No. 03-12729-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

CHARLES FRANKLIN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. *Franklin*
No. 03-12729-BB

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

I certify that, in addition to the persons listed in the certificate of interested persons in appellant's opening brief, the following persons have an interest in the outcome of this case:

R. Alexander Acosta, Assistant Attorney General

Persons associated with the Islamic Center of Tallahassee Mosque (victims)

Jessica Dunsay Silver, Attorney, Civil Rights Division, U.S. Department of Justice

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STATEMENT REGARDING ORAL ARGUMENT

Defendant has left to the Court's discretion whether oral argument would be beneficial in this case. The United States believes that the issues and the correctness of the rulings below are clear and that oral argument is therefore not necessary. The Court, however, may find argument helpful if it finds any of the issues to be substantial.

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STATEMENT OF JURISDICTION

This is an appeal from a final decision of the district court in a criminal case. Defendant-appellant was charged with and convicted of violating a federal criminal statute, 18 U.S.C. 247(c). Final judgment was entered May 30, 2003

(Doc. 88).[1] Defendant filed a timely notice of appeal May 20, 2003 (Doc. 84). The district court had jurisdiction under 18 U.S.C. 3231. This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether enactment of 18 U.S.C. 247(c) was authorized by Section 2 of the Thirteenth Amendment.

2. Whether the district court abused its discretion in excluding testimony concerning defendant's mental condition.

3. Whether the district court abused its discretion in denying defendant's motion to exclude defendant's recorded statements concerning his criminal mischief conviction.

4. Whether defendant is entitled to a new trial based upon the court reporter's failure to transcribe defendant's taped confession, even though the jury heard the tape and was provided a complete transcript thereof.

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[1] "Doc. __" refers to documents in the Record as numbered on the district court docket sheet. "Govt. Ex. __" refers to the United States' trial exhibits. "Def. Br. __" refers to pages in the defendant-appellant's opening brief in this appeal.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Court Below

By a superseding indictment filed June 21, 2002, defendant was charged with damaging religious real property because of the religious character of such property in violation of Title 18, United States Code, Section 247(a)(1) (Count One) and damaging religious real property because of the race, color, and ethnic characteristics of individuals associated with that property, in violation of Title 18, United States Code, Section 247(c) (Count Two) (Doc. 10).[2] On November 8, 2002, defendant pled guilty to Count One of the indictment (Doc. 35). One month later, on December 5, 2002, defendant moved to withdraw his guilty plea, on the ground that there was an insufficient factual basis for his plea in light of this Circuit's recent decision in *United States* v. *Ballinger*, 312 F.3d 1264 (11th Cir. 2002), pet. for reh'g pending, Nos. 01-14872-CC, 01-15080-CC (Doc. 41, 42). The government did not oppose defendant's motion (Doc. 43).

The government elected to proceed on the Section 247(c) count of the indictment, and on February 19, 2003, a jury trial commenced before the

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[2] Section 247(c) provides a criminal penalty for "[w]hoever intentionally defaces, damages, or destroys any religious real property because of the race, color, or ethnic characteristics of any individual associated with that religious property[.]"

Honorable Stephan P. Mickle (Doc. 92). Trial concluded on February 20, 2003, when the jury found the defendant guilty of violating Section 247(c) (Doc. 93 at 320). At the conclusion of a sentencing hearing on May 19, 2003, defendant was sentenced to a term of twenty-seven months' imprisonment, to be followed by a three-year term of supervised release (Doc. 94 at 35-36). This timely appeal followed (Doc. 84).

B. Statement Of The Facts

1. Offense Conduct

At around 7:30 on the evening of March 25, 2002, defendant floored the accelerator of his GMC Sonoma truck and crashed into the entryway of the Islamic Center of Tallahassee mosque (Doc. 92 at 96-97). The impact of the truck shattered a bench in the entrance hall, cracked the wall there, and displaced several concrete blocks within the wall (*id.* at 42, 44-47). Unable to open the doors of the truck, which was wedged in the mosque doorway, defendant shattered the vehicle's rear window, climbed out, and fled the scene (*id.* at 56, 97).

Two hours later, defendant walked into a local bar (Doc. 92 at 62-63, 72, 80). He approached a group of men inside the bar and asked, "Who hates Muslims?" (*id*. at 63). He told the men he had just run his truck into a mosque

because he was angry at the Arabs (*id*. at 66). Defendant began rambling about Arabs, Muslims, and September 11 (*id.* at 63). He said he thought someone ought to get back at "them" for what they did to "us" (*ibid.*). He told the men that he had tried to join the Army but had been rejected because he was too old (*ibid.*).

The men were disinclined to believe defendant's story, until they saw that his hand was covered in blood (Doc. 92 at 63). When they asked about this, defendant told them he had cut it climbing through the rear window of his truck (*id.* at 81). One of the men withdrew to telephone the police (*id.* at 81). When defendant saw what the man was doing, he asked him to "please call the sheriff's department" because they would "be much nicer" to him than the police (*id.* at 81).

When officers arrived minutes later, and took him into custody, defendant began ranting and raving (Doc. 92 at 82). He said he wanted to get even with Osama bin Laden, and that he hated Arabs (*id.* at 82). As police were taking him out of the bar, defendant shouted, "Fuck Osama bin Laden," and "Fuck Allah" (*id.* at 92).

Following his arrest and advice of rights, defendant gave a tape-recorded statement to Sergeant William Bierbaum of the Tallahassee Police Department. (Doc. 92 at 105-107; Govt. Ex. 7B). Defendant admitted that he drove his truck

into the mosque (Govt. Ex. 7B at 3). He described the mosque as the "center of Muslims" in Tallahassee (*id.* at 4). He said he even considered strapping propane tanks to his truck in order to blow up the mosque (*id.* at 5, 8). He thought no one would be inside the mosque because it was a Monday and he believed Muslims worshiped on Friday (*id.* at 8-9).

Defendant admitted that he had talked to people in the bar about what he had done (Gov't Ex. 7B at 10). When asked what he had told the people in the bar, defendant replied (*ibid.*):

> Pissed off at the Arabs. I'm pissed off at 'em. I can't stand it no more. Them fuckin' assholes. They're killing innocent people over and over again. And they coming in the country and I'm fuckin' pissed off, I'm telling you. They need to send me somewhere where I can fight. I tried to go in the Army and they wouldn't take me. They said I was too old. I'm pissed off. I am menacingly pissed off. These Arabs do not have a cause. They do not have a cause. Fuckin' black assholes in the prison with the Muslims. Fuckin' assholes. They do not have a cause.

Asked what he would have done had a Muslim walked out of the building while he was there, Franklin replied, "I'd a beat his ass * * * in a serious way. No, I wouldn't have killed him" (Gov't Ex. 7B at 15). Elaborating, defendant said, "And if any Muslim asshole would have come out of that building, I would have

beat his ass. I would have pounded his face" (*id.* at 16). Defendant said he would have done this because "they need to know they're not safe here" (*id.* at 16).

At the close of the interview, defendant was asked what statement he was hoping to make by crashing his truck into the mosque (Gov't Ex. 7B at 23). He replied, "That Muslims are not safe in America" (*ibid.*) His goal was not to kill anyone, but to inflict "[m]aximum damage to the building" (*id.* at 24).

At the conclusion of his recorded statement, defendant was transported to Tallahassee Memorial Hospital for treatment (Doc. 92 at 140). En route, the transport officer asked defendant why he had driven his truck into the mosque (*id.* at 141). He told the officer that Arabs were bringing down the country and were going to "destroy us" unless he did something (*id.* at 141). The following day, the same officer overheard defendant talking to security guards in the emergency room of the hospital (*id.* at 142). Defendant told the guards that he thought it was ironic – if he had been able to go back in the military, he would be getting awards for killing Arabs rather than getting arrested (*id.* at 142).

2. The Defense

At trial, defendant admitted that he had deliberately crashed his truck into the mosque, but claimed that he did so for religious reasons, and not because of the

color, race or ethnic characteristics of those associated with the mosque (Doc. 92 at 166). Defendant claimed that he had anti-Islamic views that intensified after September 11 (*id.* at 153-154). He viewed the September 11 attacks on the World Trade Center and Pentagon as "apocalyptic" and was convinced that Muslims would be instrumental in bringing about the end of the world as described in the Book of Revelation (*id.* at 153-154).

Defendant and his wife testified that in the months before the offense, he had stopped taking Prozac in order to enlist in the Army to fight in Afghanistan (Doc. 92 at 155-156, 237). Defendant's disuse of Prozac led to depression which he, in turn, self-medicated with alcohol (*id.* at 156-157).

Defendant drank beer all day on the date of the offense, and argued with his wife that evening (Doc. 92 at 158). After the argument, he drove to Cascades park in Tallahassee where he performed a "regional exorcism" (*id.* at 158-159). He prayed, burned fish, and used holy water to drive away the demons and fallen angels he believed to be at that location (*id.* at 158-159).

After the "exorcism," defendant drove to a parking lot across the street from the mosque (Doc. 92 at 162). He sat there thinking, "anybody could just do this" (*id.* at 162). After getting some "beer for bravery," defendant sat in the parking lot

trying to "talk [himself] out of it" (*id.* at 163). He said he knew he would probably go to jail for or be killed by what he was about to do (*id.* at 163). Finally, he simply closed his eyes and "floored it" (*id.* at 163). Asked what his explanation was for driving his truck into the mosque, defendant said, "It was probably basically just revenge for September 11th. It was a stupid thing to do, but it was a – you know, I did it because of the religion of the place" (*id.* at 166). Asked whether it would "be accurate to say" that he drove his truck into the mosque "because it represents Islam," defendant agreed with his lawyer's characterization of his motives (*id.* at 166).

On cross-examination, defendant indicated that he was unsure of his reasons for driving into the mosque:

> Q. When Mr. Murrell asked you why you crashed into the mosque, you said it was revenge for September 11. Isn't that what you told this jury?
>
> A. That's my best guess.
>
> Q. Revenge for September 11?
>
> A. I'm having to guess. I don't know what was going through my head then. It was a stupid thing to do.

Doc. 92 at 189-190.

C. Standard Of Review

ISSUE I

A ruling on the constitutionality of a federal statute is a question of law subject to *de novo* review on appeal. *United States* v. *Osburn*, 955 F.2d 1500, 1503 (11th Cir.), cert. denied, 506 U.S. 878 (1992). Consideration of this question begins "with the time-honored presumption that the [statute] is a 'constitutional exercise of legislative power.'" *Reno* v. *Condon*, 528 U.S. 141, 148 (2000), quoting *Close* v. *Glenwood Cemetery*, 107 U.S. 466, 475 (1883).

ISSUES II AND III

Evidentiary rulings, including those excluding expert testimony, are reviewed for abuse of discretion. *United States* v. *Paradies*, 98 F.3d 1266, 1289 (11th Cir. 1996), cert. denied, 521 U.S. 1106 (1997); *United States* v. *Range*, 94 F.3d 614, 620 (11th Cir. 1996); *United States* v. *Tokars*, 95 F.3d 1520, 1531 (11th Cir. 1996), cert. denied, 520 U.S. 1151 (1997). The trial court has broad discretion in determining the admissibility of evidence. Even where an abuse of discretion is shown, non-constitutional evidentiary errors are not grounds for reversal absent a reasonable likelihood that the defendant's substantial rights were affected. *United*

States v. *Sellers*, 906 F.2d 597, 601 (11th Cir. 1990); *United States* v. *Mendez,* 117 F.3d 480, 486 (11th Cir. 1997).

ISSUE IV

"The right to a new trial based on a deficiency of the record * * * is 'premised upon the district court's inability to reconstruct the record.'" *United States* v. *Charles*, 313 F.3d 1278, 1283 (11th Cir. 2002), cert. denied, 123 S. Ct. 2588 (2003). If the same attorney represents an appellant at trial and on appeal, a new trial may be granted "only if the defendant can show that the failure to record and preserve a specific portion of the trial visits a hardship on him and prejudices his appeal. * * * [I]f a new attorney represents the appellant on appeal, a new trial is necessary if there is a substantial and significant omission from the trial transcript. *Ibid*.

SUMMARY OF ARGUMENT

Congress's enactment of 18 U.S.C. 247(c) was authorized by Section 2 of the Thirteenth Amendment, which grants Congress the power to enforce the Amendment's abolition of slavery "by appropriate legislation." The Supreme Court has held that Section 2 "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the

United States." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968), quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). Congress has the power "rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Jones*, 392 U.S. at 440. The Supreme Court has held that Congress has the power under Section 2 to reach conduct that is not prohibited by Section 1 of the Thirteenth Amendment, including private discrimination in the acquisition of real and personal property, private conspiracies to deprive citizens of basic rights, and private discrimination in the making and enforcement of contracts. Moreover, Congress may use its Thirteenth Amendment powers to prohibit discrimination, not only against African Americans but also against members of other groups. Since Section 2 authorizes Congress to protect the right to "hold" property without racial discrimination, surely this provision also authorizes Congress to protect the right to hold and use religious property free of racially or ethnically motivated attacks. Bias-motivated interference with religious practices has its roots in slavery: laws suppressing slaves' religious freedom were widespread in the antebellum south. Thus, Congress could rationally determine that such interference was a "badge and incident" of slavery. Congress therefore acted within its authority under the

Thirteenth Amendment in prohibiting racially and ethnically motivated attacks on religious property in Section 247(c).

The district court did not abuse its discretion in excluding expert testimony regarding the defendant's mental condition. Defendant sought to introduce the testimony of a psychologist that he suffered from schizoaffective disorder and alcoholism. Psychiatric testimony is admissible to support an insanity defense, or to prove that the defendant lacked the requisite intent required for conviction. But defendant did not offer this testimony for either of these purposes. Rather, defendant sought to present this testimony to buttress his credibility by corroborating his own testimony regarding his mental condition. The district court correctly concluded that the testimony was not offered for a permissible purpose and was likely to confuse and mislead the jury.

The district court did not abuse its discretion in denying the defendant's motion to redact his statements regarding a past criminal mischief conviction from his tape recorded confession. During the course of his confession to Tallahassee police officers, defendant said that he had previously been convicted of criminal mischief for "smashing a radio station" (Govt. Ex. 7B at 11-12). Later in the confession, defendant referred back to his conduct at the radio station to describe

what he would have done if a Muslim had walked out the door of the mosque after he had driven his truck into it (*id.* at 15-16). Neither Rule 403 nor Rule 404(b) of the Federal Rules of Evidence required exclusion of this evidence. The district court correctly found that defendant's statements regarding this conduct were "inextricably intertwined" with his confession. Defendant's ability clearly to recount the radio station incident was also relevant to negate his theory at trial that his confession was unreliable because he was too impaired by alcohol and mental illness to have accurately reported his motivation in driving his truck into the mosque.

Defendant is not entitled to a new trial because the court reporter did not transcribe the tape of his confession as it was played to the jury. "The right to a new trial based on a deficiency of the record * * * is 'premised upon the district court's inability to reconstruct the record.'" *United States* v. *Charles*, 313 F.3d 1278, 1283 (11th Cir. 2002), cert. denied, 123 S. Ct. 2588 (2003). If the same attorney represents an appellant at trial and on appeal, a new trial may be granted "only if the defendant can show that the failure to record and preserve a specific portion of the trial visits a hardship on him and prejudices his appeal. * * * [I]f a new attorney represents the appellant on appeal, a new trial is necessary if there is a

substantial and significant omission from the trial transcript." *Ibid.* In this case, both the tape and a transcript of the tape were in evidence and are part of the record. Defendant has made no showing that this record is deficient in any way.

ARGUMENT

I. SECTION 247(c) IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION 2 OF THE THIRTEENTH AMENDMENT

Defendant erroneously contends (Def. Br. 19-39) that the enactment of 18 U.S.C. 247(c) exceeds Congress's authority under Section 2 of the Thirteenth Amendment. As explained below, this provision is well within Congress's authority.

Section 247(c) prohibits the intentional defacement, damage, or destruction of religious real property "because of the race, color, or ethnic characteristics of any individual associated with that religious real property." This provision was enacted as part of the Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392.[3]

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[3] Section 247, as initially enacted in 1988, prohibited the defacement, damage, or destruction of religious real property, and the obstruction of religious exercise. It did not include a provision criminalizing racially or ethnically motivated conduct. See Pub. L. No. 100-346, 102 Stat. 644.

In the 1996 Act, Congress made statutory findings that incidents of damage and destruction of religious property "pose a serious national problem;" that "[c]hanges in Federal law are necessary to deal properly with this problem;" that there had been a particular increase in the arson "of places of religious worship that serve predominantly African American congregations;" and that "the problem is sufficiently serious, widespread, and interstate in scope to warrant Federal intervention to assist State and local jurisdictions." Pub. L. No. 104-155, § 2, 110 Stat. 1392. Congress also found that it had authority under both the Commerce Clause and Section 2 of the Thirteenth Amendment to address the problem of attacks on religious institutions. In particular, Congress found that it "has authority, pursuant to Section 2 of the Thirteenth Amendment to the Constitution, to make actions of private citizens motivated by race, color, or ethnicity that interfere with the ability of citizens to hold or use religious property without fear of attack, violations of Federal criminal law." *Id.* at (6).[4] The House of Representatives Judiciary Committee Report and the House sponsor of

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[4] Congress also found that it had authority under the Commerce Clause, "to make acts of destruction or damage to religious property a violation of Federal law." Pub. L. No. 104-155, § 2(5), 110 Stat. 1392. Section 247(a) criminalizes attacks on religious property and obstruction of religious activities, where "the offense is in or affects interstate or foreign commerce." See 18 U.S.C. 247(a), (b).

the legislation also cited the Thirteenth Amendment as the source of Congressional authority to enact Section 247(c). See H.R. Rep. No. 621, 104th Cong., 2d Sess. 7 (1996); 142 Cong. Rec. 14,287-14,288 (1996).

Section 1 of the Thirteenth Amendment states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2 of the Thirteenth Amendment grants Congress the "power to enforce this article by appropriate legislation." The Supreme Court has interpreted Section 2 broadly, "[f]or that clause clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)). The Supreme Court has stated that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Jones*, 392 U.S. at 440.

Under Section 2, therefore, Congress may reach conduct that is not directly prohibited by Section 1. See, *e.g.*, *Jones*, 392 U.S. at 439 (upholding the

constitutionality of 42 U.S.C. 1982 on the ground that Congress's Section 2 power "include[d] the power to eliminate all racial barriers to the acquisition of real and personal property"); *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971) (upholding the constitutionality of 42 U.S.C. 1985(3) on the ground "that Congress was wholly within its powers under [Section] 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men"); *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976) (concluding that 42 U.S.C. 1981's prohibition of racial discrimination in the making and enforcement of contracts for private educational services and private employment is "appropriate legislation" for enforcing the Thirteenth Amendment).

Contrary to defendant's contentions (Def. Br. 37-39), it requires no expansion of the Supreme Court's existing Thirteenth Amendment jurisprudence to uphold Section 247(c) as valid legislation under that Amendment.

First, the Supreme Court has held that Congress may regulate private, racially discriminatory conduct under Section 2 of the Thirteenth Amendment. *Jones*, 392 U.S. at 437-443; *Runyon*, 427 U.S. at 173, 179; *Griffin*, 403 U.S. at 105;

cf., *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 171-175 (1989) (reaffirming *Runyon*'s holding that Section 1981 applies to private conduct); see *United States* v. *Bledsoe*, 728 F.2d 1094, 1097 (8th Cir.) (upholding 18 U.S.C. 245(b)(2)(B) as valid legislation under the Thirteenth Amendment), cert. denied, 469 U.S. 838 (1984); *United States* v. *Nelson*, 277 F.3d 164, 176 (2d Cir.) (same) cert. denied, 537 U.S. 835 (2002); *United States* v. *Allen*, 341 F.3d 870, 884 (9th Cir. 2003) (same).[5]

Second, in *Jones* the Supreme Court upheld Congress's authority under the Thirteenth Amendment to protect property rights from racial discrimination. Section 1982 protects the right "to inherit, purchase, lease, sell, hold, and convey real and personal property" without racial discrimination. 42 U.S.C. 1982. Section 247(c) protects the right to hold and use religious real property without racially or ethnically motivated defacement, damage, or destruction. Surely if Congress has the authority to protect the right to "hold" property without discrimination, it also has the authority to protect the right to hold and use religious property free of

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[5] Section 245(b)(2)(B) criminalizes violent interference with any person because of race, color, national origin, or religion, and because he or she has been "participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof[.]"

racially or ethnically motivated attacks. Cf., *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987) (applying Section 1982 to defacement of synagogue).

Next, the Supreme Court also has held that the Thirteenth Amendment authorizes Congress to prohibit discrimination not only against African-Americans, but also against members of other racial and ethnic groups. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287-288 & nn.17 & 18 (1976), citing *Hodges* v. *United States*, 203 U.S. 1, 16-17 (1906), and *Jones*, 392 U.S. at 441 n.78; see also *Nelson*, 277 F.3d at 176-178 (upholding application of Section 245(b)(2)(B) to protect Jews). *McDonald* held that Section 1981 protects whites, as well as racial minorities, from racial discrimination. In so ruling, the Supreme Court noted that this interpretation of the statute was consistent with the "prevailing view in the Congress as to the reach of its powers under the enforcement section of the Thirteenth Amendment" in 1866, just months after its enactment. *McDonald*, 427 U.S. at 287-288; cf., *St. Francis College* v. *Al-Khazraji*, 481 U.S. 604 (1987) (holding that Section 1981 protects Arabs and other ethnic groups); *Shaare Tefila*, 481 U.S. at 616-618 (holding that Section 1982 protects Jews). The sponsors of the Church Arson Prevention Act relied upon this principle when they drafted Section 247(c). See 142 Cong. Rec. 14,288 (1996) (Cong. Hyde) (decisions in *St. Francis*

College and *Shaare Tefila* confirm Congress's authority under the Thirteenth Amendment to protect houses of worship owned not only by African Americans, but those owned by other minority groups as well).

Finally, Congress rationally could have concluded that the destruction of religious real property was a "badge and incident" of slavery. Suppression of slaves' religious freedom was a common practice under slavery. As early as 1715, southern states passed laws curtailing the religious practices of slaves. C. Eric Lincoln, *Race, Religion and the Continuing American Dilemma* 45 (1984) ("Lincoln"). Such laws became more widespread during the first half of the 19th century, a time when there was a heightened fear among whites of slave uprisings. The assembly of slaves for whatever reason, including religion, was thought to encourage rebellion. As such, "black churches were considered dangerous to established white interests, and in every Southern state they were forbidden, suppressed, or severely regulated by law until the Civil War * * * ." *Id*. at 32. In 1800, South Carolina enacted the first of the 19th century statutes, which "forbade Negroes to assemble, even with whites present, between sunset and sunrise, 'for the purpose of * * * religious worship.'" Albert J. Raboteau, *Slave Religion: The "Invisible Institution" in the Antebellum South* 147 (1978) ("Raboteau"); see also

Vincent Harding, *Religion and Resistance Among Antebellum Slaves 1800-1860*, in *African American Religion: Interpretive Essays in History and Culture* 111-112 (Timothy E. Fulop, ed.,1997) ("Harding"); George M. Stroud, *Sketch of the Laws Relating to Slavery in the Several States of the United States of America* (1827), reprinted in *Slavery, Race and the American Legal System 1700-1872*, Ser. No. 7, V. 1 *Statutes on Slavery: The Pamphlet Literature* 245 (Paul Finkelman, ed., 1988) ("Stroud"). Other states had similar statutes. See Stroud at 248 (Georgia); Stroud at 250 (Virginia); Raboteau at 147 (Virginia); Lincoln at 45 (North Carolina); Harding at 118 (Mississippi); Stroud at 250 (Mississippi).

As the Second Circuit explained in *Nelson*, acts of violence committed against racial minorities "with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions." *Nelson*, 277 F.3d at 189. Similarly, bias-motivated interference with the religious practices of racial minorities has its roots in slavery. Congress could rationally conclude that such interference is a badge or incident of slavery. Its enactment of Section 247(c) is thus well within its authority under Section 2 of the Thirteenth Amendment.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING TESTIMONY CONCERNING DEFENDANT'S MENTAL CONDITION

1. Prior to trial, the government moved to exclude, as irrelevant, unfairly prejudicial and inadmissible under the Insanity Defense Reform Act, 18 U.S.C. 17, the testimony of Dr. Manuel E. Guitierrez, a Bureau of Prisons psychologist who examined the defendant (Doc. 58). According to his mid-trial proffer, Dr. Guitierrez would have testified that defendant suffered from schizoaffective disorder and alcohol dependence (Doc. 92 at 116). The diagnosis of schizoaffective disorder was based primarily upon defendant's delusional thinking concerning demons and fallen angels at Cascades Park in Tallahassee (*id.*at 124). Defendant had made no delusional statements concerning Arabs or Muslims (*id.* at 123-124). Dr. Guitierrez concluded that although defendant was sane at the time of the offense, his schizoaffective disorder had an "indirect impact" on the offense (*id.* at 120). That is, the schizoaffective disorder led to defendant's increased use of alcohol, and the alcohol abuse contributed to his commission of the offense (*id.* at 124).

Defendant argued that the testimony was not being offered to establish an inadmissible diminished capacity defense, but to corroborate defendant's testimony

that he suffered from depression and mental illness, and would not have committed the crime had he not been drinking and off his medication (Doc. 92 at 126-127). The court had granted the government's motion to exclude this testimony before trial, finding:

> The testimony is not in accord with recognized psychiatric testimony to negate mens rea or to establish a valid insanity defense.
>
> *It is also likely to confuse and mislead the jury, especially given the close time frame between the alleged admission [sic] of the offense and the confession.*

(Doc. 91 at 44-45, emphasis added)[6]. Defendant moved for reconsideration of the ruling mid-trial, and after hearing Dr. Guitierrez' proffered testimony, the court renewed its previous order excluding the testimony (Doc. 92 at 111-128).

2. The district court did not abuse its discretion in excluding the psychiatric testimony. The court correctly concluded that the psychiatric testimony was not offered to establish an insanity defense or to negate evidence of mens rea, and that it was likely to mislead the jury.

The Insanity Defense Reform Act provides an affirmative defense of insanity if a defendant proves that "at the time of the commission of the acts constituting the

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[6] In purporting to quote the court's holding "in its totality" (Def. Br. 41), defendant omitted the portion of the court's ruling that appears in italics above.

offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. 17(a). The statute further provides that "[m]ental disease or defect does not otherwise constitute a defense." *Ibid.* As this Court has explained, this provision does not mean that psychiatric evidence is admissible only to establish an insanity defense. *United States* v. *Cameron*, 907 F.2d 1051, 1063-1066 (11th Cir. 1990). Such evidence also may be admitted to negate an element of the crime, such as specific intent. *Ibid.* Care must be taken, however, in evaluating such evidence, which "(1) will only rarely negate specific intent, (2) presents an inherent danger that it will distract the jury from focusing on the actual presence or absence of *mens rea*, and (3) 'may easily slide into wider usage that opens up the jury to theories of defense more akin to justification.'" *Cameron*, 907 F.2d at 1067, quoting *United States* v. *Pohlot*, 827 F.2d 889, 904-905 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988). In *Cameron*, this Court set out "three central principles" that federal courts "should adhere to" in evaluating psychiatric testimony. 907 F.2d at 1062. Such evidence is not admissible (1) to show "a diminished ability or failure to reflect adequately upon the consequences or nature of one's actions;" (2) to establish "a diminished responsibility or some similarly asserted state of mind which would serve to *excuse*

the offense;" or (3) "to mislead or confuse the jury." *Id*. at 1061-1062, internal quotation marks and citation omitted.

In this case, defendant did not assert an insanity defense. Nor does he contend that the excluded testimony should have been admitted to negate evidence of specific intent. Rather, he asserts that the expert testimony was admissible to corroborate other evidence, including his own testimony, concerning his mental illness (Def. Br. 45). But, if offered for that purpose, the expert testimony was irrelevant. Whether defendant suffered from schizoaffective disorder, or whether he would not have committed the crime had he not been drinking or off his medication, was immaterial to the question whether he attacked the mosque because of the ethnic characteristics of individuals associated with it. Indeed, it appears that the real purpose of the testimony regarding defendant's mental illness – both lay and expert – was to prove that he was unable to reflect or control his behavior, or to provide an excuse for his conduct. As this Court has made clear, such evidence is not admissible. *Cameron*, 907 F.2d at 1066.

Whatever scant probative value the testimony might have possessed was outweighed by the risk that the evidence would mislead and confuse the jury, which, having no other use for the evidence, might have been left with the false impression

that defendant's mental illness and alcohol abuse constituted a valid defense to the charge. The court properly excluded the proposed testimony because it "present[ed] an inherent danger" that it would "distract the jury from focusing on the actual presence or absence of *mens rea*." *Cameron*, 907 F.2d at 1067.

Contrary to defendant's suggestion (Def. Br. 46), the government was under no obligation to "ask the court to exclude" only the "controversial" portion of Dr. Guitierrez' testimony. The burden is upon the proponent of the evidence to establish its admissibility. Defendant failed to do this, and analyzing the proffered evidence under Rule 403, the court properly excluded it.

Even if this evidence were admissible to corroborate defendant's testimony, any error in excluding it was harmless. Dr. Guitierrez' testimony would have added little to the evidence before the jury as there was no genuine dispute as to whether defendant suffered from mental illness. The testimony of defendant's wife confirmed that he was mentally ill, and defendant's own statements both on the tape and on the stand concerning the delusional beliefs that he continued to hold about Cascades Park and black magic at a local radio station amply demonstrated his illness. See Doc. 92 at 159-160, 234-239; Govt. Ex. 7B at 11-12. In view of the cumulative nature of the testimony, even if the exclusion of this evidence were an

abuse of discretion, it did not affect defendant's substantial rights, and thus provides no ground for reversal. See *United States* v. *Sellers*, 906 F.2d 597, 601 (11th Cir. 1990) (even where an abuse of discretion is shown, non-constitutional evidentiary errors are not grounds for reversal absent a reasonable likelihood that the defendant's substantial rights were affected).

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO EXCLUDE DEFENDANT'S RECORDED STATEMENTS CONCERNING HIS CRIMINAL MISCHIEF CONVICTION

Defendant contends that the district court erred in denying his motion to exclude his tape-recorded admission to officers of the Tallahassee Police Department that he had previously been convicted of criminal mischief in connection with his destruction of property at a radio station. The challenged portions of the audio-taped confession are as follows:

BIERBAUM: Have you ever been in trouble before Chuck?

FRANKLIN: Yes sir.

BIERBAUM: What for?

FRANKLIN: Smashing a radio station. Uh criminal mischief.

STEINBERG: What was that all about?

FRANKLIN: Uh (INAUDIBLE).

BIERBAUM: Tell me about that one Chuck. What'd you do?

FRANKLIN: I went into the station and I smashed it.

STEINBERG: Why?

BIERBAUM: A radio station?

FRANKLIN: Yes sir.

BIERBAUM: Where? Here in Tallahassee or somewhere else?

FRANKLIN: Yes, at FSU.

BIERBAUM: Why'd you smash it?

FRANKLIN: 'Cause they were practicing black magic.

BIERBAUM: Practicing black magic huh?

FRANKLIN: Yes sir.

BIERBAUM: The radio station was or the people that owned that show?

FRANKLIN: Yes.

BIERBAUM: Yes which one? The station or both?

FRANKLIN: Both.

BIERBAUM: Both?

FRANKLIN: Both.

BIERBAUM: When'd you do that? The last year or two?

FRANKLIN: Uh it was years ago.

BIERBAUM: Years ago?

FRANKLIN: Eight years.

BIERBAUM: Oh I'm sorry. Eight years ago. Okay. Eight years ago. What did you get charged with?

FRANKLIN: Criminal mischief.

BIERBAUM: Criminal mischief? What else have you, what else you done?

FRANKLIN: That's all.

Govt. Ex. 7B at 11-12.

Later in the interview, defendant himself used his attack on the radio station to demonstrate the seriousness of his intent in attacking the mosque:

BIERBAUM: Chuck, let's go back to tonight. What would have happened tonight after you hit that building and some, some Muslim walked out that door? What do you think you would have done?

FRANKLIN: I'd a beat his ass.

BIERBAUM: You think you would have killed him?

FRANKLIN: In a serious way. No I wouldn't have killed him.

BIERBAUM: Would have killed him?

FRANKLIN: No sir. When I busted into (INAUDIBLE)…

BIERBAUM: I'm sorry, what?

FRANKLIN: The radio station, I was in it.

BIERBAUM: Right.

FRANKLIN: They came after me.

BIERBAUM: Did you hurt anybody in the radio station when you (INAUDIBLE)?

FRANKLIN: No sir, I did not.

BIERBAUM: Okay. All right.

FRANKLIN: And they knew that I was serious and they left me alone. And if any Muslim asshole would have come out of that building, I would have beat his ass. I would have pounded his face. Then I would have left. I would not have killed anybody. I can't kill nobody. I can't kill my own damn self.

Govt. Ex. 7B at 15-16.

Defendant moved to exclude all references to the radio station incident on the grounds that the evidence was irrelevant and its probative value was outweighed by the danger of unfair prejudice (Doc. 52). The court denied defendant's motion finding (Doc. 91 at 45):

> The statements are inextricably intertwined with the defendant's taped confession and cannot be redacted in a manner that does not reveal to the jury that the confession tape has been altered.

> Furthermore, the tape in its entirety is relevant to whether the confession is an accurate reflection of the defendant's stated motivation for driving his truck into the mosque.

This ruling was not an abuse of discretion.

Defendant's principal argument at trial was that his taped statements regarding his anger toward Arabs were unreliable because he was drunk, off his medication, and upset (Doc. 93 at 279-280). He argued that his taped statements could not be credited and that the witnesses who claimed that he had made anti-Arab statements were mistaken (*id.* at 281, 283-285). The tape was the most critical piece of evidence in the government's case as it demonstrated defendant's anti-Arab sentiments and corroborated the accounts of other government witnesses (*id.* at 261).

Given the theory of the defense, the court correctly concluded that the portions of the defendant's statement regarding the radio station were inextricably intertwined with proof of the charged offense, and were relevant to the sole issue at trial: defendant's intent. During his confession, defendant used the radio station incident to emphasize the gravity of his intent in committing the charged offense (Govt. Ex. 7B at 15-16). The statements formed an integral and natural part of the account of a critical witness to the event -- the defendant himself. As such, they

were inextricably intertwined with proof of the charged offense. *United States* v. *Foster*, 889 F.2d 1049, 1054 (11th Cir. 1989).

Defendant's ability to recall and report the radio station incident accurately also was relevant to show the reliability of his audio-taped statements overall. Asked whether he had ever been in trouble before, he answered the question directly and without delay, and spoke in detail about an offense that had occurred eight years earlier. He identified the precise offense with which he had been charged (criminal mischief), the nature of the conduct underlying that offense (smashing a radio station), the motivation behind that conduct, and the length of time that had passed since that offense (Govt. Ex. 7B at 11-12). He went on to liken his intentions in the mischief case to his intentions in the present offense in order to stress the seriousness of his purpose (*id.* at 15). Defendant's statements concerning the radio station demonstrate that, notwithstanding his claims at trial, his memory was good, his thinking was clear, and he was able to process information and reliably report both his actions and intentions without significant impairment by alcohol or mental illness. Where the trial's main focus was upon defendant's intent and his ability to formulate and to report that intent, it would have been improper for the court to exclude such evidence merely because it incidentally revealed another crime.

Defendant contends that Rule 403 of the Federal Rules of Evidence requires that the challenged portions of the tape be redacted because of the potential prejudicial impact of those passages. The court correctly found otherwise. The application of Rule 403 to exclude evidence must be sparing. As the United States Court of Appeals for the Fifth Circuit observed in *United States* v. *McRae*, 593 F.2d 700, 707 (5th Cir.), cert. denied, 444 U.S. 862 (1979):

> Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance. It is not designed to permit the court to "even out" the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none.

In view of the nature of the charged offense and the narrow focus of the trial itself, defendant's statements concerning his eight-year-old misdemeanor conviction for destruction of property were not even particularly prejudicial. There was no risk, for example, that the evidence would be used to prove defendant's character by showing that he acted in conformity therewith, because defendant's **actions** were

not at issue. See Federal Rule of Evidence 404(b). Defendant admitted that he had driven his truck into the mosque; the sole issue at trial was his intent in doing so.

Nor was there any genuine risk that the jury would conclude from this evidence that defendant was "dangerously unbalanced" (Def. Br. 56). Defendant himself stressed that he was mentally ill, and continues to argue that the jury should have heard more on this subject (Doc. 92 at 151-152; Def. Br. 40). There was no risk that the jury would conclude from the radio station incident alone that defendant was any more dangerous than the evidence surrounding the charged offense itself suggested. Defendant's statements concerning the radio station incident cut both ways: they established that defendant had destroyed property eight years earlier, but they also told that jury that defendant neither injured nor intended to injure any person during the commission of that offense, and that defendant had no other criminal record except for a petty theft charge that had been dismissed (Govt. Ex. 7B at 11-12, 15). Defendant's unequivocal assertion that the radio station had been "practicing black magic" also helped bolster his claim that he genuinely suffered from mental illness (Govt. Ex. 7B at 11).

The court likewise did not abuse its discretion in denying the motion to exclude on the ground that the tape could not be redacted in a manner that would

not reveal to the jury that it had been altered. This concern was well-founded, given that part of the defense strategy at trial was to suggest to the jury that the government was selectively presenting defendant's statements (Doc. 92 at 133). Defense counsel closed his cross-examination of the detective who took defendant's confession by brandishing a written statement of the defendant that had not been offered by the government (Doc. 92 at 133):

> Q. You talked about his statement, what he said orally, but you didn't say anything about his written statement. Did you get a written statement from Mr. Franklin?
>
> A. Yes. Matter of fact it was like a one-liner.
>
> Q. Let me show you what's been marked as Defendant's Exhibit No. 6. Would you take a look at that?
>
> A. Yes.
>
> Q. That written statement that you didn't mention during direct, how does it read?
>
> A. "I let my anger at the Muslim radicals get the best of me. I'm sorry."

In closing, defense counsel emphasized the government's omission of the one-line written statement, saying, "I don't know whether to blame Mr. Bierbaum or blame Ms. Rhew for not asking the question, but this is critical information" (Doc. 92 at 281). Defense counsel recognized the value of the mere suggestion that the

government had concealed evidence. The court did too. The court's denial of the motion to alter defendant's taped statement was not abuse of discretion and did not affect defendant's substantial rights.

IV. DEFENDANT IS NOT ENTITLED TO A NEW TRIAL BASED UPON THE FAILURE TO TRANSCRIBE DEFENDANT'S TAPED CONFESSION

Defendant contends that he is entitled to a new trial because the court reporter failed to transcribe Government's Exhibit 7A, defendant's taped confession, which was played at trial (Doc. 92 at 108). Defendant contends that he is entitled to reversal because, "the record does not reflect whether the jury heard all or select portions of the tapes" and because "a new attorney represents the appellant on appeal" (Def. Br. 59). This argument is disingenuous. At trial, defendant was represented by the Federal Public Defender, Randolph P. Murrell, whose name appears on defendant's brief as one of two attorneys submitting the brief (Def. Br. 60). The brief was signed by Chet Kauffman, an Assistant Federal Defender serving in the Office of Federal Public Defender Murrell (*ibid.*).

Mr. Murrell was present at trial while the tape was played and the transcripts thereof were distributed to the jury (Doc. 92 at 108). Mr. Murrell was certainly in a position to object if only selected portions of the tape had been played and to object

if the transcript provided to the jury contained statements that were not played in open court. Indeed, in moving to exclude defendant's references to his prior convictions, defense counsel requested that only certain portions of the tape be played and the court refused, in part because the tape could not be redacted in a manner that did not reveal to the jury that it had been altered (Doc. 91 at 45). There is no basis whatsoever for appellate counsel's assertion that the jury might only have heard portions of defendant's confession. The tape was admitted into evidence, as was the transcript. Defendant's argument that this record is insufficient to "accord effective appellate review" or that the failure to transcribe the tape in any way prejudiced defendant's appeal is unfounded. *United States* v. *Charles*, 313 F.3d 1278, 1283 (11th Cir. 2002), cert. denied, 123 S. Ct. 2588 (2003). As such, defendant's request for a new trial on this basis should be denied.

CONCLUSION

The judgement of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 7,986 words.

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I certify that the foregoing brief for the United States as appellee was sent by first class mail to the counsel listed below this 9th day of December, 2003.

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