Nos. 11-30345, 11-30529

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant

v.

GREGORY MCRAE, *et al.*,

Appellants/Cross-Appellees

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

BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests oral argument in this matter. Given the number, complexity, and importance of the issues raised in the instant appeals and cross-appeal of the United States, the United States believes oral argument would assist this Court in resolving the issues presented.

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LEGISLATIVE HISTORY:

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. 3231. David Warren (Warren), Gregory McRae (McRae), and the United States all filed timely notices of appeal. Warren Supp. R. 1431; McRae R. 1571; R. 2276.[1] This Court has jurisdiction pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742.

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[1] Separate records on appeal have been submitted for Warren's, McRae's, and the United States' appeals in this matter. Wherever possible, record cites throughout this document are to the record on appeal associated with the United States' appeal in *United States* v. *McCabe*, No. 11-30529. The citation "R. ___" refers to the page number following the Bates stamp "USCA5" in the McCabe

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STATEMENT OF THE ISSUES

The appeals of Warren, McRae and the United States each raise distinct issues.

Warren's appeal raises the issues: 1) Whether the district court's manslaughter instruction was appropriate; 2) Whether the district court erred in declining to grant Warren's motions for severance or mistrial; 3) Whether the United States complied with its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963); 4) Whether the district court erred in its evidentiary rulings; 5) Whether Warren's sentence under 18 U.S.C. 924 was constitutional; and 6) Whether 18 U.S.C. 924(j) requires mandatory consecutive sentencing.

McRae's appeal raises the issues: 1) Whether the evidence was sufficient to support McRae's conviction for obstruction of justice; 2) Whether defendant's knowledge of a federal nexus is required to sustain a conviction under 18 U.S.C. 1519; 3) Whether 18 U.S.C. 1519 is unconstitutionally vague; 4) Whether the evidence was sufficient to support McRae's conviction for deprivation of rights under color of law; 5) Whether McRae's taking and burning of a vehicle belonging

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(…continued)
record on appeal. Where a document is located only in the record on appeal associated with McRae, or the supplemental record on appeal associated with Warren, the record cite is indicated as either "McRae R. ___" or "Warren Supp. R. ___."

to William Tanner constituted a seizure for purposes of the Fourth Amendment; and 6) Whether McRae's sentence was constitutional.

The United States' appeal as to Travis McCabe (McCabe) raises the issue whether the district court erred in granting a new trial to McCabe on the basis of newly discovered evidence.

STATEMENT OF THE CASE

On June 11, 2010, a federal grand jury in the Eastern District of Louisiana returned an indictment charging Warren, McRae, and McCabe, officers of the New Orleans Police Department (NOPD), for their respective roles in the death of Henry Glover in the aftermath of Hurricane Katrina; the assault upon Glover's brother, Edward King (King), and William Tanner (Tanner), who had come to the Glover family's rescue; the burning of Glover's body inside Tanner's car; and the cover-up of the entire incident.[2] R. 28-34. A superseding indictment was filed on August 6, 2010 (R. 134-140), and a second superseding indictment was filed on September 24, 2010 (R. 344-350).

Warren was charged with depriving Glover of his right to be free from the use of unreasonable force by a law enforcement officer, in violation of 18 U.S.C.

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[2] Along with Warren, McRae, and McCabe, NOPD officers Dwayne Scheuermann (Scheuermann) and Robert Italiano (Italiano) were also charged in this case. R. 344-350. The jury acquitted those officers on all counts. R. 6866-6868.

242 (Count 1), and carrying, using and discharging a firearm in furtherance of a felony resulting in an individual's death, in violation of 18 U.S.C. 924(c) and (j) (Count 2). R. 344-345.

McRae was charged with depriving King and Tanner of their right to be free from the use of unreasonable force by a law enforcement officer (Count 3), depriving Tanner of the right to be free from an unreasonable seizure of his car by a law enforcement officer (Count 4), and depriving Glover's family of the right to access the courts and seek legal redress for a harm, all in violation of 18 U.S.C. 242 (Count 5); with destroying evidence with intent to impede and obstruct the investigation of Glover's death, in violation of 18 U.S.C. 1519 (Count 6); and with using fire to commit violations of 18 U.S.C. 242 and 18 U.S.C. 1519, in violation of 18 U.S.C. 844(h) (Count 7). R. 345-347.

McCabe was charged with filing a false and misleading police report with the intent to impede and obstruct the investigation of Glover's death, in violation of 18 U.S.C. 1519 (Count 8); with making materially false statements to an FBI agent, in violation of 18 U.S.C. 1001 (Count 10); and with making false material declarations to a grand jury, in violation of 18 U.S.C. 1623 (Count 11). R. 347-350.

After a jury trial, on December 9, 2010, Warren and McCabe were convicted on all counts. R. 6865-6869. McRae was acquitted on the unreasonable force

count, but was convicted on all other counts. R. 6865-6869. Warren was sentenced to 309 months' imprisonment, consisting of 189 months on Count 1, and 120 months on Count 2, to run consecutively, and $7642.32 in restitution. R. 6904-6905. McRae was sentenced to 207 months' imprisonment, consisting of 87 months on Counts 4, 5, and 6, to run concurrently, and 120 months on Count 7, to run consecutively to Counts 4, 5, and 6, as well as $6000 in restitution. R. 6917.

McRae and Warren filed notices of appeal on April 1, 2011, and April 6, 2011, respectively. McRae R. 1571-1572; Warren Supp. R. 1431-1432.

On February 8, 2011, McCabe filed a motion for a new trial based upon newly discovered evidence. R. 2045-2054. On May 4, 2011, the district court granted McCabe's motion, and dismissed counts 8, 10, and 11 of the second superseding indictment. R. 2258-2273. On June 3, 2011, the United States filed a notice of appeal from the district court's order. R. 2276-2277.

STATEMENT OF FACTS

On the morning of September 2, 2005, David Warren shot Henry Glover without cause. Later that day, McRae seized the car of William Tanner, and burned it, with Glover's body in the backseat. McCabe thereafter wrote a false police report and made false statements to obscure Warren's role in Glover's death.

1. The Shooting Of Henry Glover: David Warren

On the morning of September 2, Glover and his family – including his girlfriend, Mickey, their child, Nehemiah Short, his sister, Patrice, and brother-in-law, Bernard Calloway (Calloway) – were preparing to leave New Orleans. R. 3207-3209, 3213-3214, 3606. Although they had stayed in the city through the storm, the family was running out of food, had no electricity, no running water, and no ability to communicate with the outside world. R. 3605-3606. They knew they needed to evacuate. R. 3606.

Glover came to pick up Calloway in a Firestone pickup truck, which Calloway assumed Glover had stolen in order to get the family out of New Orleans. R. 3607. The two men drove from Calloway's apartment to Glover's apartment in the next building. R. 3608. On the way there, they ran into Glover's sister-in-law, who they knew as Cooler, who asked them if they could pick up a bag that was inside a basket she had left at the nearby strip mall. R. 3608-3609. Glover agreed, and they turned the truck around to head to the mall. R. 3609. When they arrived at the mall, they turned the truck around and backed up to the basket. R. 3609. Calloway then went to the back of the truck to try and pick up the bag. R. 3610.

Also at the mall that day were Warren and Officer Linda Howard (Howard), a 26-year veteran of the NOPD, assigned to NOPD's 4th District.[3] R. 3269-3271, 3277. Howard and Warren had been assigned to guard the District Investigative Unit (DIU) substation at the mall. R. 3277, 3282. Howard testified that, on their way to the mall, Warren stopped at his home to pick up his personally-owned assault rifle. R. 3278-3279, 5034-5035, 5091-5094. When Howard asked him what he had the weapon for, he replied that he had it "for protection," and asked her if she wanted one. R. 3280. Howard declined, because she had her department-issued Glock 40; Warren was also carrying his department-issued Glock that morning. R. 3280.

The first thing they did upon arrival at the mall was walk around the bottom floor, to see if anybody was there. R. 3284. Howard testified that she noticed that the entrance gates to the rear of the mall were chain-locked, at both the top and the bottom. R. 3284-3286. She and Warren then went upstairs to the DIU office, where they spoke about the general situation and the absence of their families after the storm. R. 3284, 3286-3287. Warren asked Howard if she knew that they were under "martial law." R. 3287. She replied that she didn't "know anything about martial law," but did know that "the same laws that you have to follow as a police

[3] Warren was not normally assigned to the 4th District, but, given the crisis after Hurricane Katrina, reported to the 4th District because it was closest to his residence. R. 3277-3278.

officer before the storm are the same laws that you have to follow now." R. 3287. Warren didn't say anything, but nodded his head. R. 3287.

Sometime later that morning, Howard and Warren saw a man passing through the mall's parking lot. R. 3288-3289, 5088. Although Howard testified that there was nothing suspicious about the man, Warren "all of a sudden * * * fired a shot at him." R. 3289. When Howard asked him why he had done that, Warren replied, "I just want to see something. I didn't hit him." R. 3289. (Warren testified that he shot in the man's direction because the man had passed by the mall and "looked at" him several times. R. 5088. Warren never attempted to communicate with the man before firing the shot. R. 5088.) Howard testified that, after that, she didn't have any further conversation with Warren. R. 3290. She said she "felt there wasn't nothing to talk about," that she "didn't know, really, what was going on with him," and didn't feel secure talking with him about the situation. R. 3290.

As they continued to sit at the station that morning, Howard testified that she "heard a screeching sound, like tires stopping." R. 3292. When she looked down off the side of the mall, she saw a Firestone truck make a U-turn onto the back of the parking lot, and then saw two men jump out of the truck and run to a basket at its rear. R. 3293-3294. As she and Warren watched, the men went to the rear of the truck, "to get the property out of the basket to put in the truck." R. 3293-3294.

Warren yelled a "loud command, * * * telling them to get away from there." R. 3294. Howard testified that the men were "startled, like somebody – they didn't know someone was at that location. So when the loud voice rang out, they were scared, and then they ran off." R. 3294. The men ran past the truck, out toward the street, and away from the building. R. 3295. Howard testified that, she "hurried up to the front to the gate portion and * * * could see them running" away. R. 3296. Howard was looking at Glover's back as he ran. R. 3297. Officer Warren then "came * * * on the side of me – on the side, on my right side. And out of the corner of my eye I could see him coming and leveling his weapon at that time, and then a shot rang out." R. 3296. One of the men "went down * * * like he was hit," and "collapsed" on the other side of the street. R. 3297.

Calloway, too, testified that as he tried to put the bag into the truck that morning, he heard a sound and a voice "[r]ight behind each other," the sound being a "pow," and the voice saying, "Leave now." R. 3610. Calloway said that when he heard the voice, he "immediately ran," and that, as he was running, he looked back to see whether Glover was running too. R. 3611. But when Calloway looked back, Glover was stumbling. R. 3611. Calloway looked around to make sure that nothing was going to happen to him, and then began to run back toward Glover. R. 3611. When Calloway reached him, Glover had his hand on his chest. R. 3611.

He said to Calloway, "Man, I'm about to die. Tell my mama I love her." R. 3611. Glover then collapsed, face down, onto the street. R. 3611, 3614.

Howard testified that after the shooting she was "very upset," "crying," and that she "didn't know what to think." R. 3300-3301. She testified that when Warren shot the man, he had been running away. R. 3296-3297. She hadn't seen either of the men with any type of weapon, did not see them reach for their waistbands, and didn't see them make any type of move that caused her any concern. R. 3298. She herself had never reached for her gun, because she "didn't feel threatened." R. 3298. When she asked Warren why he had shot the man, Warren simply replied "I didn't hit him." R. 3299. Howard said, "Yes, you did," but Warren repeated, "I didn't hit him." R. 3299. When Howard told Warren that she had to call a superior officer, he asked, "Why?" She told him it was because he "shot somebody." R. 3299. Howard then called her supervisor, Sergeant Purnella Simmons (Simmons). R. 3300.

Meanwhile, Calloway tried to help Glover. As people started to come out of the nearby apartments, Calloway saw a man with a towel around his neck, and asked to use it. R. 3611-3612. He laid the towel under Glover's head, grabbed a 10-speed bike, and tried to ride back to the apartment where he lived; when he couldn't ride fast enough, he ran. R. 3612. When Calloway reached the apartments, he told his girlfriend, Glover's sister Patrice, and his brother-in-law,

Edward King, what happened. R. 3612, 3653-3654. Calloway told Patrice where Glover was and told her to go there and then headed back toward Glover himself. R. 3612, 3654-3655. Patrice and King were already there when Calloway arrived. R. 3655. As Calloway approached, he saw King talking with a man who he later learned to be William Tanner. R. 3612, 3615.

Tanner had been driving up the street that morning when he saw Glover lying in the street, with his brother Edward King stooped over him. R. 3487-3488. King was asking for someone to help, and Tanner stopped to help him. R. 3488. It was this scene that Calloway came upon when, just minutes after having left, he arrived back at the place where Glover lay. R. 3612. Tanner checked Glover's pulse, and saw that he was still alive, and the three men put Glover into the backseat of Tanner's car. R. 3488. Because West Jefferson Hospital was too far away, Tanner decided that he would drive to Habans School, where the NOPD had set up a compound after the storm, and which was only about four or five blocks away, to seek help. R. 3481, 3492.

After Tanner, Calloway, King and Glover departed for Habans, Officer Purnella Simmons and her partner, Keyalah Bell, arrived at the mall in response to Howard's call. See R. 4431-4432. Bell testified that they arrived on the scene to find Officer Howard "very hysterical." R. 3973. When they asked her what was wrong, "she just said, 'Just talk to him.' And she kind of just walked off." R.

3973. When Bell asked Warren what had happened, he said "he shot at him. * * * And they were looting." R. 3974.

Simmons testified that Warren's demeanor was "almost nonchalant," he just said he "discharged his firearm, he didn't believe that he hit the person." R. 4434. Simmons testified that she went around the back of the mall to look for signs of a shooting, but didn't see anything. R. 4436-4437. She then walked up the road, and observed a crowd of people coming towards her. R. 4437. Among the crowd was a woman who identified herself as Glover's sister, and said that Glover had been shot by the police and she wanted to find out what happened. R. 4437-4438. The woman told Simmons that there was a towel on the ground with blood that had come from her brother. R. 4438. Glover's sister also said that someone driving a white car had picked Glover up and taken him to the hospital. R. 4438.

As she was talking to Glover's sister, Simmons heard a distress call over the radio. R. 4439. The call said that "there was possibly a shooting victim over at Habans School." R. 4439-4440. Because of the timing of the call, and because she couldn't find a shooting victim at the mall, she thought that maybe the person who had been shot had been taken to Habans. R. 4439-4440.

2. The Events At Habans School: Gregory McRae

Tanner testified that when he, Glover, King, and Calloway pulled into Habans School that morning, they were met by "a bunch of police officers in

tactical uniforms putting laser sights and guns to my glass and t[elling] me get out the car not so very nicely." R. 3496. The men got out of the car, and were immediately handcuffed. R. 3496. King said that his brother needed medical attention, and that he would shoot the person who shot his brother. R. 3496-3497. Although all three of the men asked for medical help for Glover, Tanner testified that no one took his pulse and no one picked him up; they just let him bleed to death in the back seat of the car. R. 3502-3503.

The men were still sitting handcuffed when Sergeant Simmons and Officer Bell arrived at Habans. R. 4441-4442. Simmons testified that she and Officer Bell sought to speak to Major David Kirsch and Lieutenant Robert Italiano, the commander and assistant commander of the 4th District (R. 5618), to let them know what had happened at the mall, and to find out if the two incidents were related. R. 4440-4441. When she located Italiano and Kirsch, Simmons told them that Warren had discharged his weapon, and that this could be the victim. R. 4442. They told her, however, that the incidents were separate. R. 4442. When Simmons told Italiano that she would "go and write the report" about the shooting at the mall, he told her "No." R. 4444.

McRae, a member of the NOPD's Special Operation's Division (SOD), was among the officers at Habans School on September 2. R. 5482, 5489. At some point after the men had arrived, Tanner's vehicle was moved from its initial

location, and McRae removed items from the car, including a jug of gasoline, jumper cables, and tools. R. 3498, 3505-3506; 5527. McRae then moved the car once more, out of the schoolyard. R. 3505-3506, 5495. After the car sat there awhile, McRae, Scheuermann (who outranked McRae in the SOD) and Captain Jeff Winn (the head of the SOD), decided to move the car to the levee. R. 5495-5496. With Scheuermann following behind him, McRae got into Tanner's car and drove it to the spot they had discussed. R. 5496, 5728. He drove the car as far into the woods on the side of the levee as he could, and, leaving the car running, lit a flare and threw it into the car. R. 5497. As McRae began to walk up the levee, he saw that the flare had burned itself out. R. 5497. He turned around, fired one shot through the back window of the car to ventilate it, and the car began to burn, with Glover's body inside. R. 5497.

Later that afternoon, Tanner, King, and Calloway were released from Habans School. R. 3507-3510, 3626-3627. McRae was present when Tanner was released. R. 3510. When Tanner asked McRae about his ID badge, which McRae had taken from him earlier that day, McRae replied, "Nigga, it's with your car. That's where it's at." R. 3509-3510. Before King and Calloway were released, an officer Calloway identified as "Schumacher" told them, "your brother and your brother-in-law had been shot for looting." R. 3626. The men themselves were never questioned, however, about the circumstances of Glover's death. R. 3627.

It wasn't until two weeks later that Glover's body was finally recovered. R. 4268. Witnesses testified at trial that of hundreds of bodies recovered or autopsied after Hurricane Katrina, Glover's was the only one that had been burned. R. 4268, 4303. Because only "charred fragments" of Glover's body remained, no complete autopsy could be done, or cause of death determined. R. 4312-4315. And because McRae never wrote an official report of what he had done (R. 5563), it was not until a news report came to the attention of the FBI in February 2009 that a federal investigation was initiated (R. 4780).

3. The Cover-Up Of Warren's Role: Travis McCabe

Although Lieutenant Italiano had initially told Sergeant Simmons not to write a report about the Warren shooting, on December 2, 2005, he ordered her to write a report. R. 4457-4458. Working alone, Simmons interviewed Howard and Warren about the events that occurred at the mall. R. 4468-4470. In her report, she wrote that "that Linda Howard was on the balcony" on the morning of the shooting. R. 4471. Howard "observed the two subjects approaching, and she heard Officer Warren fire his gun after he had shouted, police, stop." R. 4471. Simmons also wrote that Howard "didn't see * * * anything in the guy's hand." R. 4471. Additionally, Simmons' report noted that Howard had told Simmons that she "didn't agree" with the shooting. R. 4472. Moreover, the report mentioned

that a bloody towel had been found down the road from the mall. R. 4473. Simmons submitted this report to Lieutenant Italiano. R. 4475-4483.

Simmons' original report was never found. Instead, sometime after she authored the report, someone, unknown to Simmons, replaced her narrative portion of the report with a false and misleading narrative about the shooting, introduced at trial as Government Exhibit 34. R. 4467-4485, 4495-4499. This false report states that:

- Linda Howard "was in a different position on the balcony and was unable to observed (sic) all that Officer David Warren observed prior to him discharging his firearm." Exh. 34, Narrative at 2.

- Captain David Kirsch and Lieutenant Robert Italiano conducted an "initial investigation" and "determined that the use of force by Officer Warren was justified and was within the guide lines of the Departmental Policy Chapter: 1.2 Use of Force." Exh. 34, Narrative at 3.

- After Kirsch and Italiano were notified, "a search of the immediate area, in the rear of the building, for evidence of a shooting was conducted and meet (sic) with negative results." Exh. 34, Narrative at 3.

The false report doesn't mention a bloody towel found down the road from the mall. Compare Exh. 34, Narrative at 3 with R. 4473. Moreover, contrary to the report, Italiano and Kirsch were never on the scene that morning, and did not conduct an investigation. R. 6067-6069, 6071-6075. And because Simmons had identified a bloody towel at the scene, the search that *was* conducted was not met with "negative results." Compare Exh. 34, Narrative at 3 with R. 4473.

It was not until a July 2009 FBI interview with McCabe that it became clear

what had happened to Simmons' original report. On that date, FBI Agent Ashley Johnson (Johnson) interviewed McCabe about the Warren shooting. R. 4802-4805. McCabe had been a sergeant with the 4th District in 2005, and Johnson thought that he might have information about the burned car and body on the levee. R. 4802. During the interview, McCabe told Johnson that he had learned about the Warren shooting from reading a police report. R. 4804. Agent Johnson asked McCabe whether, having reviewed the report, he "believed the burned body had a connection to the * * * Warren shooting." R. 4805. McCabe replied that "it was obvious and that it was common sense." R. 4805. McCabe told Johnson that in 2005, "he first read the report, and then he later went over and saw the burned car, and at that point he made the connection." R. 4805.

During the interview, Johnson also showed McCabe a copy of the narrative later introduced as Exhibit 34. R. 4805. After she did so, McCabe told her that he had authored "100 percent of the report." R. 4806. He then stated that "Sergeant Simmons had come to him because she had never written a report of that magnitude and requested his assistance[, and] that he actually typed the report as Sergeant Simmons dictated the information * * * to him." R. 4806. He also told Johnson that he participated in the interviews of both Warren and Howard about the shooting. R. 4806-4807.

When he testified before the grand jury on July 31, 2009 (R. 4809, 4811), McCabe repeated his claim about having interviewed Howard in connection with the shooting. R. 4820. He changed his story, however, regarding when he had connected the burned car to the Warren shooting, telling the grand jury that it was only "more recently when these newspaper articles came out" that "I found out that there was some connection with an incident that I had some knowledge about.[4] There may have been some connection. It happened about the same day where an officer was involved in a situation where he actually took a shot at an individual." R. 4817.

McCabe was subsequently charged with three criminal counts for authoring a false police report, making false statements, and giving false grand jury testimony regarding the shooting and subsequent burning of Glover's body. R. 344, 347-350. Specifically, Count 8 charged that McCabe had authored and submitted a false and misleading report with intent to impede, obstruct, and influence the investigation of Glover's death; Count 10 charged that he had knowingly made false statements when he told FBI agents that he collaborated with Simmons in writing the report, had interviewed Howard before writing the report, and that the report submitted to the NOPD was true and accurate; and Count

[4] In 2009, an article had appeared in the newspaper featuring an interview with William Tanner about the Glover incident. See R. 6238.

11 charged that he had knowingly made a false material declaration under oath when he testified before the grand jury that he had collaborated with Simmons in writing the report, that he had interviewed Howard before writing the report, that the report submitted was true and accurate, and that he had not connected the Warren shooting to the burned car on the levee until an account of the incident appeared in the newspaper several years later. See R. 347-350, R. 4817.

While McCabe testified at trial that he had written Exhibit 34 together with Simmons (R. 6242-6243), Simmons testified that she had, by herself, originally authored the police report, and that her version of the report was replaced with a false narrative. R. 4467-4485, 4495-4499. Simmons testified that she never spoke with McCabe about the report, and, indeed, would not have consulted with McCabe if she had questions because "Travis McCabe had less time on the job than I do." R. 4478-4479. Furthermore, contrary to McCabe's statement to the FBI and testimony that, along with Simmons, he had interviewed Howard in connection with the shooting (R. 6240-6241), both Simmons and Howard denied ever discussing the matter with McCabe (R. 3311, 4469). Agent Johnson testified at trial regarding McCabe's connecting the shooting to the burned car on the levee in 2005; McCabe denied having made the connection until 2009. R. 4805; R. 6238.

4. McCabe's Motion For A New Trial And The District Court's Decision

In February 2011, McCabe filed a motion for a new trial, based on "newly discovered evidence." See R. 2045-2054. In the motion, he alleged that in January 2011 he had become aware of an earlier draft of what the United States had labeled as the false narrative.[5] R. 2046. This earlier draft had allegedly been in the possession of David Warren. R. 2047-2048. As set forth in affidavits attached to McCabe's motion, Warren claimed that he received this draft narrative from Simmons in 2005, around the time it was originally written. R. 2064. McCabe argued that this was "compelling evidence that there was never another version of the report that differed in substance from Government Exhibit 34, as Simmons has claimed." R. 2048.

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[5] This draft is virtually identical to Exhibit 34, with just a few small differences. As recited by the district court:

> The words "hurriedly start" appear in paragraph 3 of the newly discovered narrative report. In government exhibit 34, "hurriedly started" appears instead of "hurriedly start." The words "Jefferson Parish Dispatcher" appear in the last paragraph of the newly discovered narrative report. In government exhibit 34, "Jefferson Parish Sheriff Office Dispatcher" appears in lieu of "Jefferson Parish Dispatcher." Finally, the word "shoot" is used in the last paragraph of the newly discovered narrative report. In government exhibit 34, the word "shot" appears instead of "shoot."

R. 2262.

The district court held an evidentiary hearing on McCabe's motion in April 2011. At the hearing, Warren testified that he had received the narrative directly from Simmons in 2005. R. 2287-2288. Warren testified that no one was present when Simmons gave him the report, and that he had not discussed having received the report from Simmons with anyone, including his defense attorneys, until near the end of his trial. R. 2293, 2304-2306. He alleged that what caused him to mention the report to his attorneys, shortly before trial ended, was his noticing a discrepancy between the version of the report Simmons had purportedly given him and the version of the report entered into evidence as Exhibit 34. R. 2290, 2302. Specifically, while Exhibit 34 incorrectly stated that Warren had been the one to contact Simmons on the morning of the shooting,[6] Warren testified that, after hearing the exhibit repeatedly mentioned at trial, it occurred to him that "his copy" of the report did not contain that mistake. R. 2290, 2302. When confronted with his copy of the report during the evidentiary hearing, however, Warren admitted that both it and Exhibit 34 contain the same mistake about Warren contacting Simmons, and that he was thus "mistaken at trial when [he] notified [his] counsel of what [he] thought was a discrepancy." R. 2302-2303.

[6] At trial, Howard, Warren, and Simmons all testified that Howard was the one who contacted Simmons about the shooting. R. 3300, 4431, 5062-5063.

Simmons testified at that same hearing that she never provided Warren with a copy of either her original report, or of the report introduced as Exhibit 34. R. 2409.

On May 4, 2011, the district court entered an order granting McCabe's motion. R. 2258-2273. The court analyzed McCabe's motion under the five-prong test set forth in *Berry* v. *State*, 10 Ga. 511 (1851), and reiterated in *United States* v. *Wall*, 389 F.3d 457, 467 (5th Cir. 2004), cert. denied, 544 U.S. 978 (2005), which requires that a defendant seeking a new trial prove that: "(1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal." R. 2263; see also R. 2262-2272.

The district court found that the evidence was newly discovered, holding that Warren had credibly testified that he received the report from Simmons and had not notified anyone of the report; and that McCabe had credibly testified that he did not know Warren was in possession of this report. R. 2263-2264. The court also found that McCabe's counsel was duly diligent, because the court had not been presented with any evidence that McCabe had a reason to request the report from Warren, and because McCabe's counsel had attempted to interview Simmons

before trial. R. 2265. As to prongs 3 and 4, the court found that the evidence was material and was not merely cumulative or impeaching. R. 2266. Finally, as to prong 5, the court found that the evidence would be likely to produce an acquittal if a new trial were held. R. 2270. The court first observed that, "the resolution of this [question] primarily turns on whether Warren received the newly discovered narrative report from Simmons." R. 2268. The court recited Warren's testimony that when Simmons gave him the report in December 2005, they were the only people in the room, and no one else could therefore corroborate his account. R. 2268. The court further acknowledged Warren's testimony that "he told no one about receiving the report from Simmons until he told his lawyers about it toward the end of the November 2010 trial." R. 2268. The district court also acknowledged Simmons testimony that she did not author the original narrative report that was government Exhibit 34, did not author the newly discovered report, and did not give Warren a copy of the report. R. 2268-2269.

Noting that it was faced with a "difficult credibility determination," the court observed that "[o]n one hand, Warren is a convicted felon," and that, "[o]n the other hand, Simmons admitted to testifying falsely under oath before the federal

grand jury."[7] R. 2269. However, the court found Warren's testimony that he received the report from Simmons sufficiently credible. R. 2269.

The court rejected the United States' contention that the newly discovered report was simply an earlier draft of McCabe's fraudulent report, holding that the United States had not presented any evidence to support its contention, and that, if its contention were true, the court found it "exceedingly difficult to believe that McCabe and Warren would have waited until now to bring the newly discovered

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[7] Simmons had originally testified before the grand jury that she was the author of the report later submitted as Exhibit 34. See R. 4511-4515. She later testified at trial that although she didn't write the body of the fabricated report, because her name was on the report and her handwriting was on the face sheet, she couldn't see a way to tell the grand jury that it wasn't hers. R. 4511-4514. Immediately after the grand jury session, Simmons called a lawyer, told him about the report, and made arrangements to go back before the grand jury to correct the lie she had told. R. 4514-4516.

Simmons appeared before the grand jury again on June 5, 2009. See Purnella Simmons Grand Jury Testimony, Exh. NT-4 at 1. On that occasion, she was represented by counsel. Exh. NT-4 at 4. During this second grand jury appearance, Simmons testified that while the handwritten face sheet to the report that later became Exhibit 34 was written by her, the typed narrative portion was in fact not what she had submitted regarding the Glover shooting. Exh. NT-4 at 5-7. Simmons stated that she had given false testimony on the first occasion because she was "embarrassed," felt bad for herself and the New Orleans Police Department that someone would have changed her report, and that although she had wanted to say that she hadn't written the report, the fact that the face sheet was hers prompted her to lie. Exh. NT-4 at 6. She testified that she could tell just by looking at the report that it wasn't hers, because: 1) the report was typed on white paper, whereas departmental policy required that their reports be formatted to fit on a particular form, and 2) she would have handwritten the page and item numbers on the report. Exh. NT-4 at 7-9.

narrative report to light and assert their fabricated story." R. 2269. The court continued:

> As stated previously, why not bring it up during the trial? Why not bring it up in connection with the first motion for a new trial? Additionally, assuming that Warren did not receive the newly discovered narrative report from either McCabe or Simmons, what sense does it make for Warren to fortuitously assert that he received the report from Simmons? The only person it helps is McCabe; there is no benefit to Warren.

R. 2269. The court also noted that because McCabe did not become aware of the investigation against him until July 2009, when he was first interviewed by an FBI agent and a government prosecutor, "[w]hen Warren delivered the newly discovered narrative report to his attorney in May 2009, Warren could not have known that the contents of the newly discovered narrative report and the fact that Warren received it from Simmons would have been critical to the government's case against McCabe." R. 2269-2270.

Finally, the district court called into question Simmons' credibility, noting that she had stated in an affidavit in connection with the evidentiary hearing that her original report had a border around it, but had not mentioned this fact during her trial testimony. R. 2270.

Based on this review of the record, the court concluded that the obstruction charge was significantly undercut by the newly discovered evidence. R. 2271. The court also concluded that the false statement and perjury charges pertained to

statements regarding the accuracy and preparation of the report. R. 2271. The court held that "[w]ere the jury to conclude that there never were two substantively different versions of the narrative report and that the version of events given by Simmons regarding the preparation of the report was false, a jury would probably resolve, in McCabe's favor, the conflicting testimony about whether he assisted Simmons in preparing the report, whether he interviewed Howard, whether he believed the report was true and accurate, and when he learned of the connection between the shooting and the burning of the vehicle." R. 2271. The court stated that although the false statement and perjury charges went to issues other than the statement alone, the court had no way of knowing the basis for the jury's conviction, as it did not render any special findings. R. 2271 & 2271 n.12, n.14. Concluding that the newly discovered evidence "casts grave doubt" on McCabe's criminal conviction, the district court granted him a new trial. R. 2272-2273.

SUMMARY OF ARGUMENT

A. David Warren

1. The district court's instructions on manslaughter were wholly appropriate and supported by the evidence. An instruction may be given on a lesser included offense "if (1) the elements of the lesser offense are a subset of the elements of the charged offense (statutory elements test), and (2) the evidence at trial permits a rational jury to find the defendant guilty of the lesser offense yet acquit him of the

greater." *United States* v. *Avants*, 367 F.3d 433, 450 (5th Cir. 2004) (internal quotation marks and citation omitted). It is beyond dispute that "[v]oluntary manslaughter is a lesser included offense of murder." *United States* v. *Browner*, 889 F.2d 549, 552 (5th Cir. 1989) (discussing murder under 18 U.S.C. 1111 and voluntary and involuntary manslaughter under 18 U.S.C. 1112). It is also uncontroversial that "the charge on the greater offense of murder [is] sufficient notice to the defendant that he [might] be called to defend the lesser included charge [of voluntary manslaughter]." *Fransaw* v. *Lynaugh*, 810 F.2d 518, 529 (5th Cir.) (citation and internal quotation marks omitted), cert. denied, 483 U.S. 1008 (1987). And, while Warren argues that he had a unilateral right to forgo instruction on the lesser-included offenses, his argument is incorrect. See *United States* v. *Deisch*, 20 F.3d 139, 152 (5th Cir. 1994), overruled on other grounds by *United States* v. *Doggett*, 230 F.3d 160, 165 (5th Cir. 2000), cert. denied 531 U.S. 1177 (2001).

2. The district court did not abuse its discretion in denying Warren's requests for severance or for a mistrial. See *United States* v. *Smith*, 281 F. App'x 303, 304 (5th Cir.) (unpublished), cert. denied, 129 S. Ct. 516 (2008); *United States* v. *Zamora*, 661 F.3d 200, 211 (5th Cir. 2011). In light of the common facts, participants, evidence, and witnesses relevant to all three defendants, joinder of the cases for trial was wholly appropriate. See *United States* v. *Krenning*, 93 F.3d

1257, 1266 (5th Cir. 1996). Warren has not met his "heavy burden" of showing that he was prejudiced by the joint trial, see *Smith*, 281 F. App'x at 304, and, given the substantial evidence against him, the testimony of which he complains – some of which, indeed, had nothing to do with Warren himself – cannot be said to have had a substantial impact upon the jury verdict against him, see *Zamora*, 611 F.3d at 211.

3. The United States complied with all of its *Brady* v. *Maryland*, 373 U.S. 83 (1963), obligations. Because Warren used at trial the evidence he now complains was suppressed, his *Brady* argument must fail. See *United States* v. *McKinney*, 758 F.2d 1036, 1049-1050 (5th Cir. 1985).

4. The district court did not abuse its discretion in denying the defendants' request to introduce evidence of Glover's distant criminal record; declining to allow evidence that there was a pry bar present in the truck Glover was driving at the time of the incident; allowing the United States to offer evidence of Warren's experience with weapons; and in limiting the amount of evidence the defendants could present regarding the effects of Hurricane Katrina. Each of these rulings was well within the court's discretion.

5. This court has previously held that 18 U.S.C. 924, as applied to law enforcement officers, violates neither the Due Process nor Equal Protection Clauses of the Constitution. See *United States* v. *Ramos*, 537 F.3d 439, 456-458

(5th Cir. 2008), cert. denied, 129 S. Ct. 1615 (2009). Warren's case cannot be meaningfully differentiated from the facts at issue in *Ramos*. Because 18 U.S.C. 924 and 18 U.S.C. 242 each require proof of an element the other does not, Warren's Double Jeopardy claim is incorrect. See *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Finally, because his 309-month sentence is completely reasonable, his Eighth Amendment excessive punishment argument must also fail.

6. Given the district court's clear statement that it intended to exercise its discretion in sentencing Warren consecutively on Counts 1 and 2 (R. 6895), this Court need not address his argument that 18 U.S.C. 924(j) does not require mandatory consecutive sentencing. See *United States* v. *Candrick*, 435 F. App'x 404, 406 (5th Cir.), cert. denied, No. 11-7239, 2011 U.S. LEXIS 8892 (Dec. 12, 2011).

B. Gregory McRae

1. The evidence presented at trial was more than sufficient to support McRae's conviction for obstruction of justice in violation of 18 U.S.C. 1519. "[T]he standard of review for sufficiency of circumstantial evidence is the same as it normally would be for direct evidence." *United States* v. *Moreno-Gonzalez*, 662 F.3d 369, 372 (5th Cir. 2011). The United States presented a strong circumstantial case against McRae, sufficient to allow the jury to conclude that he was guilty of the charged crime.

2. Given the conduct with which he was charged, and of which the jury found him guilty, McRae cannot reasonably argue that 18 U.S.C. 1519 is unconstitutionally vague. His act of burning a body in order to conceal evidence related to a police shooting plainly falls within the language of the statute. Cf. *United States* v. *Hunt*, 526 F.3d 739, 741-742 (11th Cir. 2008).

3. Considering the extensive evidence at trial regarding the effect of McRae's act on the Glover family's ability to find out what happened to Henry Glover, as well as its impact on the investigation of Glover's death, McRae's conviction for willfully depriving Glover's survivors of their right of access to courts should stand.

4. McRae's act of removing Tanner's car from Habans School with the intent to burn it at the levee, and his subsequent burning of the vehicle, represented a continuing course of conduct violating Tanner's right to be free from an unreasonable seizure. McRae himself admitted to facts demonstrating that he knew he was depriving an individual of ownership of his car. His conviction for violating Tanner's Fourth Amendment rights should not be overturned.

5. Because Congress clearly intended 18 U.S.C. 844(h) to provide a separate punishment for felony acts committed with fire, even when those felony acts themselves already were enhanced because of the use of fire, McRae's separate punishments for violating 18 U.S.C. 242 and 18 U.S.C. 844(h) do not

violate Double Jeopardy principles. See *United States* v. *Creech*, 408 F.3d 264, 272-273 (5th Cir.), cert. denied, 546 U.S. 1050 (2005); *United States* v. *Colvin*, 353 F.3d 569, 575 (7th Cir. 2003) (en banc), cert. denied, 543 U.S. 925 (2004).

C. United States' Cross-Appeal Regarding Travis McCabe

The district court abused its discretion when it granted McCabe a new trial on the basis of evidence Warren claimed to have possessed. Because McCabe presented no evidence that he ever asked Warren whether he had received a copy of the report in question from Simmons, despite the likelihood that Warren – the subject of the report – could potentially have such evidence, he cannot be said to have been diligent. See *United States* v. *Sullivan*, 112 F.3d 180, 183 (5th Cir. 1997). The district court erred in shifting the burden of proof to the United States on the diligence prong. See *United States* v. *Freeman*, 77 F.3d 812, 817 (5th Cir. 1996) ("[The *Berry*] rule requires *a defendant*, moving for a new trial based on newly discovered evidence, to show that" each of the factors have been met) (emphasis added). The district court also clearly erred in its evaluation of the facts and its analysis of Warren's supposed lack of interest in the outcome of McCabe's motion. See *United States* v. *Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.) ("It would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on

themselves. * * * Such testimony would be untrustworthy and should not be encouraged."), cert. denied, 506 U.S. 890 (1992). Finally, given the independent evidence presented at trial on the 18 U.S.C. 1001 and 18 U.S.C. 1623 charges against McCabe, the district court erred in also granting a new trial on these counts.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY ON MANSLAUGHTER

A. Standard Of Review

This Court has held that an instruction may be given on a lesser included offense "if (1) the elements of the lesser offense are a subset of the elements of the charged offense (statutory elements test), and (2) the evidence at trial permits a rational jury to find the defendant guilty of the lesser offense yet acquit him of the greater." *United States* v. *Avants*, 367 F.3d 433, 450 (5th Cir. 2004) (quotation marks and citation omitted). This Court reviews "the first prong *de novo*; the second, for abuse of discretion." *Ibid.*

B. Voluntary Manslaughter Under 18 U.S.C. 1112 Is A Lesser Included Offense Of Murder Under 18 U.S.C. 1111

Warren was charged in Count 1 of the indictment with depriving Glover of the right to be free from the use of unreasonable force by a law enforcement officer

in violation of 18 U.S.C. 242. R. 344-345. Count 2 charged Warren with use of a firearm in furtherance of a felony in "circumstances constituting murder" under 18 U.S.C. 1111, and in violation of 18 U.S.C. 924(c) and 18 U.S.C. 924(j). R. 345. 18 U.S.C. 924(j) states that:

> A person who, in the course of a violation of [18 U.S.C. 924](c), causes the death of a person through the use of a firearm, shall—
>
> (1) if the killing is a murder (as defined in [18 U.S.C. 1111]), be punished by death or by imprisonment for any term of years or for life; and
>
> (2) if the killing is manslaughter (as defined in [18 U.S.C. 1112]), be punished as provided in that section.

Section 1111 defines murder as "the unlawful killing of a human being with malice aforethought." Section 1112 defines voluntary manslaughter as "the unlawful killing of a human being without malice[,] upon a sudden quarrel or heat of passion." The district court appropriately instructed the jury that, if it found Warren guilty of violating 18 U.S.C. 924(c), it "must then determine if the defendant caused the death of Henry Glover through the use of a firearm, and whether the killing is a murder or a manslaughter." R. 6801. The court then defined murder and manslaughter as stated in Section 1111 and 1112. Warren argues, however, that "manslaughter is not a lesser included offense for felony murder" (Warren Br. 29), and that the district court therefore erred in giving this

instruction. This argument represents both a misunderstanding of the charge against him and a mistaken interpretation of settled law.

This Court held in *United States* v. *Browner*, 889 F.2d 549 (5th Cir. 1989), that "[v]oluntary manslaughter is a lesser included offense of murder."[8] *Id.* at 551-552 (discussing 18 U.S.C. 1111 and 18 U.S.C. 1112). *United States* v. *Miguel*, 338 F.3d 995 (9th Cir. 2003), which Warren cites in support of his argument, is inapposite. See Warren Br. 29. While it may well be true that manslaughter is not a lesser-included offense of felony murder, the point is irrelevant, because Warren was not charged under a felony-murder statute.

Warren also argues that the elements of manslaughter were not "specified in the jury charges." Warren Br. 30. But, quite to the contrary, the district court charged the jury that "manslaughter is defined as an unlawful killing without malice, that is, upon a sudden quarrel or heat of passion" (R. 6802), the precise language used in 18 U.S.C. 1112, and the same language Warren cites in his brief

[8] This Court observed in *Browner* that while the relationship between murder and voluntary manslaughter may not be apparent on the face of the statutes, "[t]he common-law background clarifies this relationship. * * * [A]dequately provoked heat of passion *negates* malice in an intentional, unjustified killing. Since malice is an element of murder, no murder can occur when a sufficient provocation induces the requisite heat of passion. Thus, the malice element of the traditional offense of murder implicitly forces prosecutors to *disprove* the existence of adequate provocation when the evidence suggests that it may be present." *Browner*, 889 F.2d at 552.

as having been lacking from the district court's instruction. There was no error in the instructions.

C. The Indictment Provided Warren Sufficient Notice Of The Availability Of The Lesser Included Offense Instruction

Warren also argues that the district court's instruction unconstitutionally "expand[ed] the indictment without input from the Grand Jury, constructively amending it." Warren Br. 30. This argument, too, must fail.

This Court has clearly held that the "lesser included offense doctrine" "permits the court to charge the jury on a lesser *unindicted offense* where that offense is complete upon commission of 'some of the elements of the crime charged.'" *Fransaw* v. *Lynaugh*, 810 F.2d 518, 529 (5th Cir.) (citing *Berra* v. *United States*, 351 U.S. 131 (1956)) (emphasis added), cert. denied, 483 U.S. 1008 (1987). Because voluntary manslaughter is complete upon commission of some of the elements of murder, see *Browner*, 889 F.2d at 552, there was no error in the district court's instruction.

D. The Evidence Presented At Trial Supported A Manslaughter Instruction

Warren further alleges that the district court erred in including a manslaughter instruction because "it is undisputed that throughout the events culminating in the shooting of Glover, Warren was observed as calm, cool, and collected." Warren Br. 31. This argument is without merit.

A manslaughter instruction is appropriate where the evidence is sufficient to show that a defendant has killed "in the heat of passion in response to a sufficient provocation." See *Browner*, 889 F.2d at 552. Such a "'heat of passion' is a passion of fear or rage in which the defendant loses his normal self-control as a result of circumstances that would provoke such a passion in an ordinary person, but which did not justify the use of deadly force." *Lizama* v. *United States Parole Comm'n*, 245 F.3d 503, 506 (5th Cir.) (citing *Browner*, 889 F.2d at 552 and discussing voluntary manslaughter under 18 U.S.C. 1112(a)), cert. denied, 534 U.S. 904 (2001).

In this case, the evidence presented at trial more than supported the district court's decision to include a manslaughter instruction. Despite his claim now that he shot Glover in a "calm, cool, and collected" fashion (Warren Br. 31), Warren went to some length at trial to present evidence showing that both his state of mind after Hurricane Katrina, and Glover's actions as he arrived at the mall, justified the shooting. Warren testified to his fatigued state and heightened sense of vulnerability after Hurricane Katrina. He testified that in the days following the storm he got very little sleep, working shifts of between 12 and 24 hours and then staying awake to keep an eye on the homes in his neighborhood, some of which had been looted. R. 5033-5034. Warren also testified to a number of factors that "made me feel more vulnerable," and "raise[d] the danger level." R. 5035-5037.

These included the fact that the police communications system had gone down, and that, due to flooding, there was no way to transport people to jail. R. 5035-5037. He testified that, "[o]ne of the determining facts of being a police officer is the ability to be able to incarcerate somebody, the ability to say if I catch you doing this, I can take you to jail. Without that ability to be able to do that, it raises * * * my senses, that it raises the boldness or the ability for somebody to be able to say, I don't care. There's no jail to take me to." R. 5037.

Warren also testified that a police officer was shot in the days after the storm and that the shooting had heighted his sense of alarm. R. 5038-5039. Warren had been on guard at another shopping center after the storm, when a call came over the radio that an officer was "down." R. 5038. Warren left his post and headed to assist another unit that had spotted the perpetrators' vehicle. R. 5038. Upon his arrival, as the responding officers were trying to pull the suspects from the car, Warren heard one of the officers say, "he's 95-G, he's 95-G, which means he has a gun." R. 5038. When one of the suspects was tasered by an officer, the man began "screaming: I am a soldier, I'm a soldier, I can take the pain." R. 5038. Warren testified, "that scared me. You know, we had an officer shot * * * in the head." R. 5038-5039. Warren also testified that, several days after that incident, he remembered seeing Oakwood Mall burning. R. 5039.

As to the Glover shooting itself, Warren's testimony was aimed at showing that he shot Glover in response to a sudden provocation. Warren testified that as he was guarding the substation, he "heard a lot of engine noise. * * * That * * * immediately drew my attention to the back of the building." R. 5055. He testified that after he ran toward the balcony, he observed a stolen pickup truck "c[oming] in quickly." R. 5055-5056. Warren recalled that the vehicle "came to a hard, fast stop." R. 5055. Then both doors opened immediately and he saw the passenger and the driver exit the vehicle. R. 5055. Warren testified that he was "very concerned," and that the instant the driver and passenger jumped out, he screamed at them "police, get back. Police get back." R. 5056. Warren testified that "from the time I screamed and the time they were moving, I had about a second to react to it." R. 5059.

Taken together, the evidence presented about Warren's sense of vulnerability after Katrina, the shooting of a police officer, the looting of homes and burning of the Oakwood Mall, the lack of radio communication or access to jails, and especially the rapidly developing circumstances that preceded the shooting, was more than sufficient to allow the jury to find that Warren acted in "a passion of fear or rage in which [he] los[t] his normal self-control as a result of circumstances that would provoke such a passion in an ordinary person," but that

the circumstances nevertheless "did not justify the use of deadly force." *Lizama*, 245 F.3d at 506. The trial court's exercise of discretion should not be disturbed.

E. A Defendant Does Not Have The Unilateral Right To Forgo A Lesser Included Offense Instruction

Finally, Warren argues that "th[e] decision to include the jury instructions is a strategic one that is reserved for the defendant," and that he had a unilateral right to determine whether a lesser-included-offense instruction should be given. Warren Br. 26-27. He argues that the district court therefore erred in giving the instruction over his objection. Warren Br. 26-27.

Warren's argument represents a misstatement of the law. While it is true that courts, including this one, have held that "a criminal defendant is entitled to make a strategic choice to forgo the lesser included offense instruction," see *United States* v. *Stafford*, 983 F.2d 25, 27 (5th Cir. 1993), this Court has never held that a judge is *prohibited* from giving a lesser-included instruction over a defendant's objection. Quite the opposite is true. In *United States* v. *Chase*, 887 F.2d 743 (5th Cir. 1988), this Court held that "[e]ven where the defendant presents a totally exculpatory defense, the [lesser included offense] instruction should nevertheless be given if the prosecution's evidence provides a 'rational basis' for the jury's finding the defendant guilty of a lesser offense." *Id*. at 747 (quoting *United States* v. *Payne*, 805 F.2d 1062, 1067 (D.C. Cir. 1986)) (citations omitted); accord *United States* v. *Deisch*, 20 F.3d 139, 152 (5th Cir. 1994), overruled on other grounds by

United States v. *Doggett*, 230 F.3d 160, 165 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001). And, in *Fransaw*, this Court noted specifically that "the [lesser included offense] doctrine is available * * * to the government *as well as* to defendants." 810 F.2d at 529 (citation omitted; emphasis added). The *Fransaw* decision, in turn, relied upon the Supreme Court's decision in *Keeble* v. *United States*, 412 U.S. 205 (1973), which makes clear that "the lesser included offense doctrine developed at common law to assist *the prosecution* in cases where the evidence failed to establish some element of the offense originally charged." *Id.* at 208 (emphasis added).

Finally, the plain text of Federal Rule of Criminal Procedure 31(c) makes clear that "a defendant *may be found guilty* of * * * an offense necessarily included in the offense charged." Fed. R. Crim. P. 31(c)(1) (emphasis added). For all of these reasons, Warren's argument that it was his option alone to decide on the jury charge must certainly fail.

II

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT JOINDER WAS PROPER, OR IN DENYING WARREN'S MOTIONS FOR SEVERANCE OR MISTRIAL

A. Standard Of Review

This Court "review[s] the denial of a motion to sever for an abuse of discretion, and * * * will not reverse the district court's decision unless there is

clear, specific and compelling prejudice that resulted in an unfair trial. This places a heavy burden on the defendant." *United States* v. *Smith*, 281 F. App'x 303, 304 (5th Cir.) (unpublished) (internal quotation marks and citations omitted), cert. denied, 129 S. Ct. 526 (2008). This Court also "review[s] a denial of a motion for mistrial for abuse of discretion. If a defendant moves for a mistrial on the grounds that the jury heard prejudicial testimony, a new trial is required only if there is a significant possibility that the prejudicial evidence had a substantial impact upon the jury verdict, viewed in light of the entire record." *United States* v. *Zamora*, 661 F.3d 200, 211 (5th Cir. 2011) (internal quotation marks and citation omitted).

B. The District Court Did Not Abuse Its Discretion In Holding That Joinder Was Proper

Federal Rule of Criminal Procedure 8(b) states that defendants may be joined in trial if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." This Court's precedents make clear that the Rule "does not require * * * that each defendant have participated in the same act or acts" in order for joinder to be proper. *United States* v. *Krenning*, 93 F.3d 1257, 1266 (5th Cir. 1996). "All that is required is a series of acts unified by some substantial identity of facts or participants." *Ibid.* (internal quotation marks and citations omitted). "Generally, the propriety of joinder under Rule 8 is to be judged from the allegations of the indictment, which for these purposes are assumed to be true." *United States* v.

Whittington, 269 F. App'x 388, 401 (5th Cir.) (unpublished) (quoting *United States* v. *Chagra*, 754 F.2d 1186, 1188 (5th Cir.), cert. denied, 474 U.S. 922 (1985)) (internal quotation marks omitted), cert. denied, 553 U.S. 1074, and 555 U.S. 865 (2008).

In this case, the United States asserted before trial that "Warren's alleged shooting of Henry Glover, the alleged beating of [King] and [Tanner], the alleged burning of a car containing Henry Glover's body by Scheuermann and McRae, the alleged obstruction of the investigation into Henry Glover's shooting, and the alleged false statements made in connection with such investigation share many of the same facts and participants and will require * * * much of the same evidence and many of the same witnesses." Warren Supp. R. 87. As the district court found, "although Warren [wa]s charged in only two counts of the eleven-count superseding indictment, nine of the counts explicitly mention either Warren and/or Henry Glover's shooting or burning." Warren Supp. R. 89. Under such circumstances, the district court clearly did not abuse its discretion in holding that joinder was proper. See *Krenning*, 93 F.3d at 1266; *United States* v. *Laca*, 499 F.2d 922, 925 (5th Cir. 1974) ("It is clear that there is no misjoinder simply because one defendant is not charged in each count of the indictment since Rule 8(b) clearly states that 'all of the defendants need not be charged in each count.'").

C. The District Court Did Not Abuse Its Discretion In Denying Warren's Pre-Trial Motion For Severance

"If defendants have been properly joined, the district court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable determination of guilt or innocence." *United States* v. *Bermea*, 30 F.3d 1539, 1572 (5th Cir. 1994) (citing *Zafiro* v. *United States*, 506 U.S. 534 (1993)), cert. denied, 513 U.S. 1156, and 514 U.S. 1097 (1995).

Warren asserts that he should have been granted a severance before trial because of the risk of a spillover effect from being tried alongside the other defendants. See Warren Br. 36. The district court correctly rejected this argument, because "[a] spillover effect, by itself, is an insufficient predicate for a motion to sever." See Warren Supp. R. 93 (quoting *United States* v. *Hidalgo*, 385 F. App'x 372, 380 (5th Cir. 2010) (unpublished)).

The case of *United States* v. *Cortinas*, 142 F.3d 242 (5th Cir.), cert. denied, 525 U.S. 897, and 525 U.S. 1032 (1998), cited by Warren for support (Warren Br. 36-38), is inapposite. In *Cortinas*, this Court ruled on the severance claims of several defendants who had been tried and convicted of drug trafficking. See *id.* at 248-249. The defendants in question had been involved in trafficking activities through 1989, when their involvement ended. *Id.* at 248. After that point, one of the individuals with whom the defendants had been trafficking separately became

involved in trafficking activities with members of the Bandido Nation Motorcycle Club. *Ibid.* The Bandido Nation proceeded to engage in a number of violent acts. *Id.* at 246. The defendants, however, had nothing to do with the Bandido Nation, or with any of the drug trafficking that their former associate engaged in after 1989. *Id.* at 248. This Court held that under such circumstances, the defendants were "prejudiced by the testimony of the Bandido's tactics and activities, including the highly inflammatory evidence of the Michigan shooting[, which resulted in the death of a 14-year old boy]." *Ibid.*

Unlike the *Cortinas* case, where the activities in question were both temporally separate and involved entirely unrelated acts, in this case the United States alleged one chain of events which began with Warren's shooting of Glover, continued with the burning of Glover's body, and ended with the writing of a false report about the incident. See Warren Supp. R. 87-88. Many of the government's witnesses, including testifying officers and investigating agents, were the same for all defendants, and, indeed, the mere explanation of who Glover was, and how his body came to be burned, involved an understanding of the fact that he had been shot by Warren and then transferred to the nearby police compound at Habans School. See Warren Supp. R. 87-88. Moreover, the chain of events surrounding the shooting and burning happened not over a period of years, but over a period of

hours. See Warren Supp. R. 87-88. Given those allegations, the district court made no error in denying Warren's pretrial motion for severance.

D. The District Court Did Not Abuse Its Discretion In Denying Warren's Motion For Severance During Trial

Warren alleges that various occurrences during and after trial establish the specific prejudice that he suffered by being tried jointly with co-defendants McCabe, Scheuermann, McRae, and Italiano. See Warren Br. 38-44. For the reasons explained below, these claims must also fail.

1. Improper Joinder With McCabe

Warren claims that the "post-trial granting of a new trial to McCabe * * * significantly affects the issue of improper joinder." Warren Br. 38. As discussed *infra*, Section XII, the district court granted McCabe a new trial on the basis of Warren's testimony that, in December 2005, Simmons gave Warren a copy of the police report that is "substantively identical to the report" that the United States argued that McCabe had fabricated, and that the jury convicted him of having fabricated. See R. 2267.

Based upon the district court's new trial ruling, Warren now seems to be arguing that since he was the subject of the report described as fraudulent, he was somehow prejudiced by being jointly tried with McCabe. Warren Br. 38-40. More specifically, Warren alleges that the "improper joinder" resulted in his "being tried

for a 'cover up' with Italiano and McCabe." Warren Br. 40. These claims lack merit.

As a primary matter, Warren was never tried for a cover up of the crime and the United States never suggested that he played any role in authoring the false report. Rather, the district court repeatedly reminded the jury that each of the defendants was being tried separately, and that there was no conspiracy charge in this case. See R. 4232, 5197, 6790-6791. It is thus unclear on what basis Warren makes this allegation.

To the extent that Warren seeks a ruling that joinder was improper based upon the new trial ruling alone, this claim also cannot succeed. The alleged newly discovered evidence was "discovered" after trial, when the question of severance was moot. More importantly, McCabe's motion was based on evidence that Warren himself claimed to possess. Given that Warren himself cannot seek a new trial based upon evidence that was in his own possession, since it was not "newly discovered" as to him, such evidence is also an inappropriate basis to claim that he should have been granted a severance. See *United States* v. *Wall*, 389 F.3d 457, 467 (5th Cir. 2004), cert. denied, 544 U.S. 978 (2005) (a defendant seeking a new trial must show that "the evidence is newly discovered and was unknown to the defendant at the time of trial").

2. Improper Joinder With McRae And Scheuermann

Warren also alleges that he was prejudiced by being tried alongside Scheuermann and McRae. Warren Br. 40-43. He points to evidence regarding McRae's burning of Tanner's car and Glover's body, and of Scheuermann and McRae's use of racial slurs and their assault upon Tanner and Calloway. Warren Br. 40-43. These claims also lack merit.

The United States never charged Warren with using racial slurs, beating any of the victims, or having any role whatsoever in burning Glover's body. Nor did the United States suggest that Warren knew anything about those actions before they occurred. Moreover, the court repeatedly instructed the jury that it was to try each of the defendants separately. For instance, directly after accepting into evidence a limited number of photographs of Glover's remains, the district court reminded the jury that it should "consider the evidence as to each defendant separately and individually," and that "the fact that you may find one or more of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant."[9] R. 4232. In its final charge, the district court again instructed the jury to consider the case and evidence

[9] In any event, evidence regarding the chain of events that took place from the time Glover was shot until the time that his body was identified through DNA evidence was wholly relevant to Warren, as the United States had to prove that death resulted from Warren's actions. R. 344-345, 6793.

against each defendant separately. R. 6790-6791. And, indeed, it is clear that the jury did just this, as it acquitted defendants Scheuermann and Italiano entirely (R. 6866-6867), and acquitted McRae of the unreasonable force count (R. 6866).

"Juries are presumed to follow their instructions." *Zafiro*, 506 U.S. at 540-541 (citation omitted). Instructions such as those given in this case "suffice[] to cure any possibility of prejudice." See *id.* at 541; see also *United States* v. *Harrelson*, 754 F.2d 1153, 1175 (5th Cir.) (internal quotation marks and citations omitted) (Spillover "is best avoided by precise instructions to the jury."), cert. denied, 474 U.S. 908, and 474 U.S. 1034 (1985).

3. Improper Joinder With Italiano

Warren also, in a footnote, alleges adverse spillover from Fifth Amendment issues that arose with two of Italiano's witnesses. Warren Br. 43-44 n.11. The district court handled these issues outside the presence of the jury (R. 5962-5973, 6216-6224), and it is unclear why either of these witnesses' testimony should have served as the basis for severance.

Finally, Warren alleges prejudice on the basis that the United States chose to call a witness, Erin Reilly, who provided testimony relevant to the cases of both Italiano and Warren. See Warren Br. 44 n.13. That is not a basis for severance. See *Zafiro*, 506 U.S. at 540.

E. The District Court Did Not Abuse Its Discretion In Denying Warren's Motion For A Mistrial

Finally, Warren claims that he was prejudiced by improper prosecutorial cross-examination and improper closing arguments, and that the district court erred in not granting a mistrial. The district court did not abuse its discretion.

1. Warren's Motion For A Mistrial

Warren's motion for a mistrial arose out of a one-sentence remark by the prosecutor on cross-examination. Warren testified that in November 2005, as he was working at the Royal Sonesta temporary police headquarters, he received a call from someone who he believed might have been the victim's mother, Edna Glover, reporting that her son had been shot near a Chuck E. Cheese, that he was subsequently taken to Habans School, and that he was in a car on the levee, which had been burned. R. 5169-5170. Despite knowing that Chuck E. Cheese was in the same mall where he had shot at someone, Warren testified that he didn't provide the caller with any information at all, except to suggest she call or go to the 4th District station. R. 5171. He did not tell her that he may have shot her son, and did not relay information about the call to a sergeant or anyone else. R. 5171. Nor did he take a follow-up number, or document receipt of the call. R. 5184. The prosecutor then asked, "in any event, by that point you were part of this 4th District fraternity and you knew to keep your mouth shut about what Ms. Glover had told you?" R. 5196.

The district court immediately sustained Warren's counsel's objection to this question (R. 5196), instructed the jury to disregard the prosecutor's last comment, and repeated at length its prior instruction that each of the defendants were being tried separately and the evidence as to each defendant should be considered separately (R. 5197-5198). The court also asked the jury, "Do each of you understand my instructions?" to which the jury members replied, "Yes." R. 5198.

This Court has held that "[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *United States* v. *Lowenberg*, 853 F.2d 295, 302 (5th Cir. 1988) (citation omitted), cert. denied, 489 U.S. 1032 (1989). "Instead, [a defendant] must establish that the comment substantially affected the jury's verdict." *United States* v. *Pando Franco*, 503 F.3d 389, 395 (5th Cir. 2007). To make this assessment, this Court "focuses on three factors: (1) the magnitude of the prejudicial effect of the statement; (2) the efficacy of any cautionary instruction; and (3) the strength of the evidence of the defendant's guilt." *Ibid.*

Here, each of these factors indicates that the district court did not abuse its discretion in refusing to grant a mistrial. As to the first factor, the magnitude of the prejudicial effect, this Court has upheld the denial of a mistrial in a similar case. In *Pando Franco*, the defendant claimed that a prosecutor's question that suggested his guilt by association should have served as a basis for a mistrial. 503 F.3d at

394-395. In denying the defendant's claim, this Court noted that "a prosecutor's question does not constitute evidence" and that the witness "never answered the question and the statement was immediately followed with a curative instruction. Thus the prejudicial effect was attenuated." *Ibid.*

"With respect to the second factor," the efficacy of any cautionary instruction, this Court has held that "an instruction to disregard is generally deemed sufficient." *Pando Franco*, 503 F.3d at 395. In this case, the district court gave a strong cautionary instruction that Warren had not been accused of a conspiracy, and that the jury should disregard the question. R. 5197-5198. At the close of all evidence, the court reiterated that "[t]he fact that you may find one or more of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant." R. 6790-6791.

Finally, the evidence of Warren's guilt was strong enough to vitiate any prejudice. *Pando Franco*, 503 F.3d at 395. The United States presented two eyewitnesses to the Glover shooting, one a fellow officer, both of whom testified that Glover posed no threat whatsoever at the time of the shooting. R. 3294-3298; R. 3609-3611. Officer Howard and Glover's brother-in-law, Calloway, both testified that Calloway and Glover began running away from the mall when they heard Warren command them to leave. R. 3294-3295, 3609-3611. Howard testified that she had not seen any type of weapons and did not see the men make

any type of threatening move. R. 3294-3296. In neither Howard nor Calloway's version of events did Glover come "running toward the gate" of the mall with "something in [his right hand]" as Warren alleged.[10] R. 5056-5059.

Howard and Calloway's testimony regarding the Glover shooting was coupled with several other key pieces of evidence against Warren. Warren's former NOPD colleague Alec Brown testified that he and Warren had an argument about looters during which Warren told him that looters "were all animals and they deserved to be shot." R. 3417. And Officer Bell, who had reported to the scene of the crime after the shooting, testified that when she asked Warren what happened, he simply said that the men were "looting" and he "shot at him." R. 3974. Warren did not say anything to Bell about the person reaching for a gun. R. 3974-3975. Finally, the evidence that Warren had earlier that same morning fired a shot in the direction of a man passing through the parking lot, for no reason other than that the man allegedly looked at him in a way that he didn't like (R. 3289, 5088), is strong evidence that the Glover shooting was also legally unprovoked.

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[10] Indeed, even assuming Warren's version of events, the jury heard extensive testimony from the United States' expert witness, Charles Key, a former police officer and expert trainer in police policies and the use of force, that the shooting still would not have been justified. R. 6448-6462. Key explained that given Glover's distance from the second floor of the mall, and the tactical advantage Warren had by being on the "high ground," firing a shot would not have been appropriate. R. 6448-6462.

Given the district court's cautionary instruction, the evidence against Warren, and the fact that the remark in question constituted one sentence within a several-week trial, Warren was not unduly prejudiced and the trial court did not abuse its discretion in refusing to grant a mistrial. See *Lowenberg*, 853 F.2d at 302 ("A conviction should not be set aside if the prosecutor's conduct … did not in fact contribute to the guilty verdict and was, therefore, legally harmless.") (citation omitted).

2. Warren's Objections To The Prosecutor's Closing Argument

Warren also objected to several statements in the prosecutor's closing argument. In response to questions raised by McRae's counsel, Mr. DeSalvo, about the absence of forensic evidence indicating that a dark spot on Glover's shirt was actually a bullet hole, the prosecutor stated, "They can't say they don't have any forensic evidence and then go burn the body." R. 6748-6749. Warren's counsel objected, stating, "[w]e are not charged with any of this other stuff, your Honor has made it clear, and I think it's improper argument and counsel knows it." R. 6749.

The district court immediately instructed the jury that, "as you know you're to consider each defendant separately as to each count." R. 6749. The prosecutor also clarified his statement, saying, "Mr. Warren didn't have anything to do with the burning, okay, I am not suggesting that. * * * And it's their, *the other four*

defendants obstruction of justice that's prevented us from being able to have that type of evidence." R. 6749-6750 (emphasis added).

Warren did not request a mistrial on this occasion, but argues that this statement "compounded" the "prejudicial effect of uncharged misconduct." Warren Br. 47. Viewed in context, however, it is clear that this remark did not prejudice Warren. Cf. *United States* v. *Irwin*, 661 F.2d 1063, 1071 (5th Cir. 1981) (holding that there was no undue prejudice where after the allegedly improper question, the parties stipulated and informed the jury of the correct facts, and noting that "[t]he stipulation made the truth evident"), cert. denied, 456 U.S. 907 (1982). And, again, in any case, the instruction to disregard was sufficient. *Pando Franco*, 503 F.3d at 395.

Finally, Warren alleges that "[i]n the initial closing argument the prosecutor argued that 'they' burned the body implying that Warren was also responsible." Warren Br. 48. This argument is a misinterpretation of the prosecutor's remarks. In initial closing arguments one of the prosecutors stated, "[t]he only thing they didn't admit is that they burned the car and body to cover-up for a police shooting." R. 6578. This statement was made directly in the context of discussing the charges against Scheuermann and McRae. See R. 6569-6580. Later in closing arguments, another prosecutor made a statement that "they" burned the car in the course of describing the phone call from Mrs. Glover that Warren received at the

Royal Sonesta Hotel. R. 6745-6746. This was simply a description of what Mrs. Glover had said to Warren. R. 6745-6746. Nowhere in either of these statements was there any allegation that Warren had anything to do with burning Glover's body. There was no impropriety here.

III

THE UNITED STATES COMPLIED WITH ALL *BRADY* OBLIGATIONS

A. Standard Of Review

This Court reviews *Brady* claims *de novo*. See *Felder* v. *Johnson*, 180 F.3d 206, 212 (5th Cir.), cert. denied, 528 U.S. 1067 (1999).

B. There Was No Brady *Violation In This Case*

Warren claims that the United States failed to provide relevant impeachment information regarding Officer Linda Howard's recollection of events surrounding the shooting, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972). Warren Br. 49-58. Specifically, Warren alleges that the United States failed to reveal that, after a meeting with FBI Agent Ashley Johnson in June 2009 during which they visited the scene of the shooting, Officer Howard's attorney notified government counsel that she had remembered that she and Warren had been standing behind the locked gate during the shooting, rather than on the balcony outside the gate. Warren Br. 56-57. Warren was provided, before trial, with a wealth of information regarding Howard's changing

recollections of where she and Warren were standing at the time of the shooting. Moreover, at trial, Warren elicited from Johnson this information regarding Howard's contact with government counsel, and used it to cross-examine her on Howard's lack of credibility. See R. 6378-6385. Any claim of a *Brady* violation is thus without merit.[11]

"The Supreme Court has stated that *Brady* applies to situations involving 'the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense.'" *United States* v. *Snoddy*, 862 F.2d 1154, 1156 (5th Cir. 1989) (citing *United States* v. *Agurs*, 427 U.S. 97, 103, (1976)) (emphasis added). Evidence is "not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *United States* v. *Zackson*, 6 F.3d 911, 918 (2d Cir. 1993) (citation omitted); see also *Lawrence* v. *Lensing*, 42 F.3d 255, 257 (5th Cir. 1994) ("Because we find that the existence and contents of the [evidence in question] were disclosed at trial, we hold that the prosecution did not suppress any evidence. *See United States* v. *Zackson*, 6 F.3d 911, 918 (2d Cir. 1993).").

In this case, Warren received, *before* trial, a plethora of information detailing Officer Howard's statements to the FBI and recollection of the events surrounding

[11] Warren made these same allegations in his motion for a new trial (Warren Supp. R. 1304), which was rejected in its entirety by the district court (Warren Supp. R. 1399).

the shooting, including contrasting statements regarding her and Warren's location at the police substation at the time he shot Glover. See *United States* v. *McKinney*, 758 F.2d 1036, 1049-1050 (5th Cir. 1985) ("If the defendant received the [*Brady*] material in time to put it to effective use at trial, his conviction should not be reversed."); see also *id.* at 1050 (citing *United States* v. *Higgs*, 713 F.2d 39, 44 (3d Cir. 1983), cert. denied, 464 U.S. 1048 (1984), for the proposition that where *Brady* material has impeachment value only, disclosure *on the day witness testifies* satisfies due process). Specifically:

- On June 28, 2010, the United States provided Warren with photographs demonstrating where (on June 19, 2009) Linda Howard positioned herself and defendant Warren on the balcony of the strip mall during the shooting. In this photograph, Howard had placed herself and Warren outside of the locked gate. The government supplemented this discovery with photographic logs on November 5, 2010.

- Warren was provided with a transcript of Linda Howard's interview with Detective Gerard Dugue in which she gave an inconsistent statement regarding the Warren shooting. In the statement she referenced a different position on the second floor and that she "didn't see anything." The transcript of the interview was provided to the defense on November 1, 2010, and the audio recording was provided on November 5, 2010.

- On November 1, 2010, Warren was provided with Officer Howard's grand jury testimony dated May 1, 2009, in which she clearly stated that she was *behind* a locked gate when Warren Shot Glover.

- On November 1, 2010, Warren was provided with an FBI 302 dated August 17, 2010, in which Officer Howard stated that

Warren fired his rifle from *behind a locked gate* on the second floor balcony, contradicting her prior statement to agents.

- Throughout discovery, the defense was provided with numerous photographs of the locked gate.[12]

The only information that Warren did not have before trial was that Howard's attorney contacted the government to correct her statement regarding her and Warren's location before the shooting. That information came out later, during Johnson's testimony. R. 6378. But the material that was provided made it clear that Howard had changed her statement on that subject more than once. Warren used that information at trial to cross-examine Howard regarding her evolving recollection of the events. R. 3323-3347. Warren also used the evidence to cross-examine Agent Johnson about the same subject. Among other testimony, after showing Agent Johnson a picture taken on June 19, representing the position where Howard and Warren had allegedly stood on the balcony, *outside* of the locked gate, Warren asked Johnson, "So [Howard] told you on June 1 that she was standing on the balcony?" R. 6378. Johnson replied, "That's what she told me on that date, yes." R. 6378. Warren then inquired, "So [Howard] changed her testimony?" R. 6378. Johnson then replied, "[Howard's attorney] Bruce Whitaker

[12] Indeed, the United States continued to supplement the discovery throughout trial, including providing photographs (including 360-degree spherical photographs) demonstrating that Linda Howard was standing behind the locked gate at the time of the shooting and a photograph taken on November 16, 2010, of Special Agent Ashley Johnson measuring the distance from where Linda Howard stood behind the second floor gate to the shopping basket on the street.

called within a few days and said she was mistaken, they were behind this door. * * * [S]he said that this gate was locked and they couldn't come out to the balcony." R. 6378. When asked why she didn't create a 302 of this conversation, Johnson testified that it was because Howard's attorney had contacted the attorney for the United States, and "[i]t wasn't direct information that [Howard] was giving to me." R. 6378. At no point, however, did Warren's attorney object, or make any claim that the government had suppressed evidence.

Warren then continued to cross-examine Johnson about the various statements Howard had made, eliciting testimony regarding the different locations where Howard stood on the balcony, and getting Johnson to testify that Howard had changed her story in conversations with Johnson "[a]t least once." R. 6379-6383; cf. *United States* v. *King*, 424 F. App'x 389, 397 (5th Cir. 2011) (unpublished) (Where the evidence in question "was produced by the government" and the government witness who could speak to it "featured prominently at trial, there is no indication that any evidence was suppressed. It follows that there could not have been any *Brady* violation."); *Lensing*, 42 F.3d at 257.

Warren repeatedly referenced Howard's inconsistent statements during his closing arguments in this case, noting that she had told one story on April 18 or 19, another story in June, and a third story later. R. 6613-6616. Warren also discussed the August 17, 2010, FBI 302 in which Howard stated that Warren fired from

behind a locked gate. R. 6616. At no point, however, did Warren attempt to recall Howard to the stand to further question her about these inconsistent statements, despite the fact that the trial court had allowed other witnesses to be recalled to the stand. See *United States* v. *Decker*, 543 F.2d 1102, 1105 (5th Cir. 1976) (Government fulfilled its disclosure duty by disclosing information to correct false testimony after witness testified but while still subject to recall), cert. denied, 431 U.S. 906 (1977).

Given that Warren had photographic evidence, grand jury statements, and an FBI 302 that all brought to light Howard's inconsistent statements; that Warren questioned Agent Johnson at trial regarding Howard's attorney having contacted the United States about her changing recollection; and that Warren emphasized Howard's varying stories during both cross-examination and closing-argument, he cannot argue now that there was a *Brady* violation. See *Lensing*, 42 F.3d at 257; see also *McKinney*, 758 F.2d at 1050 (no *Brady* violation where the "record amply supports the district court's conclusion that [the defendant] used the [allegedly suppressed] documents effectively during cross-examination and thoroughly impeached [the witness'] credibility").[13]

[13] Warren also makes the specious argument that the jury "obviously rejected" the testimony of another eyewitness to the shooting, Glover's brother-in-law Bernard Calloway. Warren Br. 63. Nothing in the jury's verdict suggests that

(continued…)

IV

THE DISTRICT COURT DID NOT ERR IN ITS EVIDENTIARY RULINGS

A. Standard Of Review

"This court reviews a district court's evidentiary rulings for abuse of discretion, subject to the harmless error doctrine." *United States* v. *Salazar*, 440 F. App'x 400, 406 (5th Cir. 2011).

B. The District Court Properly Excluded Evidence Regarding Glover's Distant Arrest Record

At trial, the United States asked government witness Kawan McIntyre, Glover's cousin, "Did you know Henry Glover to carry a weapon?" and "Did you know Henry Glover to be a violent man?" R. 4993. She replied, "No, sir," to both of these questions. R. 4993. The defendants did not object. Instead, they sought to ask Ms. McIntyre, in rebuttal, if she knew that Glover had, in the past, "been arrested for carrying a firearm illegally" and "[had] been violent." R. 5005, 5572-5574. The defendants also sought to introduce extrinsic evidence that, between 1990 and 1994, Glover had been arrested for various offenses involving concealed weapons, discharging a firearm, armed robbery, and simple battery, the last of which arrests occurred 11 years before the Warren shooting. R. 5572-5574. There

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(…continued)
it rejected Calloway's recounting of events; Warren was, in fact, convicted of depriving Glover of rights secured to him by the Constitution of the United States.

was no evidence that Glover was ever charged with, much less convicted of, these crimes. R. 5574.

After the prosecutor acknowledged that "there [was] a certain amount of the government having opened the door" (R. 5577), the district court allowed the defendants to broadly ask Ms. McIntyre whether "she ha[d] any knowledge of [Glover] being arrested" between 1991 and 1992. R. 5675, 5669-5570. The court ruled that if McIntyre replied "Yes" to such questions, the defendants could then "go into the specific arrest." R. 5575. The district court, however, declined to allow the defendants to introduce extrinsic evidence of these acts, noting that "I don't believe jurisprudence supports that." R. 5575.

Defendant Dwayne Scheuermann's attorney, Jeffrey Kearney, then called Ms. McIntyre to the stand and, after establishing the close relationship between McIntyre and the victim, asked her, "Between December of 1991 and April of 1992, have you heard ever, from any source whatsoever – family members, friends, Henry, or anything – that Henry was ever arrested during that period of time?" R. 5714-5717. McIntyre replied negatively to both that question and the follow-up question, "Did you know it?" R. 5717. The district court then asked McIntyre, "Had you ever heard that Henry [Glover] was arrested?" to which McIntyre also replied, "No, sir." R. 5717.

The district court did not abuse its discretion in its rulings. The Federal Rules of Evidence impose substantial constraints upon the type of "bad acts" evidence that may be admitted at trial. Specifically, Rule 405(b) dictates that prior acts are only admissible to prove character in cases where "a person's character or character trait is an essential element of a charge, claim, or defense." Furthermore, Rule 404(b)(1) prohibits the admission of other crimes evidence "in order to show that on a particular occasion the person acted in accordance with the character."

Warren nevertheless claims that he was prejudiced by the district court's failure to allow further extrinsic evidence of Glover's arrests. Warren Br. 62-63. This Court has previously held, however, that in a self-defense case a victim's "prior specific acts were not admissible to prove his alleged propensity for violence" because "character [i]s not an essential element of the self defense claim in the 'strict sense.'" *United States* v. *Gulley*, 526 F.3d 809, 819 (5th Cir.), cert. denied, 555 U.S. 867 (2008). This Court explained that, "a self defense claim may be proven regardless of whether the victim has a violent or passive character." *Ibid.* This Court further noted that proving character through "specific acts" is limited specifically because it "possess[es] the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time." *Id.* at 418 (citation omitted).

Prejudice and confusion is precisely what the extrinsic evidence of Glover's arrests, if admitted, would have accomplished here. The inquiry made to Ms. McIntyre consisted of literally two questions – less than 20 words – in a nearly four-week trial. The United States asked no other questions regarding Glover's character either before or after that point. By allowing the defendants to respond to this inquiry by asking Ms. McIntyre whether she had heard that Glover was arrested, but declining to allow other extrinsic evidence, the district court struck an appropriate balance between ensuring that defendants were able to make an adequate response without creating a mini-trial on the issue of Glover's distant arrests. See *United States* v. *Ramos*, 537 F.3d 439, 456 (5th Cir. 2008) (in the prosecution of two officers for shooting a fleeing victim, the district court did not abuse its discretion in prohibiting extrinsic evidence regarding the victim's prior bad acts, because the question of the victim's "guilt of a subsidiary, unadjudicated crime could quickly have become a mini-trial within the trial and a proxy for the defendants' guilt"), cert. denied, 129 S. Ct. 1615 (2009).

The district court's decision was especially reasonable considering the limited probative value of these arrests. The fact that Glover may have previously been arrested is, of course, entirely irrelevant to Warren's own on-the-spot evaluation of the danger he presented. See *United States* v. *Gregg*, 451 F.3d 930, 935 (8th Cir. 2006) (evidence of victim's prior bad acts is only admissible to the

extent a defendant establishes knowledge of such conduct at the time of the conduct underlying the offense charged).

In any event, given the evidence that Warren was not, in fact, acting in self-defense at the time he shot Glover, see pp. 8-10, 51-52, *supra*, any possible error stemming from the district court's approach to questions about Glover's arrest record was harmless. See *United States* v. *Nguyen*, 504 F.3d 561, 571 (5th Cir. 2007) ("If the district court erred in its evidentiary ruling, the error can be excused if it was harmless, particularly if there is other overwhelming evidence of [the defendant's] guilt.") (internal quotation marks and citation omitted).

C. Information About The Tire Iron Located In The Truck Driven By The Victim Was Appropriately Excluded

The district court also did not abuse its discretion in excluding evidence regarding a tire iron that was later recovered from the truck Glover was driving at the time Warren shot him. See R. 5868-5871. At trial, Warren sought to introduce evidence that this two or three foot long tire iron had been "stolen at the same time the truck was, from a different location within the Firestone dealership," and was found inside the truck some time after the shooting.[14] R. 5868-5870. Warren made no allegation that he knew about this tire iron at the time he shot Glover, and

[14] Although Warren now calls this object a "pry bar," it was introduced at trial and described by both the defendant and the district court as a "tire iron." Compare Warren Br. 64 with R. 5868, 5870.

there was also no allegation that the tire iron was in Glover's hands at the time he was shot. R. 5869. The defense, however, alleged that this was "circumstantial" evidence of the victim's "intention or * * * ability" to do something other than pick up the bag and leave the scene. R. 5869.

The district court did not abuse its discretion in finding the "tire iron not to be relevant." R. 5871. Given that the tire iron was found in the truck, and neither Glover nor Calloway had it in their hands at the time that Glover was shot (R. 5871), evidence of the tire iron has no probative value regarding Warren's allegation that he shot Glover because the victim rushed toward the mall or attempted to break into the mall. Nor was it an abuse of the district court's discretion to rule that "even if it was relevant, I would exclude it under 403, as relevant evidence may be excluded if its probative value is substantially outweighed by misleading the jury, consideration of undue delay, waste of time." R. 5871.

This Court has held, discussing a district court's determinations under Rule 403, that reversal is called for "only 'rarely' and only when there has been 'a clear abuse of discretion.'" *United States* v. *Dillon*, 532 F.3d 379, 387 (5th Cir. 2008) (internal quotation marks and citation omitted). Such a rare situation is not presented here.

D. Warren Objected To Only Three Of The United States' Questions About His Knowledge And Handling Of Weapons; In Any Case, Warren's Knowledge Of Firearms Was Plainly Relevant To The Charged Offense

Warren argues that the prosecutor's cross-examination of him regarding his knowledge of and affinity for handguns was "particularly prejudicial." Warren Br. 67. Of the numerous questions Warren cites in his brief as having been prejudicial (see Warren Br. 65-67), Warren objected at trial to only three. See R. 5102-5103, 5131. His arguments regarding the propriety of the remaining questions are therefore subject to forfeiture, and reviewed only for plain error. See *United States* v. *Steen*, 55 F.3d 1022, 1033 (5th Cir.), cert. denied, 516 U.S. 1015 (1995); *United States* v. *Garcia*, 567 F.3d 721, 726 (5th Cir.), cert. denied, 130 S. Ct. 303 (2009).

The three questions to which Warren did object are, 1) whether he "was familiar with the fact" that the type of bullet used to shoot Glover "once it enters the body will yaw" (R. 5102); 2) whether he knew that "when a round fragments in the body that it turns into a number of smaller pieces" (R. 5103); and 3) how much he paid for a training course at the Lethal Force Institute (R. 5131). The district court quickly ended questioning regarding the first matter (see R. 5102-5103), sustained Warren's objection to the second of these questions on the ground that it was asked and answered (R. 5103), and sustained his objection to the third on the ground that the jury had "heard * * * enough about it" (R. 5131).

In any event, the questions the United States asked regarding Warren's marksmanship, his understanding of how bullets function and their effect upon the body, and his knowledge of the goals and mechanics of using lethal force, were relevant to understanding Warren's actions on the morning of September 2, 2005. His decision to bring to work a personally-owned rifle, his selection of a particular ammunition, and his understanding of lethal force, all reflect on the question of whether the actions he took toward Glover that morning were justified. The district court thus properly admitted this evidence at trial, and the judgment against Warren should not be disturbed.

E. The District Court Allowed Ample Testimony Regarding Hurricane Katrina's Effects On Warren's Mindset; The Court's Prohibition On Extrinsic Evidence Regarding Katrina Conditions Was Entirely Reasonable

Warren testified about Hurricane Katrina's impact on his job, sleep schedule, and sense of vulnerability (R. 5033-5042), that homes on his street had been looted (R. 5034), that the shooting of a fellow officer in the head "scared him" (R. 5038-5039), and to disruptions in normal NOPD operations, communications, and capabilities (R. 5036-5042). Nevertheless, Warren argues that he was prejudiced by not being allowed to introduce various statements from public officials regarding the state of New Orleans after Katrina. The district court did not err in excluding such evidence.

Warren filed a motion seeking to introduce a number of public statements and Executive Orders regarding conditions in New Orleans following Hurricane Katrina. Specifically, he sought to include evidence that: during an August 26, 2005, teleconference, the U.S. Weather Bureau warned Louisiana state officials of the pending storm; on August 29, 2005, Hurricane Katrina devastated New Orleans; on August 29, 2005, an email from FEMA personnel to Michael Brown advised Brown of severe flooding; Governor Blanco declared a State of Emergency from August 26, 2005, through September 25, 2005; on August 30, 2005, Governor Blanco held a press conference reporting the effects of the storm; on August 31, 2005, a FEMA employee reported to Michael Brown that the situation was past critical and that there were thousands of people in the streets with no food or water; on September 2, 2005, Governor Blanco declared a state of public health emergency; on August 31, 2005, President Bush flew over New Orleans and that there were no federal troops yet in the city; on September 1, 2005, Mayor Nagin gave a radio interview stating that looters got out of control because most of the city's resources were used towards saving people; and that top officials of the NOPD called for maintaining "law and order" in the face of acts of lawlessness and looting, including "shootouts between looters and police." See Warren Supp. R. 816-819. Warren's motion referred to these various occurrences as a "timeline of events." Warren Supp. R. 816.

In its order denying admission of this evidence under Federal Rule of Evidence 402, the district court observed that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Warren Supp. R. 1056 (citation omitted). The court held that because "Warren has not claimed personal knowledge of the timeline events prior to the shooting," he "is unable to point to them as specific and articulable facts that reasonably warranted his use of force." Warren Supp. R. 1057. The court further held that "[s]weeping proclamations and statements regarding general conditions by public officials do not make any fact that is of consequence to the determination of whether Warren's use of force was objectively reasonable where he was stationed more probable or less probable." Warren Supp. R. 1057-1058. Nor, the court held, was evidence of the timeline events relevant to demonstrate Warren's absence of specific intent to deprive the victim of his rights, given that he did not claim personal knowledge of the events. Warren Supp. R. 1058.

The district court also held that the evidence was inadmissible under Federal Rule of Evidence 403. Warren Supp. R. 1058. Observing that the "jury [wa]s fully capable of understanding that Louisiana was in a state of emergency during and following Hurricane Katrina," the district court held that "the probative value"

of the statements that Warren sought to admit "[wa]s severely limited by Warren's lack of personal knowledge," and therefore the limited probative value of the evidence was substantially outweighed by the danger of confusing the issues or misleading the jury. Warren Supp. R. 1058.

The district court's ruling was entirely reasonable, and well within its discretion. The Supreme Court has held that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989). Without any personal knowledge of the statements or Executive Orders in question, Warren cannot point to such events as articulable facts warranting his use of force.[15]

* * * * *

Under the cumulative error doctrine, relief may be obtained "only when constitutional errors so fatally infect the trial that they violated the trial's

[15] Warren also was not prejudiced by the court's admission of testimony from the United States' expert, Charles Key, who testified that while the civil unrest following Katrina would certainly constitute a police hazard, "[t]hat fact alone doesn't change rules and regulations as to when lethal force may be used," although "[i]t's certainly a factor that could be considered." R. 6453-6454, 6468. This testimony was put on in response to testimony from Warren's expert, that "when your life is on the line, then the rules don't apply. You can't weigh an officer down with paper rules." R. 5424.

fundamental fairness." *United States* v. *Bell*, 367 F.3d 452, 471 (5th Cir. 2004) (internal quotation marks and citation omitted). Because the district court did not abuse its discretion in any of its rulings, Warren's argument must fail. See *ibid.*

V

WARREN'S CONVICTION AND SENTENCE ARE CONSTITUTIONAL IN ALL RESPECTS

A. Standard Of Review

This court reviews the constitutionality of federal statutes *de novo*. *United States* v. *Anderson*, 559 F.3d 348, 352 (5th Cir.), cert. denied, 129 S. Ct. 2814 (2009). Whether a prosecution violates the Double Jeopardy Clause is also a question of law that this Court reviews *de novo*. *United States* v. *Delgado*, 256 F.3d 264, 270 (5th Cir. 2001).

B. 18 U.S.C. 924(c) As Applied To Police Officers Does Not Violate The Due Process Clause

Section 924(c)(1)(A)(iii) declares, in part, that if a firearm is discharged during or in relation to any crime of violence, the defendant shall be sentenced to a term of imprisonment of not less than 10 years, to run consecutively with the sentence for the crime itself. See 18 U.S.C. 924(c)(1)(A)(iii), 18 U.S.C. 924(c)(1)(D)(ii).

Warren argues that 18 U.S.C. 924(c) as applied to police officers violates the due process clause. Warren Br. 71. This Court's decision in *United States* v.

Ramos, 537 F.3d 439 (5th Cir. 2008), cert. denied, 129 S. Ct. 1615 (2009), however, squarely rejects that argument. In *Ramos*, the defendants argued, as Warren does here, that 18 U.S.C. 924 is unconstitutional as "appl[ied] to law enforcement officers when carrying out their duties." 537 F.3d at 456. In rejecting that argument, this Court noted that, as a preliminary matter, "whether 18 U.S.C. § 924(c) may be applied to officers *otherwise acting lawfully* in carrying out their duties is not the question before us." *Id.* at 456 (emphasis added). This Court then observed that, given Section 924(c)'s language stating that it is applicable to "any person," and that the statute "contains no language that law enforcement officers are excepted from its application," the defendants could not "advance a persuasive textual argument supporting their * * * claim." *Id.* at 457.

Furthermore, as this Court noted in *Ramos*, Section 924(c) was explicitly amended in order to bring police officers within its scope. See 537 F.3d at 458 n.15 (citing *United States* v. *Rivera*, 889 F.2d 1029, 1031 (11th Cir. 1989), cert. denied, 495 U.S. 939, 497 U.S. 1006, and 498 U.S. 831 (1990)). The predecessor statute to 924(c) had made it illegal for an individual to either use or to *unlawfully* carry a firearm during the commission of a felony. See 18 U.S.C. 924(c)(2) (1971) ("Whoever * * * uses a firearm to commit any felony which may be prosecuted in a court of the United States, or * * * carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States

* * * shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years"); *Rivera*, 889 F.2d at 1031. The amended version of the statute expands the law by eliminating the "unlawfully" language. See 18 U.S.C. 924(c). This was a change explicitly intended to bring law enforcement officers into the law's scope:

> The requirement in present section 924(c) that the gun be carried unlawfully, a fact usually proven by showing that the defendant was in violation of a State or local law, has been eliminated as unnecessary. The "unlawfully" provision was added originally to section 924(c) because of Congressional concern that without it policemen and persons licensed to carry firearms who committed Federal felonies would be subjected to additional penalties, even where the weapon played no part in the crime, whereas the section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act[.] * * * The Committee has concluded that persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment as a person whose possession of the gun violates a State or local ordinance.

S. Rep. No. 225, 98th Cong., 2d Sess. 314 n.10 (1983).

Although he acknowledges that *Ramos* applies to his Due Process claim, Warren nevertheless urges this Court's "reconsideration of the Due Process issue * * * under 'a novel judicial construction' of the statute." Warren Br. 77-78 (emphasis and footnote omitted). The crux of his argument seems to be that, unlike the defendants in *Ramos*, he was lawfully carrying out his duties at the time of the shooting. See Warren Br. 72-73. These claims cannot serve as a basis for

Warren to succeed in this appeal. As with the defendants in *Ramos*, Warren's "attempt to distinguish * * * controlling [Fifth Circuit] cases assumes [his] version of the facts, specifically, that [the victim] posed a specific threat to [his] physical safety. * * * [T]his view of the facts was rejected by the jury." *Ramos*, 537 F.3d at 458.

C. 18 U.S.C. 924(c) As Applied To Police Officers Does Not Violate The Equal Protection Clause

Warren next argues that 18 U.S.C. 924 violates the Equal Protection Clause because "[w]hile there is a rational basis to discourage the use of guns in drug trafficking offenses, that same basis does not hold true for police officers who are required to carry their weapons while working." Warren Br. 78. This argument, too, was rejected in *Ramos*. See 537 F.3d at 458 n.15 (holding that the defendants' equal protection argument ignored "the amendment to the statute that was specifically intended to bring police officers within the statute's reach.").

D. Double Jeopardy

Warren argues that his separate punishments for 18 U.S.C. 924 and 18 U.S.C. 242 are multiple punishments for the same crime, in violation of the Double Jeopardy Clause. The argument fails upon the face of those statutes.

In *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), the Supreme Court set forth a test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment. In cases where

the same act constitutes a violation of two distinct statutory provisions, "[i]f each [crime] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977) (citing *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975)).

Warren's conviction and sentence under 18 U.S.C. 924 required proof that he discharged a firearm in relation to a crime of violence. See 18 U.S.C. 924(c)(1)(A)(iii). His conviction under 18 U.S.C. 242 required proof that, under color of law, he willfully subjected the victim to the deprivation of any constitutional or statutory rights. See 18 U.S.C. 242. Warren's Double Jeopardy claim cannot succeed.

E. Excessive Punishment

Finally, Warren argues that punishing him "for conduct that is inherent in the performance of the duties of carrying a weapon," and "[i]mposing both a sentence for the underlying offense and the § 924(c) charge," constitutes cruel and unusual punishment in violation of the Eighth Amendment. Warren Br. 80. Warren received a total sentence of 309 months' imprisonment for the crime of shooting an unarmed civilian, who later died, in circumstances that the jury found did not justify the act. The Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life

expectancy of the defendant, constitutes cruel and unusual punishment. See *United States* v. *Beverly*, 369 F.3d 516, 537 (6th Cir.) (rejecting an Eighth Amendment challenge to a defendant's 858-month sentence under 924(c)), cert. denied, 543 U.S. 910 (2004); accord *United States* v. *Angelos*, 433 F.3d 738, 753 (10th Cir.) (citing *Beverly* and rejecting challenge to 55-year sentence under Section 924(c)), cert. denied, 549 U.S. 1077 (2006); *United States* v. *Khan*, 461 F.3d 477, 495 (4th Cir. 2006), cert. denied, 550 U.S. 956 (2007). Warren's conviction should be affirmed.

VI

BECAUSE THE DISTRICT COURT APPROPRIATELY EXERCISED ITS DISCRETION TO IMPOSE CONSECUTIVE SENTENCES, THIS COURT NEED NOT ADDRESS WARREN'S ARGUMENT THAT SECTION 924(j) "DOES NOT REQUIRE A MANDATORY CONSECUTIVE SENTENCE"

The jury found Warren guilty on both Count 1, which charged him with violating 18 U.S.C. 242, and Count 2, which charged him with violating both 18 U.S.C. 924(c) and 18 U.S.C. 924(j). R. 344-345, 6865. The civil rights charge in Count 1 was the underlying crime of violence that was the subject of Warren's conviction for 18 U.S.C. 924(c). The district court sentenced Warren, consecutively, to 189 months' imprisonment on Count 1, and 120 months' imprisonment on Count 2.

Title 18, Section 924(c) commands that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of

imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. 924(c)(1)(D)(ii). The language of Section 924(j) expressly incorporates Section 924(c), providing that a person who, "in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall" be punished as defined in 18 U.S.C. 1111 or 18 U.S.C. 1112. 18 U.S.C. 924(j). Section 924(j), however, does not repeat 924(c)'s consecutive sentencing requirement.

Warren argues that this Court should adopt the Eleventh Circuit's rule, set forth in *United States* v. *Julian*, 633 F.3d 1250, 1256 (11th Cir. 2011), that Congress intended Section 924(j) to define an offense distinct from 18 U.S.C. 924(c), not a sentencing factor, and that therefore, Section 924(c)'s mandatory consecutive sentencing provision does not apply. Warren Br. 81-82. In other words, under the *Julian* rule, a district court may *concurrently* sentence a person for the crime of violence that was a predicate for the Section 924(c) violation, and for the violation of Section 924(j). He therefore seeks a remand of his case for concurrent sentencing on Counts 1 and 2. Warren Br. 82.

This Court need not address Warren's argument. While the United States maintains that 18 U.S.C. 924(j) is a sentencing factor, rather than a separate offense, see *United States* v. *Battle*, 289 F.3d 661, 667 (10th Cir.), cert. denied, 537

U.S. 856 (2002) and *United States* v. *Allen*, 247 F.3d 741, 769 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002), regardless of the answer to that question, the district court here plainly stated its intention to exercise its discretion to sentence Warren consecutively on Counts 1 and 2. See R. 6895 ("I note that the Fifth Circuit specifically has not addressed the issue of whether 924(j), Title 18 is merely an aggravating factor within the scheme already set forth under 924(c). * * * I state for the record that even if the court were to agree with the defendant and find the Eleventh Circuit's reasoning in the *Julian* case persuasive, it would not matter because the court chooses to impose consecutive sentences."). The court then explained in detail the reasons for its sentence, noting that it had considered "all of the factors set forth in 18 USC Section 3553(a)"; had taken into account the seriousness of the offense; had considered the need to promote respect for the law, just punishment, and to deter criminal conduct by law enforcement officers; had thought about the kinds of sentences available; and had concluded that, despite Warren's "tendentious arguments to the contrary," his shooting of Henry Glover "was no mistake." R. 6903.

It is beyond question that "[a] district court has discretion under 18 U.S.C. § 3584(b) to run sentences consecutively or concurrently in accordance with the § 3553(a) factors." *United States* v. *Bennett*, No. 10-30920, 2011 U.S. App. LEXIS

25056, at *45 (5th Cir. Dec. 16, 2011). The district court's sentence should not be disturbed.

VII

THE EVIDENCE PRESENTED AT TRIAL WAS MORE THAN SUFFICIENT TO SUPPORT MCRAE'S CONVICTION FOR OBSTRUCTION OF JUSTICE

A. Standard Of Review

In this Court's review of the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); see also *United States* v. *Villarreal*, 324 F.3d 319, 322 (5th Cir. 2003). In carrying out this review, the Court accepts all credibility choices and reasonable inferences made by the trier of fact which tend to support the verdict. *United States* v. *Asibor*, 109 F.3d 1023, 1030 (5th Cir.), cert. denied, 522 U.S. 902, and 522 U.S. 1034 (1997). In other words, the inquiry is "limited to whether the jury's verdict was reasonable, not whether [the appellate court] believe[s] it to be correct." *United States* v. *Williams*, 264 F.3d 561, 576 (5th Cir. 2001). Furthermore, it is clear that "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt," and that any conflict in the evidence must be resolved in favor of the jury's verdict.

United States v. *Lage*, 183 F.3d 374, 382 (5th Cir. 1999), cert. denied, 528 U.S. 1163 (2000); *United States* v. *Duncan*, 919 F.2d 981, 990 (5th Cir. 1990), cert. denied, 500 U.S. 926 (1991).

"[T]he standard of review for sufficiency of circumstantial evidence is the same as it normally would be for direct evidence." *United States* v. *Moreno-Gonzalez*, 662 F.3d 369, 372 (5th Cir. 2011); see also *Lage*, 183 F.3d at 382. "When conducting this review, '[this Court] appl[ies] a rule of reason, knowing that the jury may properly rely on their common sense and evaluate the facts in light of their knowledge and the natural tendencies and inclinations of human beings.'" *United States* v. *Aguilar*, 440 F. App'x 335, 338 (5th Cir. 2011) (citation omitted). When "considering [circumstantial] evidence, we are mindful that no single piece of circumstantial evidence need be conclusive when considered in isolation." *Id.* at 339 (internal quotation marks, citation, and alterations omitted).

B. The Evidence Supports McRae's Conviction For Obstruction Of Justice

Count 6 of the indictment against McRae charged that he burned Tanner's Chevrolet Malibu, with Glover's body and other evidence inside, in an effort to impede and obstruct the investigation of the shooting of Glover by a New Orleans police officer, in violation of 18 U.S.C. 1519. R. 347.

McRae concedes that the United States presented substantial evidence that he burned the car containing Glover's body. McRae Br. 17. He disputes, however,

that the evidence was sufficient to prove that he knew that Glover had been shot by a police officer, and that he burned Glover's body with the intent to cover up that fact. Given the evidence presented at trial, this argument fails.

McRae was present at Habans School on the morning of September 2, 2005, when, shortly after the shooting, William Tanner and others arrived with Glover in the backseat of Tanner's white Chevrolet Malibu. See R. 3488, 3492 (Calloway testifying that he returned to the mall just minutes after Glover collapsed; Tanner testifying that it was only a four block drive to Habans School from the mall); R. 5489. McRae testified at trial that when he saw Glover's body in the backseat of the Malibu, it was clear that Glover was dead and that he hadn't died of natural causes. R. 5521, 5554. Officer Simmons testified that after hearing a call about a shooting victim at Habans School while she was still on the scene of the Warren shooting, she thought that the person who had been shot by Warren may have been taken to Habans, and went to the school to talk to her superior officers about the possible connection. R. 4439-4441. When she arrived at the school, Glover's body was still in the backseat of the car. R. 4441-4442. Simmons sought out Lieutenant Italiano and Captain Kirsch, and told them that "David Warren had discharged his firearm over on DeGaulle and that he could have possibly shot someone and this could be the victim." R. 4442.

In addition to Italiano and Kirsch, McRae's ranking officer in the Special Operations Division, Scheuermann, was at the school that morning. Officer Ronald Ruiz, another NOPD officer at the time of the storm, testified that on the morning of the shooting, he arrived at Habans School to see Glover's body in the backseat of a white car, and three other men seated on the sidewalk near the rear of a police car. R. 3938. Ruiz testified that, when he arrived, "[Italiano] was talking to Lieutenant Scheuermann off to the side. R. 3939. Italiano and Scheuermann were of equal rank, and McRae testified that that it would be usual for a supervisor to get updates from another supervisor on the scene. R. 5617-5618. He also testified that Scheuermann "got on the radio * * * [and] requested if anybody was working a possible shooting involving a white vehicle." R. 5493. Italiano himself testified that when he first heard about the dead body in the backseat of the car, he thought it was probably connected to the shooting at the mall. R. 6109.

Thereafter, McRae, Captain Winn, and Scheuermann discussed what to do with Glover's body. R. 5495. McRae testified that Winn said, "We have to get it out of here," and that he, Winn, and Scheuermann "spoke of a spot on the other side of the levee near the 4th District station by the Border Patrol compound." R. 5495. McRae testified that after this conversation with Scheuermann and Winn, the plan was that he and Scheuermann would drive to a "location on the river side of the levee" where they would "leave the car and the body." R. 5521-5522.

McRae testified, however, that he had "made a decision before [he] left Habans that [he] was going to burn the body in the vehicle." R. 5522. He made this decision despite the fact that there were shortages of vehicles after Katrina, and this was a movable car (R. 5531), and that there were no houses or civilians around the levee area to whom Glover's body would otherwise be exposed (R. 5584-5585).

The United States presented extensive evidence from both McRae and others that the situation was handled in a way that differed from the usual course of police business. See R. 5797-5798 (Scheuermann testifying that "what Officer McRae did, he shouldn't have did," and that they were just "moving a car to a safe position until a body could eventually be recovered"). Indeed, McRae admits that there was no legitimate law enforcement reason for burning Glover's body. See R. 5505; see also R. 5676 (Jeff Winn, Captain of the SOD, same); R. 3739 (Jeff Sandoz, an NOPD sergeant assigned to the SOD, same). The record also showed that of the hundreds of people who died in the aftermath of Hurricane Katrina, only one body was burned – that of Henry Glover. See R. 4263-4265, 4268 (Jeffrey Dixon, a fireman hired to do body recovery after the hurricane, testifying that of over 600 bodies he recovered after Katrina, only Glover's was burned); R. 4285 (Istvan Balogh, a security consultant hired to work in New Orleans after Katrina, testifying that of all the bodies he saw after Katrina, only Glover's was burned); R. 4303

(Dana Troxclair, a forensic pathologist at the Orleans Parish coroner's office at the time of Katrina, testifying that of the 155 bodies she autopsied after the storm, Glover's was the only one that was burned).

The United States presented other evidence that McRae exhibited unusual behavior reflective of his consciousness of guilt. Alex Brandon, a photographer for the Associated Press who was a staff photographer for the Times-Picayune during Katrina, testified that the situation at Habans School that morning was "uncomfortable," and that McRae seemed agitated. R. 3825-3826, 3833, 3835-3836. Brandon recalled that as he approached the scene, McRae told him not to take any pictures, and that McRae's tone conveyed that it was "an order. I was told not to take pictures." R. 3836-3837. Brandon could not recall another time in his career where he was told not to photograph a scene at which he had shown up. R. 3837. Brandon also testified that, on a day some time after this, he and McRae were sitting together in the cafeteria at Habans, and he asked McRae what had happened with the car. R. 3844. McRae replied, "NAT," shorthand for "necessary action taken," and made a motion with his hand around his throat, signifying that that it was the end of the conversation and he did not want to discuss it further. R. 3844-3845.

Joseph Meisch, an NOPD lieutenant who had been transferred to the 4th District about a month before Katrina, also testified to McRae's behavior on the

morning of September 2, 2005. R. 4144. Meisch testified that on that morning, he was working at the Border Patrol station, near the 4th District compound, when he noticed a small car drive over the edge of the levee towards the river. R. 4149-4155. The car had been followed by a small pickup truck; the truck stayed parked on top of the levee after the car went over. R. 4154-4156. Meisch testified that the situation "piqued [his] curiosity." R. 4155. As he walked toward the gate of the station, he saw "thick, black smoke come up from behind the levee" in the area where the car had gone over. R. 4155. A few moments later, Meisch saw McRae come running down the levee towards the Border Patrol station, followed by Scheuermann. R. 4156. Meisch testified that as McRae approached the station gate, he appeared to be laughing, "like a humorous or a nervous laugh." R. 4158. When Meisch asked what was going on, McRae told him, "Don't worry about it." R. 4157.

In addition to Brandon's and Meisch's testimony, the United States also presented evidence that, during an interview with NOPD Detective Gerard Dugue, who was investigating the burned car on the levee (R. 5629), McRae never mentioned that he had burned the car (R. 5633-5635), despite knowing that this was the subject of the investigation (R. 5635).

Finally, the fact that Tanner, Calloway, and King were released from Habans School after McRae had returned from burning the car on the levee, with no

questions ever asked about the circumstances under which Glover had died, is strong evidence that those present at Habans School knew precisely what had happened to Henry Glover. See R. 3509-3510, 3626-3627. Indeed, Calloway testified that before he and King were released, an officer he believed was named "Schumacher," who had left the school sometime around when McRae left in Tanner's car, and then later returned, told them, "your brother and your brother-in-law had been shot for looting." R. 3620, 3626.

Taken together, and viewed in the light most favorable to the verdict, this evidence is more than sufficient to allow reasonable jurors to find beyond a reasonable doubt that McRae knew that Glover's death was connected to the Warren shooting, and that he burned the body to get rid of the evidence. See *Williams*, 264 F.3d at 576.

McRae's own behavior only confirms the reasonableness of this conclusion. Although he alleged at trial that he burned Glover's body because "I wasn't going to let it rot" (R. 5498), in light of the extensive evidence that Glover's body was the only body burned after the storm, that it was not a legitimate police practice to burn bodies, and that there were no houses or civilians around the levee which would have been endangered by the body, the jury was entitled to reject this explanation as incredible. See *United States* v. *Diaz-Carreon*, 915 F.2d 951, 955 (5th Cir. 1990) (holding that "a 'less-than-credible explanation' for a defendant's

actions" can serve as circumstantial evidence supporting a guilty verdict) (citation omitted). This is especially the case when coupled with the evidence that McRae had ordered the Times-Picayune photographer not to take pictures of the scene at Habans, that he was seen laughing as smoke rose from the levee, and that he neglected to tell Detective Dugue about his own role in burning the car.

As noted above, a jury is entitled to "properly rely on their common sense" and their knowledge of the "natural tendencies and inclinations of human beings." *Aguilar*, 440 F. App'x at 338; see also *United States* v. *Vasquez-Garcia*, 223 F. App'x 415, 416 (5th Cir. 2007) (unpublished) (the fact that a defendant "evaded questions asked of her" during interviews with officers was evidence of guilt). The jury here could have properly imputed a consciousness of guilt to McRae's actions here. His conviction should be affirmed.

VIII

18 U.S.C. 1519 IS NOT UNCONSTITUTIONALLY VAGUE

A. Standard Of Review

Because McRae's argument regarding the constitutionality of 18 U.S.C. 1519 was not raised in the district court, this Court reviews for plain error. See *Puckett* v. *United States*, 129 S. Ct. 1423 (2009).

B. Section 1519

The Supreme Court has held that "[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010) (citation omitted). A court "consider[s] whether a statute is vague *as applied to the particular facts at issue*." *Id.* at 2718-2719 (emphasis added).

McRae burned Tanner's car, and Glover's body, with the intent to impede, obstruct, and influence the investigation of the September 2, 2005, shooting that led to Glover's death. R. 347. This conduct falls squarely within the plain language of Section 1519, which forbids the knowing destruction of any tangible object with the intent to impede, obstruct, or influence the investigation of any matter. As a law enforcement officer, McRae cannot credibly argue that he did not reasonably understand that burning a vehicle containing the body of a victim who had been shot and killed by a police officer, with the intent to impede the investigation of his death, would fall within the purview of the statute. See *United States* v. *Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). Indeed, McRae himself admitted that by burning the car and the body, he limited the ability of the coroner

to determine a cause of death, limited the ability to find out what happened to Glover, and potentially destroyed evidence of the crime. R. 5556-5562.

McRae's discussion of hypothetical situations and circumstances outside of his own case – the destruction of objects "decades earlier" (McRae Br. 35), the destruction of child pornography (McRae Br. 36), and the assumption of a new identity as part of a witness protection program (McRae Br. 36-37) – are of no moment here; nor is his textual analysis (McRae Br. 34-36). See *Holder*, 130 S. Ct at 2718-2719 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others") (citation omitted). Section 1519 clearly prohibits McRae's actions.

IX

THE EVIDENCE IS SUFFICIENT TO SUPPORT MCRAE'S CONVICTION FOR DEPRIVATION OF RIGHTS UNDER COLOR OF LAW

A. Standard Of Review

As discussed above, this Court's "review of the sufficiency of the evidence is 'highly deferential to the verdict.'" *United States* v. *Moreno-Gonzalez*, 662 F.3d 369, 372 (5th Cir. 2011) (citation omitted). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted); see also *United States* v. *Villarreal*, 324 F.3d 319, 322 (5th Cir. 2003).

B. Argument

McRae was charged in Count 5 of the Second Superseding Indictment with "burn[ing] the body of Henry Glover * * * without legal justification, thereby willfully depriving Glover's descendants and survivors of rights secured and protected by the Constitution and laws of the United States; those are, the rights to have access to courts and to seek legal redress for a harm." R. 346. In response to McRae's motion for a bill of particulars, the United States specified, with regard to Count 5, that "[t]he potential causes of action for the 'descendants and/or survivors' include, but are not limited to, wrongful death actions in state court and civil actions for deprivation of rights in federal court." McRae R. 1221.

The district court properly instructed the jury at trial, without objection from McRae, that:

> If a defendant, acting under color of law, wrongfully and intentionally conceals information crucial to a person's ability to obtain redress with the courts, and does so for the purpose of frustrating that right, and if the concealment and delay substantially reduce the likelihood of the person obtaining the relief to which he is otherwise entitled, you may find that the defendant has committed a constitutional violation.
>
> If you find, beyond a reasonable doubt, that Henry Glover's survivors' right to access the courts was made inadequate, ineffective, or not meaningful, as a result of intentional acts by the defendant, you may find that the defendant violated the constitutional right to access of the courts. You may also find a violation of this right if you find the

> defendant's intentional conduct shielded key facts which would form the basis of the survivors' claims for redress.

R. 6818-6819.

This Court held in *Ryland* v. *Shapiro*, 708 F.2d 967, 972-973 (5th Cir. 1983), that when agents of the state, acting under color of law, conceal the fact that a victim has been murdered, the victim's family has stated a claim based upon the deprivation of access to the courts. See also *Jackson* v. *Procunier*, 789 F.2d 307, 310-311 (5th Cir. 1986) ("A substantive right of access to the courts has long been recognized. In *Ryland* v. *Shapiro*, we characterized that right as 'one of the fundamental rights protected by the Constitution.' * * * Any deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation.") (citation omitted); *Harrell* v. *Cook*, 169 F.3d 428, 432 (7th Cir. 1999) ("[W]hen police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged.").

As discussed above, the United States presented substantial evidence at trial that McRae burned the body of Henry Glover in order to impede the investigation of Glover's death. The United States also presented substantial evidence that this act deprived Glover's relatives of their ability to find out what happened to him; prevented an autopsy about the cause of death; and hindered investigation into a police shooting. First, the jury heard extensive testimony about the Glover

family's efforts to find out what had happened to Henry Glover, and to his body. For instance, the jury heard from Patrice Glover, Henry's Glover's sister, that after Tanner took Glover from the scene of the shooting to seek help, she returned to her apartment to call her mother and tell her what happened, and to call area hospitals to look for Glover. R. 3218-3223. The hospitals told her that they hadn't had any gunshot victims come through their facilities. R. 3223. About two hours later, Tanner came by her apartment and told her that he had been beaten and that her brother was probably dead. R. 3225. Ms. Glover testified that, later that day, Calloway and King returned to the apartment, and they prepared to leave New Orleans. T. 3228-3229. She eventually ended up in Dallas, Texas. R. 3230-3231. Once there, she "called various people to find out, you know, have they heard anything or can give me some information about my brother." R. 3231. She did not, however, find out any information about him. R. 3231. Ms. Glover testified that she didn't stop looking for her brother, but instead "called everybody. I called the police department. * * * I called a lot of people trying to get information." R. 3231. Ms. Glover testified that it took about two months before her brother's body was located, and that it wasn't until May 2006 that they had a funeral, because the family had to seek dental information to try and identify Glover's body. R. 3232-3233.

The United States also presented testimony from Glover's cousin, Kawan McIntyre, who testified that right after she found out that Glover had been shot, the family "got on the phone making phone calls trying to find out * * * what exactly happened to Henry." R. 4995. They tried "[c]alling the missing person hot line, the integrity bureau, just calling different people trying to find out." R. 4995. McIntyre testified that after she returned to New Orleans on October 2, 2005, she and Edna Glover, Glover's mother, went to the 4th District police station, "to find out what actually happened to Henry, where was his body, just get answers that we didn't have in the beginning." R. 4995-4997. McIntyre testified that in November 2005, she "[w]ent to the police station a second time, again with my aunt Edna Glover." R. 4998. They told the officer at the counter that they were "trying to find answers about Henry Glover, we need some information. Every time we come to the station, the only thing we're doing is constantly leaving names, numbers, and no one is returning the phone calls." R. 4997. They provided the officer information about where Glover was last seen, and where they believed he was shot, and a report was made, but they were never contacted in any way. R. 4998. McIntyre testified that about two weeks later, she went to the 4th District again, this time alone. R. 4999. She testified that she went by herself because "I didn't want my aunt to come back with me. I didn't want her to get discouraged and give up on finding Henry." R. 4999. On that occasion, McIntyre gave the

police information she had received from Tanner regarding what happened to Glover. R. 4999-5000. She explained that the police killed Glover and that Tanner's car had been set on fire on the levee. R. 5001-5002. McIntyre testified, however, that the officer with whom she was speaking "looked at me, stared me straight in my face and told me that no one killed Henry Glover." R. 5003. After that, she never again returned to the station. R. 5003.

In addition to Patrice Glover's and Kawan McIntyre's testimony, the jury heard testimony from Warren that, while on duty at the Royal Sonesta Hotel, he received a call from someone whom he believed might have been Mrs. Glover, saying that her son had been shot and his body burned, and trying to find out information about "where she could go and how she could get this resolved or get some knowledge of it." R. 5169-5170.

The United States also presented evidence showing that because Glover's body was burned, a full autopsy could not be performed, and the cause of death could not be accurately identified. Dana Troxclair, the forensic pathologist assigned to autopsy Glover's remains, testified that because she didn't have an intact skeleton, and didn't have all the body parts, she could not determine how the person had died, or whether the person was a man or a woman. R. 4310, 4312. Because she didn't have any organs, and did not have intact tissue, she could neither look for the path a bullet might have taken through Glover's body, or for

hemorrhage or tissue destruction of any kind. R. 4312-4313. Troxclair testified that while they would normally take a piece of the tibia for DNA analysis, in this case they didn't have a tibia, and used a piece of the rib. R. 4313-4314. Troxclair could not even determine whether Glover was alive when he was burned, because she couldn't see evidence of soot deposits in the trachea. T. 4314. Her final report stated only, "extensive fourth degree burns with charred fragments remaining," "hyoid bone intact" and "left rib fractures with minute fragments of metal within the surrounding soft tissue." R. 4315.

The United States further showed that, as a result of the cover-up of this incident, no investigation into the shooting began until February 13, 2009, three-and-a-half years later. R. 4780. Special Agent Ashley Johnson testified that the case was opened after an agent "received a complaint from a reporter who alleged that Henry Glover was burned inside of William Tanner's car, possibly at the hands of New Orleans police officers." R. 4780. Johnson researched the article, found Tanner's name, contacted him, and began her investigation. R. 4781.

Despite this evidence regarding how his actions impeded the Glover family from obtaining information about the death of Henry Glover, McRae nevertheless argues that the United States failed to present sufficient evidence in a number of respects. McRae Br. 41. Specifically, he claims that the United States failed to identify the persons entitled to seek redress for Glover's death and the specific

defendants who could have been lawfully named; failed to identify the courts in which they could seek redress and the specific causes of action; and failed to state whether the action would be non-frivolous. McRae Br. 41-42.

As a primary matter, McRae's argument that there was "no proof" of "the identity of the specific person or persons who either are or were lawfully entitled to seek redress for Glover's death" (McRae Br. 41) ignores the evidence that Glover was survived not only by his sister, Patrice, who testified at trial, but also by other siblings, his mother, Edna, and his child, Nehemiah Short. R. 3205-3209. Secondly, any error in the instructions would have been harmless, for it is clear that in Louisiana there is a wrongful death action available to survivors if brought within one year of the death. La. Civil Code Art. 2315.2 (Wrongful death action). It is beyond dispute that the jury, after hearing extensive evidence of Warren's role in Glover's death, and convicting Warren of a federal civil rights crime for causing the death, was well able to identify the potential defendant. Moreover, McRae stipulated that there is a one year statute of limitation for civil rights claims under 42 U.S.C. 1983. See McRae R. 5700-5701.

The cases of *Christopher* v. *Harbury*, 536 U.S. 403 (2002), and *Lewis* v. *Casey*, 518 U.S. 343 (1996), relied upon by McRae (McRae Br. 41), are largely inapplicable to the matter at issue here. In *Harbury*, for instance, the court emphasized that, "[l]ike any other element of an access claim, the underlying cause

of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant." 536 U.S. at 416 (emphasis added). The Court noted that because the plaintiff alleged only that "false and deceptive information and concealment foreclosed [him] from effectively seeking adequate legal redress," the "District Court and the defendants were left to guess at the unstated cause of action supposed to have been lost." *Id.* at 418. The Court noted that the plaintiff had further "not explained, and it is not otherwise apparent, that she can get any relief on the access claim that she cannot obtain on her other tort claims, *i.e.*, those that remain pending in the District Court," but that the situation might be different "where the statute of limitations had run." *Id.* at 422 and n.22. And in *Lewis*, the Court found that the plaintiffs, inmates of the Arizona Department of Corrections, had failed to show "widespread actual injury" related to their ability to access the courts. See 518 U.S. at 349, 356-359. Specifically, in the context of this class action, the Court found that the district court had identified "only two instances of actual injury" – one prisoner who was a slow reader who had his case dismissed with prejudice; and the other a prisoner who was unable to file a legal action. *Id.* at 356. Notably, the Court "rejected [Arizona's] argument that the injuries suffered by [these two individuals] do not count," but instead simply concluded that these injuries could not serve as a basis for the systemic injunction the district court had ordered as a remedy. *Id.* at 357-359.

The issues presented in *Harbury* and *Lewis* are not present in this case. Both the initial indictment and the United States' response to McRae's motion for a bill of particulars put McRae on notice that he was accused of depriving Glover's family of their ability to file a wrongful death suit in state court or a Section 1983 action in federal court. See R. 30; McRae R. 1221. McRae stipulated to the fact that the statute of limitations for a federal civil rights claim under 1983 is one year. McRae R. 5700-5701. There is absolutely no question that the Glover family could not file suit against Warren during this period because McRae's intentional and successful effort to cover up the details of Warren's crime prevented any clear analysis of the cause of Glover's death, and prevented any FBI investigation of his death until over three years after he had died. Indeed, McRae himself testified that by burning Glover's body, he kept Glover's family from finding out what happened to him, and might have prevented the family from being able to seek justice. R. 5559. And though McRae complains that there was no evidence that such a cause of action would be non-frivolous, this conclusion disregards both the evidence that Warren shot the unarmed Glover in the back as he fled the mall and the jury's determination that the shooting was unjustified. Unlike the *Lewis* case, it is thus quite clear not only that a potential lawsuit against Warren would not have been frivolous, but also what "actual injury" McRae inflicted upon the Glover family.

The jury here was appropriately charged that it could find McRae guilty if his "intentional conduct shielded key facts which would form the basis of the survivors' claims for redress" (R. 6819); there is simply no question that his conduct had precisely that effect. There was sufficient evidence to support McRae's conviction on Count 5 of the indictment.

X

MCRAE'S TAKING AND BURNING OF TANNER'S VEHICLE CONSTITUTED AN UNLAWFUL SEIZURE FOR FOURTH AMENDMENT PURPOSES

A. Standard Of Review

Because McRae did not raise an argument regarding this Fourth Amendment issue in the district court, this Court reviews for plain error. See *Puckett* v. *United States*, 129 S. Ct. 1423 (2009). As the Supreme Court observed in *Puckett*, plain error review is "strictly circumscribed. * * * This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Id.* at 1428.

As the Court explained in *United States* v. *Olano*, 507 U.S. 725 (1993), plain error review involves four steps. First, there must be "error" – a "[d]eviation from a legal rule" that was not intentionally abandoned. *Id.* at 732-733. Second, the

error must be "'clear' or, equivalently, 'obvious'"; a "court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." *Id.* at 734. Third, the error must have affected the appellant's substantial rights, which means that it "must have affected the outcome of the district court proceedings." *Ibid.* Even if these three prongs are satisfied, "the courts of the United States, in the exercise of a sound discretion, *may* notice" the error only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 735-736 (citation omitted; emphasis added); *Puckett*, 129 S. Ct. at 1429 (quoting *Olano*, 507 U.S. at 736). "Meeting all four prongs is difficult, 'as it should be.'" *Ibid.* (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

B. Argument

The district court properly instructed the jury that,

> The government alleges that Defendants Scheuermann and McRae violated William Tanner's constitutionally secured right to be free from unreasonable governmental seizure of his property by burning it without legal justification. The Fourth Amendment to the United States Constitution provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. The people's "effects" include their personal property. A Fourth Amendment "seizure" of personal property occurs when there's some meaningful interference with an individual's possessory interest in that property. Destroying property by burning it meaningfully interferes with an individual's possessory interest in that property.

> William Tanner had a possessory interest in his car. It necessarily follows that the car was property protected by the Fourth Amendment and that its destruction by burning constituted a Fourth Amendment seizure.
>
> To be constitutionally permissible, then, the seizure of William Tanner's car by burning must be reasonable. If you determine that either of the defendants seized William Tanner's vehicle (a 2001 Chevy Malibu) by burning it, you must determine whether such defendant acted reasonably. In doing so, you must look at the totality of the circumstances and determine whether the destruction of property was reasonably necessary to effectuate the performance of the law enforcement officer's duties.

R. 6813-6814.

McRae did not object to these jury instructions; yet, he argues that the seizure of Tanner's vehicle began when Tanner first arrived at Habans and ended when the car was moved to the levee, and that his act of burning the car was a separate, post-seizure act, that could not constitute a Fourth Amendment violation. McRae Br. 44-46. While McRae cites cases in support of the notion that once a seizure has taken place, the Fourth Amendment violation has ended, those cases are inapplicable here, where McRae's act of moving the car from the schoolyard at Habans, driving it to the levee with the intention to burn it, and then burning it, represented a continuous course of conduct that violated the Fourth Amendment. McRae's conviction on Count 4 of the indictment should therefore stand.

Under the Fourth Amendment, a "'seizure' of property * * * occurs when 'there is some meaningful interference with an individual's possessory interests in

that property.'" *Soldal* v. *Cook Cnty.*, 506 U.S. 56, 61 (1992) (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984)). The evidence was sufficient here to show, that McRae's actions did, in fact, interfere with Tanner's possessory interest in his car; that those actions were part of a continuing course of conduct which began when he moved the car from the Habans schoolyard, and ended when he burned it at the levee.

Despite McRae's contention that Tanner's vehicle had been seized before he destroyed it, the evidence introduced at trial was sufficient to allow the jury to find that, based on the totality of the circumstances, McRae's conduct constituted a violation of the Fourth Amendment. Only a short time passed between Tanner's arrival at the school and the burning of the vehicle. Cf. R. 3497, 3819, 3914-3915 (discussion of a photograph taken at 9:09 a.m. on September 2, 2005, of Tanner, King, and Calloway, sitting handcuffed behind Tanner's car at Habans) with R. 4239-4240 (photograph taken by a border patrol agent at 10:50 a.m. on September 2, 2005, of a car on fire on the levee). Tanner testified that he "watched [his] car" the entire time he was at Habans. R. 3502. At some point after Tanner's arrival, his vehicle was moved from its initial location in the schoolyard, and McRae removed items from the car, including a jug of gasoline, jumper cables, and tools. R. 3498, 3505-3506, 5495, 5527. Tanner watched McRae remove these items from the car. R. 3498, 3503, 3506. Tanner testified that, at this point, he was

"able to keep an eye on [his] car." R. 3503. Neither Tanner nor the other men were charged with any crime, and continued to ask for help for Henry Glover. R. 3503, 3627-3628. McRae, however, then moved the car again, out of the schoolyard and into another location at Habans. R. 3506, 5495. Tanner watched him do so. R. 3506. McRae then drove the car to the levee, where he set it on fire. See R. 5495, 5497.

This entire course of conduct – McRae's moving Tanner's car and driving it to the levee – triggered the Fourth Amendment violation in this case. McRae's own statements and behavior confirm this. McRae testified that before he left the school to drive to the levee, he took Tanner's keys out of the car, walked up to the three men where they were sitting on the ground, and asked, "Who owns the car, because I'm throwing the keys away." R. 5529. If McRae had believed the car had been seized prior to this point in time, it would have made little sense for him to either make such an inquiry, or to offer to return property within the car. This question shows that he himself believed that at that point he was "meaningfully interfering" with a possessory interest in the car. See *Soldal*, 506 U.S. at 61. Furthermore, McRae testified at trial that "I had made a decision *before I left Habans* that I was going to burn the body in the vehicle." R. 5522 (emphasis added). Given this testimony, the jury was entitled to find that McRae's illegal act encompassed not only his burning the car, but taking it from the schoolyard to

facilitate that action. And, indeed, Tanner's testimony also shows that it was McRae's act of driving the car away from Habans that triggered the seizure. Tanner testified that as he watched McRae drive away from the schoolyard, he turned to Edward King and said, "I'm not going to see that car no more." R. 3507.

The cases McRae cites are inapposite. Those cases deal with a circumstance in which individuals had been wholly divested of their property, and sought, days or months later, to recover it. See *Lee* v. *City of Chicago*, 330 F.3d 456, 458-460 (7th Cir. 2003) (A victim, struck by a stray bullet while driving his car, sought to recover his vehicle, which had been "promptly impounded" by police officers after the shooting in efforts to track down the shooter; the recovery was first sought several days after the car was impounded and the parties did "not dispute that the initial impoundment * * * was a reasonable seizure."); *Fox* v. *Van Oosterum*, 176 F.3d 342, 350 (6th Cir. 1999) (the plaintiff challenged, under the Fourth Amendment, state officials' refusal to return his property four months after it had been seized). Here, the challenged conduct is McRae's *own role* in divesting Tanner of his property, not some more distant act of failing to return the car. See *ibid.* ("*Soldal* and the other Supreme Court cases addressing seizures of property all concern state actors' role in taking possession of property.").[16]

[16] The facts regarding Tanner's and the other men's release from Habans School only further highlight that McRae's actions did, indeed, constitute a seizure (continued…)

In sum, given his clear intention to burn Tanner's car before he even left the schoolyard, it cannot be said that McRae's action in permanently removing the car from Tanner's possession by taking it to the levee and burning it was reasonable for Fourth Amendment purposes. To survive plain error review, there must have been obvious error that affected McRae's substantial rights and must have seriously affected the fairness of the trial. See *Olano*, 507 U.S. at 732. There was no error here, clear or otherwise, and given the evidence that McRae took Tanner's car to the levee and burned it without any legitimate law enforcement purpose, convicting McRae of a Fourth Amendment violation does not call into question the fairness or integrity of the legal system.

(…continued)
of Tanner's vehicle. At the time McRae took the car, no charges had been filed against Tanner, King, or Calloway, and, indeed, no one ever asked them any questions about the dead man in the backseat of the car. R. 3627. After a few hours at Habans, the men were entirely released from police custody, and within days, each had left the city of New Orleans. R. 3230, 3508, 3512-3513, 3627-3630. Unlike the cases McRae cites, no active investigation was pursued involving Tanner's vehicle and no inventory log of the vehicle was made. Instead, the property was destroyed.

XI

MCRAE'S SENTENCE DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION

A. Standard Of Review

Whether a prosecution violates the Double Jeopardy Clause is a question of law that this Court reviews *de novo*. *United States* v. *Delgado*, 256 F.3d 264, 270 (5th Cir. 2001).

B. McRae's Sentence Does Not Violate The Double Jeopardy Clause

As McRae acknowledges, in the context of multiple punishments, "the interest that the Double Jeopardy Clause seeks to protect * * * is 'limited to ensuring that the total punishment did not exceed that authorized by the legislature.'" *Jones* v. *Thomas*, 491 U.S. 376, 381 (1989) (quoting *United States* v. *Halper*, 490 U.S. 435, 450 (1989)).

McRae was indicted and found guilty on Counts 4, 5, and 7 of the second superseding indictment. R. 6917. Count 4 charged McRae with unreasonably seizing Tanner's car and, in doing so, using fire and a dangerous weapon, in violation of 18 U.S.C. 242 and 18 U.S.C. 2. R. 346. Count 5 charged that by burning Glover's body McRae deprived Glover's survivors of the right to access the courts and to seek legal redress for a harm, and that, in doing so, McRae used fire and a dangerous weapon, in violation of 18 U.S.C. 242 and 18 U.S.C. 2. R.

346. Finally, Count 7 charged that McRae "knowingly used fire to commit violations" of 18 U.S.C. 242, thereby violating 18 U.S.C. 844(h). R. 347.

Section 844(h) provides, in pertinent part, that: "Whoever * * * uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States * * * including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years." 18 U.S.C. 844(h). Pursuant to this Section, McRae was sentenced to 120 months' imprisonment on Count 7, to run consecutively to an 87-month sentence for each of Counts 4, 5, and 6 (running concurrently). R. 6917. McRae argues, however, that his multiple punishments for Counts 4, 5, and 7 violate the Double Jeopardy Clause, because the district court used the jury's finding of McRae's single use of fire both to elevate the charges in Counts 4 and 5 from misdemeanors to felonies, and as the sole element establishing a conviction on Count 7. McRae Br. 50. In other words, McRae asserts that nothing in Section 844(h) indicates that a felony which provides for an enhanced punishment if committed by the use of fire, as is the case with 18 U.S.C. 242 here, can likewise serve as the predicate felony for a violation of Section 844(h). McRae Br. 50-51. This argument should be rejected.

The Seventh Circuit addressed and rejected a substantially similar argument with respect to 42 U.S.C. 3631 in *United States* v. *Colvin*, 353 F.3d 569, 575 (7th Cir. 2003) (en banc), cert. denied, 543 U.S. 925 (2004), a prosecution for interference with federal housing rights by burning a cross. The defendant in *Colvin* was also convicted and sentenced pursuant to Section 844(h), for using fire to commit the violation of 18 U.S.C. 3631. *Id.* at 571. As with the 18 U.S.C. 242 charges at issue here, a violation of Section 3631 was a felony in that case because fire, explosives, or a dangerous weapon were used. *Id.* at 575. That raised the question, explored by the Seventh Circuit, "whether the reference to 'any felony' in the opening sentence of § 844(h)(1) requires that the predicate offense be a felony without regard to the conduct signaled out for additional punishment. If so, then § 844(h)(1) would not apply to § 3631 because, without the use of fire (or a dangerous weapon or explosives), the underlying offense is a misdemeanor." *Ibid.*

The court held that Section 3631 describes separate offenses, rather than one offense with varying punishments. *Colvin*, 353 F.3d at 575. In other words, the offense the defendant was convicted of was an aggravated, felony offense; and that offense is the offense to which "any felony" in Section 844(h)(1) thus referred. *Ibid*. The court noted that, "[e]ven though this felony punishes the use of fire, the 1988 amendment to § 844(h)(1)," which added the cumulative punishment

language in question, "makes clear that Congress intended separate punishment under § 844(h)(1)." *Ibid.*

The same reasoning applies here. As to Counts 4 and 5, the jury was specifically charged that to find McRae guilty, "the government must prove beyond a reasonable doubt with regard to each defendant individually * * * that the acts of such defendant included the use, attempted use, or threatened use of a dangerous weapon, to wit: A firearm, or fire." R. 6814-6815, 6820; cf. *Colvin*, 353 F.3d at 575 n.2 (noting that "[t]he jury was instructed that in order to convict Colvin on the § 3631 charges, it had to find that his 'conduct involved the use or attempted use of fire.'"). The "use of fire" element was thus a part of the conduct charged against McRae, rather than a mere sentencing element. Cf. *Castillo* v. *United States*, 530 U.S. 120 (2000) (reading 18 U.S.C. 924(c), which provides different levels of punishment depending on the type of firearm used during a crime of violence, to describe elements of separate offenses, rather than merely enhanced sentencing factors). And, as such, the aggravated, felony offenses of which McRae was convicted are precisely the offenses "to which 'any felony' in the opening sentence of § 844(h)(1) refers." See *Colvin*, 353 F.3d at 575. As the Seventh Circuit concluded, "[a]ny narrower reading of the language of § 844(h)(1) would be difficult to reconcile with the Supreme Court's expansive reading" of "similar language in § 924(c)." *Ibid.*

McRae next argues that Section 844(h) only applies to felonies which provide an enhanced punishment if committed by the use of a deadly or dangerous weapon, not to felonies enhanced by the use of fire. McRae Br. 50-51. This Court rejected precisely the same reasoning in *United States* v. *Creech*, 408 F.3d 264 (5th Cir. 2005). There, the defendant argued that Section 844(h)'s "'stacking' provision is limited to situations in which the defendant used an explosive, rather than fire, in the commission of a felony." *Id.* at 272. He argued that "because the count in which he was charged with violating § 844(h) only alleged the use of fire, not explosives, his conviction under § 844(h) did not trigger the application of the stacking provision." *Ibid.* Rejecting the argument, this Court concluded that "[t]he specific reference to an explosive-related felony does not render the stacking provision applicable only to offenses involving explosives. Quite to the contrary, the statute's language specifically dictates that the additional term imposed under the section, which applies equally to explosive- *and* fire-related felonies, run consecutively to 'any other term of imprisonment.' Moreover, the statute in no way attempts to limit the stacking provision to felonies in which explosives are used but explicitly merely includes such felonies." *Id.* at 273; see also *ibid.* (citing with approval *United States* v. *Grassie*, 237 F.3d 1199, 1214-1216 (10th Cir. 2001) (holding that 844(h)'s sentencing enhancement includes felonies committed with fire), and *Colvin*, 353 F.3d at 574 (same)).

McRae also argues that because there was no special verdict form for Counts 4 and 5, it is impossible to tell if the jury utilized a finding that he used "a firearm," "a fire," or both in reaching its verdict. McRae Br. 49. McRae himself took the stand at trial and admitted to using both a flare and firearm to set Tanner's car on fire and burn Henry Glover's body within. R. 5497. The jury was appropriately charged that the government must prove beyond a reasonable doubt that McRae's conduct included the "attempted use, or threatened use of a dangerous weapon, to wit: A firearm, or fire." R. 6814-6815. Thus, the lack of a special verdict form is irrelevant. McRae's sentence should stand.

XII

THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING MCCABE'S MOTION FOR A NEW TRIAL

A. Standard Of Review

A district court's decision to grant a new trial is reviewed for abuse of discretion, but on mixed questions of law and fact, this Court reviews the underlying facts for abuse of discretion, and the conclusions to be drawn from those facts *de novo*. *United States* v. *Wall*, 389 F.3d 457, 465 (5th Cir. 2004), cert. denied, 544 U.S. 978 (2005).

As set forth in *Wall*, 389 F.3d at 467, a defendant seeking a new trial on the basis of newly discovered evidence must show that: "(1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to

detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal." These rules stem from the court's decision in *Berry* v. *State*, 10 Ga. 511 (1851), and are known as the *Berry* factors. See *ibid.*

B. The District Court's Grant Of A New Trial Was An Abuse Of Its Discretion

1. The 1519 Count

a. McCabe's Failure To Ask His Co-Defendants Whether They Had Received A Draft Of Exhibit 34 From Simmons Was Not Diligent

The district court abused its discretion when it held that McCabe's failure to discover that Simmons had allegedly given Warren a copy of the narrative portion of Exhibit 34 was not due to a lack of diligence, and that McCabe had thus met the second *Berry* factor. R. 2265.

McCabe testified at trial that, together with Purnella Simmons, he wrote the incident report introduced at trial as a fraudulent account of the circumstances surrounding Warren's shooting of Henry Glover. R. 6242-6253. The United States proved, however, that, contrary to McCabe's testimony, the narrative portion of Simmons' original report detailing the Glover shooting was replaced by a fraudulent report prepared by McCabe alone.

McCabe's new trial motion alleged that there was "newly discovered" evidence that Simmons gave David Warren a copy of the narrative portion of Exhibit 34 in December 2005, and that this was "evidence that there was never another version of the report that differed in substance from Government Exhibit 34." R. 2047-2048. This "newly discovered" evidence is, of course, relevant only if Warren received the narrative from Simmons; otherwise, the existence of another draft of the fraudulent narrative is of no consequence whatsoever.

The indictment against McCabe was handed down in June 2010. R. 28-34. It charged McCabe with knowingly and willfully authoring a false report, and with falsely stating that he wrote an incident report in conjunction with Simmons, when in fact he did not. R. 31-34. McCabe has thus long been on notice of the allegations against him, and the relevance of the question whether Simmons had ever possessed a draft of the fraudulent report. Moreover, both Warren and Simmons testified at trial that Warren had been interviewed by her (R. 4468-4469, 5075), which would make Warren a prime candidate to actually have received a copy of the report. Yet, there is no indication that McCabe ever asked his co-defendants – in particular, Warren – whether they had ever received the report from Simmons: a fact that would have been relevant to his defense.

This Court has repeatedly emphasized that a failure to investigate or seek a continuance to respond to the government's theory constitutes lack of due

diligence. See *United States* v. *Sullivan*, 112 F.3d 180, 183 (5th Cir. 1997) (holding that defense counsel's claim of due diligence failed where counsel was made well aware early in the trial of the government's theory, yet did not investigate that theory). For instance, in *United States* v. *Vasquez*, 386 F. App'x 479 (5th Cir. 2010), cert. denied, 131 S. Ct. 972 (2011), this Court affirmed the district court's denial of a motion for new trial on the basis of newly discovered evidence where the new evidence in question was a co-defendant's exculpatory statement. In affirming the district court's decision, this Court noted that "there is no indication in the record that [the defendant,] Vasquez[,] exercised diligence in obtaining [co-defendant] Hernandez's statement." *Ibid.* Similarly, in *United States* v. *Muja*, 365 F. App'x 245, 246 (2d Cir. 2010), the court held that "where * * * 'a defendant knew or should have known that his codefendant could offer material testimony as to the defendant's role in the charged crime, his inability to procure that testimony before or during trial should not be redressed by granting the defendant a new trial when the codefendant asserts his willingness to exculpate the defendant after the original trial is over.'" (citation omitted); see also *United States* v. *Mulderig*, 120 F.3d 534, 546 (5th Cir. 1997) (holding that a defendant had not demonstrated due diligence when he failed to seek evidence "from, in [the defendant's] own words, 'one of the most important witnesses in this case'"), cert. denied, 523 U.S. 1071 (1998); cf. *United States* v. *Diggs*, 649 F.2d 731, 740 &

n.10 (9th Cir.) (holding that a defendant had not demonstrated diligence when the record indicated that neither he nor his counsel had approached co-defendant's counsel to discuss the possibility of the co-defendant testifying on the defendant's behalf), cert. denied, 454 U.S. 970 (1981), overruled on other grounds by *United States* v. *McConney*, 728 F.2d 1195 (9th Cir.), cert. denied, 469 U.S. 824 (1984).

The district court acknowledged that "McCabe's counsel have not represented to the Court that they sought documents from Warren," but held that it had not been presented with "any persuasive evidence or argument that McCabe's counsel had reason to request such." R. 2265. In light of the law in this circuit that a failure to investigate a known theory or procure relevant co-defendant testimony during trial is not duly diligent, the district court's holding was an abuse of discretion. Moreover, the district court's opinion represents a mistaken application of the law. While the district court asserted that it had not received "any persuasive evidence" that McCabe's counsel had a reason to seek the report, the law is clear that it is not the United States' burden to present such evidence, but rather McCabe's burden to prove that he did not have any reason to seek the report. See *United States* v. *Freeman*, 77 F.3d 812, 817 (5th Cir. 1996) ("[The *Berry*] rule requires *a defendant*, moving for a new trial based on newly discovered evidence, to show that [each of the factors have been met].") (emphasis added).

This Court has held repeatedly that "[i]f the defendant fails to demonstrate any one of [the *Berry*] factors, the motion for new trial should be denied." *Wall*, 389 F.3d at 467; see also *Freeman*, 77 F.3d at 817. Because McCabe cannot meet the second *Berry* factor, the district court's grant of a new trial should be reversed on that basis alone.

b. Given Warren's Lack Of Credibility And His Interest In The Outcome Of This Matter, The District Court Abused Its Discretion In Holding That The New Evidence Likely Would Result In An Acquittal

The grant of a new trial in this case hangs entirely on the word of David Warren, a convicted felon whose trial testimony the district court itself found was "contrived and fabricated," and about whom the court stated that, "[i]t is clear that one lie led to another lie, led to the truth."[17] R. 6903-6904. Without Warren's testimony that he received a copy of the narrative portion of the report from Simmons, the discovery of another copy of the narrative has no relevance to McCabe's defense. R. 2268. While the United States recognizes that this Court rarely overturns a district court's credibility determinations, we believe that this highly unusual factual scenario makes this the rare case: the district court itself already discredited Warren's veracity; it overlooked flaws in his evidentiary hearing testimony; it did not seem to take into account the suspicious timing of his

[17] See also R. 6903 ("You killed a man. Despite your tendentious arguments to the contrary, it was no mistake.").

"remembering" that he had received the narrative from Simmons; and it entirely disregarded Warren's significant personal interests in fabricating this post-trial discovery. For these reasons, and in these limited circumstances, the district court abused its discretion in finding that the newly discovered evidence – which was purportedly in Warren's hands for the entire duration of the trial in this case – would probably produce an acquittal.

The district court made four significant errors in relying on Warren's evidentiary hearing testimony to overturn McCabe's conviction. First, while the district court itself acknowledged Warren's statement that no one else was in the room when Simmons allegedly gave him the report in December 2005, and his testimony that he had told no one about receiving the report from her until near the end of the trial in 2010 (R. 2268), the court erred in the conclusions it drew regarding the circumstances of the disclosure. For instance, the court concluded that because McCabe did not become aware of the investigation against him until July 2009, "[w]hen Warren delivered the newly discovered narrative report to his attorney in May 2009, Warren could not have known that the contents of the newly discovered narrative report and the fact that Warren received it from Simmons would have been critical to the government's case against McCabe," citing this fact to credit Warren. R. 2269-2270. This conclusion, however, ignores the fact that in May 2009, Warren did not tell anyone at all that he had received the report from

Simmons. R. 2304-2306. Rather, by his own testimony, he told no one about having received the report from Simmons until either late November or early December 2010, only when it was obvious that such evidence would be critical to McCabe's case. R. 2304-2306.

Second, the court erred in concluding, skeptically, "[W]hat sense does it make for Warren to fortuitously assert that he received the report from Simmons? The only person it helps is McCabe; there is no benefit to Warren." R. 2269. This conclusion is plainly incorrect. As the court itself acknowledged in its opinion, Warren's new testimony about having received the report from Simmons is extremely helpful to him, because he could now "possibly argue that his counsel should have made further inquiry into the substance of the report (because the newly discovered narrative report corroborates Warren's account of the shooting)." R. 2265. Moreover, the grant of a new trial to McCabe has become a feature of this very appeal, where Warren argues – albeit, for the reasons explained *supra*, incorrectly – that it reflects on his own motions for severance and mistrial.

Third, the district court failed to question the suspicious circumstances of Warren's revelation to his attorneys that Simmons had given him a copy of the report. According to his own affidavit, and those of his trial attorneys, Warren raised the issue of the report by stating that he thought the copy of the report introduced at trial contained a mistake not present in the version Simmons gave

him. R. 2055, 2064. The report introduced at trial as Exhibit 34 incorrectly states that Warren himself had notified Simmons of the shooting. R. 2064. Warren stated that he thought the version that he alleges Simmons gave him did not contain that mistake: *i.e.*, that it had correctly stated that Howard called to inform Simmons of the shooting. R. 2064, 2290, 2302. However, in actuality, both Exhibit 34 and the "newly discovered" narrative state that Warren was the person who called Simmons, which calls into question Warren's alleged "recollection." R. 2302-2303. Furthermore, if Warren actually believed there was such a large difference between the reports, it is incredible that he would not have realized it before the end of his trial, as the report was mentioned over 700 times during the trial (R. 2272). The district court neither discussed these peculiar circumstances of Warren's alleged recollection, nor did it note the fact – which undermines McCabe's case – that it would not make sense for Simmons to have assisted in drafting a report that mistakenly said that Warren, rather than Howard, had first contacted her about the shooting.

Finally, the district court made a clearly erroneous factual finding when it found that Simmons' trial testimony was called into question because she had failed to mention at trial that her original report had a border around it, but then had included that fact in her affidavit in connection with the evidentiary hearing. See R. 2270. In her affidavit, Simmons stated that her original narrative – unlike

both Exhibit 34 and the "newly discovered" narrative – was generated on a standard, pre-printed form, utilized by her platoon, and that it had a border around it. R. 2175. While Simmons did not mention at trial that her report was generated on a page with a border, the fact that she would have used a pre-printed form to prepare her report *is* something that she testified to before the grand jury, months before trial began. R. 2418-2419; see also Exh. NT-3, Exh. NT-4 at 7-8. It is thus not a basis for her credibility to be called into question.

The courts of appeals, unlike the district court here, have repeatedly recognized that "codefendant testimony that is not offered until the codefendant has been sentenced is 'untrustworthy and should not be encouraged.'" *United States* v. *Rodriguez-Romero*, Nos. 92-50720, 93-50183, 1994 U.S. App. LEXIS 11272, at *10 (9th Cir. May 9, 1994) (unpublished) (citation omitted); accord *United States* v. *Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.) (holding that the district court did not abuse its discretion in denying a motion for new trial and noting that "[i]t would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged."), cert. denied 506 U.S. 890 (1992); see also *United States* v. *Blount*, 982 F. Supp. 327, 331 (E.D. Pa. 1997)

("A co-defendant who has already been convicted of a crime and is languishing away in jail has little to lose by lying to save a friend's hide."). Given these holdings, the district court erred in its overall assessment that Warren's testimony about receiving a copy of the report from Simmons would have likely changed the outcome of this case. At a new trial, Warren's testimony would be called into question because of the lack of corroboration for his account of receiving the report from Simmons, the timing of the revelation, and its potential to assist him with a possible ineffective assistance of counsel claim. His credibility would be completely undermined by his felony conviction and the district court's strongly-worded statements regarding his lack of credibility. Simmons, on the other hand, would continue to deny that she had provided the report to Warren, and would point out the other ways in which the new narrative did not comport either with the form or substance of the narrative that she had actually prepared. Because Simmons had already been cross-examined at trial regarding her credibility issues, Warren's word alone would not cause a new jury to make a radically different assessment of her truthfulness. The outcome of a new trial would thus be exactly the same: McCabe would be convicted for obstruction of justice by preparing a false statement regarding the Glover shooting. The district court abused its discretion in ruling to the contrary.

2. Section 1001 And 1623 Counts

For the reasons stated above, the district court abused its discretion in granting McCabe a new trial on the 18 U.S.C. 1519 count. If the grant of a new trial on that count is reversed, then it would follow that the grant of a new trial on the 18 U.S.C. 1001 and 18 U.S.C. 1623 counts also must be reversed. However, regardless of this Court's assessment of the district court's Section 1519 ruling, it is clear that the district court abused its discretion in granting a new trial on the Section 1001 and 1623 counts against McCabe. The newly discovered evidence did not undermine the convictions on those counts, because those convictions were based on evidence independent of the false report.

It is true that the 18 U.S.C. 1001 and 18 U.S.C. 1623 counts against McCabe were based in part upon McCabe's making false statements and giving false testimony to the effect that he had collaborated with Simmons in writing an incident report documenting the September 2, 2005, shooting by Warren. See R. 2259-2260. However, in addition to charging McCabe with making false statements with regard to the narrative report, the Section 1001 count also charged him with knowingly stating falsely to FBI agents that he and Simmons interviewed Officer Howard before writing the incident report. R. 2259-2260. And, in addition to charging McCabe with giving false testimony regarding the incident report, the Section 1623 count charged him with knowingly giving false testimony that he

interviewed Howard before writing the report, and knowingly testifying falsely that he did not connect the Warren shooting to the burned car on the Patterson Road Levee until an account of the incident appeared in the newspaper several years after it occurred. R. 2259-2260.

The United States' evidence at trial concerning both the Section 1001 and the Section 1623 charges included: 1) Howard's testimony that she never spoke to McCabe about the incident (R. 3311); 2) Simmons' testimony that McCabe never joined her in interviewing Howard (R. 4469); and 3) testimony from FBI Agent Ashley Johnson that McCabe had admitted to having made the connection between the burned car and the shooting in 2005 (R. 4805).

This evidence was bolstered by the testimony of two other witnesses, whose statements made clear that McCabe had made the connection between the Warren shooting and the burned car in 2005. First, the United States presented the testimony of Alec Brown, who was a member of the NOPD at the time of the storm. Brown testified that, a few days after the storm, he was driving on the levee near the 4th District Police Station when he noticed a burned vehicle with a burned body in the back seat sitting behind the station. R. 3397-3402. After running the VIN number and plates, Brown went back to the 4th District station with the intent of notifying someone. R. 3404-3405. McCabe was the first ranking officer he saw. R. 3406. Brown asked McCabe about the car, to see if anyone had already

done a report on it. R. 3407. McCabe replied that "they knew about it and don't worry about it. Police need to stick together." R. 3407. Brown testified that he was later having a conversation with someone else about what he had seen, when McCabe came up to them and said, "I told you we already know about it. Just leave it alone." R. 3410.

The United States also presented the testimony of Officer Bell regarding this issue. See R. 4090-4092. Bell testified that, a few days after the shooting, a man appeared at the station when she was on duty, looking for his car. R. 4115. He described his vehicle to Bell as a white car, said that the car had last been seen at Texas and Seine (the site of the shooting), and that it ended up at Habans. R. 4116. Bell testified that, after speaking to the man, she reported what he had said to Sergeant McCabe. R. 3986. McCabe told her "to tell the guy that the car was at Habans." R. 3986. Bell's testimony that she told McCabe that someone was looking for a car that had been located both at the site of the shooting and then at Habans School provides further proof that McCabe lied to the grand jury when he testified that he did not make the connection until 2009.

Besides the testimony from Howard, Agent Johnson, Bell, Brown, and McCabe's grand jury testimony, the jury also had the opportunity to hear McCabe's own trial testimony. The jury therefore had the opportunity to make a credibility determination regarding whether McCabe or other witnesses were being

truthful in their testimony. The fact that there were inconsistencies between McCabe's statements to the FBI, his statements to the grand jury, and his testimony at trial undoubtedly influenced the jury's decision. Absolutely nothing in the allegedly newly-discovered evidence undermines the convictions on those charges.

The district court found that "[w]ere the jury to conclude that there never were two substantively different versions of the narrative report and that the version of events given by Simmons regarding the preparation of the report was false, a jury would probably resolve" the Section 1001 and 1623 counts in McCabe's favor. R. 2271. While that may well be true for the portions of those counts related to the false report, it does not follow that the jury would have reached the same conclusion regarding the statements to Agent Johnson and testimony before the grand jury relating to McCabe's alleged interview of Linda Howard and the circumstances of his connecting the Warren shooting to the burned car.

Again, it is clear that the defendant himself bears the burden of proving each of the *Berry* factors. See *Freeman*, 77 F.3d at 817. McCabe submitted absolutely no evidence and made no argument as to how the allegedly newly discovered evidence undermines the 1001 and 1623 counts against him. Given the record evidence supporting conviction on these counts, the district court abused its

discretion in concluding that a jury would probably resolve these matters in McCabe's favor and in granting McCabe a new trial. See R. 2271.

CONCLUSION

For the reasons stated above, Warren's and McRae's convictions and sentences should be affirmed, and the district court's grant of a new trial to McCabe should be reversed and the case remanded for sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2012, I electronically filed the foregoing Brief for the United States as Appellee/Cross-Appellant with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that on January 30, 2012, I served a copy of the foregoing document on the following counsel of record by First Class Mail:

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CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING

I hereby certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. Rule 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Date: January 30, 2012

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set forth by this Court in its January 30, 2012, order granting the United States' Unopposed Motion For Leave To File Extra-Length Brief. The brief was prepared using Microsoft Word 2007 and contains 31,348 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: January 30, 2012