Nos. 02-30079/30081/30082/30083/30084/30085

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

SEAN ALLEN, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES AS APPELLEE

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
TOVAH R. CALDERÓN
Attorneys
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Appellate Section, PHB 5001
Washington, DC 20530
(202) 514-4142

GLOSSARY

The following abbreviations are used for citations to the record. Where more than one such document exists, citations to the record are further identified by the defendant's last name.[1]

Br.	Brief
CD	(District) Court Docket
RE	Record Excerpts
Sent. Tr.	Sentencing Transcript
Tr.	Trial Transcript

[1] For example, "Allen Br." refers to Defendant Sean Allen's opening appellant brief.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION & STATUTES:

STATUTES (continued): **PAGE**

RULES:

SENTENCING GUIDELINES: **PAGE**

LEGISLATIVE HISTORY:

JURISDICTIONAL STATEMENT

A federal grand jury charged the defendants in a four-count indictment with violating 18 U.S.C. 241 and 245(b)(2)(B). The district court had jurisdiction pursuant to 18 U.S.C. 3231. This Court has jurisdiction to review the district court's judgment pursuant to 28 U.S.C. 1291. The defendants filed timely notices of appeal on March 5 and 8, 2002, pursuant to Fed. R. App. P. 4(b), from final judgments entered on March 5, 2002.

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to prove a violation of 18 U.S.C. 241 and 245(b)(2)(B) and whether the statutes are constitutional.

2. Whether the district court abused its discretion in admitting certain "skinhead evidence."

3. Whether the evidence was sufficient to support the convictions of Flom under 18 U.S.C. 241 (conspiracy) and of Allen and Dixon under 18 U.S.C. 2 (aiding and abetting).

4. Whether the district court abused its discretion in denying Potter's motion for a mistrial.

5. Whether the district court erred in calculating the sentences of Allen, Dixon, and Skidmore.

STATEMENT OF THE CASE

On August 17, 2001, a four-count indictment was filed against the defendants, Sean Allen, Eric Dixon, Jeremiah Skidmore, Jason Potter, Michael Flom, and Ryan Flaherty in the District of Montana. Count 1 charged all of the

defendants with conspiracy to violate protected rights in violation of 18 U.S.C. 241. Count 1 alleged, *inter alia*, that the object of the conspiracy was to "attack, intimidate, threaten, chase, assault, beat, and wield weapons against any African American, Hispanic, Jewish, and Native American persons in and around Billings, Montana on account of their race" (1 Tr. 91-92). In furtherance of this conspiracy, the indictment alleged, *inter alia*, that in the spring of 2000, Allen, Dixon, and Skidmore formed a group known as the Montana Front Working Class Skinheads and began to actively recruit people to become members of the group. Allen, Dixon, and Skidmore encouraged recruits to commit acts of violence against racial minorities and Jews by offering tangible rewards, such as red shoelaces and suspenders, which indicated elevated status within the skinhead group. This practice culminated on July 29, 2000, in a so-called "park patrol," whereby Potter, Flom, Flaherty, and others attending a barbecue at Allen's house left the barbecue and, at the urging of Allen, Dixon, and Skidmore, went to Pioneer Park for the purpose of chasing out racial minorities and Jews (1 Tr. 92-95). The remaining substantive counts of the indictment stemmed from this incident.

Thus, Counts 2, 3, and 4 alleged that on July 29, 2000, in violation of 18 U.S.C. 245(b)(2)(B) and 2,[2] all of the defendants except Skidmore "did wilfully

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[2] Section 245(b)(2)(B) makes it a federal crime to willfully injure, intimidate, or interfere with an individual on account of the individual's race, color, national origin, or religion and because that person is using a public facility. Section 2 is (continued...)

intimidate and interfere, and attempt to intimidate and interfere with [a Hispanic woman, an African American man, and a Hispanic man, respectively,] by force and threat of force, and the use, attempted use, and threatened use of dangerous weapons, because of [each individual's] race, color, religion, and national origin and because [each individual] was participating in or enjoying the benefits, services, privileges, programs, facilities, and activities provided and administered by any state or subdivision thereof; to-wit, a public park known as Pioneer Park" (1 Tr. 95-97).

The defendants moved to dismiss the indictment on the ground that Sections 241 and 245(b)(2)(B) were unconstitutional, and also on the ground that the nexus between Pioneer Park and interstate commerce was insufficient to support the charges. The court rejected their challenge to the constitutionality of the statutes, but did not rule at that time on their motions disputing the nexus between interstate commerce and the park (1 Tr. 19-20; CD 76). Additionally, Potter and Dixon filed pretrial motions to exclude certain "skinhead evidence," including white supremacist and Nazi-related literature, photographs of the defendants' tattoos, group photographs, and various skinhead paraphernalia, such as flags and flight jackets. The defendants argued, *inter alia*, that these items were irrelevant, overly prejudicial, needlessly cumulative, protected by the First Amendment, and constituted improper character evidence. The district court denied these motions on the ground that the items were probative of motive, intent, and plan, and that

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[2](...continued)
the federal aiding and abetting statute.

this probative value substantially outweighed any danger of unfair prejudice (1 Tr. 12-16).

The defendants were tried before a jury between October 22 and November 2, 2001. During the trial, the defendants raised a continuing objection to the admission of photographs of the defendants' tattoos and other, "skinhead evidence" (3 Tr. 604-605; 6 Tr. 1241). The court sustained some of the defendants' objections while overruling others, and instructed the jury that it may consider the admitted evidence "only as it bears on the defendants' motive, intent, or plan *and for no other purpose*" (3 Tr. 609; see also 6 Tr. 1266).

At the close of the government's case-in-chief, the defendants renewed their motion to dismiss the indictment and also moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). The defendants argued that federal jurisdiction was lacking with respect to Counts 2, 3, and 4 because the offense occurred at 10:30 p.m., after Pioneer Park had closed. As such, the defendants argued, the City of Billings was not providing any "benefit, service, privilege, program, facility or activity" within the meaning of Section 245(b)(2)(B) (7 Tr. 1727-1731). The court denied the motions, holding that it was inconceivable "that Congress, or any court, for that matter, would construe 18 U.S.C. Section 245(b)(2)(B) to mean or state that someone's civil rights are put to bed at 10 o'clock at night until 6 in the morning if a public park is closed" (7 Tr. 1735). The court also rejected the argument that federal jurisdiction was lacking because the charged conduct did not affect interstate commerce (7 Tr. 1724-1727).

Finally, each of the defendants moved for judgment of acquittal on Count 1, arguing that the evidence was insufficient to establish his participation in the alleged conspiracy. Allen and Dixon further challenged the sufficiency of the evidence with respect to Counts 2, 3, and 4. All of these motions were denied (7 Tr. 1731-1739).

All the defendants except Flom introduced evidence. Potter testified in his own defense. During cross-examination, the prosecutor asked him whether he had told an investigating FBI agent to "suck" his "cock." Counsel for Potter immediately objected and moved for a mistrial. The court overruled the objection and denied the motion on the ground that the question constituted proper impeachment (9 Tr. 2320-2321). At the close of all of the evidence, the defendants renewed their motions for judgment of acquittal. The motions were again denied (9 Tr. 2347). Accordingly, the case was submitted to the jury, and the defendants were found guilty on all counts (10 Tr. 2621-2625).

Sentencing was conducted before the district court on February 28, 2002. Allen, Dixon, and Skidmore raised numerous objections to the recommendations contained in the pre-sentence investigation reports. The court overruled most of their objections and sentenced each of them based on the jury's verdict and the evidence introduced at trial (Allen Sent. Tr. 3-38; Dixon Sent. Tr. 3-32; Skidmore Sent. Tr. 3-18). Allen and Dixon were sentenced to concurrent terms of 120 months imprisonment on each count. Skidmore was sentenced to 100 months imprisonment on Count 1, and Potter was sentenced to a total of 180 months

imprisonment (120 months on Count 1 plus three concurrent terms of 60 months on each of the remaining counts). Flom and Flaherty were sentenced to concurrent terms of 51 and 41 months imprisonment on each count, respectively. All of the defendants were also sentenced to concurrent terms of three years supervised release upon their release from prison, and all of the defendants except Skidmore were fined $400.00; Skidmore was fined $100.00. The district court issued its final written judgment on March 5, 2002, and the defendants filed timely notices of appeal (CD 235-244, 245-246).

STATEMENT OF FACTS

In the spring of 2000, Allen, Dixon, Skidmore, and others formed a group called the Montana Front Working Class Skinheads (MFWCS) (6 Tr. 1314). The group was a white supremacist, neo-Nazi organization, affiliated with the Aryan Nations, that idolized Adolf Hitler and adhered to his views on race (3 Tr. 698-706; 6 Tr. 1304-1310). The organization's dominant purpose was to "rid the world of all of the scum" by violent means, including "[d]eath" (3 Tr. 733-734). According to the group's members, "the scum" were racial minorities and Jews (3 Tr. 733). As the leaders of the organization, Allen, Dixon, and Skidmore sought to recruit young, strong men who were at least sixteen years old and who "were kind of like outsiders in school or anywhere else," that is, young men who "seemed like they didn't have anyplace to belong or fit in" (6 Tr. 1317; see also 6 Tr. 1303). They favored juveniles because they believed that juveniles were less

likely than adults to be incarcerated for committing violent acts (3 Tr. 761; 4 Tr. 1066).

The MFWCS leaders taught members and new recruits that Hitler was a "wonderful man for what he did and what he accomplished" and that "the South should have won [the Civil War]" because if it had, "we wouldn't have minorities in America" (6 Tr. 1304-1306). The leaders also taught the group's members and recruits that they "should finish what [Hitler] started by cleaning up the streets of Billings and ridding it of minorities and * * * morally questionable people." Additionally, they instructed members and recruits to "always be alert and prepared for anything" with respect to "RAHOWA," the "racial holy war." By being "prepared," the leaders meant that they should carry weapons twenty-four hours a day (6 Tr. 1325-1326).

MFWCS members and others associated with the group regularly greeted or said good-bye to each other by reciting the numbers "14" and "88." The number "14" stood for the group's 14-word motto, "We must secure the existence of our people in the future for white children." The number "88" stood for the phrase, "Heil Hitler" (3 Tr. 704-707, 713; 6 Tr. 1307). It was also common practice for those affiliated with the MFWCS to tattoo these numbers on their bodies along with the letters "MFWCS," images of Hitler and "dancing skinheads," swastikas, Celtic crosses, "SS" bolts, and Confederate flags (3 Tr. 685-687, 702, 720-721; 4 Tr. 1059-1060). All of the defendants, Allen, Dixon, Skidmore, Potter, Flom, and Flaherty, displayed such tattoos on their bodies (3 Tr. 609-637). Individuals

associated with the MFWCS also identified themselves by shaving their heads and displaying various Confederate and Nazi-related paraphernalia (3 Tr. 688, 709-712, 722-726; 6 Tr. 1308, 1320, 1356-1361).

The MFWCS uniform consisted of a white t-shirt, black jeans, black boots, red suspenders, and red shoelaces (3 Tr. 730; 6 Tr. 1317). The red suspenders and shoelaces (also called "braces" and "laces"), however, were considered a symbol of elevated status within the group and individuals associated with the organization were not permitted to wear them unless they were properly awarded by the group's leadership. The most common way for MFWCS members and others to earn their braces and laces was to commit an act of violence against a member of a racial minority group. Individuals who chose to wear them anyway, without committing such an act and without permission from the group's leaders, were reprimanded and subjected to "rough justice," that is, a beating by one of the leaders (3 Tr. 736-747; 4 Tr. 1058; 6 Tr. 1322, 1328-1332; 7 Tr. 1659-1660). Red braces and laces could be earned by participation in a so-called "park patrol," whereby those people associated with the group attempted to rid a public park of racial minorities and others who, according to the MFWCS's beliefs, "didn't have any business there," by using "[f]orce" or "any means necessary" (6 Tr. 1336, 1338).

On July 16-18, 2000, Allen, Dixon, Skidmore, Potter, and others went to Hayden Lake, Idaho for an Aryan Nations conference. The purpose of the trip was to "better [their] knowledge of white power and National Socialism and personal

identity" (6 Tr. 1351-1352). The group was honored for being "a well-dressed skinhead crew." As a reward, they were given the right to set on fire a giant swastika (3 Tr. 788-789; 6 Tr. 1352-1353). The group also participated in a cross-burning ceremony with various Ku Klux Klan members (3 Tr. 794). While the swastika and crosses burned, Allen's girlfriend distributed swastika armbands to all of the MFWCS members and associates attending the conference (6 Tr. 1359-1361).

A couple of weeks later, on July 29, 2000, Allen hosted a barbecue at his home. All of the defendants, Dixon, Skidmore, Potter, Flom, and Flaherty, attended (3 Tr. 797-798; 6 Tr. 1361-1362). During the party, the defendants mingled, drank beer, played horseshoes, and listened to "hate music" (6 Tr. 1362-1363). At some point during the evening, somebody suggested that they conduct a "park patrol." This idea excited everyone at the party (3 Tr. 799-801; 6 Tr. 1364; 7 Tr. 1677). As Allen and Dixon instructed the others on how to proceed, emphasizing the importance of dropping people off at all four corners of the park, the level of excitement at the party rose (3 Tr. 804-808). Potter was especially excited because he had not yet been awarded his braces and laces and he viewed this "park patrol" as an opportunity to finally earn them (3 Tr. 806). Before they left, Allen warned the group to be careful not to get caught by the police. He also asked the more senior MFWCS members to watch out for the younger

individuals,[3] especially Flaherty, because he was not from Billings (3 Tr. 807-809; 6 Tr. 1367).

Potter, Flom, Flaherty, and six other individuals rode in a pick-up truck to Pioneer Park with a supply of weapons, including ax handles, two-inch flatbars, chains, and sticks. Everyone except Flaherty, who sported a black t-shirt, was dressed in the MFWCS uniform (3 Tr. 808-810; 4 Tr. 1071; 6 Tr. 1368-1372). As instructed, the driver dropped off people, in groups of two and with weapons in hand, at different corners of the park. Potter, Flom, Flaherty, and the other individuals walked through the park in pairs, while banging their weapons on trees and trash can holders, in search of minorities (3 Tr. 810-811; 4 Tr. 1072-1075; 6 Tr. 1373-1375).

Eventually, the group congregated in the middle of Pioneer Park. There, sometime around dusk (2 Tr. 367), the group encountered three individuals who they perceived to be non-white (4 Tr. 1077-1082; 6 Tr. 1376-1377). The individuals were Jason Clark (an African-American and Hispanic male), his girlfriend, Spring Ramirez (a white and Hispanic female), and his cousin, Pat Tellez (a Hispanic male) (2 Tr. 366, 419, 428). The group approached the individuals, who were talking and drinking beer while seated at a picnic table. The sight of the defendants and others with shaved heads and sticks in their hands walking toward them frightened Clark. He stood up and told his girlfriend and

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[3] The younger members of the "park patrol" group included three juveniles, Dustin Neely, Sara Fairchild, and Kevin Cox (6 Tr. 1369).

cousin that they should leave. As they began to walk away, Clark noticed the defendants and others following behind. As he, Ramirez, and Tellez walked faster, the group chased after them and yelled at them to pick up their trash and to leave the park because they were not wanted there. The group also shouted threatening and derogatory remarks such as, "We're going to fucking kill you, Nigger" and "fucking spic" (2 Tr. 368-372, 427; 3 Tr. 818; 4 Tr. 1108-1110; 6 Tr. 1377-1379). Clark and Tellez, who were carrying a cooler, dropped the cooler and began to run (2 Tr. 373; 4 Tr. 1112-1113). Ramirez, however, froze in fear and was unable to run. She continued to walk at a moderate pace, while Potter and Flaherty and others ran past her to chase after Clark and Tellez (2 Tr. 424-425). Flom and a few others stayed behind. Flom called Ramirez a "spic bitch" and told her that if she didn't run, they would "kick [her] ass" (2 Tr. 425; 3 Tr. 817). The others continued to chase the men out of the park, but eventually gave up when Clark found refuge inside a nearby house (3 Tr. 815-817; 6 Tr. 1382).

SUMMARY OF THE ARGUMENT

_____1. The evidence was sufficient to prove a violation of 18 U.S.C. 241 and 245(b)(2)(B), and both statutes are constitutional. In order to prove a violation of Section 241 in this case, the government had to establish that Pioneer Park was a covered public accommodation under Title II of the Civil Rights Act of 1964 (1964 Act). The defendants do not deny that the park is a "place of exhibition or entertainment," as defined by Title II, but rather, they argue that the evidence was insufficient to establish that their actions had an effect on interstate commerce.

The defendants, however, make the wrong argument. The relevant question is whether the operations of Pioneer Park "affect commerce" within the meaning of the statute. 42 U.S.C. 2000a(b)(3). Title II provides that the operations of any place of exhibition or entertainment "affect commerce" if the place "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce." 42 U.S.C. 2000a(c)(3). The evidence showed that many pieces of park equipment and related materials were purchased from out-of-state vendors. This evidence alone was sufficient to establish that the operations of Pioneer Park "affect commerce" within the meaning of the statute. However, there was also evidence that the park is regularly used for fundraising functions and other events which attract out-of-state visitors, and that many of these events are sponsored by national and international corporations. This evidence is further poof of a nexus to interstate commerce. Moreover, it is well-settled that Title II is a valid exercise of Congress's power under the Commerce Clause.

In order to establish a violation of Section 245(b)(2)(B), however, the government was not required to prove that the "park patrol" itself affected commerce. Even if proof of a nexus to interstate commerce were required, the evidence that the park's operations affected commerce within the meaning of Title II would be sufficient. The defendants' argument that the government was required to prove that Pioneer Park was open to the public at the time of their offenses is also without merit. Pioneer Park is a covered "facility" under Section

245(b)(2)(B) and interference with a person's right to use and enjoy that facility without discrimination is prohibited at all times of the day. Indeed, in order to violate the victims' right to equal utilization of the park, the defendants had to enter and also use and enjoy the park, even if the park was closed. Nothing in the language nor the legislative history of the statute suggests that Congress intended to limit the statute's applicability to the facility's hours of operation, and the defendants cite no authority to the contrary.

Moreover, Section 245(b)(2)(B) is a valid exercise of Congress's power under the Commerce Clause since the statute regulates a class of activities – that is, the violent interference with a person based on that person's race and use of a public facility – that substantially affects commerce. Because Section 245 was passed in 1968 as the criminal counterpart to the 1964 Act, Congress appropriately relied on the extensive evidence it heard in support of the 1964 Act of the burdens racial discrimination had on interstate commerce, as well as Supreme Court decisions upholding the constitutionality of Title II of the 1964 Act soon after it was passed. The fact that the statute regulates a class of activities that has a real and substantial relation to the national interest (violent interference with federal civil rights) further supports the conclusion that Section 245(b)(2)(B) is valid Commerce Clause legislation.

Finally, courts have held that Section 245(b)(2)(B) is a valid exercise of Congress's power to enforce the Thirteenth Amendment. Congress has broad authority under Section 2 of the Thirteenth Amendment rationally to determine

what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Section 245(b)(2)(B), as applied to this case, lies within this expansive enforcement authority, since its application is limited to racially-motivated, violent conduct intended to interfere with a person's use of a public facility. Indeed, Congress could find that such conduct has a long and intimate historical association with slavery and its cognate institutions. The legislative history of Section 245(b)(2)(B) reveals that Congress was aware of this association, and that in enacting the statute it intended "to strengthen the capability of the Federal Government to meet the problem of violent interference, for racial or other discriminatory reasons, with a person's free exercise of civil rights." S. Rep. No. 721, 90th Cong., 1st Sess. 3 (1967). Accordingly, the statute is valid Thirteenth Amendment legislation.

2. The district court did not abuse its discretion in admitting certain "skinhead evidence," including white supremacist and Nazi-related literature, photographs of the defendants' tattoos, group photographs (of the defendants and other co-conspirators), and various skinhead paraphernalia. This evidence was admissible for the purpose of proving that the defendants conspired to and carried out a plan to use violence against racial minorities to drive them out of Billings. In ruling on the admissibility of the "skinhead evidence," the district court carefully applied the balancing test of Federal Rule of Evidence 403. With the exception of the tattoo photographs, the court excluded more than half of the challenged evidence. The court was careful to admit only those items that were

highly probative of racial animus in light of the government's theory of prosecution and the various theories of defense, and it correctly concluded that this probative value was not substantially outweighed by the danger of unfair prejudice or by the needless presentation of cumulative evidence. Moreover, the court took appropriate measures to minimize potential prejudice, including instructing the jury that it should consider the evidence only as it pertained to the defendants' motive, intent, or plan. Finally, the evidence was not needlessly cumulative in light of some of the defendants' willingness to admit that they were racist skinheads, as the government was entitled to prove its case with its own evidence.

3. The evidence was sufficient to support the convictions of Flom under 18 U.S.C. 241 (conspiracy) and Allen and Dixon under 18 U.S.C. 2 (aiding and abetting). The government introduced ample circumstantial and direct evidence of Flom's intent to conspire to violate the victims' federal civil rights. Two of Flom's co-conspirators testified that Flom was associated with the MFWCS long before the "park patrol" incident and that Flom educated them about the group's mission of ridding Billings of racial minorities and Jews. They also testified that Flom was the group's tattoo artist, and that he tattooed skinhead images and swastikas on new recruits with permission from MFWCS leadership. They further testified that although Flom was drinking or drunk on July 29, 2000, Flom was able to participate in conversations about the "park patrol" and that he seemed just as excited about the idea as everyone else. Once at the park, Flom wielded a

weapon and shouted racial slurs. Viewed in the light most favorable to the government, the evidence was more than sufficient to support Flom's conviction for conspiracy.

The evidence was similarly sufficient to prove that Allen and Dixon aided and abetted in the commission of the "park patrol." Two co-conspirators testified that Allen and Dixon provided support, encouragement, and instruction to the other members of the "park patrol" group as to how they should carry it out. The fact that these witnesses may have contradicted themselves on cross-examination and that their testimony conflicted at times with that of other witnesses is inapposite, as the evidence must be viewed in the light most favorable to the government. Moreover, the co-conspirators' testimony was corroborated by much of the conspiracy evidence, which Allen and Dixon do not challenge.

4. The district court did not abuse its discretion in denying Potter's motion for a mistrial. Potter contends that the prosecutor improperly asked him on cross-examination whether he told an FBI agent to "suck" his "cock." This argument is without merit, as the question constituted proper impeachment of Potter's statement that he respected the FBI and court orders, as well as Potter's mother's testimony that Potter was a non-violent person. Given the overwhelming evidence of Potter's guilt and the offensive nature of the crimes charged, the question did not prejudice Potter or affect his substantial rights.

5. The district court did not err in calculating the sentences of Allen, Dixon, and Skidmore. Because the court based its findings on the jury's verdict and the

evidence introduced at trial, a sufficient evidentiary basis existed to support the court's calculation of the base offense levels and upward adjustments.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO PROVE VIOLATIONS OF 18 U.S.C. 241 AND 245(b)(2)(B) AND THE STATUTES ARE CONSTITUTIONAL

The defendants argue that there was no federal jurisdiction to prosecute them for violations of 18 U.S.C. 241 and 245(b)(2)(B) because there was an insufficient nexus between their actions and interstate commerce (Allen Br. 9-16; Dixon Br. 20-27; Potter Br. 22-34; Flom Br. 5-10; Flaherty Br. 9-18). The United States understands this argument to mean either that there was insufficient evidence to prove a violation of the statutes, or that the statutes are unconstitutional as applied to their offenses. Both of these contentions are without merit.

A. *Standards Of Review*

Whether the record contained sufficient evidence for the district court to conclude that the operations of Pioneer Park affected commerce is a mixed question of law and fact that is reviewed *de novo*. *Diamond* v. *City of Taft*, 215 F.3d 1052, 1055 (9th Cir. 2000). A district court's assumption of federal jurisdiction and the constitutionality of a statute are also reviewed *de novo*. *United States* v. *Visman*, 919 F.2d 1390, 1392 (9th Cir. 1990), cert. denied, 502 U.S. 969 (1991); *United States* v. *Carranza*, 289 F.3d 634, 643 (9th Cir.), cert. denied, 123 S. Ct. 572 (2002).

B. *The Evidence Was Sufficient To Prove A Violation Of 18 U.S.C. 241 And The Statute Is Constitutional*

Section 241 makes it a federal crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States, or because of his having so exercised the same[.]" 18 U.S.C. 241. Count 1 of the indictment charged the defendants under Section 241 with conspiracy to violate "the right to the full and equal enjoyment of the services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination on the ground of race, color, religion, and national origin" (1 Tr. 91). This right is secured by Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a(a), which defines "public accommodation" as, *inter alia*, "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment," provided that "its operations affect commerce." 42 U.S.C. 2000a(b)(3).

1. The Evidence Was Sufficient To Establish That The Operations Of Pioneer Park Affected Commerce

The defendants do not dispute that Pioneer Park is a "place of exhibition or entertainment" within the meaning of the statute; instead, they contend that the evidence was insufficient to show that their offenses affected commerce. The defendants, however, make the wrong argument. The question is not whether the offenses had an actual effect on commerce, but, rather, whether the park's operations affect commerce within the meaning of the statute. Title II provides

that the operations of any place of exhibition or entertainment "affect commerce" within the meaning of the statute if the place "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce." 42 U.S.C. 2000a(c)(3). The statute further defines "commerce" as "travel, trade, traffic, commerce, transportation, or communication among the several States." 42 U.S.C. 2000a(c). The evidence presented in this case satisfies these definitions.

Eugene Blackwell, the superintendent of parks and forestry for the City of Billings, testified that the playground equipment in Pioneer Park was purchased from manufacturers in Utah. Additionally, picnic tables, barbecue grills, and related materials used in the park were purchased from manufacturers located in Ohio, Iowa, and Utah (3 Tr. 583-586). Under the Supreme Court's decision in *Daniel* v. *Paul*, 395 U.S. 298 (1969), these facts alone are sufficient to establish that the operations of Pioneer Park "affect commerce" under Title II. In that case, the Court held that a recreational facility's paddle boats and juke box purchased from an out-of-state company are "sources of entertainment [which] move in commerce" within the meaning of the statute. *Id.* at 308.

Blackwell also testified that Pioneer Park is regularly used for fundraising functions for national organizations, such as the March of Dimes and American Cancer Society, which attract out-of-state visitors (3 Tr. 590-591). Saturday Live, a fundraising event for the Billings Public School Foundation, is also held in Pioneer Park and is sponsored by national and international corporations,

including Exxon Oil, Pepsi Cola, and Marriott. Additionally, Blackwell testified that Pioneer Park is the site for the Montana AIDS Vaccine Ride, which is organized by production coordinators from Chicago, Illinois (Tr. 592-594). Similarly, Joanna Giesek, the former executive director of the Billings Symphony Orchestra, testified that out-of-state musicians performed with the orchestra at the last Symphony in the Park program, held annually in Pioneer Park. Additionally, a production company from Denver, Colorado was retained to put together the concert's sound system. Giesek testified that the annual event is used as a marketing tool for the symphony in order to promote season ticket sales and generate revenues generally (Tr. 1638-1641). This evidence is additional proof of a nexus to interstate commerce.

In sum, the participation of out-of-state individuals and organizations in the production of these events, in addition to the sponsorship of national corporations and the purchase of materials for the park from out-of-state manufacturers, constitute "sources of entertainment which move in commerce," 42 U.S.C. 2000a(c)(3), since "commerce" is "travel, trade, traffic, commerce, transportation, or communication among the several States," 42 U.S.C. 2000a(c); see also *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964) ("Commerce among the states * * * consists of intercourse and traffic between their citizens, and includes the transportation of persons and property."). The evidence, therefore, was sufficient to prove that the operations of Pioneer Park affected commerce.

2. The Statute Is Constitutional

"It has long been settled that 18 U.S.C. 241 * * * is constitutional." *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971). Indeed, Section 241 simply prohibits conspiracy to violate a substantive federal right. While the validity of a conspiracy charge under Section 241 depends upon the existence of a federal right, there are no independent grounds for challenging the constitutionality of Section 241 alone.

Moreover, the substantive federal right at issue in this case–the right to full use and enjoyment of public accommodations without discrimination–was created by a statute which has been upheld as a valid exercise of Congress's power under the Commerce Clause. Indeed, the constitutionality of Title II's prohibition of racial discrimination in public accommodations was challenged soon after the Civil Rights Act of 1964 was enacted.[4] The Supreme Court held that the statute's

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[4] Title II defines four categories of establishments as covered "public accommodations," provided that their operations "affect commerce":

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests * * *;
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of any covered establishment.

(continued...)

application to hotels and motels, *Heart of Atlanta Motel*, 379 U.S. 241, as well as to restaurants, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), was a valid exercise of Congress's power under the Commerce Clause. In both cases, the Court relied on the evidence cited in the Senate Committee Report – of the burdens of racial discrimination on interstate commerce – to support its conclusion that Congress had a rational basis for enacting Title II. *Heart of Atlanta Motel*, 379 U.S. at 252-253; *McClung,* 379 U.S. at 299-301. The Court emphasized that "[w]ith this situation spreading as the record shows, Congress was not required to await the total dislocation of commerce. * * * Congress was entitled to provide reasonable preventive measures[.]" *McClung,* 379 U.S. at 301 (internal quotation marks and citation omitted). Moreover, the fact that "Congress was legislating against moral wrongs * * * rendered its enactment[] no less valid." *Heart of Atlanta Motel*, 379 U.S. at 257.

Finally, the Court held that the "local character" of hotels and motels was irrelevant since "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof." *Id.* at 258. The harmful effect of racial discrimination by hotels and motels on travelers provided a sufficient nexus to interstate commerce for Congress to regulate. *Ibid.* ("One need only examine the evidence * * * to see that Congress may–as it has–prohibit racial

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[4](...continued)
42 U.S.C. 2000a(b).

discrimination by motels serving travelers, however 'local' their operations may appear."). Similarly, in the context of restaurants, the Court rejected the argument that Title II should provide "for a case-by-case determination–judicial or administrative–that racial discrimination in a particular restaurant affects commerce," *McClung*, 379 U.S. at 303, and instead concluded that the application of Title II is constitutional where the restaurant "either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce." *Id.* at 304.

Just a few years later, in *Daniel* v. *Paul*, 395 U.S. 298, 306-308 (1969), the Supreme Court considered the statute's application to a recreational facility with a lake for swimming and boating. It held that the facility was a "place of entertainment" that affected commerce, 42 U.S.C. 2000a(b)(3), and therefore a covered public accommodation under Title II: "In light of the overriding purpose of Title II 'to move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public,' we agree * * * that the statutory language 'place of entertainment' should be given full effect according to its generally accepted meaning and applied to recreational areas." *Id.* at 307-308 (citations omitted). In reaching this conclusion, the Court noted that the legislative history contained statements by two of the 1964 Act's leading sponsors, Senators Humphrey and Magnuson, that racial discrimination at "establishments which receive supplies, equipment, or goods through the channels of interstate commerce," such as an amusement park providing merchandise and

facilities transported across state lines, had a substantial effect on interstate commerce and therefore satisfied the definition of "public accommodation" under Title II. *Id.* at 306-307 & n.10 (citations to legislative history omitted). The Court held that the recreational facility "affect[ed] commerce" within the meaning of Title II because it leased paddle boats from an out-of-state company and contained a juke box manufactured in another state. *Id.* at 308.

In *United States* v. *Baird*, 85 F.3d 450 (9th Cir.), cert. denied, 519 U.S. 995 (1996), a case very similar to the one at bar, this Court relied on the Supreme Court's opinion in *Daniel* to reinstate an indictment charging several white supremacists with conspiracy under Section 241 to violate the rights secured by Title II. The indictment alleged that the defendants beat an African-American man and a Hispanic man in the parking lot of a 7-11 store. The district court, however, dismissed the indictment on the ground that the store was not a "place of * * * entertainment" and therefore not a covered "public accommodation" under Title II. *Id.* at 451. On appeal, this Court reversed, holding that under *Daniel*'s broad construction of the statute, the store was a "place of * * * entertainment" because it contained two video game machines which are used by people to "amuse themselves and pass the time agreeably." *Id.* at 453. This Court explained:

> The public accommodations provision of the Civil Rights Act of 1964 cured a great evil. Prior to the statute, many establishments generally open to the public discriminated against blacks, or Jews, or Indians, or any number of other groups, based on their race, color, religion, and national origin. This established public badges of inferiority for the excluded groups, marking them as of lower social status. It also caused numerous practical problems, as for black people trying to

> drive from Washington, D.C. to New York, yet unable to stop for a hamburger and to go to the bathroom on the then long drive. In response to almost a decade of massive demonstrations, freedom rides, and sit-ins, which swayed public opinion throughout the nation, Congress used its power under the Commerce Clause to eliminate segregation of public accommodations. There is no reason to read this statutory prohibition narrowly.
>
> In this case, the store was not charged with any discrimination. But the alleged white supremacist gang was charged with using violence to prevent blacks and Hispanics from enjoying the use of the store, because of their race or national origin. The store was not merely a vender of goods, but also a supplier of entertainment by means of video games. If the charges are proved, then the conduct was of the kind Congress prohibited in this statute.

Id. at 454-455.

Indeed, the decisions upholding Title II under the Commerce Clause are well-supported by the legislative history of the 1964 Act. For example, members of the Senate Committee observed:

> All citizens and all regions can agree that the pattern of race relations that has developed in recent months–boycotts and counterboycotts, economic retaliations, demonstrations–must be terminated. Of equal certainty is the fact that the systematic denials of service directed at certain of our citizens in facilities otherwise available to the public are a powerful force behind this unrest.
>
> In the absence of affirmative action now there can be little doubt that there will be repercussions in the near future, *repercussions that may affect the Nation's economy*, welfare, and international prestige. On this issue the Nation has a common and an immediate interest.

S. Rep. No. 872, 88th Cong., 2d Sess. 11 (1964) (emphasis added). Additionally, Franklin D. Roosevelt, Jr., then Under Secretary of Commerce, told the Senate Committee that "discriminatory practices in places of entertainment or amusement not only artificially restrict the demand for entertainment," but:

> [w]here segregation is practiced in theaters and auditoriums, the entire community, both white and Negro, is denied access to a variety of cultural and entertainment activities. The Metropolitan Opera Co. canceled its annual season in Birmingham because municipal authorities failed to desegregate theater facilities. Although they had formerly had very successful seasons in Birmingham, there are no plans for resumption in the immediate future.

Id. at 20. Finally, the Senate Report found that such discrimination burdens interstate commerce by, for example, depressing business conditions and deterring professional and skilled people from moving into areas where such practices occur:

> The reluctance of industry to locate in areas where such discrimination occurs is another manifestation of the burden on our economy resulting from discriminatory practices. Employees do not wish to work in an environment where they will be subject to such humiliation. There is a lack of local skilled labor available in such areas because many workers, rather than be subject to discriminatory practices, have relocated in other regions. * * * Not only is industry discouraged from locating where discrimination is practiced, but physicians, lawyers, and other professional persons are deterred from engaging in their professions where the advantages of membership in local professional associations, or other benefits, will be refused them because of the color of their skin.

Id. at 18.

In sum, the evidence was sufficient to prove a violation of Section 241. Moreover, Section 241 is constitutional as applied to the charged conduct because Title II of the 1964 Act, the statute securing the underlying right at issue in Count 1 of the indictment, is a valid exercise of Congress's power under the Commerce Clause.

C. *The Evidence Was Sufficient To Prove A Violation Of 18 U.S.C. 245(b)(2)(B) And The Statute Is Constitutional*

Section 245(b)(2)(B) of the United States criminal code provides:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with any person because of his race, color, religion or national origin and because he is or has been participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof[,] shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under this title, or imprisoned not more than ten years, or both[.]

18 U.S.C. 245(b)(2)(B). Counts 2, 3, and 4 of the indictment alleged that, in violation of this statute, the defendants "did wilfully intimidate and interfere, and attempt to intimidate and interfere with [a Hispanic woman, an African American man, and a Hispanic man, respectively,] by force and threat of force, and the use, attempted use, and threatened use of dangerous weapons, because of [each individual's] race, color, religion, and national origin and because [each individual] was participating in or enjoying the benefits, services, privileges, programs, facilities, and activities provided and administered by any state or subdivision thereof; to-wit, a public park known as Pioneer Park" (1 Tr. 95-97).

1. The Evidence Was Sufficient To Prove A Violation Of Section 245(b)(2)(B)

The defendants argue that in order to prove a violation of Section 245(b)(2)(B) in this case, the government was required to prove that the "park

patrol" affected commerce. They also argue that because Pioneer Park was closed at the time of the offense, the evidence did not establish that the City of Billings was providing "any benefit, service, privilege, program, facility or activity" within the meaning of the statute. These arguments are without merit. Section 245(b)(2)(B) contains no express jurisdictional element.[5]

Proof of a nexus to interstate commerce, therefore, is unnecessary to establish a violation of the statute. However, even if such proof were required, the evidence introduced by the government to prove that the operations of Pioneer Park affected commerce within the meaning of Title II is sufficient to establish a nexus to interstate commerce. See Part I.B.1, *supra*.

Nor was the government required to prove that Pioneer Park was open to the public at the time of the "park patrol." Section 245(b)(2)(B) protects persons

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[5] Nor was a jurisdictional element required. As explained below, see Part I.C.2, *infra*, Section 245(b)(2)(B) is a valid exercise of Congress's power to enforce the Thirteenth Amendment. However, even as Commerce Clause legislation, no evidence of a nexus to interstate commerce is required where Congress rationally concludes that a class of activities substantially affects commerce. *Perez* v. *United States*, 402 U.S. 146, 154 (1971) ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."); accord *Visman*, 919 F.2d at 1393; see also *United States* v. *Lane*, 883 F.2d 1484, 1492 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990) (holding that the government was not required to produce evidence that the defendants' conduct affected commerce in order to prove a violation of Section 245 because Congress "is not constitutionally obligated to require proof beyond a reasonable doubt that each individual act in the class of activities regulated had an effect on interstate commerce").

"participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof[.]" Pioneer Park is a public park, administered by the City of Billings, and therefore a "facility" within the meaning of the statute. Clearly, the victims in this case were enjoying the use of the park before the offenses occurred. And in order to carry out the "park patrol," the defendants had to enter and thereby "enjoy use" of the park as well. The federal right protected by Section 245(b)(2)(B) is not the right to use the park, but the right not to be excluded from its use on the basis of race. The defendants violated that right. Nothing in the language or the legislative history of the statute suggests that Congress intended to limit federal protection of that right to the hours of operation of a particular facility, and the defendants do not cite any authority in support of a contrary interpretation. As the district court stated, it is inconceivable "that Congress, or any court, for that matter, would construe 18 U.S.C. section 245(b)(2)(B) to mean or state that someone's civil rights are put to bed at 10 o'clock at night until 6 in the morning if a public park is closed" (7 Tr. 1735).

2. The Statute Is Constitutional

The defendants also suggest that Section 245(b)(2)(B) is an unconstitutional exercise of Congress's power under the Commerce Clause. This argument is without merit. Moreover, the statute is a valid exercise of Congress's authority under Section 2 of the Thirteenth Amendment.

a. Section 245(b)(2)(B) Is A Valid Exercise Of Congress's Power Under The Commerce Clause

The Commerce Clause of the United States Constitution provides that Congress shall have the power to "regulate Commerce * * * among the several States * * *." U.S. Const. Art. I, § 8, cl. 3. The Supreme Court has identified three broad categories of activity that Congress may regulate under this power: (1) "the use of the channels of interstate commerce;" (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995) (citations omitted).

With respect to the third category, the Supreme Court considers a number of factors when determining whether a particular activity which Congress wishes to regulate "substantially affects" commerce, including whether: (1) the activity is economic in nature; (2) the activity is proved to affect interstate commerce on a case-by-case basis by means of an express jurisdictional element in the statute; (3) legislative findings exist demonstrating the effect of the activity on interstate commerce; and (4) the link between the activity and a substantial effect on interstate commerce is not attenuated. See *United States* v. *Morrison*, 529 U.S. 598, 609-613 (2000).

While these factors serve "as reference points" for analyzing the constitutionality of a statute under the Commerce Clause, *id.* at 613, the Supreme Court has never required that all four factors be present. For example, with respect to the first factor, the Court has declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity." *Ibid.* Instead, it has emphasized that Congress, in regulating "noneconomic, violent criminal conduct," must be mindful of the Constitution's "distinction between what is truly national and what is truly local." *Id.* at 617-618. Similarly, with respect to the second factor, the Court has observed that use of a jurisdictional element may "lend support" to a statute's constitutionality under the Commerce Clause, *id.* at 613, however, it has not required one where the prohibited conduct falls within a "class of activities" that have a substantial effect on interstate commerce. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (upholding a federal loansharking statute on the ground that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce"). Finally, so long as the legislative history of a statute indicates that Congress was aware of a regulated activity's effects on interstate commerce at the time it acted, the Court has never required, with respect to the third factor, that Congress "make particularized findings in order to legislate." *Id.* at 156; accord *Morrison*, 529 U.S. at 612.

With these principles as a guide, Section 245(b)(2)(B) should be upheld as a valid exercise of Congress's power under the Commerce Clause. Section 245 is

the criminal counterpart to the Civil Rights Act of 1964. As explained above, the legislative history of the 1964 Act demonstrates that Congress heard extensive evidence of the substantial effect that racially motivated interference with a person's use of a public accommodation or facility could have on interstate commerce. See Part I.A.2, *supra*. In enacting Section 245, therefore, Congress appropriately relied on that evidence. See, *e.g.*, *United States* v. *Lane*, 883 F.2d 1484, 1494 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990) (finding proper Congress's reliance on evidence supporting the 1964 Act to enact Section 245(b)(2)(C)). Moreover, Congress was aware of two Supreme Court cases decided immediately after it passed the 1964 Act upholding under the Commerce Clause Title II's prohibition of discrimination in places of public accommodation. See Part I.A.2, *supra* (discussing *McCLung* and *Heart of Atlanta Motel*). Thus, unsurprisingly, Congress expressly invoked its commerce power when it passed Section 245. See S. Rep. 721, 90th Cong., 1st Sess. 6-7 (1967). The absence of new evidence or findings in the legislative history of Section 245 is of no consequence. *Ibid.* ("Congress is not required to make 'particularized findings in order to legislate.'" (quoting *Perez*, 402 U.S. at 156)).

In *United States* v. *Furrow*, 125 F. Supp. 2d 1178 (C.D. Cal. 2000), a district court within this circuit held that Section 245 was a valid exercise of Congress's power under the Commerce Clause. Although the defendants in that case were charged under Section 245(b)(2)(F) (public accommodations) and (b)(4)(a) (federal employment), the court did not limit its analysis to those

provisions. Rather, the court broadly held that because the Civil Rights Act of 1964 has been recognized as a valid exercise of Congress's commerce power, "violent conduct that interferes with the rights guaranteed by the [1964 Act] necessarily implicates commerce." *Id.* at 1182. Thus, the court found, "Congress could rationally conclude that violent interference with the right of access to facilities that serve the public * * * has a substantial connection to interstate commerce." *Ibid.*

Significantly, *Furrow* was decided after *Lopez* and *Morrison*, the Supreme Court's two most recent Commerce Clause cases. In *Lopez*, the Court struck down the Gun-Free School Zones Act (GFSZA), which made it a federal offense to knowingly possess a firearm in a known school zone, see *Lopez*, 514 U.S. at 551, and in *Morrison*, the Court invalided a section of the Violence Against Women Act (VAWA) that provided a federal civil remedy for victims of gender-motivated violence, see *Morrison*, 529 U.S. at 601-602. In both of those cases, the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based *solely* on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617; accord *Lopez*, 514 U.S. at 567. Instead, it emphasized that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-618; accord *Lopez*, 514 U.S. at 567-568; see also *Heart of Atlanta Motel*, 379 U.S. at 255 ("In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which

concerns more States than one' *and* has a real and substantial relation to the national interest." (emphasis added)). The Court found no such national interest in the GFSZA and the challenged provision of VAWA, which applied to "areas of traditional state regulation." *Morrison*, 529 U.S. at 615; accord *Lopez*, 514 U.S. at 567.

Section 245 is easily distinguishable from the statutes at issue in *Morrison* and *Lopez* since Section 245 "regulates only offenses that occur within recognized areas of federal concern, such as civil rights." *Furrow*, 125 F. Supp. 2d at 1185 (citing *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972)). Thus, unlike the GFSZA and VAWA, "the statutory provisions at issue here are part of a comprehensive federal body of civil rights legislation aimed at eradicating discrimination found to have an adverse impact on interstate commerce." *Id.* at 1183 (citing *Lane*, 883 F.2d at 1490). Indeed, the Second Circuit Court of Appeals has noted that "an important connection exists between the Thirteenth Amendment argument on which [it has upheld] the constitutionality of [Section] 245(b)(2)(B) and the suggestion that the statute is a constitutional exercise of Congress's powers under the Commerce Clause." *United States* v. *Nelson*, 277 F.3d 164, 191 n.28 (2nd Cir.), cert. denied, 123 S. Ct. 145 (2002). The *Nelson* court explained:

> [P]rivate violence motivated by a discriminatory animus against members of a race or religion, etc., who use public facilities, etc., is anything but intrinsically a matter of purely local concern. Instead, such violence has long been intimately connected to a system of slavery and involuntary servitude that the Thirteenth Amendment made centrally a matter of national concern. And for this reason, congressional action taken to regulate such activity is not likely to

> infringe impermissibly on local affairs. It follows that laws such as [Section] 245(b)(2)(B) (if the activity regulated also involves substantial effects on interstate commerce) may well be constitutional directly under the Commerce Clause, even after *Lopez* and *Morrison*, and even without any independent resort to the Thirteenth Amendment.

Ibid.

In sum, Section 245(b)(2)(B) is a valid exercise of Congress's power under the Commerce Clause. As explained above, Congress invoked its commerce power when it enacted Section 245. Because the statute criminalizes violent interference with the federal rights established in the 1964 Act, Congress appropriately relied on the extensive evidence it heard in support of that Act of the burdens that racial discrimination places on interstate commerce when it enacted Section 245(b)(2)(B). The "real and substantial relation to the national interest" of the statute's subject matter further supports this conclusion. *Heart of Atlanta Motel*, 379 U.S. at 255.

b. Section 245(B)(2)(b) Is A Valid Exercise Of Congress's Enforcement Power Under The Thirteenth Amendment

Section 1 of the Thirteenth Amendment to the United States Constitution states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. Amend. XIII, § 1. Section 2 of the Thirteenth Amendment grants Congress the "power to enforce this article by appropriate legislation." *Id.* § 2. The Supreme Court has

interpreted Section 2 broadly, "[f]or that clause clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*.'" *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (emphasis added)). Thus, the Court has stated that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440.

Under Section 2, therefore, Congress may reach conduct that is not directly prohibited by Section 1. See, *e.g.*, *id.* at 439 (upholding the constitutionality of 42 U.S.C. 1982 on the ground that Congress's Section 2 power "include[d] the power to eliminate all racial barriers to the acquisition of real and personal property"); *Griffin*, 403 U.S. at 105 (upholding the constitutionality of 42 U.S.C. 1985(3) on the ground that "Congress was wholly within its powers under [Section] 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men"); *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976) (concluding that 42 U.S.C. 1981's prohibition of racial discrimination in the making and enforcement of contracts for private educational services and private employment is "appropriate legislation" for enforcing the Thirteenth Amendment); cf. *Palmer* v. *Thompson*, 403 U.S. 217, 227 (1971) (declining to hold that the City of Jackson's decision to close rather

than desegregate a municipal swimming pool violated Section 1 of the Thirteenth Amendment, but explaining in *dicta* that Congress might have the authority to regulate such action under Section 2); *City of Memphis* v. *Greene*, 451 U.S. 100, 128 (1981) (declining to hold that the closing of a city street which traversed predominantly black and white neighborhoods violated the Thirteenth Amendment but suggesting that this activity "does not disclose a violation of any of the enabling legislation enacted by Congress pursuant to [Section] 2").

The prohibitions of Section 245(b)(2)(B) would appear to fall within this enforcement power. The statute makes it a federal crime to "willfully injure[], intimidate[], or interfere[] with, or attempt[] to injure, intimidate or interfere with any person *because* of his race, color, religion, or national origin and *because* he is or has been participating in or enjoying any [public] benefit, service, privilege, program, facility or activity." 18 U.S.C. 245(b)(2)(B) (emphasis added). As this Court has explained, "[t]he language of [Section] 245(b)(2)(B) leaves little doubt that a defendant will be convicted * * * only where he has the specific intent to interfere with a victim's enjoyment of a federally protected right on the basis of the victim's race." *United States* v. *Makowski*, 120 F.3d 1078, 1081 (9th Cir.), cert. denied, 522 U.S. 1019 (1999).

The legislative history of Section 245(b)(2)(B) reveals that the statute was focused on violent crime which interfered with racial minorities' participation in federally protected activities. The first use of the word "because" in Section 245(b)(2)(B), the Senate Judiciary Committee Report explained, was intended to

limit the statute's scope to acts "*motivated* by the race, color, religion, or national origin of the victim." S. Rep. No. 721, 90th Cong., 1st Sess. 8 (1967) (emphasis added). The second "because" was intended to further limit the statute's scope to two types of situations: "[1] interference intended to prevent present or future participation in a described activity by the victim, and [2] interference intended as a reprisal against the victim for having participated in a described activity." *Ibid.* Because of these limitations, Section 245(b)(2)(B) stops well short of the irrational step of creating a general, undifferentiated federal law of criminal assault. See, *e.g., Nelson*, 277 F.3d at 189.

Congress's determination that this sort of intentional interference with a person based on the person's race and use of a public facility imposed a "badge of slavery" was not irrational.[6] Indeed, in 1968, the same year in which Congress enacted Section 245(b)(2)(B), the Supreme Court held that the prohibition of racial discrimination in the sale and acquisition of real and personal property constituted a valid exercise of Congress's power to enforce the Thirteenth Amendment. *Jones*, 392 U.S. at 439. The Court explained:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for

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[6] The fact that Congress did not expressly invoke its Thirteenth Amendment enforcement authority in enacting Section 245(b)(2)(B) is irrelevant. See, *e.g., Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."); accord *United States* v. *Edwards*, 13 F.3d 291, 294 (9th Cir. 1993), rev'd on other grounds, 514 U.S. 1093 (1995).

> the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Id. at 441-443. In his concurrence, Justice Douglas further observed:

> Some badges of slavery remain today. * * * Cases which have come to this Court depict a spectacle of *slavery unwilling to die*. * * * Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, *public parks*, restaurants, public beaches, municipal golf courses, amusement parks, buses, public libraries, [etc.]

Id. at 445-446 (Douglas, J., concurring) (citations omitted) (emphasis added). If Congress could have rationally concluded that segregation and non-violent discrimination constituted badges and incidents of slavery in 1968, then Congress could have also rationally concluded that violent interference with a person's use of a public facility constituted a badge of slavery. See, *e.g.*, *United States* v. *Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984) ("Nor can there be doubt that interfering with a person's use of a public park because he is black is a badge of slavery."), cert. denied, 469 U.S. 838 (1984). Moreover, the Supreme Court has already held that Congress's conclusion that violent assault of African-American men on a public highway constituted a badge or incident of slavery prohibited by the Thirteenth Amendment was not irrational. *Griffin*, 403 U.S. at 105.

Indeed, acts of violence or force committed against racial minorities "with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions." *Nelson*, 277 F.3d at 189. Slavery itself is "preeminently a

relationship of power and dominion originating in and sustained by violence. * * * Significantly, this practice of race-based private violence both continued beyond [emancipation] and was closely connected to the prevention of former slaves' exercise of their newly obtained civil and other rights[.]" *Id.* at 189-190.

Congress was well aware of the association of private violence with slavery when it enacted Section 245(b)(2)(B). For example, the House Committee found that "[v]iolence and threats of violence have been resorted to in order to punish or discourage Negroes from voting, *from using places of public accommodation and public facilities*, from attending desegregated schools, and from engaging in other activities protected by Federal law." H.R. Rep. No. 473, 90th Cong., 1st Sess. 3-4 (1967) (emphasis added). Similarly, the Senate Committee stated that Section 245 was enacted specifically "to strengthen the capability of the Federal Government to meet the problem of violent interference, for racial or other discriminatory reasons, with a person's free exercise of civil rights." S. Rep. No. 721, 90th Cong., 1st Sess. 3 (1967).

Finally, the only two other courts of appeals to have entertained a constitutional challenge to Section 245(b)(2)(B) have upheld it under Section 2 of the Thirteenth Amendment. See *Nelson*, 277 F.3d at 190-191 (2d Cir.) (finding that Section 245(b)(2)(B) "is a constitutional exercise of Congress's power under the Thirteenth Amendment"); *Bledsoe,* 728 F.2d at 1097 (8th Cir.) (holding that, under the Thirteenth Amendment, Section 245(b)(2)(B) "does not exceed the scope of power granted to Congress by the Constitution"). Accordingly, this

Court should also uphold Section 245(b)(2)(B) as a valid exercise of Congress's enforcement power under the Thirteenth Amendment.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING CERTAIN "SKINHEAD EVIDENCE"

A. *Standard Of Review*

"A district court's evidentiary rulings during trial are reviewed for abuse of discretion." *United States* v. *Hankey*, 203 F.3d 1160, 1167 (9th Cir.) (internal quotation marks and citations omitted), cert. denied, 530 U.S. 1268 (2000). Even where the district court has abused its discretion, however, a conviction will not be reversed unless it can be shown that "the evidentiary ruling constituted more than harmless error; that is, it affected [the defendant's] substantial rights." *United States* v. *Skillman*, 922 F.2d 1370, 1373 (9th Cir. 1990) (citations omitted), cert. denied, 502 U.S. 922 (1991).

B. *The District Court Did Not Abuse Its Discretion In Refusing To Exclude All Of The Evidence Under Rule 403*

Federal Rule of Evidence 403 provides that relevant evidence "*may* be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added). The defendants argue that the district court abused its discretion under Rule 403 in refusing to exclude certain "skinhead evidence," including white supremacist and Nazi-related literature, photographs of the defendants' tattoos, group photographs, and various skinhead paraphernalia (flight

jackets, combat boots, swastika armbands, etc.). Most of the defendants do not challenge any specific piece of evidence on any particular ground, but rather, contend more generally that the probative value of all the items was substantially outweighed by the danger of unfair prejudice and that their admission was needlessly cumulative (Allen Br. 26-28; Dixon Br. 27-33; Skidmore Br. 23-24; Potter Br. 15-22; Flom Br. 18-20).[7] These claims are without merit.

This Court has repeatedly held that such evidence is admissible to prove racial animus. *Skillman*, 922 F.2d at 1374; *United States* v. *McInnis*, 976 F.2d 1226, 1232 (9th Cir. 1992). In *Skillman*, for example, this Court considered the admissibility of testimony about the defendant's loose affiliation with a neo-Nazi skinhead group. 922 F.2d at 1373-1374. Similarly, in *McInnis*, this Court reviewed the admissibility of evidence establishing the defendant's possession of various items bearing swastikas and racially derogatory language. 976 F.2d at 1231-1232. In both cases, the defendants were prosecuted under 42 U.S.C. 3631(a), which makes it a federal crime to interfere with housing rights on account of race. The Court held in both cases that the evidence was properly admitted

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[7] Only Flom identifies specific pieces of evidence that he believes are highly inflammatory. He points to five pieces of literature: Exhibits 138 (Declaration of War), 140 (88 Precepts), 46 (New Order Newsletter), 18 (RAHOWA News), and 17 (Calling Our Nation). Exhibits 138 and 140, however, were not introduced in the government's case-in-chief, but rather, were moved into evidence during cross-examination of Dixon for impeachment purposes after Dixon testified that he does not believe in violence (8 Tr. 1941-1946, 1970-1971). Exhibit 138 is also referenced in Potter's brief (Potter Br. 15).

because it was relevant to proving that the defendants acted because of the victims' race, an element of the crimes charged. *Skillman*, 922 F.2d at 1374; *McInnis*, 976 F.2d at 1232. In *Skillman*, this Court rejected the defendant's argument that the evidence should have been excluded under Rule 403:

> Here, the skinhead evidence tended to establish Skillman's racial animus and that he might act on his beliefs. Skillman also contends that the skinhead references were cumulative to other animus evidence, including Exhibit 3, the business card with the racist poem found in his wallet as well as Milum's and Becky's testimony on Skillman's prior race statements. We conclude this evidence was not 'needless[ly]' cumulative in light of the difficulty in establishing the requisite racial animus and Skillman's theory-of-defense that he was a mere passive bystander at the crime.

Skillman, 922 F.2d at 1374. Relying on *Skillman*, this Court similarly upheld the admission of disputed "swastika evidence" in *McInnis*. The Court found that the evidence was probative of the defendant's motive for interfering with the victim's housing rights, and that such probative value was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence, especially in light of the defendant's defense that he was too intoxicated to have formed the requisite intent. *McInnis*, 976 F.2d at 1232.

The instant case is analogous to *Skillman* and *McInnis*. The defendants were prosecuted under 18 U.S.C. 245(b)(2), which makes it a federal crime to willfully injure, intimidate, or interfere with an individual on account of the individual's race, color, national origin, or religion and because that person is using a public facility. Because racial animus is an element of Section 245(b)(2)(B), admission of the contested "skinhead evidence" here was also

proper. See, *e.g.*, *United States* v. *Dunnaway*, 88 F.3d 617, 619 (8th Cir. 1996) ("Because [the defendant] was charged with [violating Section 245(b)(2)(B)], evidence of his racist views, behavior, and speech were relevant and admissible to show discriminatory purpose and intent, an element of the charges against him."). Moreover, like the defendants in *Skillman* and *McInnis*, several defendants here argued that they were too intoxicated and/or too uninvolved in the charged conduct to have formed the requisite intent. Given these theories of defense, the "skinhead evidence," in this case was especially probative of intent and purpose.

Dixon's reliance on *Guam* v. *Shymanovitz*, 157 F.3d 1154 (9th Cir. 1998), is misplaced (Dixon Br. 32-33). In that case, the government argued that evidence of the defendant's possession of certain, sexually-explicit literature of a homosexual nature was probative of the defendant's intent to "engage[] in sexual contact for the purpose of sexual arousal or gratification." *Id.* at 1157. This Court, however, rejected that argument on the ground that "sexual contact," as defined in the Guam penal code, did not require proof of the defendant's purpose. Thus, unlike the evidence in this case, the challenged evidence in *Shymanovitz* was not probative of any element of the crime charged. *Id.* at 1157-1158; see also *Skillman*, 922 F.2d at 1374 (distinguishing the probative value of evidence of homosexuality in a sex offense prosecution from evidence of racial animus in federal civil rights prosecution). Moreover, the Court held, the evidence should have been excluded under Rule 403 since it is well-established in this circuit that "evidence of homosexuality is extremely prejudicial." *Shymanovitz,* 157 F.3d at 1160. In

contrast, this Court has found no prejudice in admitting evidence of a defendant's racial animus in cases where intent to act on the basis of race is not even an element of the crime charged. See, *e.g.*, *United States* v. *Cutler*, 806 F.2d 933, 936 (9th Cir. 1986) (holding that evidence of the defendant's membership in a white supremacist organization was admissible in murder-for-hire prosecution in order "to rebut Cutler's entrapment defense" and also to "assist the jury to understand the [other evidence] and Cutler's motives"); accord *United States* v. *Winslow*, 962 F.2d 845, 850 (9th Cir. 1992).

Most of the "skinhead evidence" in this case, including the racist literature and group photographs, was seized from Dixon's home. In ruling on the admissibility of the seized items, the district court conducted a hearing outside the presence of the jury and carefully applied the balancing test set forth in Rule 403. In preparation for the hearing, the judge reviewed this Court's opinions in *Skillman* and *McInnis*, among other cases (6 Tr. 1237). Of the twenty-nine pieces of literature and group photographs taken from Dixon's house and offered by the government, *only thirteen* were admitted into evidence (6 Tr. 1238-1266). The court was very careful to admit only items that were highly relevant to the government's theory of prosecution. For example, the court admitted Exhibit 18 ("RAHOWA News") because it confirmed and explained a witness's testimony about the MFWCS's beliefs regarding RAHOWA (6 Tr. 1242-1243).

The defendants nevertheless challenge the probative value of this evidence, arguing that the items seized from Dixon's house should have been admitted

against Dixon only.[8] The district court, however, correctly refused to limit the admissibility of the "skinhead evidence" to any particular defendant.[9] Indeed, Count 1 of the indictment charged all of the defendants with a racially motivated conspiracy under 18 U.S.C. 241 (1 Tr. 91-95). Thus, the "skinhead evidence" was not only probative of racial purpose, an element of the crimes charged under Section 245(b)(2)(B) in Counts 2, 3, and 4, but also of the Section 241 conspiracy because it established the defendants' shared racial beliefs and ideology, as well as the intent to use violent means to drive racial minorities out of Billings. The literature and skinhead paraphernalia, for example, established the existence and operation of organizations, such as the MFWCS and the Aryan Nations, which

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[8] Skidmore also challenges the probative value of the seized materials on the ground that they "related only to anti-Jewish sentiments. None of the people chased around Pioneer Park * * * were Jewish [sic]" (Skidmore Br. 23). This argument fails for two reasons: (1) the characterization of the "skinhead evidence" as solely antisemitic is false. Indeed, Exhibit 18 (RAHOWA News), discussed above, for example, espouses hatred against African Americans and other minorities; and (2) Count 1 explicitly charges the defendants with conspiracy to commit violent acts against "African American, Hispanic, *Jewish*, and Native American persons" (1 Tr. 92 (emphasis added)). Thus, even if the "skinhead evidence" were only of an antisemitic nature, it would nevertheless be probative of the conspiracy, the only offense of which Skidmore charged.

[9] Of course, the court instructed the jury that evidence introduced during the cross-examination of Dixon, such as Exhibits 138 (Declaration of War) and 140 (88 Precepts), should be considered only as it pertained to Dixon (8 Tr. 1970-1971). This instruction was provided at the request of counsel for Flom, and it indeed appeared acceptable to him at the time. Nonetheless, he now argues that "[n]o limiting instructions shielded Flom from the implications of this Nazi literature" (Flom Br. 20).

advocate and promote the use of racially motivated violence. The group photographs and photographs of the defendants' tattoos, on the other hand, were probative of the defendants' affiliation with those organizations, as well as with each other.[10]

The probative value of the "skinhead evidence" was not, as the defendants contend, outweighed by the danger of unfair prejudice. As already explained, the district court was selective in the evidence it chose to admit, and it only allowed those items that were highly relevant to the government's theory of prosecution. Moreover, the court took appropriate measures to minimize any potential prejudice. For example, the court forbade the government and its witnesses from using the word "hate" to characterize the literature and any other evidence or actions of the defendants (6 Tr. 1261-1262). Additionally, the court encouraged defense counsel to explore the relevance of the "skinhead evidence" as to each defendant on cross-examination (6 Tr. 1263). Most importantly, however, the court instructed the jury that it could consider such evidence "*only* as it bears on the defendants' motive, intent, preparation, and plan, *and for no other purpose*" (6 Tr. 1266; see also 3 Tr. 609 (emphasis added)).[11]

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[10] As the district court explained, it was unnecessary to limit the admissibility of such photographs to Dixon or any other particular defendant because such evidence, by virtue of its content, is "limiting by itself" (8 Tr. 1945).

[11] Potter argues that he was further prejudiced because much of the "skinhead evidence" constituted First Amendment protected materials. Although he concedes that the admission of such materials for the purpose of proving racial

(continued...)

Nor was the evidence needlessly cumulative. Although the government established through witness testimony that each of the defendants was somehow affiliated with white supremacist organizations and beliefs, the "skinhead evidence" challenged here was needed in order to further develop and corroborate that testimony. Naturally, the government was entitled to introduce such corroborating evidence, especially after its witnesses had been impeached on cross-examination. *E.g.*, *United States* v. *Williams*, 626 F.2d 697, 703-704 (9th Cir.) (affirming that gun was admissible, although cumulative, because it corroborated witness testimony that defendant had a gun), cert. denied, 449 U.S. 1020 (1980). The fact that there was "a lot" of this evidence does not, as the

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[11](...continued)
animus was approved by the Supreme Court in *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), he argues that *Mitchell* "should not be continually interpreted to allow admission of all types and sizes of evidence implicating precious First Amendment rights" (Potter Br. 18). However, this Court is bound by Supreme Court precedent. Moreover, as already explained, the district court's instruction to the jury as to how it should consider the "skinhead evidence" minimized any potential prejudice resulting from the admission of such materials. See, *e.g.*, *United States* v. *McDermott*, 29 F.3d 404, 408-409 (8th Cir. 1994) (finding that the defendant's conviction under Section 241 was not based on protected First Amendment expression where the jury was instructed to consider the challenged evidence with respect to the element of intent). In addition, the government told the jury in its closing argument that "it is not illegal to be a skinhead. It is not illegal to be a member of the Montana Front Working Class Skinheads. It is not illegal to hate blacks, hate Native Americans, to hate Jews, or to hate anybody, for that matter. * * * It is only illegal when the defendants engage in conduct and act on those motivations, and, of course, that's exactly what happened here in Billings in July of last year" (10 Tr. 2458).

defendants suggest, render it needlessly cumulative (Allen Br. 28). There was "a lot" of evidence because there were six defendants. Moreover, the *quantity* of such evidence was itself probative of racial animus. The evidence showed that the defendants did not have a mere passing interest in racial hatred. They embraced racial hatred as a lifestyle. They covered their bodies in tattoos with symbols and images of racial hatred. They associated themselves with white supremacist organizations that advocate violence, and they attended conferences at the Aryan Nations compound. They studied Hitler, read racist literature, listened to hate music, and promoted racially motivated violence. This evidence was relevant to proving that they engaged in violence for racial purposes.

The fact that some of the defendants were willing to admit that they were racist skinheads does not render the "skinhead evidence" needlessly cumulative (Allen Br. 27-28; Dixon Br. 28-29). It is well-settled that "the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Old Chief* v. *United States*, 519 U.S. 172, 186-187 (1997). In *Old Chief*, the Supreme Court recognized a narrow exception to this general rule where proof of a prior felony conviction is required to establish a violation of a particular statute. The Court explained, "the choice of evidence for such an element is usually not between eventful narrative and abstract proposition, but between propositions of slightly varying abstraction, either a record saying that conviction for some crime occurred

at a certain time or a statement admitting the same thing without naming the particular offense." *Id.* at 190. Thus, because "there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence," the Court concluded that the district court's admission of the defendant's full criminal record constituted an abuse of discretion where the defendant was willing to stipulate the relevant prior conviction. *Id.* at 191. The Court's exception in *Old Chief* obviously does not, as the defendants argue, apply here. Indeed, the defendants' proffered stipulation that they were members of a skinhead group and harbored some prejudicial feelings towards racial minorities and Jews (or, in some cases, that they were simply proud of their Aryan heritage) would not have had the same evidentiary force as the white supremacist and Nazi-related literature and photographs. As already discussed, this "skinhead evidence" was probative of the intensity of their racial animus, and their intent to use violent means to accomplish this purpose of the conspiracy. Accordingly, the district court did not abuse its discretion in admitting those materials.[12]

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[12] Because most of the "skinhead evidence" was merely corroborative of witness testimony and other evidence introduced during cross-examination of the defendants for impeachment purposes, its admission did not affect any of the defendants' substantial rights. See, *e.g.*, *McInnis*, 976 F.2d at 1232 (concluding that admission of "swastika evidence" did not affect the defendant's substantial rights where other evidence overwhelmingly established racial animus). Thus, even if this Court were to find an abuse of discretion, admission of the contested "skinhead evidence" should nevertheless be upheld as harmless error. *Id.* at 1231.

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS OF FLOM UNDER 18 U.S.C. 241 (CONSPIRACY) AND ALLEN AND DIXON UNDER 18 U.S.C. 2 (AIDING AND ABETTING)

A. *Standard Of Review*

"The sufficiency of the evidence is reviewed in the light most favorable to the Government to determine if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States* v. *Skillman*, 922 F.2d 1370, 1372 (9th Cir. 1991) (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)), cert. denied, 502 U.S. 922 (1991).

B. *The Evidence Was Sufficient To Support The Conviction Of Flom Under 18 U.S.C. 241 (Conspiracy)*

Count 1 of the indictment charged Flom under 18 U.S.C. 241 with conspiracy to violate "the right to the full and equal enjoyment of the services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination on the ground of race, color, religion, and national origin." The conspiracy existed from about March 1, 2000, to about October 30, 2000 (1 Tr. 91). In order to establish a violation of Section 241, the government must demonstrate: (1) an agreement to accomplish an illegal objective; and (2) the requisite intent necessary to violate the protected right. *Skillman*, 922 F.2d at 1373 n.2.

Flom argues that the evidence was insufficient to support his conviction under Section 241 because the government failed to prove beyond a reasonable doubt that he possessed the requisite specific intent (Flom Br. 11-12). Flom first contends that there was no evidence that he was a member of the MFWCS or any other evidence that he intended to partake in a racially motivated conspiracy before or after the "park patrol" on July 29, 2000 (Flom Br. 12-15). Second, Flom submits that evidence of his presence at the barbecue at Allen's house on July 29, 2000, was insufficient to prove that he intended to participate in the "park patrol" and further, that the record suggests that he was too intoxicated to have formed the requisite specific intent (Flom Br. 15-17). This argument fails on both accounts.

First, there was ample evidence of Flom's association with the MFWCS prior to July 29, 2000, and of racial beliefs shared with the other defendants. Thomas Edelman, a co-conspirator who pled guilty, testified on behalf of the government that he first met Flom before January of 2000, when Edelman began associating with the skinhead group (3 Tr. 688). Edelman testified that Flom educated him on what it meant to be a skinhead, and encouraged Edelman to become a member of the MFWCS (3 Tr. 691-694). Specifically, Edelman stated that Flom taught him that the MFWCS was a white supremacist and neo-Nazi organization, and that the organization's mission was to rid the town of racial minorities and Jews. He further testified that Flom taught him that Hitler was to be admired for what he did to the Jews (3 Tr. 696-701). Edelman also testified that Flom taught him the significance of wearing red suspenders, and how red

suspenders were earned within the MFWCS organization (3 Tr. 740). Edelman testified that Flom was the group's tattoo artist (4 Tr. 1039). Indeed, Edelman testified that Flom tattooed on Edelman two skinhead images, one with a swastika on his arm and another with a MFWCS banner underneath it (3 Tr. 687, 830; Exh. 103, 105). Edelman testified, however, that Flom was permitted to give these tattoos to MFWCS members only with permission from Allen, one of the group's leaders (3 Tr. 830; 4 Tr. 1039).

Another co-conspirator, Jeremiah Johnson, similarly testified that Flom associated with members of the MFWCS long before July of 2000, and that, in fact, Flom was once subjected to a beating (or "rough justice," as it was called) by Dixon, one of the group's leaders, for not following the rules of the organization (6 Tr. 1323-1324). Johnson further testified that Flom partook in conversations about the group's distaste for seeing minorities in public places (6 Tr. 1333-1334). Finally, several photographs of Flom's tattoos were admitted into evidence. These photographs depicted tattoos similar to those displayed on the bodies of the other defendants (Exh. 73, 74, 75).

Second, Flom's claim that evidence of his presence at the barbecue at Allen's house on July 29, 2000, was insufficient to establish that he intended to conspire with others to commit the alleged "park patrol" is without merit. Indeed, the evidence established that Flom was not merely present at the barbecue, but rather, an active participant in the planning and execution of the "park patrol." Johnson, for example, testified that Flom took part in the conversation about doing

a "park patrol" that evening, and that he was just as excited about the idea as everybody else (6 Tr. 1364-1366). The evidence further established that Flom was dressed in the MFWCS uniform, as were all his co-conspirators (4 Tr. 1054). Moreover, the evidence established that Flom not only traveled to Pioneer Park with Potter and Flaherty, but that once there, he wielded a weapon like everyone else (3 Tr. 810-811). Finally, Edelman testified that during the "park patrol," Flom shouted racial slurs at one of the victims (3 Tr. 817; see also 2 Tr. 425). Although many witnesses testified that Flom drank alcohol that evening, and that he may have even been drunk, the evidence did not establish that he was too intoxicated to form the requisite specific intent. To the contrary, Johnson testified that Flom was able to participate in the conversations about the "park patrol" at the barbecue, and that once they arrived at Pioneer Park, he had no difficulty getting out of the pick-up truck (6 Tr. 1365, 1373).

All of this evidence, considered together, is more than sufficient to establish that Flom intended to participate in the racially motivated conspiracy alleged in Count 1. *Skillman*, 922 F.2d at 1373 (finding evidence of racial animus, including testimony that the defendant had a loose affiliation with a skinhead group, sufficient to prove intent under Section 241). This case is easily distinguishable from *United States* v. *Estrada-Macias*, cited by Flom for the proposition that a "mere casual association with conspiring people is not enough." 218 F.3d 1064, 1066 (9th Cir. 2000). Indeed, as explained above, Flom's association with the MFWCS and his co-conspirators was more than a "mere casual association." The

court instructed the jury that "a person does not become a conspirator merely by associating with one or more persons who are conspirators" (10 Tr. 2432) and further, that it may "consider evidence of intoxication in deciding whether the government has proved beyond a reasonable doubt that the defendant acted with the intent to commit the crime[] of conspiracy against rights" (10 Tr. 2447-2448). The jury nevertheless found Flom guilty of conspiracy. Thus, viewed in the light most favorable to the government, the evidence described above was sufficient to prove that Flom possessed the requisite specific intent. *United States* v. *McInnis*, 976 F.2d 1226, 1230 (9th Cir. 1992) (concluding that even though the defendant was intoxicated, the evidence was sufficient to establish specific intent because there was evidence of racial animus, including evidence that he made racially derogatory remarks, and also that he picked up a weapon and took other deliberate steps in preparation for committing the alleged act). Accordingly, this Court should affirm Flom's conviction under Section 241.

C. *The Evidence Was Sufficient To Support The Convictions Of Allen And Dixon Under 18 U.S.C. 2 (Aiding And Abetting)*

The indictment charges Allen and Dixon with three counts of aiding and abetting in violation of 18 U.S.C. 2. The district court instructed the jury that in order to find a defendant guilty of aiding and abetting in this case, the government had to prove beyond a reasonable doubt that: (1) a violation of 18 U.S.C. 245 was committed by someone; (2) the defendant knowingly and intentionally aided, counseled, commanded, induced, or procured that person to commit a violation of

18 U.S.C. 245; and (3) the defendant acted before the crime was completed (10 Tr. 2446). The court further instructed the jury that "[i]t is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit a violation of 18 U.S.C. 245" (10 Tr. 2446). Neither Allen nor Dixon challenges these instructions. Instead, they argue that the evidence pertaining to their conduct at the barbecue on July 29, 2000, did not establish that they knowingly and intentionally aided, counseled, induced, or procured anyone to conduct the alleged "park patrol" in violation of Section 245(b)(2)(B) (Allen Br. at 16-26; Dixon Br. 17-20). This argument is without merit.

It is undisputed that on the night of July 29, 2000, Allen hosted a barbecue at his home, and that both Allen and Dixon were present. It is also undisputed that the alleged "park patrol" took place later that night. The only issue is whether Allen and Dixon aided and abetted the commission of that unlawful act. Viewed in the light most favorable to the government, the evidence establishes that they did. Several witnesses testified, for example, that both Allen and Dixon participated in the initial conversations about doing a park patrol (3 Tr. 800-801, 4 Tr. 1064). Indeed, Edelman testified that Allen said, "It's time to go do a park patrol," and that Dixon said, "Yeah, let's go get them," or "Yeah, do it" (3 Tr. 800). Both Allen and Dixon participated in the conversations about the plan of

action to be followed once the group arrived at Pioneer Park. For example, Kevin Cox testified that both Allen and Dixon explained to him that it was standard procedure for juveniles, rather than elders, to conduct "park patrols" because juveniles were punished less severely under the law (4 Tr. 1066). Edelman testified that Dixon instructed the group that it should drop people off at each corner of the park (3 Tr. 804-805). Edelman further testified that he didn't really want to participate in the "park patrol," but felt obligated to go because Allen had specifically instructed him to watch out for Flaherty, who was not from Billings. Edelman explained that he felt that he could not disobey Allen, since Allen had the power to kick him out of the MFWCS group (3 Tr. 807-808). Finally, Edelman and Johnson both testified that before they left for the park, Allen and Dixon instructed them to watch out for the younger guys, and to make sure they didn't get caught (3 Tr. 809; 6 Tr. 1367).

All of the testimony regarding the defendants' behavior on the night of July 29, 2000, is corroborated by the extensive and undisputed evidence describing in great detail the structure, purpose, and operation of the MFWCS organization. It is telling that neither Allen nor Dixon challenges the sufficiency of the evidence to support his conspiracy conviction. That evidence established that Allen and Dixon formed and remained the leaders of a white supremacist, neo-Nazi organization that had the mission of ridding Billings, Montana of minorities and Jews. That evidence also established that this mission was accomplished by the recruitment of socially outcast juveniles for the purpose of committing so-called

"park patrols" and other racially motivated acts of violence, and that Allen and Dixon rewarded juveniles who committed such violent acts with red laces and braces, symbols of elevated status with the skinhead group. See Statement of Facts, *supra*. In sum, the conspiracy evidence is also probative of the defendants' intent to aid and abet the commission of the Section 245(b)(2)(B) violations because it is explicative and corroborative of the government witnesses' testimony regarding their behavior on July 29, 2000.

Viewed in the light most favorable to the government, this evidence is sufficient to support the defendants' convictions for aiding and abetting. See, *e.g.*, *United States* v. *Freeman*, 761 F.2d 549, 551 (9th Cir. 1985) ("Words alone may constitute a criminal offense[.]"), cert. denied, 476 U.S. 1120 (1986); *United States* v. *Nelson*, 277 F.3d 164, 213 (2d Cir.) (finding that the defendant's speech, which incited a riot, was sufficient evidence to support a conviction for aiding and abetting a violation of Section 245(b)(2)(B)), cert. denied, 123 S. Ct. 145 (2002). Allen and Dixon, however, challenge this evidence on the ground that some of the government witnesses contradicted themselves on cross-examination, and that their testimony may have conflicted at times with the testimony of other witnesses. This argument must fail, since "[a]n appellate court 'must respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts, by assuming that the jury resolved all such matters in a manner which supports the verdict.'" *United States* v. *Nguyen*, 284 F.3d 1086, 1090 (9th Cir.) (quoting *United States* v. *Gillock*,

886 F.2d 220, 222 (9th Cir. 1989)), cert. granted, No. 01-10873 (Nov. 4, 2002). Accordingly, this Court should affirm the convictions of Allen and Dixon for aiding and abetting.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING POTTER'S MOTION FOR A MISTRIAL

A. *Standard Of Review*

"A district court's decision denying a motion for mistrial is reviewed by an appellate court for abuse of discretion." *United States* v. *George*, 56 F.3d 1078, 1082 (9th Cir.), cert. denied, 516 U.S. 937 (1995). A finding by this Court that the district court abused its discretion will not warrant reversal unless the error affected the defendant's substantial rights. *Id.* at 1083; Fed. R. Crim. P. 52(a) (defining harmless error).

B. *The District Court's Denial Of Potter's Motion For A Mistrial Did Not Constitute Reversible Error*

During the government's cross-examination of Potter, Potter testified that he respected the Federal Bureau of Investigation (FBI) and court orders. Subsequently, the prosecutor asked Potter if he had willingly complied with a court order compelling him to have his tattoos photographed by the FBI. Potter stated that he did comply (9 Tr. 2318). The prosecutor then asked Potter if he told the FBI agent, "you're going to have to wrestle my ass to the ground to take [my] fucking pictures"? (9 Tr. 2319-2320). Potter responded that he was not sure exactly what words he used. The prosecutor next asked Potter if he told the FBI agent to "suck" his "cock." Counsel for Potter immediately objected and moved

for a mistrial. The court overruled the objection and denied the motion on the ground that Potter's mother had previously testified that Potter was a nonviolent person, and that the prosecutor's question constituted proper impeachment (9 Tr. 2320-2321). The district court did not, as Potter contends (Potter Br. 34-35), abuse its discretion. The question constituted proper impeachment of both the mother's statement that Potter was a nonviolent person, as well as Potter's own testimony that he respected the FBI and court orders.[13]

In any event, if there was error, the error was harmless. In light of the overwhelming evidence linking Potter to the racially motivated conspiracy and establishing his active role in the "park patrol" on July 29, 2000, the prosecutor's cross-examination of him in no way deprived him of a fair trial. *George*, 56 F.3d at 1083 (finding harmless error where contested testimony was not crucial to proof of any element of the crime charged and where government's evidence of guilt was overwhelming).

V. THE DISTRICT COURT DID NOT ERR IN CALCULATING THE SENTENCES OF ALLEN, DIXON, AND SKIDMORE

Prior to sentencing each of the defendants, the district court stated on the record:

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[13] Moreover, this case is easily distinguishable from the only case Potter cites in support of his argument, *United States* v. *Merino-Balderrama*, 146 F.3d 758, 763 (9th Cir. 1998), in which this Court found an abuse of discretion under Rule 403 when the district court allowed the jury to view several graphic videos of child pornography.

> A jury heard all of the evidence in this case. They convicted all of the defendants, except for Mr. Skidmore, of all counts, and I believe that most, if not all, of those enhancements, and I'll go through them individually when I rule on them with these defendants, but I believe each one of those enhancements, most or all, have not only been proven by clear and convincing evidence, they've been proven beyond a reasonable doubt in front of the jury (Allen Sent. Tr. 4-5).

Thereafter, the court sentenced each of the defendants based on the jury's verdict and the evidence introduced at trial.

A. *Standards Of Review*

"The district court's factual findings at sentencing are reviewed for clear error, and must be supported by a preponderance of the evidence." *United States* v. *Sager*, 227 F.3d 1138, 1146 (9th Cir. 2000) (citations omitted), cert. denied, 531 U.S. 1095 (2001); see also *United States* v. *Jordan*, 291 F.3d 1091, 1099 (9th Cir. 2002) (In reviewing the factual findings, this Court ordinarily "give[s] broad deference to the district court, which gained an intimate understanding of the people and events involved over the course of the * * * trial."). However, where a sentencing factor has a disproportionate effect on the sentence relative to the offense of conviction, due process requires that the facts be supported by clear and convincing evidence. *United States* v. *Jordan*, 256 F.3d 922, 926 (9th Cir. 2001). Application of the United States Sentencing Guidelines to the facts is reviewed for abuse of discretion. *United States* v. *Daas*, 198 F.3d 1167, 1181 (9th Cir. 1999), cert. denied, 531 U.S. 999 (2000).

B. *The Court Correctly Calculated The Base Offense Level*

Under the applicable sentencing guideline for a violation of 18 U.S.C. 241 and 245(b), the base offense level is calculated according to the offense guidelines applicable to the underlying offense. U.S.S.G. 2H1.1(a)(1). In this case, the district court applied the guideline for aggravated assault, defined as "a felonious assault that involved * * * a dangerous weapon with intent to cause bodily injury * * * with that weapon." U.S.S.G. 2A2.2, cmt. n.1. In accordance with the specific offense characteristics for that guideline, the court enhanced each defendant's sentence by three levels for brandishing or using a dangerous weapon. See *id.* 2A2.2(b)(2)(C). Allen and Dixon argue that the base offense level was erroneously calculated because (1) it was not "reasonably foreseeable," as required by U.S.S.G. 1B1.3(a)(1)(B), that a dangerous weapon would be brandished or used; and (2) they did not intend to cause bodily injury (Allen Br. 39-43; Dixon Br. 33-35, 40-42). This argument fails on both accounts.

The court instructed the jury that in order to find Allen and Dixon guilty of aiding and abetting, it had to find that they "knowingly and intentionally aided, counseled, commanded, induced, or procured [another] person to commit a violation of 18 U.S.C. Section 245" (10 Tr. 2446). The court further instructed the jury that use, attempted use, or threatened use of a dangerous weapon, and intent to injure, intimidate, or interfere with the victims were elements of a Section 245 violation in this case (10 Tr. 2441-2442). In order to find Allen and Dixon guilty of the charged offenses, therefore, the jury had to find that the evidence

established beyond a reasonable doubt that Allen and Dixon intended that those who went on the "park patrol" would brandish or use a deadly weapon with intent to cause bodily harm. The court's calculation of the defendants' base offense levels, therefore, was not clearly erroneous.

C. *The Contested Sentence Enhancements Were Applicable And Supported By The Record*

1. Leadership Role

Allen, Dixon, and Skidmore contest the four-level sentence enhancement imposed on each for having acted as "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive" pursuant to U.S.S.G. 3B1.1(a) (Allen Br. 29-32; Dixon Br. 36-40; Skidmore Br. 10-16). "To impose an enhancement under U.S.S.G. § 3B1.1(a), the district court must determine that 'the defendant exercised some control over others involved in the commission of the offense [or was] responsible for organizing others for the purpose of carrying out the crime.'" *United States* v. *Berry*, 258 F.3d 971, 977 (9th Cir. 2001) (quoting *United States* v. *Harper*, 33 F.3d 1143, 1151 (9th Cir. 1994)). "There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." U.S.S.G. 3B1.1, cmt. n.4.

Allen and Dixon, and Skidmore were convicted of conspiracy. In support of these convictions, Edelman, Johnson, and others testified that Allen, Dixon, and Skidmore were the founders and leaders of the MFWCS, and that, as the leaders of this organization, they recruited others and taught them about the MFWCS's

mission of ridding Billings of racial minorities and Jews by committing so-called "park patrols" and other racially motivated acts of violence. Witnesses also testified that Allen, Dixon, and Skidmore offered red laces and braces as rewards to recruits who committed such violent acts, and that they further encouraged recruits to earn these rewards, as they were considered symbols of elevated status within the group. See Statement of Facts, *supra*. As explained above, Edelman and Johnson, two of the defendants' co-conspirators, testified at trial that both Allen and Dixon provided encouragement and instruction to the "park patrol" group, which consisted of nine individuals altogether. This testimony was sufficient to support these defendants' convictions for aiding and abetting. See Part III.C, *supra.* This testimony was summarized in the pre-sentence reports and relied on by the district court in making its determination that each defendant was a "leader or organizer" within the meaning of U.S.S.G. 3B1.1 (Allen Sent. Tr. 31; Dixon Sent. Tr. 18-19; Skidmore Sent. Tr. 10-11). Accordingly, there was sufficient evidence to support the enhancement.

2. Use Of A Minor

The district court enhanced the sentences of Allen, Dixon, and Skidmore by two levels for "us[ing] or attempt[ing] to use a person less than eighteen years of age to commit the offense[s] or assist in avoiding detection of, or apprehension for, the offense[s]" pursuant to U.S.S.G. 3B1.4. The court based this enhancement on testimony at trial, as summarized in the pre-sentence reports, that three of the defendants' co-conspirators, Dustin Neely, Sara Fairchild, and Kevin Cox, were

minors at the time of the offenses. The defendants do not dispute that at least one of these individuals was a minor at the time of the offenses; nor do they dispute that all three of these individuals participated in the "park patrol." Instead, they contend that neither Neely, Fairchild, nor Cox was an official dues-paying member of the MFWCS (Allen Br. 32-38; Dixon Br. 43-44; Skidmore Br. 17-22). This argument is inapposite.

Commentary to the sentencing guidelines explains that "'[u]sed or attempted to use' includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting." U.S.S.G. 3B1.4 n.1. As explained above, the evidence in support of the conspiracy and aiding and abetting convictions established that Allen, Dixon, and Skidmore did exactly that; indeed, the evidence established that these defendants specifically targeted minors for recruitment because they believed that minors were less likely than adults to be incarcerated for committing acts of violence. See Statement of Facts, *supra*; Part III.C, *supra*. The enhancement does not require that the juveniles be official dues-paying members of the MFWCS. Neely, Fairchild, and Cox may not have been official dues-paying MFWCS members, but the evidence established that they were associated with the organization as well as with Allen, Dixon, and Skidmore, and that those defendants encouraged, counseled, and recruited them to participate in the "park patrol." Accordingly, there was sufficient evidence to support enhancing the defendants' sentences under U.S.S.G. 3B1.4.

3. Obstruction Of Justice

The district court enhanced Skidmore's sentence by two levels for obstruction of justice, pursuant to U.S.S.G. 3C1.1, based on its finding that "Mr. Skidmore provided a false alibi when he testified he was at work during the park patrol" (Skidmore Sent. Tr. 8). Specifically, the court found that:

> Mr. Skidmore testified under oath, knowing full well that the employment records showed it was not true, knowing full well, he testified under oath he was at work from approximately 5 p.m. until 10:30 p.m. on the night of the park patrol, and as we all know, that was not true, and Mr. Skidmore knew it at the time. An attempt was made to keep the, prevent the government from obtaining the employment records to prove that the defendant was not at work, and he will get a two-level enhancement under the guideline * * * (Skidmore Sent. Tr. 8-9).

Skidmore does not challenge the court's finding as unsupported by the record, but rather, argues that his alibi statement did not constitute perjury because it was not a "material lie" (Skidmore Br. 4-9). Skidmore's contention that his statement was immaterial is without merit.

This Court has held that "[a]n adjustment must be imposed under U.S.S.G. § 3C1.1 if the district judge determines that the defendant, with willful intent, gave false testimony concerning a material matter." *Daas*, 198 F.3d at 1181. The guidelines define "material statement" as one that "if believed, would tend to influence or affect the issue under determination." U.S.S.G. 3C1.1 n.6. Count 1 charged Skidmore with a racially motivated conspiracy that had the object of inducing MFWCS recruits to participate in a "park patrol" at Pioneer Park (1 Tr. 91-92). See also Part III.B, *supra*. Accordingly, evidence of Skidmore's presence

at the barbecue at Allen's house on the day of the "park patrol" was probative, albeit circumstantially, of his participation in that conspiracy. Skidmore's testimony about his whereabouts that evening, therefore, related to a material matter. Accordingly, the court did not abuse its discretion in applying the enhancement for obstruction of justice to Skidmore's sentence.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully Submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

_____
JESSICA DUNSAY SILVER
TOVAH R. CALDERÓN
Attorneys
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Appellate Section, PHB 5001
Washington, DC 20530
(202) 514-4142

STATEMENT OF RELATED CASES

All related cases are consolidated herein. The United States is unaware of any additional related cases or proceedings.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached Brief for the United States as Appellee is proportionally spaced, has a typeface of 14 points, and contains 17,991 words.

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TOVAH R. CALDERÓN
Attorney

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief for the United States as Appellee was sent by first class mail this 6th day of February, 2003, to the following counsel of record:

Lynn Hamilton, Esq.
240 North Center
Mesa, AZ 85201

Wendy Holton, Esq.
211 5th Avenue
Helena, MT 59601

Palmer Hoovestal, Esq.
P.O. Box 747
Helena, MT 59624

Larry Jent, Esq.
506 East Babcock
Bozeman, MT 59715

Robert L. Kelleher, Esq.
230 Grand Avenue
Billings, MT 59101

Penelope S. Strong, Esq.
P.O. Box 1257
Billings, MT 59101

_____
TOVAH R. CALDERÓN
Attorney