ORAL ARGUMENT REQUESTED

Nos. 03-1515, 03-1522, 03-1523 & 04-1000

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant,

v.

MIKE LAVALLEE, ROD SCHULTZ, AND ROBERT VERBICKAS,

Defendants-Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE WILEY P. DANIEL

REPLY BRIEF OF THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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ARGUMENT

I

DEFENDANTS BEAR THE BURDEN OF SHOWING THE SENTENCING ERRORS THAT THE GOVERNMENT IDENTIFIED WERE HARMLESS

In its cross appeal, the government argued (Gov't Br. 81-100) that the district court erred in applying the Sentencing Guidelines by granting the defendants downward departures and by not enhancing their sentences for obstruction of justice, and that those errors were not harmless. Defendants suggest (Verbickas 3d Br. 22; LaVallee 3d Br. 18) that the government bears the burden of proving that the district court's sentencing errors were harmless. In fact, it is

defendants who bear that burden. As this Court has stated, in harmless error analysis "[t]he burden of proving that an error does not affect substantial rights is upon the 'beneficiary of the error.'" *United States* v. *Lang*, 405 F.3d 1060, 1065 (10th Cir. 2005) (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)). In the government's cross appeal of defendants' sentences, it is defendants who benefitted from the district court's misapplication of the Guidelines.

II

THE GOVERNMENT'S CROSS APPEAL DOES NOT SEEK IMPOSITION OF SENTENCES IN VIOLATION OF *UNITED STATES* V. *BOOKER*

Defendants argue (LaVallee 3d Br. 17) that the government seeks, through its cross appeal, to require the district court to adhere to a mandatory application of the Guidelines. That is not correct. The government seeks a remand for the district court to exercise its discretion in sentencing, but only after it has determined the appropriate range under the Guidelines. That is precisely the procedure contemplated in *Booker* and followed by this Court. *United States* v. *Magallenez*, 408 F.3d 672, 685 (10th Cir. 2005). Moreover, this Court has already held that where the government preserved an objection to the application of the Guidelines, and the application was error, the government, as well as the defendant, is entitled to a remand for resentencing under the procedures required after *Booker*. *United States* v. *Lynch*, 397 F.3d 1270, 1272 (10th Cir. 2005).

Contrary to defendants' suggestion, there is no constitutional impediment to the district court making findings of fact in determining the appropriate Guideline

range. This Court has held that "*Booker* * * * does not render judicial fact finding by a preponderance of the evidence per se unconstitutional. * * * [S]uch fact finding is unconstitutional only when it operates to increase a defendant's sentence *mandatorily*." *United States* v. *Dalton*, No. 04-7043, 2005 WL 1283850 (10th Cir. June 1, 2005), slip op. 8.

Verbickas argues (Verbickas 3d Br. 24) that because the district court has already rejected the arguments, made in his renewed motion for release, for a *shorter* sentence under *United States* v. *Booker*, that decision "precludes the cross-appeal request[ing] remand." That argument is mistaken. The district court's conclusion that if there were a remand it would not grant additional downward departures was premised on its understanding that its application of the Guidelines was correct. R. 1637 (3/10/05 Order at 11). The district court did not suggest that if this Court were to rule that its application of the enhancements and downward departures was incorrect, it would, in its discretion, still impose the same sentence. After *Booker*, the beginning point of any sentencing is the appropriate Guideline range. "[D]istrict courts are still required to consider Guideline ranges, which are determined through application of the preponderance standard, just as they were before. The only difference is that the court has latitude, subject to reasonableness review, to depart from the resulting Guideline range." *Magallenez*, 408 F.3d at 685. The government's cross appeal, therefore, seeks only to have the district court exercise its discretion after it has consulted the correct Guideline range.

III

THE DISTRICT COURT'S APPLICATION OF THE GUIDELINES WAS ERRONEOUS

A. The District Court Misapplied The Obstruction Of Justice Enhancement

Defendants argue (Schultz 3d Br. 11-21; LaVallee 3d Br. 2-8) that the district court did not err in refusing to apply the enhancement for obstruction of justice under Sentencing Guideline § 3C1.1. The Guideline applies to obstructive conduct committed "during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." Sentencing Guideline § 3C1.1. The government argued that the defendants obstructed justice within the meaning of the Guideline when they faked injuries to themselves and prepared false reports and memoranda so that supervisors reviewing the incidents would be misled. Defendants argue (LaVallee 3d Br. 7) that conduct occuring before the investigation begins does not fall within the Guideline. That is not a correct reading of the Guideline.

In *United States* v. *Mills*, 194 F.3d 1108, 1115 (10th Cir. 1999), this Court held that the Guideline applied where the defendant prison guard, who had destroyed a videotape recording of himself beating an inmate, "knew that an investigation would be conducted, and * * * understood the importance of the tape in that investigation." Thus, action taken with knowledge that there would be an investigation is sufficient to satisfy the Guideline. Indeed, Application Note 4(d) of the Guideline gives, as an example of obstructive conduct that would satisfy the

Guideline, destroying evidence "upon learning that an official investigation has commenced *or is about to commence*." (emphasis added). LaVallee argues (LaVallee 3d Br. 6-7) that this interpretation of "during the investigation" is limited to destruction of evidence and does not apply to filing false reports, as the defendants in this case did. Nothing in the Guideline or this Court's decisions supports that reading.

LaVallee argues (LaVallee 3d Br. 2) that the Guideline does not apply where the investigation is an internal investigation by prison officials. But that was the same type of investigation at issue in *Mills*.

As discussed in the government's opening brief (Gov't Br. 8-9, 90), the evidence at trial established that defendants knew that their superiors would conduct an investigation whenever an inmate was injured by a guard and the inmate needed medical attention. As the district court stated, the evidence showed that the defendants "wrote these memos to cover up their conduct so they wouldn't be caught." Sent. Tr. at 84. Defendants were thus in exactly the same circumstance regarding their knowledge of a pending investigation as the defendant in *Mills*. The district court erred in concluding that *Mills* did not apply to the facts of this case.[1]

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[1] LaVallee argues (LaVallee 3d Br. 3 (citing Sent. Tr. at 88)) that the government conceded that there was no pending investigation within the meaning of Guideline 3C1.1 at the time the defendants wrote the false reports. The government obviously acknowledged before the district court, as it acknowledges here, that the internal investigation of the beatings had not yet begun when the defendants wrote their false reports. That is not a concession that the Guideline does not apply. The type of investigation that the defendants in this case knew to be imminent when they wrote their false reports was the same type of investigation that the defendant in *Mills* knew was imminent.

Defendant Schultz argues (Schultz 3d Br. 12) that there is no evidentiary support for the district court's conclusion that Schultz falsified documents. The government's opening brief (Gov't Br. 16) discusses the trial testimony that establishes that Schultz and the other officers involved in the beating of inmate Castillo prepared false reports. Schultz also argues (Schultz 3d Br. 15-16) that any false statements in his report did not materially impede the investigation and, therefore, they would not be sufficiently material to be obstruction of justice. Schultz understates the importance of the false reports. Had the reports been truthful, that is, had Schultz or another officer written a report stating that Schultz and LaVallee beat Castillo while he was compliant as punishment for his prior misconduct, they would have admitted their guilt. Defendants attempted to avoid discovery by falsely stating that the use of force was in response to Castillo's alleged suicide attempt and omitting any reference to the unlawful beating. See Gov't Br. 9 & 16 (discussing testimony regarding the importance the defendants placed on "sticking to" their false reports during any investigation). The fact that their scheme was ultimately unsuccessful does not mean that they did not obstruct justice. Again, in that regard, these defendants are in the same situation as the defendant in *Mills*.

B. The District Court Misapplied The Guidelines By Downwardly Departing

Schultz and LaVallee argue that the district court did not err in concluding that each was entitled to a two-level downward departure. The government argued (Gov't Br. 93-96) that the district court should not have granted the departure

because the defendants had not shown that they were *unusually* susceptible to abuse in prison, as required by *Koon* v. *United States*, 518 U.S. 81, 112 (1996). LaVallee argues (3d Br. 9-12) that the departure was based on more factors than the defendants' status as corrections officers. As the government argued in its opening brief (Gov't Br. 94-95), the factors identified by the district court do not show that these defendants were unusually susceptible to abuse in prison compared to other law enforcement officers convicted of similar offenses and, therefore, are insufficient to warrant the two-level departure.[2]

[2] Two of the factors LaVallee asserts (LaVallee 3d Br. 9) justified the departure — the stress and the challenge of being a corrections officer at USP-Florence — were clearly intended by the district court to apply only to Verbickas in justifying *his* two-level departure for aberrant behavior and victim misconduct. See Sent. Tr. at 220. LaVallee also argues (LaVallee 3d Br. 16-17) that the government did not argue that the degree of the departure he received was unreasonable. But the government did argue (Gov't Br. 94) that the two-level departure in this case was unjustifiable when compared to the three-level departure (supported by multiple factors) in *Koon* v. *United States*.

CONCLUSION

This Court should affirm defendants' convictions. It should also vacate defendants' sentences and remand for resentencing based on the appropriate, higher Guideline ranges.

Respectfully submitted,

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CERTIFICATION OF DIGITAL SUBMISSION

I hereby certify that the digital version of the foregoing is an exact copy of what has been submitted to the court in written form. I further certify that this digital submission has been scanned with the most recent version of McAffee VirusScan Enterprise (ver. 8.0i) and is virus-free.

s/ Karl N. Gellert
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DATED: June 22, 2005

CERTIFICATE OF SERVICE

On June 22, 2005, I served the foregoing REPLY BRIEF OF THE UNITED STATES AS APPELLEE/CROSS-APPELLANT by first class mail, as well as an electronic copy of the same, on:

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