3, p. 177 (Bryant). During the visit, the Sheriff, to whom defendant reported, directed defendant to move Roberson out of

cell 107. R. 141; Vol. 2, pp. 45-46, 140-141 (Ferrell); R. 123; Vol. 3, pp. 66-67 (Garrett). Defendant complied with the Sheriff's order and had Roberson returned to cell 139, which had been available throughout his confinement in cell 107. R. 141; Vol. 2, pp. 22 (Swallows), 103, 147 (Ferrell); R. 123; Vol. 3, pp. 51-52; 66-67 (Garrett), 178-179 (Bryant), 249 (Crawford); R. 124; Vol. 5, pp. 73-74 (Miller). Afterwards, cell 107 was repeatedly scrubbed and repainted, but the smell of excrement and urine was not totally eliminated. R. 128; Vol. 4, p. 126 (Michaelson).

Defendant testified in his own behalf. R. 142; Vol. 7, pp. 9-80, 88-188. He admitted that pursuant to his orders, Roberson, while wearing only boxer shorts, was confined to cell 107 for three weeks and continuously restrained 24 hours a day – at least 12 hours a day in a straightjacket and the remainder of time in shackles, leg irons, and/or and handcuffs. He also conceded that Roberson did not have access to a toilet unless three male officers were present to escort him down the hall. R. 142; Vol. 7, pp. 76, 117, 122, 147-150, 154-155, 169-171.

Defendant claimed that he imposed his orders exclusively for the safety of his fellow officers and because Roberson was a threat until sometime in August 2004. R. 142; Vol. 7, pp. 117, 123. He did not, however, describe any statements or conduct by Roberson, following the May 6 incident that even suggested that

Roberson was a danger to himself or others. Defendant also admitted that he "probably" told a newspaper reporter, who published an article in May 2004, that he knew that there was not always sufficient staff on duty to comply with his three-officer-escort rule. R. 142; Vol. 7, pp. 158-160. He also acknowledged that even though Roberson was not a threat when asleep, he required that officers lace him in a straightjacket every night from 6 p.m. until 6 a.m. R. 142; Vol. 7, p. 170. Finally, defendant conceded that several officers complained about his treatment of Roberson. R. 142; Vol. 7, pp. 119-120.

SUMMARY OF ARGUMENT

The evidence is sufficient to sustain the jury's verdict that "bodily injury" resulted because a rational juror could easily conclude that defendant's confinement of Roberson for approximately three weeks in a cold holding cell without a toilet, blanket, or clothing, other than boxer shorts, while restrained in a straightjacket or shackles, leg irons, and handcuffs caused Roberson *both* pain *and* physical injury. First, there is ample evidence that the conditions defendant imposed caused Roberson stomach pain, including cramping, nausea, and hunger since Roberson was: (1) denied timely access to a toilet; (2) exposed to his own excrement and urine; (3) restrained in a straightjacket for at least 12 hours a day; and (4) forced to miss meals and continually remain in a cold cell while nearly

naked. Second, regardless of whether pain resulted, defendant's felony conviction should be affirmed, because there is strong evidence that Roberson sustained red welts to his groin area due to his being restrained in a straightjacket pursuant to defendant's orders.

The district court also did not err, much less commit plain error, when it denied defendant's motion for severance. Because defendant argues for the first time on appeal that severance was warranted based on certain evidence relating to bodily injury, that claim is waived and not subject to review by this Court. In any event, because defendant has failed to demonstrate both that he suffered any prejudice as a result of a joint trial with co-defendant Hawkins, or is entitled to severance, he clearly is not entitled to relief pursuant to the plain error standard.

ARGUMENT

I

THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT BODILY INJURY RESULTED

Defendant contends (Br. 19-28) that the evidence is insufficient to establish that he committed a felony violation of 18 U.S.C. 242 because no reasonable juror could have found that his conduct resulted in bodily injury. Because there is ample evidence that defendant's three-week confinement and restraint of Roberson

resulted in *both* pain *and* physical injury, defendant's claim should be rejected.

A. Standard Of Review

A defendant seeking to reverse his conviction on the basis of the insufficiency of evidence bears a "heavy burden." *United States* v. *White*, 492 F.3d 380, 396 (6th Cir. 2007) (quoting *United States* v. *Vannerson*, 786 F.2d 221, 225 (6th Cir.), cert. denied, 476 U.S. 1123 (1986)). "The verdict of a jury must be sustained if there is substantial evidence taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). See *United States* v. *Davis*, 547 F.3d 524, 528 (6th Cir. 2008). That standard requires a reviewing court to give "full play to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979). See *United States* v. *Caseslorente*, 220 F.3d 727, 731 (6th Cir. 2000). Accordingly, a defendant's challenge to the sufficiency of the evidence should be rejected when "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Khalil*, 279 F.3d 358, 368 (6th Cir. 2002) (quoting *Jackson*, 443 U.S. at 319). See *United States* v. *Kuehne*, 547 F.3d

667, 696 (6th Cir. 2008).

B. There Is Ample Evidence That Defendant's Orders Caused Roberson Pain

18 U.S.C. 242 proscribes action taken "under color of any law [that] * * * willfully subjects any person * * * to the deprivation of any rights * * * secured or protected by the Constitution or laws of the United States." Thus, for all violations of Section 242, the government must prove that defendant acted "(1) willfully and (2) under color law (3) to deprive a person of rights protected by the Constitution or laws of the United States." *United States* v. *Lanier*, 520 U.S. 259, 264 (1997) (internal quotation marks omitted). "If bodily injury results," (but not death) the offense is a felony punishable by up to ten years' imprisonment. See 18 U.S.C. 242. Because defendant does not dispute that the correct definition of "bodily injury" is phrased in the disjunctive and includes pain *or* physical injury, this Court should sustain the jury's verdict so long as there is evidence that allows a rational person to conclude that defendant's confinement and restraint of Roberson resulted in *either* pain *or* physical injury.[3]

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[3] The district court, without objection, correctly instructed the jury (R. 147; Vol. 9, p. 41-42, 53) (emphasis added):

> Bodily injury includes any injury to the body including physical pain *or* a physical injury, such as a cut, abrasion, bruise, fracture or disfigurement. The injury need not be significant, severe or permanent.

(continued...)

The conditions of confinement ordered by defendant caused Roberson pain in numerous respects. First, the evidence is undisputed that during the entire three weeks Roberson was confined to cell 107, defendant did not allow him to have access to a toilet unless three male officers were present to escort him from his cell to the bathroom. R. 142; Vol. 7, p. 156 (Wilson). As a result, Roberson was repeatedly forced to experience discomfort and stomach cramping as a result of trying to wait for officers to take him to the bathroom. When the officers did not appear and he could no longer control his bodily functions, he had to defecate and urinate on himself. R. 141; Vol. 2, pp. 113 (Ferrell), 232-233 (Weldon); R. 123; Vol. 3, pp. 54-55 (Garrett), 173-174 (Bryant), 247-248 (Crawford); R. 128; Vol. 4, p. 124 (Michaelson); R. 124; Vol. 5, pp. 65-66, 68-69 (Miller), 104-105, 113 (Harvey). Accordingly, defendant's confinement of Roberson for three weeks without timely access to a toilet unquestionably caused Roberson pain. See, *e.g.*, *Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002) (handcuffing inmate to hitching post for

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(...continued)

* * * * *

> The government need only prove that bodily injury was a natural and foreseeable result of the acts that violated 18 U.S.C. Section 242.
>
> The government does not need to prove that either defendant intended to cause bodily injury or that his acts were the direct, immediate or sole cause of bodily injury.

seven hours without bathroom breaks, following altercation with prison guards, "create[s] a risk of particular discomfort and humiliation" sufficient to establish "wanton and unnecessary pain" in violation of the Eighth Amendment) (internal quotation marks omitted); *Williams* v. *Vidor*, 17 F.3d 857, 859 (6th Cir. 1994) (shackling inmate with chains to bed for 72 hours because he broke a toilet sufficient to state claim that defendant imposed "unnecessary and wanton infliction of pain" in violation of the Eighth Amendment) (internal quotation marks omitted); *Williams* v. *Benjamin*, 77 F.3d 756, 765 (4th Cir. 1996) (eight-hour placement of inmate in four-point restraints that prevented prisoner from washing off mace and using a toilet "supports a 'reliable inference of wantonness in the infliction of pain.'")(quoting *Whitley* v. *Albers*, 475 U.S. 312, 322 (1986)). See also *Stewart* v. *Rhodes*, 473 F. Supp. 1185, 1193 (S.D. Ohio 1979) (chaining inmates to beds for days at a time without timely access to toilet facilities is cruel and unusual punishment in violation of the Eighth Amendment), aff'd without opinion, 785 F.2d 310 (6th Cir. 1986).[4]

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[4] The Eighth Amendment expressly prohibits "cruel and unusual punishments," which the Supreme Court has interpreted as protecting a convicted prisoner from "the unnecessary and wanton infliction of pain." *Hope*, 536 U.S. at 737; *Hudson* v. *McMillian*, 503 U.S. 15 (1992); *Whitley*, 475 U.S. at 320. Because defendant was convicted of a felony violation of 18 U.S.C. 242 for willfully subjecting a convicted inmate to cruel and unusual punishment that resulted in bodily injury, Eighth Amendment cases enunciate the proper standard for determining whether

(continued...)

The evidence is also sufficient to allow a rational juror to conclude that Roberson experienced the pain of sickness as a result of exposure to his own excrement and urine. See, *e.g.*, *Thaddeus-X* v. *Blatter*, 175 F.3d 378, 400-403 (6th Cir. 1999) (upholding sufficiency of Eighth Amendment challenge, that protects against "unusual and wanton" infliction of pain, based on smell from inmate "using the toilet on his floor (and) urinating out [the] door" of cell); *DeSpain* v. *Uphoff*, 264 F.3d 965, 974, 977 (10th Cir. 2001) (reversing award of summary judgment to defendants based on prisoner's claim that 36-hour exposure to "urine and feces via * * * standing water" violated Eighth Amendment rights). See also *Fruit* v. *Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990) ("Courts have been especially cautious about condoning conditions that include an inmate's proximity to human waste.").

Numerous witnesses testified that Roberson's confinement in cell 107 was "inhumane" because the stench resulting from defendant's forcing Roberson to defecate and urinate on the floor was unbearably foul. R. 141; Vol 2, pp. 111-112 (Ferrell), 236 (Weldon); R. 123; Vol. 3, pp. 54-55, 133-134 (Garrett), 173-174 (Bryant), 249 (Crawford); R. 128; Vol. 4, pp. 122, 125-126 (Michaelson); R. 124;

(...continued)
the evidence is sufficient in this case.

Vol. 5, pp. 68, 71 (Miller), 104 (Harvey); R. 145; Vol. 6, p. 158 (Daniels). Several witnesses related that Roberson's cell, as a result of the three-officer- escort rule, smelled like a "septic tank" or "a sewer," and there is evidence that the odor remained even after cell 107 was eventually scrubbed and repainted. R. 141; Vol. 2, p. 111 (Ferrell); R. 123; Vol. 3, p. 173 (Bryant); R. 128; Vol. 4, p. 126 (Michaelson); R. 124; Vol. 5, p. 104 (Harvey). One officer who worked in the intake area explained that the odor of feces, urine, and sweat was so offensive that "it would almost gag you." R. 123; Vol. 3, p. 134 (Garrett). Accordingly, because the three-officer-escort rule forced Roberson to live and sleep in the midst of his own excrement and urine for three weeks, there clearly is sufficient evidence, particularly when viewed in the light most favorable to the government, to establish that defendant caused Roberson nausea and stomach cramping.

Moreover, Roberson's three-week confinement to cell 107 undoubtedly resulted in pain because defendant, according to his own version of events (R. 142; Vol. 7, p. 155), required Roberson to be confined in a straightjacket for at least 12 hours a day. As a result, for hours at a time, Roberson was forced to endure the pain of having his arms tightly pinned to his chest and the soreness of seeking sleep in an uncomfortable position on a hard concrete floor. See, *e.g.*, *Johnson* v. *Testman*, 380 F.3d 691, 698 n.6 (2d Cir. 2004) (seven-hour handcuffing of inmate

behind his back to cell "for the sole reason to inflict wanton, gratuitous, cruel pain [violates] * * * clearly established right * * * not to be subjected to * * * cruel and inhumane punishment"); *Aldape* v. *Lambert*, 34 F.3d 619, 623-624 (8th Cir. 1994) (handcuffing inmate behind his back contrary to medical orders violated Eighth Amendment because conduct "constituted unnecessary and wanton infliction of pain"). In addition, since defendant repeatedly insists (Br. 19, 26) that the red welts in Roberson's groin area could only have occured when Hawkins, pursuant to defendant's orders, placed Roberson in a straightjacket and firmly yanked on the strap that went between his legs, it is unimaginable that this action did not likewise result in pain to Roberson. See, *e.g.*, *United States* v. *Davenport*, 30 F. App'x 338, 339-340 (6th Cir.) (unpublished) (affirming sentencing enhancement for "bodily injury" as a result of victim's suffering headache after being hit in the head by either defendant or codefendant), cert. denied, 535 U.S. 1029 (2002).

Fourth, the jury's verdict is easily sustained because there is strong evidence that defendant forced Roberson to often go hungry and to remain in a cold, concrete cell without a blanket, mattress, or any clothing, other than boxer shorts and a straight jacket for approximately three weeks. See *Wilson* v. *Seiter*, 501 U.S. 294, 304 (1991) ("*Some* conditions of confinement may establish an Eighth Amendment violation in combination when each would not do so alone, * * *

when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise-for example.") (emphasis in original; internal quotation marks omitted); *Foulds* v. *Corley*, 833 F.2d 52 (5th Cir. 1987) (isolation in a cold cell in which inmate is forced to sleep on floor with rats).

Defendant does not dispute that he required Roberson to remain in a holding cell that "could be cold" without any clothing other than boxer shorts for three weeks. R. 142; Vol. 7, p. 150 (defendant). In fact, there was uncontradicted testimony that cell 107 "start[s] getting cold" "after a few minutes." R. 124; Vol. 5, p. 101 (Harvey). Two witnesses also related that they would have been cold had they, like Roberson, been confined to cell 107 wearing only boxer shorts and a straightjacket. R. 123; Vol. 3, pp. 52-53 (Garrett), 245 (Crawford). In addition, the government introduced evidence that defendant did not allow Roberson to have a blanket or mattress, and out of sympathy, an inmate and officer on the night shift gave Roberson a blanket because cell 107 was so cold. R. 123; Vol. 3, pp. 243-244 (Crawford); R. 124; Vol. 5, pp. 101-102 (Harvey).

Roberson was forced to go without food for several hours and even days at at a time because defendant's three-officer-escort rule also applied to taking Roberson out of his cell. Officers on the night shift explained that after several

days, they felt sorry for Roberson and disobeyed defendant's orders in part because he was not allowed to eat during the day. R. 141; Vol. 2, p. 232 (Weldon); R.123; Vol. 3, p. 248 (Crawford); R. 124; Vol. 5, p. 70 (Miller). Accordingly, because the evidence convincingly establishes that defendant forced Roberson to remain in a cold cell for approximately three weeks without any clothing other than damp, soiled boxer shorts, seek sleep while lying nearly naked on a cold concrete floor without a blanket or mattress, and go without food for prolonged periods of time, a rational juror could easily conclude that Roberson's confinement resulted in pain. See R. 141; Vol. 2, pp. 220, 232 (Weldon); R.123; Vol. 3, pp. 47-48, 52 (Garrett); R. 124; Vol. 5, pp. 101, 113 (Harvey).

Defendant nonetheless contends (Br. 25-26) that the evidence is legally insufficient to establish that pain resulted because: (1) Roberson did not testify that he had been in pain; and (2) cold "is not a proper basis for establishing pain." Both defendant's claims demonstrate a fundamental misunderstanding of the law and ignore certain evidence.

First, contrary to defendant's suggestion, a victim need not testify in order for a reasonable juror to conclude that bodily injury resulted. See, *e.g.*, *United States* v. *Perkins*, 470 F.3d 150, 153-154, 161 (4th Cir. 2006) (evidence that "bodily injury" resulted sufficient to sustain felony violation of 18 U.S.C. 242

when victim did not testify and the only evidence of pain was testimony from a doctor that victim reacted to pain stimuli even though he was unconscious). To conclude otherwise would allow a defendant to impair a victim's ability to communicate and nonetheless be convicted only of a misdemeanor violation.

More generally, there is no requirement that any particular witness testify in order to prove the elements of a criminal offense. See, *e.g.*, *United States* v. *Torres-Ramos*, 536 F.3d 542, 556-557 (6th Cir.) (evidence sufficient to allow jury to infer defendants' state of mind even though defendants did not testify and verdict based merely on circumstantial evidence), cert. denied, 129 S. Ct. 772 (2008). Instead, it is well established that a jury may draw all reasonable inferences from the facts and circumstances in evidence and that "circumstantial evidence alone is sufficient to sustain a conviction." *United States* v. *Fekete*, 535 F.3d 471, 476 (6th Cir. 2008); *Kuehne*, 547 F.3d at 696. See *Evans* v. *Detlefsen*, 857 F.2d 330, 334 (6th Cir. 1988) ("[I]nferences and probabilities suggested by common sense * * * are to be taken into account in assessing the facts."). Accordingly, in the instant case, a rational juror could "logical[ly] infer" that Roberson experienced pain from the conditions defendant imposed. *Torres-Ramos*, 536 F.3d at 556.

Defendant's argument also ignores uncontradicted evidence that Roberson appeared to be experiencing pain. Several witnesses testified that as a result of

confinement to cell 107, Roberson became pale and thin, appeared "dazed" and "not altogether there," and would just lay "limp" on the floor, "not move," and seemed not to "have much life." R. 141; Vol. 2, p. 116 (Ferrell); R. 144; Vol. 5B, p. 66 (Dennis); R. 124; Vol. 5, p. 105 (Harvey).

To the extent that defendant contends (Br. 25) that the cold of Roberson's cell is legally insufficient to establish pain, he is wrong. The Supreme Court has explicitly held that confinement of an inmate in a cold cell without a blanket can cause pain in violation of the Eighth Amendment. See *Wilson*, 501 U.S. at 304. In any event, even if cell 107 had not been cold, the other conditions of Roberson's three week confinement, including denial of timely access to a bathroom, exposure to excrement and urine, restraint at least 12 hours a day in a straightjacket, and denial of meals, are more than sufficient to have allowed a rational juror to conclude that Roberson experienced pain. Accordingly, this Court should affirm defendant's felony conviction for a violation of 18 U.S.C. 242 because there is substantial evidence that the conditions defendant imposed caused Roberson pain.

C. There Is Ample Evidence That Defendant's Order Requiring Roberson To Be Restrained In A Straightjacket Resulted In Physical Injury

Regardless of whether pain resulted, the jury's verdict should be sustained because there is ample evidence that physical injury resulted from defendant's requiring Roberson to be restrained in a straightjacket. Officer Dennis testified

that he observed red welts in Roberson's groin area when he escorted Roberson to the bathroom. R. 144; Vol. 5B, pp. 65, 69-70 (Dennis). Because Officer Dennis testified that Roberson's welts were "red and raw," appeared to be caused by "rubbing," and were in the area of the straightjacket's groin strap, the jury could reasonably conclude that Roberson sustained physical injury pursuant to defendant's orders, or as a result of the straightjacket's strap constantly rubbing his soiled damp boxer shorts against his skin during the three weeks he was confined. R. 124; Vol. 5, p. 69 (Miller); R. 144; Vol. 5B, p. 69 (Dennis).

Defendant argues (Br. 19, 26-27) that the red welts in Roberson's groin area do not support the jury's verdict because the government failed to "establish that the straightjacket caused the welts, or how the welts were established." According to defendant (Br. 26-27), because Officer Dennis testified that the welts in Roberson's groin area "appeared to be made by being hit by a belt" and "[t]he only proof related to that injury was when co-defendant Hawkins jerked Roberson up by the groin strap [to] put [him] in the straightjacket" – which is "unattributable to the defendant" – the evidence is insufficient to establish that physical injury resulted. Defendant's claim is flawed for multiple reasons.

First, defendant mischaracterizes the evidence when he argues that Officer Dennis suggested that the welts in Roberson's groin area resulted from Roberson's

being "hit with a belt, or something like that." Br. 26 (quoting R. 144; Vol. 5B, p. 65 (Dennis)). Officer Dennis twice testified to precisely the contrary and repeatedly explained that he believed the welts in Roberson's groin were most likely caused by the rubbing of a belt or strap from the straightjacket.

In response to inquiry from defendant's counsel as to whether he said that "the[] welts looked as though someone * * * had beaten Mr. Roberson with a belt," Officer Dennis replied (R. 144; Vol. 5B, p. 69):

> No, ma'am. I said they looked – that was the way I described them, as if – like a belt. That's the only way I knew how to describe them, as if, like, a belt had hit his legs or like a rubbing, red and raw. * * * But, no, I didn't say that they – someone had struck him.

In addition, when co-defendant's counsel asked if the "redness and the welts were * * * in close proximity to where the strap was for the straightjacket," Officer Dennis responded (R. 144; Vol 5B, p. 70):

> After Deputy Gungarare put the straightjacket on him – because I'm not familiar with * * * the workings of the straightjacket – it appeared where the strap was is the area * * * where * * * the welts were.

Accordingly, a fair reading of Officer Dennis' testimony does not suggest, as defendant claims, that the raw red welts in Roberson's groin area were caused when Roberson was hit with a strap, or more specifically, when co-defendant

Hawkins initially placed Roberson in a straightjacket and pulled on the strap between his legs.

Even if it did, (which we do not concede), it is of no legal consequence. First, it is well settled that a jury is "entitled to choose from among reasonable constructions of the evidence" and the government need "not remove every reasonable hypothesis except that of guilt" in order for the evidence to be sufficient. *United States* v. *Hill*, 142 F.3d 305, 312 (6th Cir.), cert. denied, 525 U.S. 898 (1998); *Fekete*, 535 F.3d at 476; *Kuehne*, 547 F.3d at 696 (quoting *United States* v. *Jones*, 102 F.3d 804, 807 (6th Cir. 1996)).

Moreover, contrary to defendant's presumption, the jury was entitled to conclude that bodily injury resulted even if the evidence established that Roberson's red welts were caused when co-defendant Hawkins placed Roberson in a straightjacket. Defendant does not dispute that he ordered Roberson to be restrained in a straightjacket for 23 hours a day, or that co-defendant Hawkins was acting pursuant to that directive when he placed Roberson in the straightjacket on May 6.

In addition, the district court, without objection, correctly instructed the jury that "the government need only prove that bodily injury was a natural and foreseeable result" of defendant's orders and need not prove "either defendant

intended to cause bodily injury or that his acts were the direct, immediate, or sole cause of the bodily injury." R. 147; Vol. 9, pp. 41-42, 53; See *United States* v. *Rebmann*, 226 F.3d 521, 525 (6th Cir. 2000) (dicta that statutory phrase "if death or serious bodily injury results" is "in effect a strict liability statute"), overruled on other grounds by *United States* v. *Leachman*, 309 F.3d 377, 385 (6th Cir. 2002); *United States* v. *Atkins*, 289 F. App'x 872 (6th Cir. 2008) (unpublished) (citing, with approval, the decisions of six circuits that have held that the phrase "if death or serious bodily injury results" requires merely that defendant's conduct "be the proximate cause of the victim's death or that the death be foreseeable."). See, *e.g.*, *United States* v. *Perkins*, 89 F.3d 303, 308 (6th Cir. 1996) (explaining that sentencing enhancement for causing "bodily injury" is "based on particular result, not the defendant's conduct"). See also Pattern Crim. Jury Instr., 5th Cir., 2.18 (2001); Model Crim. Jury Instr., 8th Cir., 6.21.846A.1 (2007). Thus, because it was entirely foreseeable that an officer, such as co-defendant Hawkins, might tightly pull on the straightjacket's straps when carrying out defendant's orders to secure Roberson in a straightjacket, defendant is responsible for any injuries, including the red welts in Roberson's groin area, that resulted from such conduct. Accordingly, because there is ample evidence for a rational juror to conclude that

defendant's orders caused Roberson *both* pain *and* physical injury, defendant's felony conviction for a violation of 18 U.S.C. 242 should be affirmed.

II

THE DISTRICT COURT DID NOT ERR NOR COMMIT PLAIN ERROR WHEN IT DENIED DEFENDANT'S MOTION FOR SEVERANCE

Defendant contends (Br. 36) that the district court erred in denying his motion for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure because "it was effectively impossible for the jury to compartmentalize and distinguish evidence concerning the different proof for each defendant regarding the element of bodily injury and pain."[5] Defendant's claim is waived and, in any event, without merit.

A. Standard Of Review

There is a strong presumption in favor of a joint trial of defendants who are indicted together. See *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993); *United States* v. *Beverly*, 369 F.3d 516, 534 (6th Cir.), cert. denied, 543 U.S. 910 (2004). A motion for severance is committed to the sound discretion of the trial court and

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[5] Rule 14(a) of the Federal Rules of Criminal Procedure provides:

> If the joinder of offenses or defendants in an indictment * * * appears to prejudice a defendant or the government, the court may order separate trial of counts, sever the defendants' trials, or provide any other relief that justice requires.

denial of such a request will not be reversed unless a defendant carries the "heavy burden" of making a "strong showing of factually specific and compelling prejudice" that can "only be rectified by separate trials. *United States* v. *Sivils*, 960 F.2d 587, 594 (6th Cir.), cert. denied, 506 U.S. 843 (1992); *United States* v. *Lloyd*, 10 F.3d 1197, 1215-1216 (6th Cir. 1993), cert. denied, 511 U.S. 1043, 511 U.S. 1146 and 513 U.S. 883 (1994). More specifically, a defendant must establish that "there is a serious risk that a joint trial would compromise a specific trial right, * * * or prevent the jury from making a reliable judgment about guilt or innocence" and even then, is entitled to severance only when the substantial danger of demonstrated prejudice outweighs society's interest in the speed and efficiency of a joint trial. *Zafiro*, 506 U.S. at 539. See *United States* v. *Walls*, 293 F.3d 959, 966-967 (6th Cir.), cert. denied, 537 U.S. 1022 (2002).

B. Defendant Waived His Claim That He Was Entitled To Severance Based On Evidence Relating To Bodily Injury

It is axiomatic that an issue raised for the first time on appeal is waived. See *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)("Because [petitioner's] argument was neither raised nor considered below, we decline to consider it."). In order to preserve an issue for appeal, it must be squarely presented to the district court. See *United States* v. *McKelvey*, 203 F.3d 66, 70 (lst Cir. 2000)("[L]egal theories not raised squarely in the lower court

cannot be broached for the first time on appeal."). An issue raised below in a perfunctory manner, without argument, or not accompanied with supporting authority, is not properly put forward for consideration and thus not subject to review on appeal. See, *e.g.*, *United States* v. *Buchanon*, 72 F.3d 1217, 1226-1227 (6th Cir. 1995)(defendant who "argued generally that the troopers illegally seized him in violation of his Fourth Amendment Rights, * * * but he did not specify when the seizure occurred – before the dog sniff or after the alert * * * forfeited the pre-sniff seizure argument by not raising it with specificity"). See also *Benge* v. *Johnson*, 474 F.3d 236 (6th Cir.), cert. denied, 128 S. Ct. 626 (2007); *McPherson* v. *Kelsey*, 125 F.3d 989, 995-996 (6th Cir. 1997), cert. denied, 523 U.S. 1050 (1998). Likewise, a claim that seeks review of a decision on a different basis, theory, or set of facts than presented to the court below is not preserved for review on appeal. See *United States* v. *A.B.*, 529 F.3d 1275, 1280 n.4 (10th Cir.) (a defendant is "obliged to inform the district court of all the theories under which he claimed an entitlement to relief in order to preserve those theories for appellate review" and that is so "even when [the claim] fall[s] under the same general rubric as an argument presented to the district court"), cert. denied, 129 S. Ct. 440 (2008); *United States* v. *Davis*, 471 F.3d 783, 786 (7th Cir. 2006) ("Neither a general objection to the evidence nor a specific objection on other grounds will preserve

the issue for review.") (citation omitted); *United States* v. *Lockett*, 406 F.3d 207, 212 (3d Cir. 2005) ("A litigant cannot jump from theory to theory like a bee buzzing from flower to flower.").

To preserve review of a district court's denial of a motion for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure a defendant must move for severance prior to the trial *and* renew the motion after the presentation of all the evidence. See *United States* v. *Allen*, 160 F.3d 1096, 1106 (6th Cir. 1998), cert. denied, 526 U.S. 1044 (1999); *United States* v. *Garcia*, 20 F.3d 670, 673 (6th Cir. 1994), cert. denied, 513 U.S. 1159 (1995). See also Fed. R. Crim. P. 12(e) ("[a] party waives any Rule 12(b)(3) defense, objection, or request," which includes a Rule 14 motion to sever charges or defendants, "not raised" prior to trial). Because defendant argues (Br. 28-36) for the first time on appeal that he is entitled to severance based on evidence relating to bodily injury, his claim is waived. Defendant argues that he was entitled to severance because the spillover affect of the evidence against Hawkins of bodily injury prejudiced him.

First, defendant failed to preserve the issue he now seeks to raise because his pretrial motion for severance was defective on its face and failed to present that claim. That pleading, as the district court explained (R. 146; Vol. 11, pp. 9, 14), was deficient since it was not accompanied by a memorandum of law and did not

cite any caselaw. In addition, because the motion never mentioned any evidence pertaining to bodily injury, nor argued that defendant was entitled to a separate trial because of any proof relating to that element, defendant's current claim is waived and not subject to review on appeal.

Defendant's claim is also waived because he did not present it at the close of the trial. Instead, defendant, without explanation or argument, after the district court agreed to co-defendant Hawkins' request to instruct the jury on a lesser included misdemeanor violation and government counsel questioned whether that charge could be given as to one defendant and not the other, orally moved for severance.

In addition, during the course of the trial, defendant never objected to any of the evidence relating to bodily injury. Nor did he request a special limiting instruction that certain evidence that co-defendant Hawkins inflicted pain on Roberson not be considered as to him. Accordingly, because defendant never alleged any prejudice from testimony relating to bodily injury, or sought severance on the basis of that evidence in the court below, he failed to preserve his current claim for review by this Court.[6]

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[6] To the extent that defendant now contends (Br. 28-29) that Counts One and Two were improperly joined pursuant to Rule 8(b) of the Federal Rules of Criminal Procedure that claim is also waived and without merit. Because defendant, in his

(continued...)

C. Defendant Was Not Entitled To Severance Based On Certain Evidence Relating To Bodily Injury

Should this Court grant review, defendant is not entitled to relief because he has not established error and certainly not plain error.[7] For the reasons discussed, pp. 21-33, *supra,* the jury was entitled to conclude that bodily injury resulted based on testimony about what occurred when co-defendant Hawkins, pursuant to defendant's orders, placed Roberson in a straightjacket. In addition, since such evidence would have been admissible had defendant been tried separately, the district court's denial of his motion for severance had no bearing on the jury's consideration of the evidence to which he belatedly objects.

(...continued)
pretrial motion, requested severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure only, did not cite to Rule 8 of the Federal Rules of Criminal Procedure, and did not allege that Counts One and Two were improperly indicted together, he has waived his right to challenge misjoinder. Defendant's Motion for Severance of Defendants, R. 34; ROA, p. 44-46. See *United States* v. *Williams*, 711 F.2d 748, 750-751 (6th Cir. 1983). See also *Lloyd*, 10 F.3d at 1214 (explaining that Rule 8(b) and Rule 14 are "analytically and procedurally distinct"). In any event, because Counts One and Two charge defendants who worked together with the same crimes, allege temporarily overlapping offenses against the same victim, and pertain to conduct that was motivated by the same series of events, they are "logically interrelated" and thus correctly joined. *United States* v. *Beverly*, 369 F.3d 516, 533 (6th Cir.), cert. denied, 543 U.S. 910 (2004).

To grant relief under plain error review, "this court must find that error occurred; the error was plain; the error affected substantial rights; and the plain error seriously affected the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Gilpatrick*, 548 F.3d 479, 482 (6th Cir. 2008) (internal citation marks omitted).

Moreover, it is purely speculative to presume, as defendant does, that testimony as to the manner in which co-defendant Hawkins placed Roberson in a straightjacket impacted the jury's verdict that bodily injury resulted. After all, the jury returned its verdict only slightly more than an hour after it inquired "[d]oes pain alone constitute bodily injury?" The evidence offered by the government as to Count One overwhelmingly focused on the conditions of confinement, and there was substantial evidence, as discussed, pp. 19-28, *supra,* that those conditions caused Roberson pain without regard to co-defendant Hawkins' conduct. R. 147; Vol. 9, p. 54. In addition, as previously noted, see pp. 28-30, *supra*, since Officer Dennis, the only witness who saw or testified about Roberson's red welts, repeatedly explained that Roberson's groin injury was most likely caused by the straightjacket's belt constant rubbing against it, it is more than a stretch to conclude that co-defendant Hawkins caused the *multiple, raw red* welts, particularly since he is alleged to have pulled on the strap between Roberson's legs only *once*. Accordingly, defendant has failed to demonstrate that the evidence to which he objects had any impact on the jury's conclusion that bodily injury resulted.

Further, defendant was not prejudiced in any respect as a result of being tried with co-defendant Hawkins. After all, defendant was the senior officer, and

he ordered Roberson to be confined and restrained. The jury clearly concluded that co-defendant Hawkins, who was carrying out defendant's orders, was less culpable since it found him guilty only of a misdemeanor violation of 18 U.S.C. 242. In addition, three times – before, during, and after the presentation of the evidence – the district court gave a special instruction reminding the jury of its duty to separately consider the evidence against each defendant. See *Zafiro*, 506 U.S. at 540-541; *United States* v. *Pierce*, 62 F.3d 818, 829-830 (6th Cir. 1995), cert. denied, 516 U.S. 1136 (1996). In fact, since the jury found defendant guilty of a felony but convicted co-defendant Hawkins of a misdemeanor, it clearly had no problem, notwithstanding defendant's claim, "distinguish[ing] * * * the different proof for each defendant regarding the element of bodily injury and pain." Br. 36. Accordingly, defendant has failed to establish prejudice as a result of being tried with co-defendant Hawkins.

Finally, even assuming prejudice, defendant is not entitled to relief. After all, defendant has not demonstrated, nor even argued, that the substantial danger of harm outweighs society's interest in preserving court resources and avoiding the inefficiency, inconvenience, and delay that results when there are two separate trials. See *Walls*, 293 F.3d at 966-967. Accordingly, since defendant has failed to

demonstrate that he was entitled to a separate trial, the district court did not err, no less commit clear error by denying his motion for severance.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 32(a)(7)(B). This brief was prepared using WordPerfect 12.0 and contains no more than 9,657 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Lisa J. Stark
LISA J. STARK
Attorney

Date: February 11, 2009

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I further certify that a copy of the foregoing has been served upon the below listed parties, via electronic mailing, through the CM/ECF service:

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