Nos. 14-15622-DD, 14-15633-DD, 14-15740-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

DELTON RUSHIN;
RONALD LACH, JR.;
CHRISTOPHER HALL,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS APPELLEE

VANITA GUPTA
Principal Deputy Assistant
Attorney General

AYESHA N. KHAN
CHRISTINE A. MONTA
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9035
Christine.Monta@usdoj.gov

United States v. *Delton Rushin, et al.*, Case Nos. 14-15622-DD, 14-15633-DD, 14-15740-DD

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for the United States as appellee hereby certifies that in addition to the persons listed in appellants' briefs filed August 17, 2015, the following persons and parties may also have an interest in the outcome of this case:

Griffin, Tyler, Defendant

Gupta, Vanita, Counsel for the United States, Appellee

Hinton, James, Defendant

Johnson, Jess B., Counsel for Griffin, Defendant

Khan, Ayesha N., Counsel for the United States, Appellee

Schieber, Michelle L., Counsel for the United States, Appellee

United States of America, Appellee

Vogelbaum, Martin J., Counsel for Lach, Appellant

Williams, Catherine M., Counsel for Lach, Appellant

Wimbush, Derrick, Defendant

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Date: December 10, 2015

STATEMENT REGARDING ORAL ARGUMENT

The United States has no objection to the appellants' request for oral argument in this case.

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STATEMENT OF JURISDICTION

These appeals are each from a judgment of conviction and sentence issued under the laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. On December 12, 2014, the court sentenced each appellant and

entered final judgment.[1] Doc. 299, 301, 303. The appellants filed timely notices of appeal. Doc. 306, 308, 312. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district judge abused his discretion in declining to recuse himself, shortly before trial and over a year after he was assigned the case, based on his participation ten years earlier as a lawyer representing inmates in an unrelated civil-rights suit against other officers at a different prison?

2. Whether the district court violated Hall's and Rushin's Sixth Amendment rights by precluding them from cross-examining cooperating witnesses about the specific penalties they avoided by cooperating?

3. Whether the district court's exclusion of evidence regarding prior inmate assaults on officers, unrelated to the incidents at issue at trial, violated Hall's and Rushin's Fifth and Sixth Amendment rights?

4. Whether the district court violated Hall's and Rushin's Sixth Amendment rights in calculating their sentences?

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[1] On March 26, 2015, the district court issued amended judgments removing the restitution requirement. Doc. 358, 360, 362.

STATEMENT OF THE CASE

1. Procedural History

This case arises out of the infliction, and subsequent cover-up, of a series of retaliatory assaults by Macon State Prison (MSP) correctional officers on handcuffed inmates. On April 15, 2013, a grand jury returned a 22-count indictment charging the three appellants and five co-defendants with various civil-rights, conspiracy, and obstruction-of-justice violations.[2] The indictment charged all three appellants with conspiracy to violate inmates' civil rights in violation of 18 U.S.C. 241 (Count 1), deprivation of inmate Terrance Dean's civil rights in violation of 18 U.S.C. 242 (Count 2), conspiracy to obstruct justice in violation of 18 U.S.C. 371 (Count 3), obstruction of justice for persuading others to provide false and misleading information in violation of 18 U.S.C. 1512(b)(3) (Counts 4-6), and obstruction of justice for falsifying an MSP witness statement regarding the Dean incident in violation of 18 U.S.C. 1519 (Counts 16-18). Additionally, the

[2] Two co-defendants, Kerry Bolden and Kadarius Thomas, pled guilty before trial—Bolden to two conspiracy counts, and Thomas to one count of falsifying documents. Doc. 73-74, 91-92. Three other co-defendants, James Hinton, Derrick Wimbush, and Tyler Griffin, went to trial with appellants and were acquitted of all charges. Doc. 232, 244-246.

grand jury charged Hall with providing misleading information regarding the Dean incident to the Georgia Bureau of Investigations (GBI) in violation of 18 U.S.C. 1512(b)(3) (Count 9), and Rushin with three additional counts of violating 18 U.S.C. 1519 by falsifying a handwritten statement provided to the GBI (Count 22) and two witness statements regarding assaults on inmates Jabaris Miller and Mario Westbrook (Counts 13-14). Doc. 1.

Before trial, the government moved to exclude any reference to the possible sentence defendants would face upon conviction—including indirectly through cross-examination of cooperating witnesses regarding their plea agreements—on the grounds that potential punishment is irrelevant to the jury's consideration of guilt and informing the jury of the penalties defendants faced invites nullification. Doc. 118. The government also moved under Federal Rules of Evidence 402 and 403 to exclude evidence of inmate violence unrelated to the four alleged incidents on the ground that such evidence is irrelevant to the charged offenses and its sole function would be to encourage "nullification based on sympathy for the defendants." Doc. 120, at 1. Rushin filed written responses to both motions. Doc. 131, 133.

After argument at the May 14, 2014, pretrial hearing (Doc. 174), the district court granted both motions (Doc. 183). In ruling on the first, the court made clear that it would permit the defendants ample leeway to cross-examine the cooperators regarding their plea agreements, including exploration of the facts that they avoided additional charges carrying a "more severe penalty," and that they hoped to receive a sentence reduction in exchange for testifying favorably to the government. Doc. 183, at 6. The sole limitation the court imposed was that counsel could not question the cooperators about the specific sentences they avoided because that information would indirectly inform the jury of the sentence the defendants faced, an impermissible consideration that could lead to nullification. Doc. 183, at 5-6. On the second motion, the court found that the defendants had not articulated any theory by which evidence of harsh prison conditions would be relevant. Doc. 183, at 7. Hall and Rushin challenge both rulings on appeal.

On May 23, 2014—over a year after they were indicted and just over two weeks before the start of trial—defendants filed a joint motion asking the judge to recuse himself under 28 U.S.C. 144 and 28 U.S.C. 455 because of his representation, while a practicing lawyer a decade earlier, of unrelated inmates in a

civil-rights lawsuit against different officers at another Georgia prison. Doc. 166. The judge denied that motion, concluding both that it was untimely and that his participation in that case created neither bias nor appearance of bias. Doc. 177. All three appellants challenge that ruling on appeal.

Following a nine-day trial, a jury found all three appellants guilty of conspiracy to obstruct justice (Count 3) and falsifying their witness statements regarding the Dean assault (Counts 16-18), Hall guilty of lying to the GBI regarding his role in the Dean assault (Count 9), Rushin guilty of falsifying a witness statement regarding an assault on Mario Westbrook (Count 14), and Lach guilty of depriving Dean of his Eighth Amendment rights (Count 2). Doc. 232. The jury acquitted appellants of the remaining charges. Doc. 232.

The district court sentenced Hall to a within-guidelines sentence of six years, Rushin to a within-guidelines sentence of five years, and Lach to a below-guidelines sentence of seven-and-a-half years. Doc. 299, 301, 303; Doc. 345, at 152, 163, 168. On appeal, Hall and Rushin argue that the district court improperly relied on acquitted conduct in calculating their sentences.

2. Facts

This case concerns the systematic abuse of power and obstruction of justice by members of the Correctional Emergency Response Team (CERT) at Macon State Prison in Oglethorpe, Georgia, in late 2010. Hall was the CERT team sergeant at the time; Lach and Rushin were its next most senior members. Doc. 254, at 213-214; Doc. 258, at 26, 222.

CERT is a specially trained group of correctional officers responsible for responding to and controlling disturbances at MSP. Doc. 258, at 211. Among other duties, CERT is responsible for responding to "Code 3" calls, which are situations involving inmate-on-officer assaults. Doc. 254, at 234-235. CERT's role in a Code 3 is to gain control of the assaultive inmate, remove him from the building, and escort him first to the medical unit and ultimately to segregated housing. Doc. 254, at 35, 216; Doc. 258, at 217-218. For safety reasons, CERT is required to video record the entire escort. Doc. 254, at 36-37, 217-218; Doc. 258, at 25, 220. Like all Georgia corrections officers, CERT members are taught that they may use only as much force as necessary to "gain positive control" over an inmate, and that using force to punish an inmate after he has been subdued violates

the inmate's civil rights. Doc. 259, at 75-78; see also Doc. 254, at 216-217; Doc. 258, at 218.

Notwithstanding this training, in the fall of 2010, CERT culture was one of retaliatory violence and abuse of power. When new members joined CERT, senior officers told them that if an inmate hits an officer, CERT "would get them back" (Doc. 258, at 27; see Doc. 258, at 222, 224, 262), and that "whatever happens on CERT stays on CERT" (Doc. 254, at 220). The retaliatory "system" for dealing with assaultive inmates (Doc. 255, at 41) began with officers taking the inmate to a remote location free of cameras—usually, but not always, the prison gymnasium—and assaulting him while he was still in handcuffs. Doc. 254, at 65; Doc. 255, at 36; Doc. 258, at 224. They would then escort the inmate to the medical unit, where they would lie about how he received his injuries. Finally, they would write false witness statements to conceal their conduct and collude to ensure the consistency of those statements. Doc. 254, at 231.

a. The Four Assaults

The government introduced evidence of four assaults following the general pattern described above.

(i) Franklin Jones – October 25, 2010

On October 25, 2010, inmate Franklin Jones assaulted Officer Jason Davis with a pair of clippers. Doc. 254, at 254; Doc. 258, at 17, 44; Doc. 241-40. CERT officers, including the three appellants, responded to the scene and escorted Jones to the gym. There they repeatedly beat him, still in handcuffs, as punishment for assaulting Davis. Doc. 254, at 254-257; Doc. 255, at 14; Doc. 258, at 18-19. According to Darren Douglass-Griffin, a junior CERT officer, Rushin told Jones, "This is what you get for beating on one of our officers." Doc. 258, at 19.

Following the beating, the officers took Jones to the medical unit, where a nurse treated his injuries, which included a laceration to the back of the head, swelling in the bones around both eyes, and blood in his mouth and nostrils. Doc. 256, at 147, 150; Doc. 241-6, 241-7, 241-8, 241-9, 241-10, 241-15. Jones did not have those injuries before being escorted to the gym. Doc. 254, at 255; Doc. 255, at 19; Doc. 258, at 18.

The officers then returned to the CERT office to write their Use of Force reports and witness statements, which are required whenever an officer places hands on an inmate. See Doc. 254, at 218-219. Their reports universally omitted any mention of the officers' assault on Jones. See Doc. 255, at 29-30; Doc. 258, at

22-23; Doc. 241-11, 241-12, 241-13, 241-48, 241-49, 241-50, 241-51. Two of the junior CERT officers testified that they were taught to "write their statements to coincide with each other" (Doc. 258, at 23) and to report the incident "like nothing happened" (Doc. 255, at 25; see also Doc. 255, at 30; Doc. 254, at 232). When they later learned that the prison's Internal Affairs office was coming to investigate the incident, Hall told them "to just stick to what [they] had on the statement." Doc. 255, at 31.

(ii) Jabaris Miller – October 28, 2010

Three days after the Jones incident, inmate Jabaris Miller attacked Sergeant Carlos Felton in a prison dining hall. Doc. 258, at 232-233, 249. CERT officers responded, put Miller in handcuffs, and escorted him behind the "ID" building where, like the gym, there were no surveillance cameras. Doc. 258, at 233-234. There, Lach hit Miller, who was still handcuffed, and "pushed him against the wall," at which point "everybody else just joined in" beating him. Doc. 258, at 235. Rushin was among the officers who assaulted Miller. Doc. 258, at 233-235; Doc. 259, at 45.

The government introduced witness statements from Rushin and Willie Redden, the most junior CERT member. Both statements omitted mention of the

officers' assault on Miller. Doc. 241-18, 241-38. Redden testified that Hall and Lach told the junior officers "exactly what to write" on their reports, and that Redden omitted the assault on Miller because including it was "against policy." Doc. 258, at 239-240.

(iii) Mario Westbrook – December 14, 2010

On December 14, 2010, inmate Mario Westbrook punched Deputy Warden James Hinton in the face, breaking his jaw. Doc. 255, at 32-33, 63; Doc. 258, at 14-15, 56, 250. A Code 3 was called, and CERT officers arrived to subdue Westbrook and escort him from the building. Doc. 255, at 32-34; Doc. 258, at 15. As they were leaving, Trevonza Bobbitt, an MSP unit manager, told the officers, "Y'all need to fuck him up," which Kerry Bolden, a junior CERT member, understood to mean that they needed to "[b]eat him." Doc. 255, at 33-34. CERT officers, including Rushin and Lach, took Westbrook, handcuffed, to the gym, where they beat him up in retaliation for assaulting Hinton. Doc. 255, at 35; Doc. 256, at 17-22; Doc. 258, at 15-17, 236-237. By this point, two CERT members testified, such retaliatory beatings were "Standard Operating Procedure." Doc. 255, at 36; Doc. 258, at 16 (beatings were "what the CERT team * * * did").

After the beating, CERT officers escorted Westbrook to medical. Doc. 255, at 35; Doc. 258, at 16. Photographs taken there show Westbrook with abrasions, a laceration, and two black eyes, injuries he did not have before entering the gym. Doc. 259, at 210-212, 232-235; see also Ex. 68-70. According to Bolden, Unit Manager Bobbitt peered in the doorway of the medical unit and, observing Westbrook, commented, "That was all y'all did?" Doc. 255, at 35. Douglass-Griffin similarly testified that Cedric Taylor, head of the tactical squad, entered medical and remarked, "This inmate is sitting up? If that was my deputy warden, he wouldn't be able to walk."[3] Doc. 258, at 16.

Rushin's witness statement regarding the Westbrook incident omitted any mention of the CERT officers' assault on Westbrook in the gym, stating only that he "assisted with escorting inmate Westbrook, Mario" from "unit E1 to medical." Doc. 241-19; Doc. 256, at 214-15. This false statement was the basis for Rushin's conviction on Count 14. Doc. 1; Doc. 261, at 33.

[3] At trial, Bobbitt and Taylor admitted being present during Westbrook's treatment but denied making these statements. Doc. 259, at 169; Doc. 260, at 83.

(iv) Terrance Dean – December 16, 2010

(1) The Beating

Two days after the Westbrook incident, inmate Terrance Dean assaulted Officer Stephen Walden in the E2 housing unit. Doc. 254, at 31-32. CERT officers responded and escorted Dean to the gym. Doc. 254, at 35-36. Dean had no serious injuries at that time. Doc. 254, at 33, 236, 242; Doc. 256, at 101, 125, 191; Doc. 257, at 239; Doc. 258, at 223-224. Although they were carrying a handheld video camera, CERT was not recording the escort. Doc. 254, at 36-37. En route, Rushin warned Dean, "This is what you get for hitting an officer." Doc. 257, at 240.

Emmett McKenzie, an MSP shift supervisor who had previously worked on CERT, testified that he followed the officers into the gym and saw Dean standing with his hands handcuffed behind his back and two CERT officers holding each arm. Doc. 254, at 28, 40. As McKenzie approached, he heard an officer say, "We're about to handle this now." Doc. 254, at 38. McKenzie testified that he then told Dean, "don't you be putting your hands on my staff," and swiped his finger across Dean's face. Doc. 254, at 40; see also Doc. 257, at 241. Rushin then said something to the effect of, "Y'all know what to do. What are you waiting

for?" Doc. 257, at 242; see also Doc. 254, at 238. Although accounts differed as to precisely how the assault unfolded (see Doc. 254, at 41, 239-240; Doc. 258, at 226, 267), the witnesses unanimously testified that the CERT officers savagely pummeled Dean as punishment for having hit Officer Walden (Doc. 254, at 44, 238-239; Doc. 257, at 242-245; Doc. 258, at 226-229).

The CERT officers' attack on Dean was more brutal than their previous assaults on inmates. While Dean lay on the ground, the three appellants and four other CERT members punched and kicked him in the head and body until he was unresponsive. Doc. 254, at 238-242; Doc. 257, at 243-245; Doc. 258, at 226-228. The beating continued until Bolden "slapped him in the face about three or four times," screaming at the immobile Dean to "[g]et [his] ass up and stop playing" (Doc. 254, at 240; see also Doc. 257, at 245), at which point Hall, who had been "kicking Dean at first," saw how badly Dean was injured and "started pulling * * * the team off of Dean" (Doc. 257, at 245). When the beating ceased, Dean could neither walk nor talk. Doc. 254, at 243-244; Doc. 258, at 229. He had blood coming from his mouth and a "large-sized knot growing on his forehead." Doc. 258, at 228; see Doc. 254, at 242; Doc. 257, at 245.

Because it is dangerous for "nonmedical personnel" to move a seriously injured inmate, the MSP protocol is for officers to summon medical staff to respond with a "golf-cart-type ambulance" and assess the patient on-site. Doc. 256, at 161, 184. The CERT officers, however, did not follow that protocol. Doc. 256, at 162. Instead, Hall and Lach ordered Douglass-Griffin and Redden to take Dean to medical (Doc. 257, at 246; Doc. 258, at 229), while the more senior officers were "directed to go out of the gym in different directions" (Doc. 257, at 246; see Doc. 258, at 230). Douglass-Griffin and Redden attempted to lift Dean and "drag him" to medical, but his body "was like dead weight," so Hall instructed Bolden to help them carry Dean to the infirmary. Doc. 258, at 229-230; see Doc. 254, at 243; Doc. 257, at 246-247.

When Dean arrived at medical, he was "[c]onfused," "agitated," and "thrashing around on the stretcher." Doc. 256, at 152. He was unable to walk or speak and was "responsive to nothing." Doc. 256, at 151, 154, 157. He had a five-inch wide hematoma on his forehead, abrasions on his face and feet, and a lacerated upper lip. Doc. 256, at 154, 164, 185. His right pupil was dilated and unresponsive to light, a condition that the treating nurse described as "really abnormal" and potentially indicative of a brain injury. Doc. 256, at 155, 187. The

nurse believed it was "possible he would die." Doc. 256, at 166. She testified that, notwithstanding Dean's dire condition, two CERT members "were laughing" during the examination. Doc. 256, at 158. When she admonished them to "stop it" because "[i]t wasn't appropriate," Hall pulled her out of the room and told her to "[l]et [him] handle [his] men." Doc. 256, at 158-159.

Because MSP was not equipped to "care for someone who is that badly injured," the medical staff called an ambulance to take Dean to Flint River Community Hospital. Doc. 256, at 165; see Doc. 256, at 156; Doc. 257, at 247-248. Dean continued to be nonresponsive at the hospital's emergency room, unable to speak, answer questions, or follow commands. Doc. 254, at 8, 10. His arms would sometimes flail wildly and other times "posture" inward, a "sign of a severe neurological injury." Doc. 254, at 15; see also Doc. 254, at 8. He tested 5 out of 15 on the Glasgow Coma Score, a test of brain function; a score below 7 or 8 raises concerns of "respiratory and cardiac arrest." Doc. 254, at 9. The emergency-room nurse at Flint River testified that Dean had the "most severe" injuries she had ever seen on an MSP inmate. Doc. 254, at 16.

Because Flint River is a "small rural community hospital" lacking neurological services, the emergency-room staff intubated Dean, placed him on a

ventilator, and transferred him "to a larger facility where they had neurotrauma services." Doc. 254, at 10-11; see also Doc. 254, at 47. Dean remained unconscious for a week. Doc. 256, at 192. When he finally awoke, his speech was slurred, he experienced headaches, and he could not walk properly. Doc. 256, at 192-193. He had difficulty picking up small objects, and his "whole right side was weak." Doc. 256, at 195. Dean underwent one month of speech therapy and six months of physical therapy to relearn how to walk. Doc. 256, at 193, 196.

(2) The Cover-Up

The CERT officers recognized that they were in danger of losing their jobs, or worse. See, *e.g.*, Doc. 254, at 244 (Hall remarked, "We're going to lose our jobs over this one"); Doc. 254, at 54, 147 (Unit Manager Don Blakely told McKenzie that "this thing is going to go federal" and "when it do[es] their ass is going to be in the ringer"). Accordingly, upon their return to the CERT office, appellants set about colluding with the other CERT members to falsify their reports about the Dean assault. The government introduced appellants' witness statements, each of which omitted any mention of the CERT officers' use of force against Dean. Doc. 256, at 216-220; Doc. 241-20, 241-21, 241-22. These

statements were the bases for appellants' convictions on Counts 16, 17, and 18. Doc. 1; Doc. 261, at 33.

Three junior CERT members—Bolden, Douglass-Griffin, and Redden—testified extensively about appellants' role, as the senior CERT members, in orchestrating the cover-up. Bolden testified that, when he returned to the CERT office that night, Hall instructed him to look at the other CERT members' witness statements and "make [his] statement match theirs." Doc. 254, at 246; see Doc. 254, at 247-249; Doc. 255, at 154; Doc. 256, at 34-35. The other officers' statements were written "like nothing out of the ordinary happened" and uniformly omitted mention of their use of force on Dean. Doc. 254, at 247, 249. Bolden complied and likewise omitted from his statement any mention of the beating: instead, he claimed that, when Bolden arrived, Dean already "appeared to be passed out" on the sidewalk outside the gym, and that Bolden's only involvement was to assist in carrying Dean to medical. Doc. 254, at 247-248; Doc. 241-5. The statements of Lach, Redden, Douglass-Griffin, and Wimbush made the same claim about Dean being "passed out." Doc. 241-21; Doc. 241-23; Doc. 241-29; Doc. 241-37. Hall, who was "present for" and "participated in" Dean's beating, reviewed Bolden's false statement and did not instruct him to change it. Doc. 254,

at 250. To the contrary, when Bolden went to meet with Internal Affairs investigators, Hall told him to "[s]tick to what you wrote on the statement." Doc. 254, at 251. Bolden did so, providing false accounts both to Internal Affairs and to the GBI. Doc. 254, at 252-253; Doc. 256, at 36-37. Bolden eventually pled guilty to conspiring to cover up the Dean assault. Doc. 91, at 3, 12.

Douglass-Griffin testified that, when he returned to the CERT office, all the other officers were gone, so he wrote his witness statement and put it on Hall's desk. Doc. 257, at 249. The next morning, Hall directed him to change his statement so that it "would work with the rest of the CERT team's statements." Doc. 257, at 249-250. Specifically, Hall told him to write that Redden and Douglass-Griffin were alone in the gym with Dean when Dean became "unruly" and "combative," "snatched away" from them, and fell and hit his head. Doc. 257, at 250. Douglass-Griffin protested that he did not want to write that account, but Rushin, who was in the office at the time, assured Douglass-Griffin that "everything would be all right if [they] all stick to the same story." Doc. 257, at 250; Doc. 258, at 134, 200-201. Accordingly, Douglass-Griffin changed his statement to the false story that Hall suggested, stating that Dean "snatched away," "ran from staff," and fell "head first on the floor." Doc. 241-29; Doc. 257, at 250.

Lach and Redden told the same version in their statements, even using the same "snatched away" language. Doc. 241-21; Doc. 241-37. Urged to "stick with the story" by his fellow CERT members, Douglass-Griffin continued to tell the false account both to the internal investigator and to GBI. Doc. 258, at 9-12, 206-207. He ultimately pled guilty to conspiring to violate Dean's civil rights and falsifying his witness statement. Doc. 258, at 13, 207; Plea Agreement, *United States* v. *Douglass-Griffin*, No. 5:12-CR-57 (M.D. Ga.) (Doc. 5).

Redden testified that, when he returned to the CERT office to write his witness statement, Lach, Rushin, and Wimbush told him to claim that Dean had become "combative," tried to "snatch away," and then "slipped and fell and hit his head on the floor." Doc. 258, at 240. Redden did so, explaining at trial that writing a truthful report was "against policy" because CERT officers could get "in trouble" or "fired." Doc. 258, at 241-242; see Doc. 241-37. Redden submitted the report to Hall, who did not make any corrections. Doc. 258, at 242. When Redden went to speak with Internal Affairs, the senior CERT members told him to "stick with the story," so he did, including telling the investigator that Dean already had a knot on his forehead when he left the dorm—a claim that both Rushin and Wimbush had made in their witness statements. Doc. 258, at 243-244; Doc. 241-

22; Doc. 241-23. Before Redden met with GBI, he spoke with Bolden and Rushin in the parking lot, who again told him to "[j]ust stick with the story." Doc. 258, at 245. Although Redden initially did so, he eventually told GBI, and later the FBI, "exactly what happened." Doc. 258, at 246; see also Doc. 257, at 9. Redden pled guilty to conspiring to violate inmates' civil rights. Doc. 258, at 246; Plea Agreement, *United States* v. *Redden*, No. 5:12-CR-48 (M.D. Ga.) (Doc. 4).

Two GBI agents testified regarding appellants' false statements made during their GBI interviews. Agent Terry Hunt interviewed Lach and Hall on January 7, 2011. Doc. 256, at 51. Hunt testified that Hall told him that Hall did not go into the gym with Dean, "had no knowledge" of the CERT officers assaulting Dean, and "was unaware of any discussion as to what was to be written in" officers' witness statements. Doc. 256, at 51. Lach originally told Hunt, as in Lach's and others' witness statements, that Dean had simply "passed out" and fallen to the ground. Doc. 256, at 54. When Hunt responded that he "didn't believe him," Lach acknowledged that he and other officers had assaulted Dean and that his witness statement was "all false and a lie." Doc. 256, at 54-57. Lach ultimately prepared a written statement for GBI in which he admitted that he and other CERT officers assaulted Dean. Doc. 256, at 58-60; Doc. 241-14.

Agent Trebor Randle, the lead GBI investigator handling the Dean incident, interviewed the three junior CERT members, Rushin, and Hall. Doc. 257, at 13-14. Although Rushin initially told Randle that he had not even entered the dorm where the Code 3 was called, when she confronted him with surveillance footage, he admitted that he was there. Consistent with his witness statement, however, Rushin claimed that he only partially escorted Dean across the yard and did not enter the gym. Doc. 257, at 16-20. Having already spoken to the three junior CERT members, Randle challenged that assertion. Rushin "finally acknowledged that he had entered the gymnasium" and that he and other officers had given Dean "hands on treatment," which Randle understood to mean that Dean "had been beaten or whipped." Doc. 257, at 21-22, 27.[4]

Randle interviewed Hall a week later at the regional GBI office; excerpts of a video recording of the interview were played at trial and admitted into evidence. Doc. 257, at 33-44. Although Hall initially maintained that he never entered the

[4] Rushin prepared a written statement for Randle in which he acknowledged that Dean "could have gotten snatched around a little bit" but claimed not to "remember everything" and also that Dean had a knot on his head before arriving at the gym. Doc. 257, at 25-26; Doc. 241-25. Rushin was charged with obstruction of justice for those false assertions but was acquitted of that charge (Count 22). Doc. 262, at 9; Doc. 232, at 7.

gym, he "eventually acknowledged going into the gym with the other officers," that officers beat Dean, and that there was "a possibility" that Hall participated. Doc. 257, at 33, 41. Hall's false statement to Agent Hunt that he did not enter the gym was the basis for his conviction on Count 9. Doc. 1; Doc. 261, at 30.

SUMMARY OF THE ARGUMENT

None of appellants' claims on appeal has merit. First, the district judge was well within his discretion in ruling that appellants' recusal motion was untimely, as it was filed on the eve of trial, over a year after the case was assigned to the judge, and was based on information that was easily ascertainable from public records that entire time. The judge also properly rejected the motion on the merits, as his participation, a decade earlier, in a civil-rights lawsuit involving unrelated inmates at a different prison created neither actual bias nor an appearance of bias.

Appellants Hall and Rushin contend that the district court violated their Sixth Amendment rights by restricting their cross-examination of the four cooperators—Redden, Bolden, McKenzie, and Douglass-Griffin—regarding the precise sentences the cooperators avoided by pleading guilty. The district court, however, permitted appellants to engage in extensive questioning about both the substantial benefits the cooperators received as well as other potential sources of

bias. This more than satisfied the Confrontation Clause, and the district court's minor restriction, which was aimed at preventing jury nullification and a side-trial on the mechanics of sentencing, fell squarely within the court's discretion. Regardless, any error in imposing this narrow limitation was harmless in light of the substantial cross-examination that was permitted and the overwhelming evidence of appellants' guilt on the charges of conviction.

Hall's and Rushin's claim that the district court erred in excluding evidence of prior inmate-on-officer assaults is likewise meritless. Defendants were unable to articulate any theory under which violent conduct by inmates unrelated to the four incidents at issue would have been relevant. Such evidence would have served only to garner sympathy for the defendants and thereby encourage nullification, an impermissible basis for admitting evidence. Regardless, any error was harmless, as Hall and Rushin were both acquitted of the civil-rights charges—the only counts to which this evidence conceivably had any bearing—and the proposed evidence would have been largely cumulative given the extensive evidence of the dangerous conditions at MSP that was admitted.

Finally, Hall's and Rushin's constitutional challenge to their sentence is foreclosed by binding circuit precedent. Even if it were not, their claim fails on the

merits, as the district court did not increase their sentences based on acquitted conduct. Rather, to the extent the court considered aspects of the Dean assault in sentencing, it was only to determine the severity of the offense appellants were convicted of covering up—a consideration that the Sentencing Guidelines and this Court's precedent mandate—not to treat appellants as actually having committed that civil-rights violation.

ARGUMENT

I

THE DISTRICT JUDGE DID NOT ABUSE HIS DISCRETION IN DECLINING TO RECUSE HIMSELF FROM THIS CASE SHORTLY BEFORE TRIAL DUE TO HIS PARTICIPATION AS A LAWYER IN A CIVIL-RIGHTS LAWSUIT TEN YEARS EARLIER

A. Standard Of Review

A district court's denial of a recusal motion is reviewed for abuse of discretion. *United States* v. *Scrushy*, 721 F.3d 1288, 1303 (11th Cir. 2013).

B. The Judge Did Not Abuse His Discretion In Denying Appellants' Recusal Motion As Untimely

Appellants moved for recusal under both 28 U.S.C. 144 and 28 U.S.C. 455. Section 144 mandates recusal where a party "makes and files a timely and sufficient affidavit that the judge * * * has a personal bias or prejudice either

against him or in favor of any adverse party." 28 U.S.C. 144. Because of the disruption and delay that recusal causes, a judge must "strictly scrutinize[]" a Section 144 affidavit "for form, timeliness, and sufficiency" before deciding to recuse himself. *United States* v. *Perkins*, 787 F.3d 1329, 1343 (11th Cir. 2015) (citation and internal quotation marks omitted), cert. denied, No. 15-6742, 2015 WL 6614012 (Dec. 7, 2015). Timeliness is also a requirement for recusal motions filed under 28 U.S.C. 455. See *Summers* v. *Singletary*, 119 F.3d 917, 920 (11th Cir. 1997); *United States* v. *Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983). A timely recusal motion is one filed within a "reasonable time after the grounds for the motion" either are known, *Summers*, 119 F.3d at 921, or are "readily available" as "public knowledge," *United States* v. *Siegelman*, 640 F.3d 1159, 1188 (11th Cir. 2011).

Here, the judge was well within his discretion in ruling that appellants' recusal motion was untimely. Appellants knew at least as of May 16, 2013, that Judge Treadwell was assigned to this case. Doc. 67.[5] The ground on which they

[5] Although the May 16, 2013, docket entry is the first that mentions Judge Treadwell, the judge represented in his order denying appellants' recusal motion that the case was assigned to him when it was filed on April 15, 2013. Doc. 177, at

(continued…)

based their recusal request—Judge Treadwell's representation of inmate plaintiffs in an unrelated civil-rights lawsuit a decade earlier, while he was still in private practice—was "information readily available" at that time. *Siegelman*, 640 F.3d at 1188. Yet, appellants did not file their motion until over a year later, on May 23, 2014—less than three weeks before trial was to begin. Doc. 166. Under these circumstances, the judge did not abuse his discretion in deeming that motion untimely.

Appellants acknowledge that Judge Treadwell's participation in the *Doe* case was "a matter of public record" but assert that they "had no reason to examine this extensive public record" until they heard his supposedly objectionable comments at the May 14, 2014, conference. Hall Br. 13-14; Rushin Br. 21. But where "the facts upon which the motion relies are public knowledge," the party seeking recusal has an obligation to act with due diligence to uncover and present

(…continued)

1. Hall and Rushin appear to concede that they were aware of Judge Treadwell's assignment as of the April date. Hall Br. 13; Rushin Br. 21.

them in a timely manner. *Siegelman*, 640 F.3d at 1188. Here, a simple Westlaw search would have revealed Judge Treadwell's involvement in the *Doe* case.[6]

In *Siegelman*, this Court held that a recusal motion filed over nine months after trial was untimely because the basis for the motion—the judge's "ownership interest in two aviation companies that engage in business with agencies of the United States," the party prosecuting the case—was "readily available" to the defendant "prior to trial," via the Internet and the judge's public financial-disclosure reports. *Siegelman*, 640 F.3d at 1188. Similarly, in *United States* v. *Daley*, 564 F.2d 645 (2d Cir. 1977), the court held that a recusal motion filed seven months after the judge was assigned the case was untimely because the facts underlying the motion—namely, that the judge had presided years earlier over a civil trial in which the defendant was a witness—"as a matter of public record, were at all times ascertainable by counsel." *Id.* at 651. See also *Huff* v. *Standard Life Ins. Co.*, 643 F. Supp. 705, 708-709 (S.D. Fla. 1986) (holding that, because the plaintiff "could have easily ascertained" the basis for the recusal request from the court clerk's office, the information was "knowable, with due diligence from

[6] *Doe* appears as the third case on a date-sorted list arising from an all-cases search in WestlawNext using the search term "AT(Marc /3 Treadwell)."

public records," and therefore the plaintiff's "delay of over ten months" in filing his recusal motion rendered it untimely).[7]

Here, appellants' counsel "could have easily ascertained" Judge Treadwell's involvement with the *Doe* case the moment they learned of his assignment to this case. *Huff*, 643 F. Supp. at 708. While appellants may have had no *desire* to seek Judge Treadwell's recusal until the motions hearing on May 14, 2014, their *basis* for seeking his recusal existed long before that and could have been ascertained by any lawyer with minimal effort. The timing of their motion—filed shortly after "the first substantive hearing in this matter" (Hall Br. 7; Rushin Br. 14)—"has all the earmarks of an eleventh-hour ploy based upon [their] dissatisfaction" with the judge's rulings and leanings expressed in that hearing.

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[7] Appellants attempt to distinguish *Huff* as a case about *actual* knowledge, but the discussion they cite is from a separate, unrelated portion of the opinion. Hall Br. 13-14; Rushin Br. 20-21. The portion of *Huff* relevant here is its ruling that lawyers have an obligation to conduct "due diligence" to ascertain, in a timely fashion, facts supporting a recusal request that are "knowable" from "public records." *Huff*, 643 F. Supp. at 708-709. Whether appellants or their lawyers had actual knowledge of Judge Treadwell's work on *Doe* is beside the point, as they "could have easily ascertained" that information from Westlaw. *Id.* at 708; see *Siegelman*, 640 F.3d at 1188 (timeliness rule applies "when the facts upon which the motion relies are public knowledge, even if the movant does not know them").

Siegelman, 640 F.3d at 1188. Under these circumstances, Judge Treadwell did not abuse his discretion in denying the motion as untimely.

C. The Judge Did Not Abuse His Discretion In Denying Appellants' Recusal Motion On The Merits

The judge also ruled that, even if appellants' motion had been timely, the grounds for their request did not require recusal under either Section 144 or 455. Doc. 177, at 4-13. That ruling likewise was not an abuse of discretion.

"To warrant recusal under Section 144, the moving party must allege facts that would convince a reasonable person that bias actually exists." *Christo* v. *Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000). In other words, it is not enough to show an appearance of bias; a party seeking recusal under Section 144 must allege facts that, if believed, demonstrate that the judge harbors *actual* bias either "against him or in favor of any adverse party." 28 U.S.C. 144. Section 455(a), in contrast, is broader than Section 144, mandating recusal whenever a judge's impartiality "might reasonably be questioned," whether or not he is actually biased. 28 U.S.C. 455(a). "The test under Section 455(a) is whether an objective, disinterested, lay observer fully informed of the facts on which recusal was sought would entertain a

significant doubt about the judge's impartiality." *United States* v. *Chandler*, 996 F.2d 1073, 1104 (11th Cir. 1993).[8]

Appellants' affidavits did not establish an appearance of bias warranting recusal under Section 455(a), much less actual bias warranting recusal under Section 144. Appellants did not allege *any* bias against any of the defendants specifically. Rather, the sole basis for their recusal motion was that, "while a private practicing attorney," Judge Treadwell "served as lead counsel for plaintiff prisoners who sued personnel of the Georgia Department of Corrections and the" Department itself. Doc. 166-3, at 5, 8, 11. Appellants did not contend that either they or the four assaulted inmates in this case were a party to that suit. Instead, defendants' argument was that Judge Treadwell's participation in *Doe* biased him "against [defendants'] *position* and in favor of that of the government." Doc. 166, at 4 (emphasis added). This Court, however, has squarely rejected the notion that a

[8] Although appellants contended below that Judge Treadwell's involvement in the *Doe* case gave him "personal knowledge of disputed evidentiary facts" mandating his recusal under 28 U.S.C. 455(b)(1) (see Doc. 166, at 3-4), they do not press that argument on appeal and, consequently, have abandoned it. *Sapuppo* v. *Allstate Floridian Ins. Co.*, 739 F.3d 678, 680-683 (11th Cir. 2014). Regardless, there can be no serious argument that the judge gained any personal knowledge about disputed facts in this case from his participation in a case involving different individuals at a different facility six years before the events giving rise to this case.

judge's "background representing plaintiffs in civil rights actions" renders him biased in any future case involving similar civil-rights issues. *United States* v. *Alabama*, 828 F.2d 1532, 1543 (11th Cir. 1987). "A judge is not required to recuse himself merely because he holds and has expressed certain views on a general subject." *Ibid.* Moreover, as the Supreme Court has noted, the term "bias" does not refer to every predisposition but only to those that are "somehow *wrongful* or *inappropriate*." *Liteky* v. *United States*, 510 U.S. 540, 550, 114 S. Ct. 1147, 1155 (1994). A general belief in favor of vindicating the rights of incarcerated prisoners subjected to cruel and unusual punishment is not "*wrongful*" or "*inappropriate*" so as to constitute "bias." *Ibid.*

Nor did Judge Treadwell say anything at the May 14, 2014, hearing creating an objective appearance of bias. The passages to which appellants point occurred during argument on the government's motion to exclude evidence regarding harsh conditions at MSP. Hall Br. 7-8; Rushin Br. 14-16. The majority of those passages involved instances in which the judge was articulating the government's allegations. The judge was not expressing opinions about, much less purporting to agree with, those allegations; he was simply attempting to assess whether evidence of prior inmate violence was relevant to any of the defenses appellants might

mount. Determining the admissibility of evidence is precisely the judge's job. Nor did the judge "openly wonder[] what defense could even be possibly mounted to" the civil-rights charge. Hall Br. 18; Rushin Br. 26. Indeed, he identified several defenses a defendant might press, such as that he "didn't do it," that he "wasn't there" in the gym, or that he was there but "there was no use of force." Doc. 174, at 80, 97; see also Doc. 174, at 77 (co-defendant's counsel acknowledging that there are "only a limited number of defenses" to the 18 U.S.C. 242 charge). The judge simply (and correctly) rejected the notion that a defendant who conceded the alleged use of force could argue that such use of force was justified because of the dangerous conditions at MSP. Doc. 174, at 78, 80, 82. But even if the judge's comments had suggested skepticism of appellants' position, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, the counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555, 114 S. Ct. at 1157. Here, nothing about the judge's comments at the hearing evinced a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Ibid.*

Appellants also highlight the judge's comments that he "see[s] a lot of cases" and thus understands "what the work of a corrections officer entails and the

substantial pressures and adverse conditions they have to work under." Hall Br. 7 (quoting Doc. 174, at 76-77); Rushin Br. 15 (same). While these comments might suggest familiarity with "how the prison system works" (Hall Br. 18; Rushin Br. 26),[9] they in no way evince "antagonism" toward the appellants, *Liteky*, 510 U.S. at 555, 114 S. Ct. at 1158—if anything, they suggest *sympathy* toward them. See Doc. 177, at 11 ("[S]uch comments, if anything, give the Government cause to complain.").

Appellants' "opinion" that Judge Treadwell "has a personal bias" against them is also insufficient to warrant his recusal. Doc. 166-3, at 5, 8, 11. Bias and appearance of bias under Sections 144 and 455(a) are determined by an objective standard. See *Chandler*, 996 F.2d at 1104; *Christo*, 223 F.3d at 1333. "Assertions merely of a conclusionary nature are not enough, nor are opinions or rumors."

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[9] Contrary to appellants' assertion, Judge Treadwell did not refer to any "personal knowledge" of the Georgia prison system (Hall Br. 18; Rushin Br. 26); rather, he made clear that he was referring to his experience *as a judge* presiding over Section 1983 cases, not his experience as a litigator. See Doc. 174, at 76 ("I see a lot of cases here."); Doc. 174, at 82 ("I see those cases all the time."); Doc. 177, at 10-11 & n.13. Such knowledge is not "extrajudicial." *United States* v. *Amedeo*, 487 F.3d 823, 828-829 (11th Cir. 2007). In any event, a judge's general background on a subject gained through prior experience as a litigator is not "bias" warranting recusal. *Alabama*, 828 F.2d at 1542-1544.

United States v. *Haldeman*, 559 F.2d 31, 134 (D.C. Cir. 1976) (footnotes omitted). Indeed, if a movant's subjective opinion were sufficient to establish bias, recusal would be required in every case in which a party seeks it. The district court's failure to give weight to appellants' self-serving "opinion" reflects not hostility but a proper application of the legal principles governing recusal.

Finally, there is no merit to Hall's suggestion that Judge Treadwell lacked impartiality in denying compensation for time his lawyer spent preparing the recusal motion. Hall Br. 19. The Criminal Justice Act requires district judges to fix the compensation of appointed attorneys. 18 U.S.C. 3006A(d)(5). The amount of compensation is within a court's discretion and unreviewable on appeal. *United States* v. *Rodriguez*, 833 F.2d 1536, 1537-1538 (11th Cir. 1987). Judge Treadwell denied payment for work on the recusal motion because he concluded, "[a]fter careful consideration and consultation with [his] colleagues," that the motion was "specious." Hall App'x, Vol. IV, Tab A. That exercise of administrative duties provides no basis for disqualification. See *Davis* v. *Board of Sch. Comm'rs of Mobile Cnty.*, 517 F.2d 1044, 1049-1052 & n.7 (5th Cir. 1975) (language in a judicial order expressing disapproval with a lawyer's conduct in the proceeding is

not grounds for recusal under Section 144 or 455 because it is not extrajudicial and alleged bias toward a party's counsel may not be imputed to the party).

II

THE DISTRICT COURT'S MINOR LIMITATION ON APPELLANTS' CROSS-EXAMINATION OF COOPERATING WITNESSES DID NOT VIOLATE HALL'S OR RUSHIN'S SIXTH-AMENDMENT RIGHTS

A. Standard Of Review

This Court reviews a claim that the district court improperly limited the scope of cross-examination for "a clear abuse of discretion." *United States* v. *Maxwell*, 579 F.3d 1282, 1295 (11th Cir. 2009). The district court's discretion to limit cross-examination is, however, subject to the constraints of the Sixth Amendment. *Ibid.* Whether the defendant's Sixth Amendment rights were violated is reviewed *de novo*. *United States* v. *Ignasiak*, 667 F.3d 1217, 1227 (11th Cir. 2012). "Once there is sufficient cross-examination to satisfy the Sixth Amendment's Confrontation Clause, further questioning is within the district court's discretion." *United States* v. *Garcia*, 13 F.3d 1464, 1468 (11th Cir. 1994).

B. The Confrontation Clause Entitles A Defendant To Question Cooperating Witnesses About The Substantial Benefits They Received But Not To Do So By Eliciting Information About The Specific Sentences They Avoided

The Sixth Amendment's Confrontation Clause guarantees every criminal

defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. The "main and essential purpose" of confrontation is the "opportunity of cross-examination." *Davis* v. *Alaska*, 415 U.S. 308, 315-316, 94 S. Ct. 1105, 1110 (1974) (quoting 5 Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)).

The confrontation right, however, is not unfettered. The Sixth Amendment guarantees defendants an opportunity for effective cross-examination, not cross-examination "that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985) (per curiam). Trial judges "retain wide latitude" under the Confrontation Clause "to impose reasonable limits on" cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986). The constitutional test is whether a "reasonable jury" would have received "a significantly different impression of the witness' credibility" had counsel been permitted to pursue the proposed line of questioning. *Garcia*, 13 F.3d at 1469 (citing *Van Arsdall*, 475 U.S. at 680, 106 S. Ct. at 1436). If the permitted cross-examination "exposes the jury to facts sufficient to evaluate the credibility of the witness and enables defense

counsel to establish a record from which he properly can argue why the witness" is biased, the Sixth Amendment is satisfied. *United States* v. *Baptista-Rodriguez*, 17 F.3d 1354, 1371 (11th Cir. 1994).

Here, the district court permitted appellants ample opportunity to establish a record from which they could argue that the cooperators' plea agreements gave them a motive to testify favorably for the government. Under the district court's ruling, appellants could—and did—establish that the cooperators were testifying pursuant to a plea agreement with the government; that, but for that agreement, they could have been charged with more serious charges carrying a "more severe penalty" (Doc. 183, at 6; see Doc. 254, at 111-112, 126); that the government's allowing them to plead to "reduced charges" was contingent on them testifying for the prosecution (Doc. 255, at 45); that they had not yet been sentenced; that if the government deemed them to have "substantially assisted" the prosecution, it would file sentence-reduction motions (Doc. 259, at 35-36; see Doc. 254, at 114-115); and that they "hope that if [they] do everything expected of [them] by the government[,] things are going to be easier on [them]" (Doc. 254, at 113). From this record, appellants could—and did—urge the jury in closing to conclude that the cooperators' plea agreements gave them a motive "to twist the truth in a way

that supports what the Government says transpired in this case" (Doc. 261, at 41), that they were "doing what they could to minimize the time they will face" (Doc. 261, at 63; see Doc. 261, at 109), and that, consequently, the jury should be skeptical of their testimony (Doc. 261, at 43). Thus, the cross-examination the district court permitted more than enabled defense counsel to argue that the jury should doubt the cooperators' testimony in light of their strong incentive to curry favor with the government.

Hall and Rushin nonetheless contend that the district court erred by precluding them from questioning the witnesses regarding the numerical value of the sentences they avoided by cooperating with the government, particularly with respect to the two witnesses who pled to felonies carrying a five-year statutory maximum. Hall Br. 20-29; Rushin Br. 26-36. That is incorrect. "As long as sufficient information is elicited from the witness from which the jury can adequately assess possible motive or bias, the Sixth Amendment is satisfied." *United States* v. *Lankford*, 955 F.2d 1545, 1549 n.10 (11th Cir. 1992). Where, as here, the defense has been allowed to examine the witnesses extensively about the benefits they hoped to receive and have received by testifying for the government, the jury has available adequate information to assess any potential bias stemming

from their cooperation; the Sixth Amendment does not require the court to permit additional questioning into "the precise number of years" the witnesses avoided. *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995).

This Court has already rejected in an unpublished opinion the argument that the Confrontation Clause entitles defendants to such an inquiry. In *United States* v. *Ramos*, 144 F. App'x 764 (11th Cir. 2005), the appellant contended that the district court violated his Sixth Amendment rights by precluding him from cross-examining the government's star witness, Bryan Harris, about "the thirteen to sixteen years of imprisonment [the witness] might have faced" had the government not agreed to drop charges against him in exchange for his testimony. *Id.* at 765. As in this case, the district court had permitted Ramos to elicit on cross-examination that Harris "hoped to avoid a considerable prison term in exchange for cooperating with the government," but had barred inquiry into the exact sentence that Harris avoided because "Ramos was being prosecuted for the same crime and Ramos's questions would have apprised the jury of the sentence Ramos faced." *Ibid.* This Court held that, because the cross-examination the district court permitted enabled defense counsel to expose the potential for bias stemming from

Harris's cooperation, the district court's preclusion of questioning into the precise sentence Harris avoided did not violate Ramos's Sixth Amendment rights.

Although appellants speculate that this Court "more than likely favors" a rule that the Sixth Amendment requires courts to permit cross-examination into the specific sentence a witness avoided, citing *United States* v. *Burris*, 242 F. App'x 677 (11th Cir. 2007) (see Hall Br. 28; Rushin Br. 34), *Burris* made no such intimation. Rather, the Court simply concluded that, although the defendant had "the constitutional right to question the cooperating government witness over the plea bargain and any 'substantial incentive' that she may have received in exchange for testifying," the "error, if any, was harmless." *Id*. at 684-685 (quoting *Lankford*, 955 F.2d at 1548). That articulation of the right is fully consistent with *Ramos*. *Burris* did not hold that the Confrontation Clause requires a court to permit inquiry into the specific penalties the witness avoided by cooperating, and this Court's subsequent decision in *Ramos* made clear that it does not.

Ramos and *Burris* are consistent with the majority of federal appellate courts to consider this question. The First, Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits have all held that a district court does not violate the Sixth Amendment by restricting criminal defendants from asking quantitative questions

about the specific possible length of sentences a witness avoided by cooperating with the government. See *Luciano-Mosquera*, 63 F.3d at 1153; *Brown* v. *Powell*, 975 F.2d 1, 5-6 (1st Cir. 1992); *United States* v. *Reid*, 300 F. App'x 50, 52 (2d Cir. 2008); *United States* v. *Cropp*, 127 F.3d 354, 358-359 (4th Cir. 1997); *United States* v. *Arocho*, 305 F.3d 627, 635-637 (7th Cir. 2002); *United States* v. *Walley*, 567 F.3d 354, 358-360 (8th Cir. 2009); *United States* v. *Dadanian*, 818 F.2d 1443, 1449 (9th Cir. 1987), rev'd on reh'g on other grounds, 856 F.2d 1391 (9th Cir. 1988); *United States* v. *Hall*, 613 F.3d 249, 255-256 (D.C. Cir. 2010). Those cases are grounded in a recognition that, where a defendant is able to cross-examine cooperating witnesses regarding the benefits they expect to receive by testifying for the government, additional testimony regarding the precise number of years the witness avoided is "only marginally relevant." *Arocho*, 305 F.3d at 636. Thus, these courts have concluded, "whatever slight additional margin of probative information [is] gained by quantitative questions" is outweighed by "the certain prejudice that would result from a sympathetic jury" learning the stiff penalties that would result from convicting the defendants, *Cropp*, 127 F.3d at 359; accord *Luciano-Mosquera*, 63 F.3d at 1153, as well as the jury confusion that would result

from a "detailed inquiry" into "side issues" regarding the federal sentencing guidelines, *Arocho*, 305 F.3d at 637.

Citing unidentified cases from the Third, Fifth, and Ninth Circuits, appellants urge this Court to adopt a rule holding that a district court errs by precluding a quantitative inquiry into the number of years a witness potentially avoided by cooperating. Hall Br. 27; Rushin Br. 34. Upon examination, however, the law of these circuits does not support appellants' position.

In *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), the Ninth Circuit held that the district court erred in precluding cross-examination of a key witness about the fact that his cooperation with the government was necessary to avoid a *mandatory minimum* life sentence. 495 F.3d at 1097, 1104-1107. In so doing, the court expressly reaffirmed its previous decision holding that "it is *not* error for the district court to prohibit cross-examination regarding the potential *maximum* statutory sentence that the witness faces." *Id.* at 1106 (citing *Dadanian*, 818 F.2d at 1449) (emphases added). As the court explained, whereas the fact that a cooperating witness "faced a mandatory life sentence * * * in the absence of a government motion is highly relevant to the witness' credibility" because "the witness knows *with certainty*" that he will be imprisoned for life unless the

government moves to reduce his sentence, the "potential maximum statutory sentence that a cooperating witness *might* receive * * * lacks significant probative force" because "a defendant seldom receives the maximum penalty." *Ibid.* As this case does not involve any mandatory minimums—much less a mandatory life sentence—*Larson* is not helpful to appellants' argument.

Nor does the Fifth Circuit support appellants' position. In *United States* v. *Cooks*, 52 F.3d 101 (5th Cir. 1995), the Fifth Circuit held that a district court violated the Sixth Amendment when it barred the defendant from questioning a cooperating witness about the "stiff penalties" he faced if convicted on state charges that were pending at the time of his cooperation. *Id.* at 103. Critically, however, the court did not state that the defendant was entitled to question the witness about the precise *numerical* value of those penalties. Although the court observed in a footnote that the pending state charges carried possible 99-year and 40-year sentences, *id.* at 104 n.13, it did not address *how* the defendant could have presented that information to the jury—whether he was entitled to elicit specific numbers or whether words like "severe," "significant," or the court's own word, "stiff," would have sufficed—as the district court had precluded *all* questioning into the penalties the witness faced. *Id.* at 103.

In any event, *Cooks* is distinguishable from this case. Unlike here, there was no countervailing nullification concern in *Cooks*, as questioning the witness regarding the penalties he faced on *state* drug and purse-snatching charges would not have informed the jury of the sentence the defendant faced on his *federal* drug-conspiracy charges. Therefore, *Cooks* did not grapple with the balancing of interests that this case involves. Moreover, the district court's limitation in *Cooks* went beyond questioning into penalties—the court precluded *any* cross-examination into one of the witness's pending criminal charges. 52 F.3d at 103. Thus, unlike here, the jury in *Cooks* was entirely "unaware of the serious pending charge" that could have influenced the witness's testimony. *United States* v. *Landerman*, 109 F.3d 1053, 1063 (5th Cir. 1997) (holding, relying on *Cooks*, that court erred in barring any questioning regarding witness's pending state felony charge). The court's error holding turned on the cumulative impact of this curtailment, not on the preclusion of inquiry about penalties alone.

As for the Third Circuit, appellants overstate that court's rule. In *United States* v. *Chandler*, 326 F.3d 210 (3d Cir. 2003), the court held that a district court violated the Confrontation Clause when it prohibited questioning of two key witnesses about the magnitude of the sentence reduction they had earned, or hoped

to earn, by testifying. *Id.* at 222. The trial court had permitted the defense to elicit that one witness "had benefitted from his cooperation" through a sentence reduction, and that the other witness, who was still awaiting sentencing, hoped for such a benefit, *ibid.*, but precluded any questioning into the "specific penalty reduction that they believed they would obtain, or that they did obtain, through their cooperation," *id.* at 220. As a result, while the jury learned that the witnesses had received some benefit by cooperating, it had no sense of the "enormous magnitude" of that benefit—*i.e.*, that one witness had saved himself a minimum eight years in prison by cooperating, and the other, who faced a potential twelve-year minimum, "hoped for similar treatment." *Id.* at 222. The court concluded that, under these circumstances, the district court's restriction violated the Sixth Amendment because the precluded questioning could have given the jury "a significantly different impression" of the witnesses' credibility. *Id.* at 221 (quoting *Van Arsdall*, 475 U.S. at 680, 106 S. Ct. at 1436). Critically, however, the court made clear that it was *not* holding that the Sixth Amendment "entitles a defendant *categorically* to inquire into" the "specific sentence that [a] witness may have avoided through his cooperation." *Ibid.* (emphasis added)

In subsequent cases, the Third Circuit has clarified that what matters, under *Van Arsdall* and *Chandler*, is that the defendant be permitted to question the cooperating witness regarding the magnitude of the benefit he received or hoped to receive, but that the Confrontation Clause does *not* require that he be able to do so through specific *numerical* information about the sentence the witness avoided. In *United States* v. *Mussare*, 405 F.3d 161, 170 (3d Cir. 2005), the Third Circuit reaffirmed that there is no "categorical right" under the Sixth Amendment to inquire into the specific penalty a cooperating witness seeks to avoid. *Id.* at 170. There, as here, the defendant had been allowed to question the cooperator regarding his plea deal and hopes of leniency, but the district court had precluded discussion of the specific maximum penalties he had faced before cooperating. *Id.* at 169-170. The court concluded that, "[b]ecause of the extensive testimony permitted regarding the plea bargain, the actual number of years in jail [the witness] would otherwise have faced was not likely to have altered the jury's impression of his motive for testifying." *Id*. at 170. Accordingly, the district court's restriction did not violate the Confrontation Clause.

Since *Mussare*, the Third Circuit has repeatedly rejected arguments that a district court violates the Sixth Amendment by precluding inquiry into the specific

sentence a witness faced before cooperating. In *United States* v. *John-Baptiste*, 747 F.3d 186 (3d Cir. 2014), for example, the court declined to find a constitutional violation where the district court had "allowed testimony regarding the witnesses' agreements to cooperate" and "the fact that they expected to receive more lenient sentences in return," *id.* at 212, but "prohibited questions relating to the specific lengths of time they faced without cooperation," *id.* at 211, explaining that the appellate court has "allowed trial courts to curtail" that line of questioning, *ibid.* (citing *Mussare*, 405 F.3d at 170). Likewise, in *United States* v. *Potter*, 596 F. App'x 125 (3d Cir. 2014), the court found no constitutional violation where the district court permitted the defendant to ask a key witness whether he had "faced a 'substantial' sentence" before cooperating but prevented him from inquiring about "the specific sentence" the witness "would have faced absent his cooperation." *Id.* at 129 & n.5. In so holding, the court emphasized that the latter inquiry could have "influenced the jury's deliberations with improper considerations about the sentence" the defendant faced. *Ibid.* See also *United States* v. *Chitolie*, 596 F. App'x 102, 105-106 (3d Cir. 2014) (same).

Thus, the Third Circuit's overall approach, evolved since *Chandler*, is consistent with the majority approach: so long as the defense is able to cross-

examine the witness about the benefit he hopes to receive by cooperating, the Sixth Amendment does not entitle the defense to elicit information about the *specific* sentence the witness avoided, particularly where doing so would create a nullification risk. That approach makes sense. After all, the ultimate question, under the Confrontation Clause, is whether the precluded inquiry would have given the jury "a *significantly different impression* of the [witness'] credibility." *Van Arsdall*, 475 U.S. at 680, 106 S. Ct. at 1436 (emphasis added). When the jury learns that, by cooperating, the witness has avoided a "significant," *Walley*, 567 F.3d at 360, "substantial," *Potter*, 596 F. App'x at 129, or "severe" sentence, *Cropp*, 127 F.3d at 358, it has sufficient basis to assess how the plea agreement might influence the witness's testimony. Effective cross-examination does not require inquiry into "specific lengths of time." *John-Baptiste*, 747 F.3d at 211.

The district court's minor limitation of appellants' cross-examination was a far cry from "the categorical limitations condemned by this Court and the Supreme Court in other cases." *DiLisi* v. *Crosby*, 402 F.3d 1294, 1302 (11th Cir. 2005). In *Van Arsdall*, for example, the trial court "prohibited *all* inquiry into the possibility that" the government's main witness "would be biased as a result of the State's dismissal of his pending public drunkenness charge." 475 U.S. at 679, 106 S. Ct.

at 1435. Similarly, in *Davis*, the trial court barred "any reference" to the key witness's juvenile probation status, which, the defendant sought to argue, could have been revoked had the witness not cooperated. 415 U.S. at 310, 94 S. Ct. at 1107. In *Lankford*, the district court prohibited any questioning into whether the government's star witness was motivated to testify favorably to the government to gain leniency on criminal charges pending against his children. 955 F.2d at 1548-1549. And in *Baptista-Rodriguez*, the district court barred counsel from asking an FBI agent "*any questions* about the contents, or even the existence, of" a critical document the government relied on to establish intent. 17 F.3d at 1366.

Here, by contrast, the district court did not categorically prohibit inquiry into the cooperators' plea agreements or the potential motive those agreements created to testify favorably for the government. It simply restricted inquiry into one detail—the precise number of years the cooperators avoided, or believed they avoided, by pleading guilty—because of its concern that this "marginal[ly] probative" fact would both invite nullification and lead to a "confusing" side-trial on the mechanics of federal sentencing. Doc. 183, at 5-6. These concerns fell squarely within those that the Supreme Court in *Van Arsdall* identified as

justifying "reasonable limits" on cross-examination consistent with the Sixth Amendment. 475 U.S. at 679, 106 S. Ct. at 1435.

C. Any Error Was Harmless

Even if the district court's ruling had violated appellants' Sixth Amendment rights, reversal would not be warranted, as any such error was harmless beyond a reasonable doubt. See *Van Arsdall*, 475 U.S. at 684, 106 S. Ct. at 1438. Whether a confrontation error was harmless "depends upon a host of factors," including "the importance of the witness' testimony," whether the testimony "was cumulative," the "presence or absence of evidence corroborating or contradicting the testimony of the witness on material points," the "extent of cross-examination otherwise permitted," and "the overall strength of the prosecution's case." *Ibid.*

First, the government's case against Hall and Rushin on the four substantive obstruction counts of which they were convicted did not depend on the cooperators' testimony. Count 9, which alleged that Hall provided misleading statements to GBI investigators by falsely claiming that he did not enter the gym during the Dean assault, turned on the testimony of two unbiased GBI investigators: Terry Hunt, who testified that Hall said that he did not go into the gym with Dean (Doc. 256, at 51), and Trebor Randle, who testified that Hall

"eventually acknowledged going into the gym with the other officers," admitted that Dean "was beaten in the gymnasium," and even stated that Hall's participation "was a possibility" (Doc. 257, at 33, 41). The government introduced excerpts of a video recording of Hall's interview with Randle that corroborated her account (Doc. 257, at 36-42). On Counts 14, 16, and 18, the government introduced the witness statements that Hall and Rushin were accused of falsifying. Doc. 256, at 215-220; Doc. 241-19, 241-20, 241-22. Thus, the jurors could see for themselves that Hall wrote, contrary to his later admission to Randle, that he did not enter the gym during the Dean assault; that both he and Rushin omitted mention of the use of force against Dean (Counts 16 and 18); and that Rushin omitted mention of the CERT officers' assault on Mario Westbrook (Count 14). Given this strong, objective evidence of appellants' false and misleading statements, any error regarding the cross-examination of the cooperators, whose testimony was not essential to proving appellants' obstructive conduct, was harmless beyond a reasonable doubt with respect to these counts.[10]

[10] Indeed, McKenzie and Redden were actually *helpful* to Hall on Counts 9 and 16, as they both testified that they did not remember seeing Hall in the gym during the Dean assault. Doc. 254, at 39-40, 107, 115; Doc. 258, at 230, 250.

While the cooperators' testimony was certainly important to the conspiracy-to-obstruct-justice count (Count 3), any error in restricting appellants' cross-examination was still harmless beyond a reasonable doubt. First, the evidence on this charge was overwhelming. Even under appellants' proposed rule, there was no conceivable confrontation error with respect to Darren Douglass-Griffin, who pled guilty to violating 18 U.S.C. 1519 and thus faced the 20-year statutory maximum he would have faced had he been charged in the indictment alongside appellants. See Plea Agreement at 3, *United States* v. *Douglass-Griffin*, No. 5:12-CR-57 (M.D. Ga.) (Doc. 5). Douglass-Griffin provided powerful testimony that new CERT members were taught to write matching, false witness statements to conceal their assaults on inmates (Doc. 258, at 23); that, following the Dean assault, Hall and Rushin persuaded him to fabricate his witness statement to match the other officers' false statements (Doc. 257, at 249-253); and that the team pressured him to "stick with" that false story when he went to speak with internal and GBI investigators (Doc. 258, at 9-12).

Douglass-Griffin's account was corroborated not only by the testimony of two other junior CERT members, Bolden and Redden,[11] but also by the written statements of the junior CERT officers and of appellants themselves. Those statements omitted any mention of the officers' use of force against Dean and told effectively the same false story, in some cases using identical language. For example, three of the statements claimed that Dean "snatched away," began to run, and fell face-first to the floor (Doc. 241-21, 241-29, 241-37); five of the statements claimed that Dean "passed out" or "appeared to" have "passed out" while walking to medical (Doc. 241-5, 241-21, 241-23, 241-29, 241-37); and two statements claimed that Dean had "a knot" or "knots" on his forehead before he even entered the gym (Docs. 241-22, 241-23). This provided compelling corroboration to the witnesses' testimony that appellants colluded with other CERT members to align their false reports.

Further, the district court permitted appellants to cross-examine the cooperators extensively, not only about the incentives their plea agreements

[11] McKenzie was no longer a CERT member at the time of the Dean assault and thus did not provide any testimony regarding the conspiracy to falsify witness statements. Accordingly, any error in restricting cross-examination of McKenzie is harmless as to appellants' convictions on Count 3.

created but also about other sources of bias. Hall, for example, elicited that Bolden "tried to quit CERT several times" (Doc. 255, at 76), "didn't like Sergeant Hall's leadership" (Doc. 255, at 77), and felt like he and Douglass-Griffin "were excluded" (Doc. 255, at 78), and that Hall "didn't respect" them (Doc. 255, at 79). Rushin elicited that Redden was "mad" that he was suspended from his job while "other folks were still working" (Doc. 258, at 283), and that it "didn't help ease" his anger that he soon stopped receiving paychecks and had to move his family from their home into an apartment (Doc. 258, at 284). Hall similarly elicited that it "bothered" Douglass-Griffin that he and Redden were suspended while Hall and the rest of the team were "still working" (Doc. 258, at 31, 33), and Rushin elicited that Douglass-Griffin was "upset" that appellants had left him "in the breeze" when they had promised him that they would not "leave [him] hanging out there" and "let [him] go down for this" (Doc. 258, at 114). Appellants were also able, through cross-examination, to highlight inconsistencies both within and between the cooperators' accounts (see *e.g.*, Doc. 255, at 54, 159; Doc. 258, at 97-98, 276-279), which appellants capitalized on in closing argument as providing reason to doubt the witnesses' credibility (see Doc. 261, at 43-45, 48-49, 62-69). And, as Hall emphasized in closing (Doc. 261, at 43), the district court instructed the jury

that "a witness who hopes to gain more favorable treatment may have a reason to make a false statement in order to strike a good bargain with the Government" and that, accordingly, the jury "should consider that testimony with more caution than the testimony of other witnesses" (Doc. 261, at 188), lending added weight to appellants' efforts to undermine the cooperators' credibility. Cf. *Quercia* v. *United States*, 289 U.S. 466, 470, 53 S. Ct. 698, 699 (1933) ("The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" (quoting *Starr* v. *United States*, 153 U.S. 614, 626, 14 S. Ct. 919, 923 (1894))).

In short, given the strength of the government's case and the ample basis appellants were afforded to establish and argue the cooperators' lack of reliability, the district court's limited restriction on appellants' cross-examination was harmless beyond a reasonable doubt.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING AS IRRELEVANT AND UNDULY PREJUDICIAL EVIDENCE OF PRIOR ACTS OF INMATE VIOLENCE

A. Standard Of Review

This Court reviews a district court's ruling on the relevancy and admissibility of evidence for abuse of discretion. *United States* v. *Adair*, 951 F.2d 316, 320 (11th Cir. 1992). Constitutional questions are reviewed *de novo*. *United States* v. *Ignasiak*, 667 F.3d 1217, 1227 (11th Cir. 2012).

B. The District Court Did Not Err, Much Less Reversibly So, In Excluding Irrelevant And Prejudicial Evidence Of Harsh Working Conditions At MSP

"[I]t is axiomatic that a defendant's right to present a full defense does not entitle him to place before the jury irrelevant or otherwise inadmissible evidence." *United States* v. *Ruggiero*, 791 F.3d 1281, 1290 (11th Cir.) (quoting *United States* v. *Anderson*, 872 F.2d 1508, 1519 (11th Cir. 1989)), cert. denied, 136 S. Ct. 429 (2015). As the Supreme Court has explained, "the Constitution permits judges" to exclude evidence under "well-established rules of evidence" such as Federal Rule of Evidence 403, which allows exclusion of evidence "if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes* v. *South Carolina*, 547 U.S. 319,

326, 126 S. Ct. 1727, 1732 (2006); see also *United States* v. *Hurn*, 368 F.3d 1359, 1362-1367 (11th Cir. 2004) (no constitutional violation where excluded evidence was not relevant to any element of the offense or an affirmative defense, to impeachment of a witness, or to dispelling a misleading impression left by the government's evidence about a material fact in the case).

Here, the district court properly excluded under Federal Rules of Evidence 402 and 403 evidence regarding unrelated inmate violence. Appellants were charged with participating in, and subsequently covering up, four specific retaliatory assaults. Evidence that different inmates, on different occasions, had acted violently toward MSP officers does not make it "more or less probable" either that Hall or Rushin violated the complainants' civil rights or that they obstructed justice. Fed. R. Evid. 401. The district court found that "[n]o defendant could articulate a reason why" such evidence would be relevant to the charged offenses except via a nullification theory. Doc. 183, at 7. The "potential for nullification," however, "is no basis for admitting otherwise irrelevant evidence." *United States* v. *Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998).

On appeal, appellants suggest three ways in which such evidence could have been relevant, none of which has merit. First, appellants contend that the court's

ruling prevented them from "framing the true picture" of MSP. Hall Br. 31; Rushin Br. 38. But to the extent that the "true picture" they sought to paint is that MSP was a dangerous place to work, that is simply a restatement of their nullification arguments. The fact that appellants' job was difficult or dangerous is not a legal defense to a civil-rights or obstruction-of-justice violation. Thus, even if the jury had learned the full extent of the environment at MSP, they still "would have lacked a reason in law not to convict." *Funches*, 135 F.3d at 1408.

Second, appellants contend that an *absence* of retaliatory assaults in response to inmate violence *before* the four charged offenses would have supported an argument that the four charged assaults were committed exclusively by the junior CERT members. Hall Br. 33-34, 37; Rushin Br. 40-41, 44. Appellants, however, never argued below that such evidence should be admitted under this theory, nor did they pursue such a defense at trial. Accordingly, this argument is waived on appeal. *OSI, Inc.* v. *United States*, 285 F.3d 947, 951 (11th Cir. 2002). A district court does not abuse its discretion by declining to admit evidence on a theory that was never presented to it. In any event, evidence that appellants did not retaliate against every inmate who assaulted an officer does not tend to disprove that they behaved accordingly on the occasions charged.

Finally, appellants contend that evidence of unrelated inmate violence was relevant to their "state of mind" on the obstruction counts, insofar as it could have supported an argument that they "did not intentionally lie or cover up information" but simply were "confused due to the overwhelming number of incidents at the prison." Hall Br. 34, 36-37; Rushin Br. 41, 43-44. But the district court acknowledged in its ruling that unrelated incidents "could be relevant" under "those unique circumstances," and invited the defendants to advise the court "if circumstances arise" in which such evidence would become relevant. Doc. 183, at 7 & n.1. Neither Hall nor Rushin, however, defended against the obstruction counts on the theory that they had inadvertently confused the incident at issue with an earlier one.[12] They cannot complain that the district court excluded evidence supporting a theory that they never sought to pursue.

Finally, any error in excluding this evidence was harmless. Hall and Rushin were acquitted of both counts regarding the violation of inmates' civil rights; their

[12] Although Rushin suggested at the pretrial conference that previous incidents of inmate violence might help explain his claim in his GBI witness statement that he could not remember what happened in the gym (Doc. 174, at 91), he never ultimately pursued that theory and, in any event, was acquitted of the charge pertaining to that statement (Count 22).

sole convictions were for providing false and misleading statements and conspiring to obstruct justice. Evidence regarding prior incidents of inmate violence would have had no bearing on those counts. And, as described above, the evidence that was presented on those charges was overwhelming.

Moreover, even without the excluded evidence, the jury was well aware that MSP was a dangerous workplace. It heard evidence that, over a two-month period, inmates (1) viciously beat an officer with clippers hidden inside a sock, resulting in a "gruesome scene" with "blood everywhere" and the officer "screaming" in "agony" (Doc. 256, at 105-107; Doc. 258, at 44); (2) assaulted a sergeant in the dining hall, busting his lip (Doc. 258, at 232-233; Doc. 259, at 25); (3) sucker-punched the deputy warden in the face, breaking his jaw, then tried to stab him with a shank (Doc. 257, at 138-139; Doc. 258, at 56, 250; Doc. 259, at 115; Doc. 261, at 65); and (4) hit an officer in the head from behind (Doc. 256, at 129).

Relying on this evidence, appellants made MSP's violent and dangerous atmosphere a central and dramatic theme in their closing arguments. Hall's lawyer, for example, described inmate Jones as "a murderer" who had "taken the breath of life out of another human being" and "was going to do it again" (Doc. 261, at 50-51); described the officer whom Jones attacked as "laying in a pool of

his own blood with his head split open, not knowing if he was going to live or die" (Doc. 261, at 51); and argued that the government wanted the jury "to ignore that these were violent, potentially deadly assaults on their fellow officers" and "to ignore the emergency, the crisis [defendants] were reacting to" (Doc. 261, at 55). Rushin's lawyer made similar statements, culminating in an argument that "[t]he men they stood by every day trying to maintain order in that chaos, stood shoulder to shoulder with, were being beaten, and were being injured by men who were murderers. Men who had been removed from society because of their crimes." Doc. 261, at 76. Thus, the court's ruling excluding earlier incidents of inmate violence in no way precluded appellants from painting the "true picture" of conditions at MSP, and any further evidence on this point would have been cumulative.

IV

APPELLANTS' CONSTITUTIONAL CHALLENGE TO THEIR SENTENCES IS FORECLOSED BY CIRCUIT PRECEDENT AND, IN ANY EVENT, IS MERITLESS

A. Standard Of Review

This Court reviews constitutional challenges to sentencing *de novo*. See *United States* v. *Paz*, 405 F.3d 946, 948 (11th Cir. 2005).

B. Circuit Precedent Forecloses Appellants' Claim

Hall and Rushin both contend that the district court violated their Sixth Amendment rights by calculating their sentences based on conduct of which they were acquitted. Hall Br. 37-40; Rushin Br. 44-47. As both concede, however, this Court's precedent forecloses that argument. See Hall Br. 38 (citing *United States* v. *Smith*, 741 F.3d 1211 (11th Cir. 2013), cert. denied, 135 S. Ct. 704 (2014), and *United States* v. *Faust*, 456 F.3d 1342 (11th Cir. 2006)); Rushin Br. 45 (same).

Hall and Rushin nevertheless argue that this Court should "re-visit" its holdings in those cases. Hall Br. 37; Rushin Br. 44. This panel is not free to do so. "The law in this circuit is emphatic that 'only a decision by this court sitting *en banc* or the United States Supreme Court can overrule a prior panel decision.'" *United States* v. *Woodard*, 938 F.2d 1255, 1258 (11th Cir. 1991) (quoting *United States* v. *Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986)). Three justices' dissent from denial of certiorari in *Jones* v. *United States*, 135 S. Ct. 8 (2014), does not constitute an "intervening Supreme Court decision" that would permit a panel to

depart from this Court's binding precedent.[13] *United States* v. *Marte*, 356 F.3d 1336, 1344 (11th Cir. 2004).

C. Appellants Were Not Sentenced Based On Acquitted Conduct

In any event, even if this claim were not foreclosed, the district court did not increase Hall's or Rushin's sentence based on acquitted conduct. Where, as here, a defendant has been convicted of obstructing justice, the Sentencing Guidelines require the court to cross-reference the underlying offense to determine the severity of the defendant's obstructive conduct. U.S.S.G. § 2J1.2(c). The commentary to the guideline explains that "[u]se of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, *whether such offense was committed by the defendant or another person*." U.S.S.G. § 2J1.2, background notes (emphasis added). Thus, this Court has concluded, consideration of the underlying offense in this context "is intended not

[13] Since appellants filed their briefs, a petition for a writ of certiorari has been filed in the Supreme Court raising the question of the constitutionality of using acquitted conduct to calculate a criminal sentence. *Siegelman* v. *United States*, petition for cert. pending, No. 15-353 (filed Sept. 17, 2015). The Supreme Court has repeatedly denied certiorari petitions challenging a sentencing court's reliance on acquitted conduct. See Br. in Opp. at 16, *Siegelman* v. *United States*, No. 15-353 (Nov. 20, 2015) (citing six recent cases).

to treat the defendant as having committed the underlying offense, but to weigh the severity of one's actions in obstructing justice based on the severity of the underlying offense that was the subject of the judicial proceeding sought to be obstructed, impeded or influenced." *United States* v. *Brenson*, 104 F.3d 1267, 1285 (11th Cir. 1997). The idea, simply put, is that an officer who obstructs an investigation into a violent assault should be punished more severely than an officer who obstructs an investigation into, say, a minor theft.

Here, the district court did not increase either appellant's sentence based on a finding that he was actually guilty of violating Dean's civil rights. Rather, the court considered aspects of the underlying assault only to determine the severity of the offense that was the subject of the investigation the jury found appellants guilty of obstructing.[14] Doing so is mandatory under this Court's precedent, *Brenson*,

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[14] Although both Hall and Rushin claim that consideration of the underlying offense significantly enhanced their sentencing ranges, neither explains how he arrived at his calculation. Hall contends, albeit obliquely, that consideration of the Dean assault contributed to a 12-level increase. Hall Br. 37-38 & n.7. The 3-level adjustment for "role in the offense," however, concerned Hall's role in obstructing justice, not his role in the assault. Doc. 345, at 71, 79. Thus, consideration of the underlying civil-rights violation at most contributed 9 levels for each appellant—2 levels for "more than minimal planning," 5 levels for "serious bodily injury," and 2 levels for "vulnerable victim." See Rushin Br. 44-45 (asserting a 9-level increase).

(continued…)

104 F.3d at 1285, and in no way undermines the jury's verdict that the government failed to prove beyond a reasonable doubt that appellants violated Dean's civil rights.

(…continued)
Regardless, as explained above, those enhancements all reflect the severity of the assault that appellants were convicted of covering up, not a judicial finding that they themselves participated in it. See *Brenson*, 104 F.3d at 1285.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction and sentence as to all appellants.

Respectfully submitted,

VANITA GUPTA
Principal Deputy
Assistant Attorney General

s/ Christine A. Monta
AYESHA N. KHAN
CHRISTINE A. MONTA
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9035
Christine.Monta@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32 (a)(7)(B) because it contains 13,995 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Eleventh Circuit Rule 32-4; and

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

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Dated: December 10, 2015

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeal for the Eleventh Circuit by using the appellate CM/ECF system and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid.

I also certify that all counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney