No. 05-31111

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

LEN DAVIS,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Because this is a federal death penalty case involving an extensive record, the United States believes oral argument is appropriate.

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STATEMENT OF JURISDICTION

This is a capital case under the Federal Death Penalty Act, 18 U.S.C. 3591-3599. The district court had jurisdiction under 18 U.S.C. 3231. It sentenced defendant Len Davis on October 27, 2005, and entered final judgment on November 4, 2005. SR 143, 5267-5271; DRE Tab 1 & 9.[1] After receiving a five-

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[1] "SR _" refers to pages in the first supplemental record on appeal, using the pagination provided by this Court. "R _" refers to pages in the original record, using the pagination provided by this Court. "Br. _" refers to pages in defendant's

(continued...)

day extension from the district court on November 18, 2005, Davis filed his notice of appeal to this Court on that date. SR 5267-5268, 5300-5308; DRE Tab 2 & 9. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3595(a).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the jury's finding that Davis posed a threat of future dangerousness.

2. Whether the district court committed reversible error in providing a written answer to the jury's question regarding a minor discrepancy between phrasing used in the verdict forms and jury instructions.

3. Whether the prosecutors engaged in misconduct requiring reversal under a plain-error standard by (1) introducing evidence about the involvement of Davis and co-defendant Paul Hardy in violence, (2) presenting arguments to the jury about their involvement, and (3) cross-examining defendant's expert.

4. Whether the victim-impact testimony and the prosecution's arguments related to that evidence were plain error.

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[1](...continued)
opening brief, and "LD-_" refers to transcripts and recordings admitted at trial, as identified at SR 5241-5242. "Causey USCA5 _" and "Hardy USCA5 _" refer to pages in the records of Davis's codefendants, submitted as the second supplement on appeal. "DRE Tab _" refers to tabbed portions of defendant's record excerpts. "R. _" refers to documents filed in the district court by docket entry.

5. Whether closing arguments by the prosecutor at the selection phase of the sentencing hearing were reversible error.

6. Whether the district court abused its discretion in instructing the jury on the "substantial planning and premeditation" aggravating factor under 18 U.S.C. 3592(c)(9).

7. Whether the district court committed plain error in instructing the jury on mitigating evidence or in drafting the verdict forms on the same.

8. Whether Davis may now relitigate a claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), which this Court properly rejected in his previous appeal.

9. Whether Davis's claims under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972), are untimely. If the Court determines that they are timely, the question presented is whether the government withheld material evidence about prosecution witness Sammie Williams in violation of *Brady* and G*iglio.*

10. Whether the law-of-the-case doctrine bars this Court's consideration of Davis's challenge to the sufficiency of the evidence on the "color of law" element of his two counts of conviction.

11. Whether the law-of-the-case doctrine bars this Court's consideration of Davis's argument that the omission of the Federal Death Penalty Act elements

from the indictment precluded the government from seeking the death penalty at resentencing.

12. Whether waiver and the law-of-the-case doctrine bar this Court's consideration of Davis's argument that the Double Jeopardy Clause precludes his conviction for violating both 18 U.S.C. 241 and 242.

13. Whether waiver and the law-of-the-case doctrine bar this Court's consideration of Davis's argument that the indictment erroneously alleged a deprivation of the right to "liberty" rather than a deprivation of the right to "life."

14. Whether Davis has waived his argument that the Supreme Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Ring* v. *Arizona*, 536 U.S. 584 (2002), resulted in an unconstitutional judicial rewriting of 18 U.S.C. 241 and 242.

STATEMENT OF THE CASE

Much of the procedural history of this case is described in this Court's previous decisions. See *United States* v. *Causey*, 185 F.3d 407, 423 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000); *United States* v. *Davis*, No. 01-30656, 2001 WL 34712238 (5th Cir. July 17, 2001); *United States* v. *Davis*, 285 F.3d 378 (5th Cir.), cert. denied, 537 U.S. 1066 (2002); *United States* v. *Davis*, 380 F.3d 821 (5th Cir. 2004), cert. denied, 544 U.S. 1034 (2005).

1. This case involves a death sentence imposed under the procedures set forth in the Federal Death Penalty Act (FDPA), 18 U.S.C. 3591-3599. The FDPA authorizes the death penalty for killings resulting from certain federal crimes. 18 U.S.C. 3591(a)(2). The statute provides for a separate, post-conviction penalty proceeding in two stages – commonly referred to as the "eligibility" and "selection" phases. In the first stage, which establishes death penalty eligibility, a jury must unanimously find beyond a reasonable doubt that defendant acted with the statutorily required intent and that one or more of 16 statutorily defined aggravating factors is present. 18 U.S.C. 3593(b), 3591(a)(2), 3592(c); *Jones* v. *United States*, 527 U.S. 373, 407-408 (1999).

In the second, or "selection," phase, the jury must decide whether to impose the death penalty after considering and weighing both aggravating and mitigating factors. 18 U.S.C. 3592(c); *Jones*, 527 U.S. at 373, 408. The jury must find aggravating factors unanimously beyond a reasonable doubt. *Jones*, 527 U.S. at 408; 18 U.S.C. 3593(c). It determines mitigating factors, however, individually by "a preponderance of the information," 18 U.S.C. 3593(c), so that "a mitigating factor may be considered in the jury's weighing process if any one juror finds the factor proved," *Jones*, 527 U.S. at 408; see also 18 U.S.C. 3593(d).

2. In 1995, a federal grand jury returned a three-count indictment charging Len Davis, Paul Hardy, and Damon Causey with federal offenses relating to the killing of Kim Marie Groves. Count 1 of the indictment charged defendants with conspiracy to violate the civil rights of Groves and another unnamed individual by use of excessive force, resulting in death, in violation of 18 U.S.C. 241. Count 2 alleged that the three defendants violated Groves' civil rights by excessive force (*i.e.*, by shooting Groves with a firearm), resulting in her death, in violation of 18 U.S.C. 242 and 18 U.S.C. 2. Count 3 charged defendants with willfully killing Groves to prevent her communications to a law enforcement officer regarding a possible federal crime, in violation of 18 U.S.C. 1512(a)(1)(C) and 18 U.S.C. 2. SR 862-866; DRE Tab 3. At the time of the charged offenses, Davis was a police officer with the New Orleans Police Department, Hardy was drug dealer in New Orleans, and Causey was an associate of Davis and Hardy. SR 5578, 5708, 5718.

In 1996, a jury found Davis and Hardy guilty on all three counts, and found Causey guilty on Counts 1 and 2. SR 1928-1934; DRE Tab 6. In the penalty phase, the jury recommended that both Davis and Hardy be sentenced to death (SR 2002-2007, 2078-2084), and the district court imposed death sentences for both men. SR 2314; *Causey*, 185 F.3d at 412. The court sentenced Causey to life imprisonment. SR 2314; Causey USCA5 1408; Hardy USCA5 2089.

This Court affirmed Causey's conviction and sentence and affirmed Davis's and Hardy's convictions on Counts 1 and 2, noting the "overwhelming evidence of Davis's guilt." *Causey*, 185 F.3d at 418, 423. It reversed Davis's and Hardy's convictions on Count 3, holding that, as Groves had only contacted local authorities, there was insufficient evidence to support the convictions for federal witness tampering. *Id.* at 423. Given that the jury's recommendations of death for Davis and Hardy were not tied specifically to conviction on a particular count, this Court vacated Davis's and Hardy's death sentences and remanded for resentencing. *Ibid*.

3. On remand, the United States notified Davis that it planned to seek the death penalty based on evidence of intent pursuant to 18 U.S.C. 3591(a)(2)(A)-(C), and the statutory aggravating factor of substantial planning and premeditation, 18 U.S.C. 3592(c)(9). SR 2776-2777; DRE Tab 4. The government also notified Davis of the nonstatutory aggravating factors it would rely upon to seek the death penalty. SR 2743, 2772-2775; DRE Tab 5.

After a number of intervening appeals that are not relevant to the case at hand,[2] Davis's resentencing trial took place in August 2005. His primary defense

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[2] See *United States* v. *Davis*, 380 F.3d 821, 830 (5th Cir. 2004) (reversing determination that indictment's failure to include FDPA elements precluded a (continued...)

was that he was innocent of the offenses for which he had been convicted in 1996. SR 5090, 6347. Beginning at voir dire, the defense told jurors that "Davis maintains his innocence of these crimes." SR 6386.

Davis chose to represent himself in the eligibility phase, assisted by his attorneys. SR 5490. He gave the opening statement and cross-examined witnesses. SR 5515-5564, 5610-5698. Davis told the sentencing jury it would "be the first jury to hear about the untold facts in this case." SR 5515. He stated that neither he nor Paul Hardy was a murderer, that Groves had "enemies" "due to [her] unfortunate lifestyle," and that eyewitnesses identified her boyfriend as her killer. SR 5521, 5525, 5549, 5555-5556. Davis claimed that he and Hardy had planned, at most, to frame Groves in a drug deal, not to kill her. SR 5524-5525, 5529.

At the eligibility phase of the sentencing proceeding, the jury found that Davis acted with the statutorily required intent and after substantial planning and premeditation. SR 5138-5143, 6035; see 18 U.S.C. 3591(a)(2)(c), 3592(c)(9).

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[2](...continued)
death sentence); *United States* v. *Davis*, No. 01-30656, 2001 WL 34712238, at *3 (5th Cir. July 17, 2001) (issuing writ of mandamus that Davis be permitted to represent himself); *United States* v. *Davis*, 285 F.3d 378, 385 (5th Cir. 2002) (issuing another writ of mandamus finding appointment of independent counsel violated Davis's right to self-representation).

The sentencing hearing proceeded to the selection phase where the government presented evidence of its proposed non-statutory aggravating factors, and the defense presented evidence in support of its proposed mitigating factors. Davis elected not to attend the selection phase. SR 6042-6043. The government proposed four aggravating factors: (1) Davis used his position as a police officer to seriously jeopardized the health and/or safety of others; (2) Davis poses a threat of future dangerousness; (3) Groves' death created harmful emotional distress for her daughter; and (4) Davis killed Groves to prevent her from providing information and assistance to law enforcement authorities about an offense or in retaliation for her role in providing such information. SR 6331; DRE Tab 15. Davis proposed numerous mitigating factors, including "residual doubt" or "lingering doubt" about his guilt. SR 4966-4968, 6332-6334; DRE Tab 11. The court combined these mitigating factors into seven categories in presenting them to the jury. SR 6332-6334; DRE Tab 15.

On August 9, 2005, the jury unanimously recommended that Davis be sentenced to death on both Counts 1 and 2. SR 142, 5226-5238. For each count, the jury unanimously found all four of the government's non-statutory aggravating factors beyond a reasonable doubt. SR 142, 5226-5238. Unanimity was not required in finding Davis's proposed mitigating factors, and the verdict form

asked the panel to identify the number of jurors who found each factor. No jurors found that the defense had established any of its mitigating factors. SR 142, 5226-5238.

Davis filed a motion for judgment of acquittal and a new trial, which the district court denied on October 20, 2005. SR 5252-5258, 5266.

On October 27, 2005, the court sentenced Davis to death on each count of conviction. SR 5267. The court entered final judgment on November 4, 2005. SR 143, 5252, 5266, 5267-5271; DRE Tab 1 & 9.

STATEMENT OF FACTS

This case concerns the "execution-style murder" of Kim Marie Groves on October 13, 1994, in New Orleans, Louisiana, through the coordinated efforts of Len Davis, Paul Hardy, and Damon Causey. *United States* v. *Causey,* 185 F.3d 407, 411, 415 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000). At the time of Groves' murder, Davis was a New Orleans police officer. Davis, while an officer, "exchanged police protection for favors" with Hardy, who was a drug dealer in New Orleans. *Ibid*. One of Hardy's favors, at Davis's request, was to murder Groves. *Ibid*.

Unbeknownst to Davis, at the time he was planning and coordinating Groves' murder with Hardy and Causey, he was the target of an undercover drug

investigation, and his cellular telephone conversations were recorded. *Causey*, 185 F.3d at 411. These conversations were submitted to the jury at the resentencing trial, along with the testimony of Sammie Williams, Davis's police partner, who was present during many of the conversations.

1. Davis's Relationship With Paul Hardy, Damon Causey, And Other Drug Dealers

Davis helped protect Hardy and his "crew" as they engaged in drug dealing and violent crime. See *Causey*, 185 F.3d at 411. For example, Davis gave Hardy advice on how to accomplish killings. Once, when the two were discussing a recent murder, Hardy said he was afraid he would be blamed. LD-6. Davis assured him "you can't go to jail for putting a hit on somebody, Paul. You only go to jail if you were the gunman." LD-6; SR 5241, 6158. Davis also agreed to "clear off" and warn Hardy if other police officers were nearby when he planned to commit a crime. LD-24; SR 6160-6162. He told Hardy when police shift changes occurred and advised him that such changes offered the safest time to act without being caught. LD-27; SR 6161-6162. Davis also set up a system of codes so that Hardy could warn him "before he got ready to do something." SR 5722. The two socialized together and saw each other "probably every day." SR 5616.

One example of Davis's efforts to protect Hardy and cover up his criminal activities occurred on September 30, 1994, the day Carlos Adams was shot and killed outside a residence in the Florida housing project in New Orleans. LD-4; SR 5718-5720, 6108-6109, 6155. Davis's partner, Sammie Williams, was near the Florida project on the day of the shooting when he heard gunshots, saw Paul Hardy running away, and observed two other people who appeared to be members of Hardy's crew – one with a gun – run to Hardy's car. SR 5719-5720. Shortly thereafter, Williams called Davis so he could warn Hardy to be more careful. LD-2; LD-4; SR 5720-5722. In that conversation, Williams told Davis that "'PH' is the 'P'" (meaning Paul Hardy is the perpetrator). LD-2; SR 5721, 6154.

Davis then contacted Hardy, who reluctantly admitted that he had been at the scene of the shooting. SR 5722. During their conversation, Hardy asked Davis to tell Williams to keep quiet about Hardy's involvement in the crime. LD-4. Davis assured Hardy that Williams had not told anyone except Davis about Hardy's involvement. LD-4.

During the conversation, Davis reminded Hardy to use their coded warning system to avoid getting caught by the police. LD-4. Davis instructed Hardy that before he and his crew engaged in future criminal activity, they should first call Davis and let him know what they were about to do so Davis could advise them

whether it was safe to proceed. LD-4; SR 5722. Davis instructed Hardy to alert Davis by calling his beeper number and entering either a series of "1's" or the number "34." SR 5722. (In police code, 34 meant aggravated assault and 34-S meant a shooting. SR 5723.)

Davis was unhappy that Hardy had not informed him of the planned attack on Adams. Davis told Williams, "I'm gonna show 'em just how they're slippin', how I, I play a part." LD-3.

On another occasion, Davis and Williams found a shooting victim dying of a stomach wound and heard him mutter a name that sounded like "Damon." Davis became concerned that Hardy's associate, Damon Causey, might be responsible. LD-23. Davis called Causey to see if he needed Davis's help in covering up the crime. During the conversation, Davis asked Causey if he had "handle[d] something." LD-23. Causey explained that if he were involved, the shooting would have been immediately fatal and agreed that he would have shot the victim in the head to "[k]nock that bitch's brains out." LD-23; SR 6161. Davis said "[w]ell . . . the nigger died before he could say anything else, but it ain't you, so fuck it." LD-23.

Sometime between 1989 and 1991, Davis began protecting his cousins, Little June and Charles Butan, in their drug dealing activities. SR 6119, 6121-

6125, 6127. They paid Davis to accompany them when they transported drugs; when riding with them, Davis brought his police uniform, his guns, and police light "to keep them from getting caught" when transporting drugs. SR 6124, 6127. Davis explained to his then-police partner, Leon Duncan, that if the police were to come by when Davis was riding with his drug-dealing cousins, Davis would "jump out, identify [himself], show [his] badge and just drive off." SR 6127. He also helped a fellow officer "invest" money in his cousin Charles Butan's drug dealing. SR 6125-6126, 6148.

2. Davis's Participation In The Drug Conspiracy That Was The Subject Of An FBI Sting Operation

In the spring of 1994, the FBI began to investigate the New Orleans Police Department and conducted an elaborate undercover sting operation entitled "Shattered Shield." SR 6079, 6081. FBI Agent Juan Jackson, posing as a high-level drug dealer called "JJ," recruited Williams and Davis into his business. SR 6079-6082. The operation began after Terry Adams, a local drug dealer, went to the FBI to report that Williams was shaking him down. SR 6079-6081, 6145-6148. Davis was also involved in "protecting" Terry Adams. SR 6146, 6081. Between April and December 1994, when Davis's arrest for Groves' murder cut

short the undercover sting, Davis recruited at least nine officers and two civilians to work in what he believed was the drug business. SR 6148-6152.

Davis managed the participants – including another officer Williams recruited – and paid them for their work in the drug scheme. SR 6087, 6151, 6153. Davis and the other police officers worked armed and in uniform to guard purported transfers of drugs and money and storage of drugs at a warehouse. SR 6081-6083, 6085, 6101. During this period, Davis told JJ (Agent Jackson) he would like to leave the police force and work for him full time in the drug business. SR 6102, 6317-6318.

Wiretapped conversations recorded during the sting indicate that Davis had long since given up on performing his duties as a police officer. He stated, for example, that the police force "lost [him] a long fucking time ago," and he was "just there in uniform" but "sure not the police no more." LD-29; LD-30; SR 6170-6171. Davis said that he was "on this bitch strictly to get what I can get. Use my job to benefit me." LD-29; SR 6317; DRE Tab 14; see also LD-30 ("Fuck the, fuck the citizens!").

3. Davis's Arrangements To Kill Kim Groves

Around October 10, 1994, Davis and Williams were patrolling in the city's Ninth Ward looking for a suspect. SR 5723-5724. The wanted man had an

identical twin, and when Davis and Williams saw a pair of twins matching his description they pulled them over. SR 5723. Neither man was the fugitive; the twins were Nathaniel and Nathan Norwood. SR 5724. Kim Groves approached, identified herself as the twins' aunt and got into a "loud" and "angry" argument with Davis. SR 5724-5725. (Although Groves referred to herself as the twins' aunt, they apparently were not her nephews. LD-7.)

The next day, Williams and Davis were again patrolling the Ninth Ward and spotted a man who fled at their approach. Assuming he might be the wanted man, Williams chased him, grabbed him, and struck him on the back of the head with his service gun. SR 5725-5727. The blow knocked the man's face against a banister, cutting his nose. SR 5727. After Williams handcuffed the suspect, he realized that he had once again apprehended Nathan Norwood. SR 5727. Groves again appeared, asking why her "nephew" had been apprehended. SR 5727.

Later that evening, the Norwood twins' cousin, Tonga Amos, contacted the police department's Internal Affairs Division (IAD) to make a complaint against Davis and Williams. *Causey*, 185 F.3d at 411; SR 5570-5573; Def. Exh. 53B Tab 8W. IAD investigators met with Nathan Norwood, his mother, and other witnesses, including Groves. SR 5576-5578. Inconsistencies emerged and the

investigator never interviewed Davis or Williams about the complaint. SR 5582-5590.

At about 1:00 a.m. on October 13, 1994, Davis called Williams to say that his cousin, Little June, told him that Groves had accused Davis of misconduct and had filed a complaint with IAD. SR 5727-5728; LD-7.

When Davis met Williams for work later at 2:25 p.m., Davis was "angry" and began talking about Groves and the twins. SR 5730-5731. He stopped at a traffic light and saw Groves in a car next to theirs. SR 5732. Groves and Davis began pointing and mouthing words to each other. SR 5732.

Davis "really got upset." SR 5732. He told Williams: "I can get 'P' to come do that 'ho and we can handle the thirty." SR 5732; LD-8. "P" referred to Paul Hardy. SR 5733. "Thirty" was the New Orleans police code for a homicide. SR 5733.

Davis paged Hardy around 5:00 p.m. SR 5504, 5732; LD-8. When Hardy called back at 6:14 p.m., Davis told him that "[t]he bitch got out in the car with the twins[,] * * * [t]he niggers that I was telling you about," and that he was worried that Groves and the twins might have been on their way to the IAD. LD-9. He described Groves' physical appearance and clothing and exclaimed to Hardy, "You know what I wanna do!" SR 5981; LD-9.

Later in the day, Davis talked to a member of Hardy's "crew," Damon Causey, and asked to meet him and Hardy at the Fifth District police station. LD-10; SR 5718, 5840. Afterwards, Davis suggested that he would drive Causey and Hardy in a police car to Groves' neighborhood to "show [them] what [he was] talkin' about." LD-10. Davis met Hardy, Causey, and two of their associates at the police station and took them inside to see a collection of murder scene photographs that one of the sergeants kept for entertainment. SR 5733-5735. Davis gave Hardy his cell phone. SR 5735. Afterwards, Davis rejoined Williams in their patrol car and the two went back to the Ninth Ward. SR 5735; LD-11. Shortly before 7:30 p.m., they called Hardy to explain they were looking for Groves. SR 5735; LD-11.

Then they went to the Florida housing project and picked up Hardy, who brought a gun. SR 5736. The three men traveled in Davis's patrol car back to the area where Davis and Williams had previously seen Groves. SR 5736. Hardy got out and walked around the neighborhood, but did not find her. SR 5737.

As the evening progressed, Davis became anxious that he had not heard from Hardy. SR 5737. Sometime after 9:30 p.m., he again called Hardy to complain that Hardy had "fucked [him] over" because Hardy "ain't went and handled y'all business." SR 5737-5738; LD-12. Hardy assured Davis he was

"about to go out there now," LD-12, and Davis then told Hardy that he was going to go back to Groves' neighborhood to "see if [he could] see that whore" and would let Hardy know if he found her. LD-12; SR 2918.

Davis and Williams drove to Groves' neighborhood and spotted her shortly thereafter. Davis dialed Hardy's beeper number, entering the code 911 to indicate the urgency of his page, and saying "[c]ome get this 'ho." SR 5737-5738; LD-13. As Davis watched Groves from his patrol car he muttered: "Don't go nowhere. Please, baby. Please, baby." SR 5737-5738; LD-13. When Hardy called back in response to the page, Davis told him "that whore's standin' out there right now" and described Groves' clothing, hairstyle, and location. LD-13. Referring to the Norwood twins, Hardy asked whether the "home boys" were there as well, and Davis answered: "No, fuck them. If they ain't out there, get that whore." LD-13. Hardy responded: "A[l]right, I'm on my way, my nigger." LD-13. Davis and Williams ended their duty shift after this call. SR 5738.

Davis called Hardy again at 10:43 p.m., and Hardy assured him "we [are] on our way." LD-14; SR 5738. Davis again described Groves' clothing and appearance in detail to Hardy. LD-14. "I got the phone on and the radio," Davis added. "After it's done, go straight uptown and call me." LD-14.

4. Groves' Killing

Hardy and two of his associates – Causey and Steve Jackson – then drove to Groves' neighborhood. SR 5619, 5621. When they arrived, Hardy got out of the car, walked up to Groves, shot her, and returned to the car exclaiming, "hurry up, hurry up. * * * I hit the bitch one time in the head." SR 5623-5624, 5743. As the three drove away, Hardy removed the barrel of his 9 millimeter handgun and threw it out the window into the Florida Avenue Industrial Canal. SR 5624-5625; *Causey*, 185 F.3d at 419.

At 11:10 p.m., Davis called Williams and said "[s]ignal 30. N A T." LD-15; SR 5738. As Williams explained, "30" is a police code for murder and "NAT" signifies "necessary action taken." SR 5733, 5739. Davis then called the police station's dispatcher about a "thirty-four S" (a shooting) and was told that a "head shot" had occurred on Alabo Street. LD-16. Davis then received a call from Hardy and advised Hardy that "a certain motherfucker" was being taken to the hospital. LD-16. Davis paged Gary Washington, the officer at the scene, and then called Williams. LD-16; LD-17. Laughing, Davis reported that "they [were] fuckin' code-nining this bitch, man," indicating that Groves had been rushed to the hospital with a police escort. LD-17; LD-20; SR 5739-5740.

Williams then went to Flynn's Den bar to join Davis, who was speaking with Washington on the police radio and Hardy on his cell phone. SR 5739, 5741. Davis asked Washington if the situation was "looking like a thirty," and Washington said it was. LD-18. Turning off the radio, Davis shouted, "Yeah, yeah, yeah, roc, rock-a-bye." LD-18. According to Williams, the phrase was a line in a movie used when the villain killed someone. SR 5741-5742.

In later conversations with his girlfriend, Davis told her that "[t]hey did a code nine with the 'ho. Man, that 'ho was dead when she left the scene. Fuck that 'ho! Goody for that bitch! Goody, goody, goody. Rockhead 'ho!" LD-20; SR 5744.

The next day, Hardy threatened to hurt Steve Jackson or one of his family members if Jackson told anyone about Groves' murder. SR 5626. During this conversation with Jackson, Hardy said that he "had to" kill Groves "for [his] nigger, Len." SR 5626. At Davis's resentencing hearing in 2005, Jackson testified that Hardy "shot the bitch for [Davis]." SR 5675.

Davis made plans to eliminate Nathan Norwood, as well. On October 14, 1994, the day after Groves' murder, Davis told Hardy: "Yeah, bro. I still want that nigger." LD-21; SR 5744-5746. During that conversation, Davis told Hardy that Williams had recommended "hold[ing] off on the nigger for a while because

it's gonna look too suspicious." LD-21. Davis reiterated, "I want that nigger." LD-21. Hardy replied: "I want to do that tonight." LD-21.

A few days later, Davis found out that neither Nathan Norwood nor his twin brother was planning to pursue a complaint against him. SR 5746. Davis then explained to Williams that as long as the twins were not making any complaints, he was not going to kill them. SR 5746. Davis called Hardy to talk about Nathan Norwood. Davis told Hardy that "we gonna let that go" "as long as the nigger not tryin' to lie on me." LD-22. But Davis added: "[I]f I hear any fuckin' thing come up about that shit with them lies. Then hey, rock-a-bye, baby!" LD-22. Hardy, nonetheless, assured Davis: "Ah, bitch, you just holla at me," meaning that Hardy would kill Norwood whenever Davis wanted him to. LD-22.

5. Davis's Convictions And Life Sentence For Drug Conspiracy And Firearms Offenses

Before Davis's 1996 guilt-phase trial in the present case, he was indicted, along with Williams and other New Orleans police officers, for their participation in the drug business that was the subject of the FBI sting operation "Shattered Shield." In 1996, Davis was convicted of firearms and drug conspiracy charges and sentenced to life in prison. Gov. Exh. 77.

6. Williams' Guilty Plea And Cooperation

In connection with the drug conspiracy sting, Williams pleaded guilty in 1995 to conspiracy to possess with intent to distribute cocaine and use of a firearm in a drug trafficking crime. Gov. Exh. 76. The judge agreed to stay Williams' sentencing pending the outcome of Davis's trial in the present case. Apr. 17, 1996 Tr. 8. Williams testified in that trial as a government witness. Apr. 17, 1996 Tr. 7. No charges were dropped as a result of his cooperation. Apr. 17, 1996 Tr. 7-8.

SUMMARY OF ARGUMENT

Davis seeks review not only of his death sentences but also his convictions on Counts 1 and 2, which this Court affirmed in 1999. For various reasons, including the law-of-the-case doctrine, Davis is barred from challenging his convictions. As for his death sentences, most of Davis's arguments were not properly preserved in the district court and thus can be reviewed only under the plain-error standard. Davis has not come close to demonstrating reversible error under this highly deferential standard of review. Even where Davis preserved an objection below, his arguments are meritless and should be rejected.

1. Sufficient evidence supports the jury's finding that Davis posed a threat of future dangerousness. The capital crimes for which Davis was convicted, which involved the execution-style murder of Kim Groves, show that Davis is

capable of deadly action with little provocation, and that he is a sophisticated criminal adept at using subterfuge, planning crimes in code, and acting through intermediaries – skills that transfer well to a prison setting. In addition, Davis led what he believed was a major drug operation, aided and counseled co-defendant Paul Hardy in the planning and commission of violent crime, and protected other drug dealers. Even before the murder of Groves, Davis's record as a police officer showed that he was easily provoked to violent and threatening behavior. And while in prison, he has engaged in threatening behavior toward a correctional officer and has posed behavioral problems since his incarceration.

2. The district court did not commit reversible error in providing a brief, written answer to the jury's question about a minor discrepancy between the verdict forms and jury instructions. Although the record does not indicate whether the court notified the parties before answering the jury's question, any failure to do so was harmless. The court properly instructed the jury that, in the context of this case, there is no meaningful difference between the terms "in prison" and "while imprisoned," and thus the alleged failure to consult the parties beforehand had no effect on the outcome of the trial.

3. The prosecution did not commit reversible error in presenting evidence and arguments about Davis's and Hardy's involvement in violence. The

prosecutors' arguments were proper and, in any event, not plainly erroneous. There was ample evidence from which a jury could conclude that Hardy and his crew were involved in killing and that Davis counseled and protected their endeavors. The prosecutor permissibly argued that, as a police officer who protected criminals and engaged in crime himself, Davis betrayed the public trust and thus victimized the citizens of New Orleans. In addition, admission of testimony about Hardy's reputation as a killer was not plain error under the permissive evidence standards of the Federal Death Penalty Act.

Nor did the prosecutor commit reversible error in questioning defendant's expert about local crime statistics. The prosecutor had a good-faith basis to believe the statistics were true, the court cut short this line of questioning, the defense itself had already introduced citywide crime statistics, and the prosecutor never referred to the statistics in argument.

4. The introduction of victim-impact evidence and the prosecutor's arguments about that evidence were not plainly erroneous. The inquiry into why the victim's daughter favored the death penalty for Davis was responsive to the defendant's theory that the Groves family preferred a life sentence. At any rate, the victim-impact evidence and arguments about Davis's failure to apologize did not affect his substantial rights, as they were consistent with his defense of

innocence. The victim's daughter did not improperly characterize the defendant or the crime or make impermissible statements about Davis's ability to appeal.

5. The prosecutors' selection phase arguments were permissible advocacy and do not cast doubt on the correctness of the verdict. In response to the defense argument that a life sentence would be a very severe punishment, the prosecutors permissibly pointed out that a life sentence would be inadequate punishment because Davis was already serving a life sentence for drug offenses. The prosecutors' arguments did *not* make improper appeals to community expectations, did *not* tell the jury that it could not consider Davis's mitigating factors, did *not* communicate to jurors that they were legally bound to impose the death penalty, did *not* manufacture inflammatory evidence, and did *not* improperly disparage Davis.

6. The district court did not abuse its discretion in declining to instruct the jury that the statutory aggravating factor of "substantial planning and premeditation" required a "large amount" of planning. The court's instructions correctly stated the law. Contrary to Davis's contention, the prosecutor's closing argument accurately and repeatedly referred to the applicable standard. Accordingly, there is no reasonable likelihood the court's instructions prevented consideration of constitutionally relevant evidence.

7. The district court did not commit plain error in instructing the jury on mitigating evidence or in drafting the verdict forms on the issue. The court acted within its discretion in grouping Davis's proposed mitigating factors into categories, in deciding how to organize and word the mitigating factors, and in omitting a proposed mitigating factor that was already amply covered by another. The court also instructed the jury that it could consider any mitigating factor established by a preponderance of the evidence, and that it had wide discretion to decline to impose the death penalty for any reason.

8. Davis may not now seek reconsideration of this Court's prior determination that there were no *Batson* errors in selecting the jury that convicted him in 1996. Reconsideration is barred under the law-of-the-case doctrine. The Supreme Court's decisions in *Miller El* v. *Dretke*, 545 U.S. 231 (2005), and *Snyder* v. *Louisiana*, 128 S. Ct. 1203 (2008), are not changes in controlling law that warrant an exception to that doctrine. This Court's previous rejection of the *Batson* claims was not clearly erroneous and would not work a manifest injustice. Davis raised the same claims in his prior appeal that he now seeks to relitigate. He had ample opportunity to fully develop the factual support for those claims in the first appeal and should not be allowed a second bite of the apple to challenge convictions affirmed a decade ago.

9. Davis's *Brady* and *Giglio* claims are untimely. At any rate, the government satisfied its disclosure requirements under *Brady* and *Giglio*, because the defense had most, if not all, of the information Davis claimed was improperly withheld and, at any rate, the information was not material.

10. This Court should decline to decide the merits of the remaining five issues that Davis raises (Arguments 10 through 14).

The law-of-the-case doctrine bars this Court's consideration of Davis's arguments that (1) the evidence on the "color of law" element was insufficient to uphold his two counts of conviction, and (2) the omission of FDPA elements from the indictment precluded the government from seeking the death penalty at resentencing. This Court correctly decided both of those issues in previous appeals in this case.

In addition, Davis has waived his arguments that (1) the Double Jeopardy Clause precludes his conviction for violating both 18 U.S.C. 241 and 242, (2) the indictment erroneously alleged a deprivation of the right to "liberty" rather than the right to "life," and (3) the Supreme Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Ring* v. *Arizona*, 536 U.S. 584 (2002), resulted in an unconstitutional judicial rewriting of 18 U.S.C. 241 and 242. The law-of-the-

case doctrine also bars this Court's consideration of the first and second of these arguments. At any rate, these arguments are without merit.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT DAVIS POSED A THREAT OF FUTURE DANGEROUSNESS

In considering the non-statutory aggravating factors, the jury found that "Len Davis poses a threat of future dangerousness to the lives and safety of other persons in prison." SR 5229; DRE Tab 8. Contrary to Davis's argument (Br. 13-27), the evidence is more than sufficient to support the jury's finding.

A. Standard Of Review

This Court is obliged to review "the evidence in a light most favorable to the government" and determine whether "any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt." *United States* v. *Agofsky*, 458 F.3d 369, 374 (5th Cir. 2006) (citation and internal quotation marks omitted), cert. denied, 549 U.S. 1182 (2007). The government is entitled to "all reasonable inferences and credibility choices" in its favor. *United*

States v. *Jones*, 133 F.3d 358, 362 (5th Cir.) (citation omitted), cert. denied, 523 U.S. 1144 (1998).

B. Analysis

"[T]he facts of the crime alone, if severe enough, can be sufficient to support" a finding of future dangerousness in a death penalty case. *Miller* v. *Johnson*, 200 F.3d 274, 286 (5th Cir.), cert. denied, 531 U.S. 849 (2000); see *United States* v. *Fields*, 516 F.3d 923, 943 (10th Cir. 2008) (upholding finding of future dangerousness where "[o]ther than the circumstances of the murders themselves, the government's case on future dangerousness was not particularly strong"). Moreover, evidence of other past crimes can be highly probative of future dangerousness, even if those crimes occurred long before the offense of conviction and even if the defendant will have little or no opportunity in prison to commit the same crimes. See *United States* v. *LeCroy*, 441 F.3d 914, 918, 930 (11th Cir. 2006) (upholding, in a capital case, admission of evidence that defendant had committed burglary and statutory rape, even though those crimes occurred at least a decade before the offense of conviction and approximately 14 years before his death sentence), cert. denied, 550 U.S. 905 (2007). But the government need not show that the defendant had a criminal history in addition to the offense for which he is being sentenced. *United States* v. *Bernard*, 299 F.3d

467, 482 (5th Cir. 2002) (rejecting argument that future dangerousness was unfounded given defendant's "lack of any substantial prior criminal history"), cert. denied, 539 U.S. 928 (2003).

The criminal conduct for which Davis has been convicted – especially the killing of Groves – by itself supports a finding that Davis poses a threat of future dangerousness in prison. Nonetheless, as explained below, a number of additional facts bolster the jury's finding on this aggravating factor.

The killing of Groves and the related (albeit aborted) plan to kill one of the Norwood twins shows a willingness to resort to extreme violence based on little provocation – a trait that could be particularly dangerous in prison. See *Fields*, 516 F.3d at 943 (relying on circumstances of murders themselves to uphold finding of future dangerousness, even though some details of those past crimes "would obviously not directly translate to a prison setting"). Groves was a woman Davis hardly knew and whose only action against him was to pursue a civil rights complaint. SR 5576-5577. Davis also planned to have Hardy kill Nathan Norwood after learning that Norwood might file a complaint against Davis. Davis called off the murder only when Norwood decided not to pursue the complaint. But Davis told Hardy that if Norwood again tried to pursue a complaint, he would be killed. LD-21; LD-22; SR 6014-6015.

This past behavior raises a legitimate concern that Davis may commit future acts of violence for personal revenge if someone in prison disrespects him or accuses him of wrongdoing. One can easily imagine that prison guards or inmates might do or say something to provoke his anger. Indeed, as explained below, Davis has already been disciplined in prison for threatening an officer who did not let him use the telephone. See p. 36, *infra*.

In addition, Davis has a history of organizing and directing dangerous, violent criminals to carry out his wishes. This is particularly worrisome because many inmates he encounters in prison will themselves have histories of violence. In Groves' case, Davis ordered and orchestrated the killing. He drove Hardy to Groves' neighborhood to show him where she lived, called him to describe her appearance and clothing, and tipped off Hardy about her whereabouts after he sought her out on the night of the murder. He made several calls to follow up with Hardy and ensure the crime was completed.

Davis also actively facilitated other violent acts by protecting Hardy and Causey and helping them avoid getting caught when they committed crimes. He advised Hardy that he could avoid going to prison for murder if he used an intermediary as the triggerman. LD-6. Davis told Hardy when police officers were scheduled to change shifts so he would know the best time to commit crime

and agreed to warn him if patrol cars were nearby. LD-24, LD-25, LD-27; SR 5722, 6160-6162. Once, when Davis suspected Causey was responsible for a deadly shooting, Davis called him to determine whether he needed help in a cover-up. LD-23; SR 6161. This willingness to assist other violent criminals could carry over to prison and make it easier for other inmates to engage in violence.

Davis's criminal activities also show that he is adept at using sophisticated methods to avoid, and help others avoid, detection – a "talent" that could enable him to plan crimes in prison. A prime example is Davis's use of codes and cryptic language to discuss criminal activities with co-conspirators. Davis taught drug dealer Terry Adams to use code words when discussing drug deals. See SR 6147; LD-1. In planning Groves' murder and confirming her death, Davis used codes to communicate with Hardy and Williams. LD-8, LD-13, LD-15, LD-17, LD-18, LD-22; SR 5733, 5739, 5741-5742, 6014-6015. Davis also set up a code system in which Hardy would call Davis's pager number and enter "34" to warn him he was about to commit a violent crime. SR 5722-5723; LD-4. (In police code, 34-S means a shooting.)

His use of codes and cryptic language allowed him to protect his and others' criminal activities even when surveilled. Indeed, although FBI agents tapped Davis's phone, they did not detect the Groves murder plot in time to stop it,

probably because of Davis's effective codes and cryptic language. See SR 3085, 3689, 3694, 4876-4877. Davis has had access to visitors and phone calls in prison, possibly giving him the continued ability to send coded messages organizing criminal behavior even while incarcerated. Def. Exh. 55 at 145; Def. Exh. 56 at 99, 101, 102; Def. Exh. 57 at 106, 134[3]; SR 6312; DRE Tab 14; see *United States* v. *Johnson*, 223 F.3d 665, 673 (7th Cir. 2000) ("anyone who has access to a telephone or is permitted to receive visitors may be able to transmit a lethal message in code"), cert. denied, 534 U.S. 829 (2001).

Davis's ability to recruit others to commit crimes could also make him dangerous in prison. He not only convinced Hardy to murder Groves, but also recruited at least nine police officers and two civilians to guard what he thought was a major drug warehouse and managed those individuals' work in the drug scheme. SR 6087, 6149-6153. A jury could reasonably infer from Davis's past behavior that he may encourage criminal activity in prison.

Davis's lack of remorse provides additional evidence of his future dangerousness. See *Fields*, 516 F.3d at 943 ("evidence that the killer had no remorse" is relevant in future dangerousness determination). He expressed

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[3] Those exhibits are not consecutively paginated, but the United States has assigned page numbers to each exhibit and includes those numbers in its citations.

jubilation upon hearing of Groves' death and later while discussing the murder with his girlfriend. See p. 21, *supra*. At his resentencing hearing – nearly 11 years after Groves' murder – Davis continued to assert his innocence. Acting as his own attorney, he told the jury he considered Groves a criminal and had welcomed her death. SR 5553.

Davis argues (Br. 13-32) that his allegedly good behavior in prison renders his previous criminal acts insufficient to support the finding of future dangerousness. While Davis's behavior behind bars is relevant and properly considered by the jury, see *Skipper* v. *South Carolina*, 476 U.S. 1, 5 (1986), he is mistaken in assuming (Br. 15) that his incarceration record is the only factor that may be considered in evaluating his potential for violence. Davis points to no case where an inmate's good behavior during prolonged appeals rendered past actions insufficient to support a finding of future dangerousness.

The probative value of Davis's prison record is diminished by the fact that he has had an incentive to be on his best behavior while his case is pending. He argued, in his prior appeal to this Court, that his behavior in prison undercut the sufficiency of the evidence on future dangerousness. Brief for the Defendant/Appellant Len E. Davis at 61, *United States* v. *Causey*, 185 F.3d 407 (5th Cir. 1999) (Nos. 96-30486, 96-31171), 1997 WL 33484999, at *61. He no

doubt wanted to preserve this argument after this Court remanded for resentencing.

Davis's prison record, however, is far from unblemished. In late 1999, at the federal maximum-security facility in Terre Haute, Indiana, Davis was disciplined for acting in a "threatening manner" toward a guard who refused to let him use the telephone. Def. Exh. 57 at 127-137.[4] Davis called the officer's report a "lie," said he had an "attitude problem," and complained he "has disrespected me ever[] since I have been here." Def. Exh. 57 at 133, 216. This incident – especially when viewed in light of Davis's deadly retaliation against Groves after she accused him of wrongdoing and his plan to have Norwood killed if he pursued a complaint against him – supports the jury's finding that Davis poses a risk of future dangerousness in prison. In addition, numerous records from the Terre Haute facility state that Davis is "extremely vocal and argues with staff" and has been a "behavioral problem since his incarceration." Def. Exh. 57 at 75, 138-171, 173-182, 184, 186-191.

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[4] Davis was initially charged with "Threatening Another with Bodily Harm," but a hearing officer concluded that, although Davis behaved in a "threatening manner," the offense was best charged as "Conduct Which Disrupts." Def. Exh. 57 at 130, 133, 137.

He has had other disciplinary problems in prison. For example, in July 1996, prison officials cited Davis and ten other inmates for "[r]ioting," "[e]ngaging or encouraging a group demonstration," and "[c]onduct which disrupts or interferes with the security or orderly running of the institution." Def. Exh. 56 at 90.[5] Later that year, Davis was also cited for disruptive behavior and possession of prohibited materials (a five-foot pole made of rolled-up newspaper). Def. Exh. 56 at 92-94. In 1998, Davis received a "major disciplinary" citation from prison officials for "refusing an order" to provide a blood sample for DNA analysis. Def. Exh. 55 at 167, 170, 172. In appealing the action, he asserted that "you [prison officials] need to realize that you are dealing with a *man* and nothing you can do will intimidate me." Def. Exh. 55 at 169 (emphasis in original).

In July 1997, Davis requested that a fellow inmate, Bruce Webster, be placed on his "Enemy Alert List." Def. Exh. 55 at 140. Davis complained that Webster "has a big problem with speaking about subjects that I do not wish to be part of," and warned that "if inmate Webster is allowed to continue to go on yard with me, a problem could arise for inmate Webster." Def. Exh. 55 at 140.

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[5] The inmates threw "large amounts" of food, water, and milk. Def. Exh. 56 at 89-90. While the specific offending inmates could not be identified, all of the inmates refused to cooperate with guards. Def. Exh. 56 at 89.

Davis's record as a police officer further suggests he overreacts to slight provocation. In 1992, Davis was arrested for battery after he beat a woman with a metal flashlight, giving her a bloody head wound and two black eyes. Def. Exh. 53A Tab 5N. Davis claimed the woman, a bystander, shouted insults and struck him after he arrested a drug suspect near her house, but he was not injured in the incident. Def. Exh. 53A Tab 5N. On another occasion, Davis was disciplined for threatening another officer with bodily harm after the officer stopped him for driving on the shoulder. Def. Exh. 53B Tab 8W. These two complaints belie defendant's assertion (Br. 19) that he "had no record of violent or threatening behavior, charged or uncharged, prior to 1994."

C. Even If The Jury Had Erred In Finding Future Dangerousness, Such Error Was Harmless

"The FDPA provides that, in reviewing a death sentence imposed pursuant to the act, 'the court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor.'" *United States* v. *Hall*, 152 F.3d 381, 418 (5th Cir. 1998) (quoting 18 U.S.C. 3595(c)(2)). Thus, if this Court determines that the evidence was insufficient to support the "future dangerousness" aggravator, it must "strike the factor and either reweigh the remaining factors against the

mitigating evidence or apply harmless error review." *United States* v. *Webster*, 162 F.3d 308, 325 (5th Cir. 1998).

Even without the "future dangerousness" aggravator, the jury would have imposed the death penalty against Davis. The jury unanimously found three other non-statutory aggravating factors beyond a reasonable doubt: (1) Davis used his position as a police officer to seriously jeopardize the health and safety of others; (2) Groves' death caused harmful emotional distress for her daughter; and (3) Davis committed the offense to prevent Groves from providing, or to retaliate against her for providing, information and assistance to law enforcement authorities regarding the possible commission of another offense. SR 6331; DRE Tab 15. Evidence of these other aggravating factors was overwhelming. See, *e.g.*, SR 6174-6182; DRE Tab 12 (impact on daughter); *United States* v. *Causey*, 185 F.3d 407, 413-416 (5th Cir. 1999) (misusing police position to endanger others); SR 5733-5736, 5736; LD-15; LD-16; LD-17 (same); *Causey*, 185 F.3d at 415-416 (killing Groves to prevent her from pursuing complaint); SR 5553, 5572-5577, 5731-5732; LD-7; LD-9; LD-22 (same). And even though Davis proposed several mitigating factors, no juror found any of them. SR 6332-6334; DRE Tab 15. Under these circumstances, the absence of the "future dangerousness" aggravating factor would not have changed the jury's decision to select the death penalty.

II

THE DISTRICT COURT'S ANSWER TO THE JURY'S QUESTION DOES NOT WARRANT REVERSAL

Davis argues (Br. 32-41) that the district court's written response to a note from the jury violated his constitutional rights to counsel, due process, and a reliable sentencing determination. The court's response was not reversible error.

The note brought up a minor discrepancy between the jury instructions and the verdict forms. Before the jury retired to deliberate, the court instructed jurors that they must decide whether Davis posed a future danger "to the lives and safety of other persons *while imprisoned*." SR 5205, 6331; DRE 15 (emphasis added). The special interrogatory on the verdict forms asked whether he posed a future danger "to the lives and safety of other persons *in prison*." SR 5229; DRE Tab 8 (emphasis added). The jury sent the following note to the judge:

> Please clarify which is correct. Count One – Part B states: ". . . in prison." On Pg 9 – issues to be decided states: ". . . while imprisoned."

SR 5227; DRE 16. The judge responded in writing: "I apologize for the different terminology. It's intended to mean the same thing." SR 5227; DRE Tab 16.

Davis claims that the court failed to notify the parties before responding to the jury's question. In fact, the record does not indicate whether the court

discussed the jury's question with counsel.[6] But even if the court failed to do so, any error was harmless and thus does not warrant reversal under a plain-error standard.

A. Standard Of Review

This Court should review the issue for plain error. Davis claims (Br. 33 n.22) that "there is no indication that, prior to this appeal, trial counsel or Davis were ever apprised of the jury's question or the court's response." In fact, the note and answer were appended, together with the verdict forms, to the court's minute order, of August 9, 2005, which was entered on the docket on August 11, 2005. R. 1513 at 2 (reproduced in addendum to this brief); see also SR 142; DRE Tab 16. Accordingly, defense counsel should have been aware of the note by August 11, or at least shortly thereafter. Davis made a motion for judgment of acquittal and a new trial on August 17, 2005, but did not mention the note as a basis for the motion. SR 5252. The district court did not deny the motion until October 20, 2005 (SR 5266), and did not sentence defendant until October 27, 2005 (SR 5267-5268; DRE Tab 9). Davis did not appeal to this Court until November 18, 2005.

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[6] The government's lead prosecutor in this case has advised undersigned counsel for the United States that he does not recall whether the court discussed this matter with the parties. Although the United States does not concede the point, it will assume for the remainder of this argument that the district court answered the jury's question without first advising counsel.

SR 5306; DRE Tab 2. Therefore, more than three months elapsed between the entry of the minute order (with the jury question and answer appended) and the notice of appeal – a period that gave Davis ample opportunity to discover the jury question and raise the issue with the district court.

Plain-error review is appropriate in this context because it provides an incentive for a defendant to bring the issue before the district court in a motion for a new trial. Cf. *United States* v. *Lindsey*, 482 F.3d 1285, 1293 (11th Cir.) (applying plain-error review to *Brady* claims because defendant failed to raise them in motion for new trial), cert. denied, 128 S. Ct. 438 (2007). Post-trial proceedings in the trial court are appropriate for addressing allegations of improper interaction with jurors. See *United States* v. *Gagnon*, 470 U.S. 522, 528 (1985) ("post-trial hearings may often resolve this sort of claim"); *United States* v. *Williams*, 613 F.2d 573, 574 (5th Cir.) (noting appeal was stayed for hearing in district court on defendant's claim of newly-discovered *ex parte* communication with juror), cert. denied, 449 U.S. 849 (1980). The trial court is better able to determine the possible effects of legal error and to address the issue while evidence is fresh. If this Court were to entertain such claims *de novo*, defendants would have an incentive to remain silent about alleged errors until appeal.

To prove plain error, Davis must "show (1) there was error, (2) the error was plain, (3) the error affected his substantial rights, and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Jackson*, 549 F.3d 963, 975 (5th Cir. 2008) (citation omitted), petition for cert. filed (Feb. 13, 2009) (No. 08-8713). To satisfy the first and second prongs, "the legal error must be clear or obvious, rather than subject to reasonable dispute." *Puckett* v. *United States*, 129 S. Ct. 1423, 1429 (2009). Even if there was an obvious error, reversal "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Acosta*, 475 F.3d 677, 681 (5th Cir. 2007) (citation omitted).

If the Court decides that Davis was not required to object post-verdict, it still may not reverse if the error was harmless. See 18 U.S.C. 3595; *United States* v. *McDuffie*, 542 F.2d 236, 241 (5th Cir. 1976).

B. The Alleged Error Is Harmless And Thus Davis Cannot Prove That It Prejudiced His Substantial Rights

When a judge receives a question from the jury, the proper procedure is to consult with the parties before responding. *McDuffie*, 542 F.2d at 241. Therefore, the United States agrees that the judge erred *if*, in fact, she answered the jury's question without first consulting the attorneys for both parties.

But any such error – if it occurred (see p. 41 n.6, *supra*) – was harmless because the judge's response to the jury was correct, and thus the presence of the parties would not have affected the content of the judge's answer. The court did nothing more than tell the jury to disregard a minor discrepancy in wording best characterized as a clerical error.

In this context, there is no meaningful distinction between "while imprisoned" and "in prison," and thus the judge appropriately explained that, as far as Davis's case was concerned, "in prison" and "while imprisoned" were "intended to mean the same thing." SR 5227; DRE Tab 16. Standard dictionaries support the judge's determination. "Imprison" means to "confine *in* * * * *prison*," *Random House Dictionary of the English Language* 963 (2d ed., unabridged, 1987) (emphasis added), "to put *in prison*," or "confine in a jail," *Merriam Webster's Third New International Dictionary* 1137 (1993) (emphasis added). A prison is defined as "an institution for the *imprisonment* of persons." *Id.* at 1804. Indeed, Davis himself treats the terms as synonyms at one point in his brief. See Br. 15 ("[T]he government agreed that [the] aggravator should be limited to Davis's alleged dangerousness *in prison*, since the only alternative sentence was life *in prison*. * * * And that is how the district court would later charge the factor to the jury at the selection phase: 'That Mr. Davis poses a threat of future

dangerousness to the lives and safety of other persons *while imprisoned*.'" (emphasis added)). There is no difference between Davis's potential dangerousness "in prison" or "while imprisoned," and the court properly informed the jury to disregard the wording disparity.

Davis contends (Br. 37) that the judge's response may have misled jurors to believe either that Davis "might be allowed out [of prison] for work release or weekend furloughs," or that his "term of incarceration could end before his death." There is no realistic possibility that the judge's answer led the jury to believe either of these options. The judge, Davis's counsel, and the government all made clear that Davis was not eligible for parole and would never be released if the jury chose a life sentence. See SR 6306-6307 (defense argument), 6319 (prosecution argument that "life without parole is the * * * least sentence available in this case"), 6328-6329, 6337 (instructions referring to a life sentence as "life imprisonment without the possibility of release"). Indeed, this was a central theme of defense counsel's closing argument:

> [Davis] can only live one life, but *he is going to live it in jail*. And a whole lot of people would argue * * * that death is better than life in jail.
>
> *You will never again be without those four walls around you*. You'll never again determine what time you go to bed, you won't determine what time you get up, you'll never again walk the lake, see the sunset,

> you will never again have any privacy, never again, never another day in his life will he have any privacy. * * * Never again. *He will grow old and die in jail*.

SR 6306-6307 (emphasis added). When viewed in this context, the judge's response could not plausibly have misled the jury.

For these reasons, the judge's alleged failure to consult with the parties was harmless and, *a fortiori*, does not warrant reversal under the plain-error standard.

III

THE GOVERNMENT DID NOT COMMIT REVERSIBLE ERROR IN PRESENTING EVIDENCE AND ARGUMENTS ABOUT DAVIS'S AND HARDY'S INVOLVEMENT IN VIOLENCE OR IN CROSS-EXAMINING THE DEFENSE EXPERT

Davis argues (Br. 41-71) that the prosecutors committed reversible misconduct in introducing evidence of Davis's and Hardy's involvement in violent criminal activity, in referring to that evidence in arguments to the jury, and in cross-examining defendant's expert witness. His argument is without merit.

A. Plain Error Is The Standard Of Review

Because Davis failed to object below, this Court will review the prosecutors' actions only for plain error. See pp. 42-43, *supra*. Davis has not proved reversible error under this standard.

The plain-error standard is even more deferential than the "already narrow standard of review" that this Court would apply had Davis preserved his objections below. *United States* v. *Holmes*, 406 F.3d 337, 355-356 (5th Cir.), cert. denied, 546 U.S. 871 (2005). First, a prosecutor's remarks, even if improper, will not constitute reversible error unless "the defendant's right to a fair trial is substantially affected." *United States* v. *Bernard*, 299 F.3d 467, 488 (5th Cir. 2002) (citation omitted), cert. denied, 539 U.S. 928 (2003). "A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *Ibid*. (citation omitted). Second, if a defendant in a FDPA case raises a timely objection in the district court to the admission of evidence, this Court will apply the "deferential" abuse-of-discretion standard. *United States* v. *Fields*, 483 F.3d 313, 341, 345 n.29 (5th Cir. 2007). Finally, a district court's decision to permit a certain line of cross-examination is also reviewed for abuse of discretion if the defendant objected in the district court. *United States* v. *Smith Bowman*, 76 F.3d 634, 636 (5th Cir.), cert. denied, 518 U.S. 1011 (1996); *United States* v. *Crosby*, 713 F.2d 1066, 1075 (5th Cir.), cert. denied, 464 U.S. 1001 (1983).

B. The Prosecutors' Arguments Were Proper And, In Any Event, Not Plainly Erroneous

(Responsive To Point III.C. Of Defendant's Brief)

Davis objects to numerous statements in the prosecutors' arguments. Those statements fit into three broad categories: (1) Hardy was a murderer and a "street assassin" and was known to be a killer; (2) Davis was a "godfather to a hit squad" and befriended, protected, and counseled Hardy and other criminals about their criminal activities; and (3) Davis's and Hardy's conduct resulted in a reign of terror that victimized the entire City. Br. 62; see also Br. 61-65. The evidence amply supports each of the prosecutors' statements. *United States* v. *Lowenberg*, 853 F.2d 295, 302, 304 (5th Cir. 1988) (a prosecutor is allowed "wide latitude" to argue all reasonable inferences from the record viewed in the light most favorable to the prosecution).

There was ample evidence that Hardy was a killer and street assassin. This Court affirmed Hardy's 1996 conviction for killing Groves in the street and Davis's conviction for requesting the killing. *United States* v. *Causey*, 185 F.3d 407 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000). Defense counsel also elicited through her questioning of an expert witness that Hardy had been convicted for Groves' murder. SR 6254. Davis claims (Br. 62) the prosecutors'

statements about Hardy referred to conduct "aside from the capital crime against Kim Groves." In fact, many of the comments can reasonably be interpreted as referring to Groves' killing.

In addition, the record supports the inference that Hardy was a killer before he murdered Groves. The evidence links Hardy to the killing of Carlos Adams. Sammie Williams saw Hardy running from the scene of Adams' killing shortly after the shooting, Hardy admitted that he was present, and both Williams and Davis believed Hardy was involved. See pp. 12-13, *supra*. It would be reasonable for the jury to draw the same conclusion.

Davis's former police partner, Leon Duncan, testified that Hardy had been involved in "murder" and "shooting" cases as a defendant and explained that he and Davis had discussed Hardy's murderous propensities. SR 6136-6138. When Duncan asked Davis why he would consort with "a cold-blooded killer like Paul Hardy," Davis replied that Hardy "never killed nobody that didn't deserve to die." SR 6138. The statement indicates that Davis knew Hardy was a killer and was familiar with those homicides.

Recordings of Davis's and Hardy's conversations also support the prosecutor's statements that Hardy was a murderer and had a reputation as such.

Br. 63; SR 6295-6296; DRE Tab 13.[7] Davis and Hardy recounted recent local murders and joked about their gruesome details. LD-6. Hardy was worried he might be blamed, as rumors were spreading that he was involved. LD-6. Davis answered: "Naturally, nigger. Who I call first? * * * [Y]ou the main one known." LD-6.

Davis incorrectly claims that, in Hardy's own sentencing trial, the government has abandoned, for lack of evidentiary support, the allegations that Hardy was involved in homicides other than that of Kim Groves. Br. 48 (quoting R. 1814, Order of April 15, 2008). In fact, the government intends to introduce evidence at Hardy's sentencing that he was involved in: (1) a shooting spree in July 1989, in which Michael Handy was killed, William Gettridge was paralyzed, and several others were wounded; (2) the murder of Carlos Adams in September 1994; (3) the murder of Shawn King and Troy Watts in October 1994, by a person known to Paul Hardy, using Hardy's gun; and (4) a plan, not carried out, to kill Nathan Norwood at Len Davis's request. Compare R. 1796 with R. 1740. The government has decided not to present evidence of Hardy's involvement in the

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[7] Davis takes the prosecutor's statement out of context when he alleges (Br. 62) the prosecutor said Hardy "was * * * in the 'business of murder.'" What the prosecutor really said was "[t]hey [Davis and Hardy] are friends. You hear it, they talk about families, girlfriends, they talk about things other than the business of dope and the business of murder." SR 5975.

murders of Jerome Andrews, Corey Richardson, and Don Bright, a.k.a. "Poonie." See R. 1796; R. 1814 at 1 n.1.

There was also evidence from which the jury could infer that Causey, a member of Hardy's crew, was a "murderer." Br. 62; SR 5718. Causey was, of course, convicted and sentenced for his role in Groves' killing. Furthermore, Davis and Williams both thought Causey was a murderer. Once, when they found a man dying from an abdominal gunshot wound, they suspected Causey; Davis called Causey to determine whether he had shot the man and whether he needed Davis's assistance in covering up his involvement. LD-23; SR 6160. Causey denied responsibility and reminded Davis that he would not be so sloppy as to inflict only a stomach wound: "Well, my nigger, you know I ain't gonna leave no nigger * * * to say my fuckin name. * * * Knock that bitch's brains out!" LD-23. Davis responded that he "sure hope[d] you all wouldn't slip like that." LD-23. Causey tried to reassure Davis by telling him, "you know us better than that, bro." LD-23; SR 6161. Davis also stated that if Causey shot someone "[i]t's gonna be a head shot. It ain't gonna be no stomach shot." LD-23.

The record also contains abundant evidence that Davis himself instigated violence and protected Hardy and his associates so they could freely engage in violence. Most importantly, of course, Davis ordered a "hit" on Kim Groves and

for that alone he was appropriately characterized as "Godfather * * * to a hit squad." SR 6292-6293; DRE Tab 13. Davis's and Hardy's relationship went far beyond a mere failure to report Hardy's transgressions. Davis was an active abettor of Hardy and his crew. This Court has already concluded that "Davis had a relationship with Hardy, a New Orleans drug dealer, in which Davis exchanged police protection for favors." *Causey*, 185 F.3d at 411. Defense counsel acknowledged in examining a witness that "Davis appears to be protecting both Mr. Hardy and his – what's described as his crew * * * [i]n relationship to violent crime." SR 6207. It was surely appropriate for the prosecutor to argue that the evidence showed Davis was connected to violence, given that his own counsel acknowledged as much.

In addition, tape recordings showed that Davis considered killing Nathan Norwood and asked Hardy to do it, before calling off the murder once he learned Norwood was not going to pursue a complaint against Davis. Davis told Hardy that, as long as Norwood did not follow-up on the brutality incident, Davis would let him live. Hardy, nonetheless, assured Davis he was ready to kill Norwood. See pp. 21-22, *supra*.

Davis also helped to ensure that Hardy was not held responsible for the shooting of Carlos Adams. After witnessing Hardy running away from the murder

scene, Sammie Williams, Davis's partner, notified Davis that Hardy was the perpetrator. Davis then called Hardy to confirm his involvement and to warn him to be more careful. During the conversation, Davis reminded Hardy to use their coded warning system to avoid getting caught by the police. See pp. 12-13, *supra*; LD-4.

Davis instructed Hardy that before he and his crew engaged in criminal activity in the future, they should first call Davis and let him know what they were about to do so that Davis could advise them whether it was safe to proceed. Davis instructed Hardy to alert Davis by calling his beeper number and entering either a series of "1's" or the number "34". (In police code, 34 meant aggravated assault and 34-S meant a shooting.) See p. 13, *supra*; SR 5723. Because the police code Davis told Hardy to use referred to a shooting or aggravated assault (rather than drug offenses or other non-violent crimes), Davis's instruction to Hardy supports the inference that Davis was abetting violent behavior.

Davis took other affirmative steps to help Hardy and his crew safely accomplish crimes. Davis would protect Hardy, Williams explained, "and if he needed an alibi, Len Davis would cover for him, say he was with him." SR 5718. On at least one occasion, Causey called Davis to advise him that Hardy's crew was about to commit a crime; Davis agreed to leave the scene and promised to warn

Hardy and his crew if there was a danger of getting caught. See pp. 11, 32, *supra*; LD-24. During a subsequent conversation, Davis appeared to be scouting the location where Hardy planned to commit a violent crime: "[t]hey got a lot of people hanging out around this motherfucker * * * so just come right." LD-25, SR 6161. Hardy assured Davis that he was "gonna be right," that he was "[m]asked up," and his "mask [was] cool," meaning that his wearing a mask would be sufficient to avoid detection. LD-25. Davis then warned Hardy that if Davis dialed his beeper number and entered the number nine, that would signal Hardy to "[h]urry up" and leave the area and abort his plan. LD-25.

In addition, Davis gave Hardy advice on how to accomplish killings, telling him that "you can't go to jail for putting a hit on somebody, Paul. You only go to jail if you were the gunman." LD-6. Thus, contrary to Davis's assertion (Br. 63-64), he did "actively counsel[]" Hardy on "how and when to commit murder and mayhem." SR 6320; DRE Tab 14.

The prosecutor appropriately argued that Davis's crimes harmed the citizens of New Orleans as a whole and adversely affected the community because his actions violated the public trust placed in him as a police officer. See Br. 62-65; SR 6294, 6317, 6321; DRE Tab 13. Davis used his position in the police force to undermine law enforcement and benefit himself. He profited from protecting

Hardy, Terry Adams, Little June, Charles Butan, and other criminals from the law. See pp. 11-14, 33, *supra*. Davis protected Hardy and his "crew" by advising them on how to avoid legitimate law enforcement, including telling them when police shifts were changing so they could act with impunity. See p. 32, *supra*. Davis thus endangered citizens by facilitating crimes that, if not for his involvement, might have been stopped. He ordered a hit on Groves and planned a similar strike against Norwood simply because the two complained about his behavior as an officer. Accordingly, the prosecutor could reasonably argue that Davis "pr[e]yed on [the] community" (SR 6294-6295; DRE Tab 13), and that his actions "terrorize[d]" and "victimize[d]" New Orleans' citizens and thus produced a "reign of terror." SR 6313, 6320; DRE Tab 14.

The arguments did not cross the line and, regardless, they did not affect Davis's substantial rights. The district court repeatedly reminded the jurors that counsel's arguments "are not evidence." See SR 5492-5493, 5514, 5564. This Court has held such instructions have great power to cure potentially inflammatory argument. In *Fields*, for example, this Court noted that although the prosecutor's argument that defendant was a "psychopath" carried "some risk of inflaming the jury," given the court's careful instructions that arguments were not evidence, the statement "did not affect [defendant's] substantial rights." 483 F.3d at 360.

C. Davis Has Not Demonstrated That Williams' And Duncan's Testimony About Hardy Was Error, Much Less Clear Or Obvious Error, And Has Not Shown That It Affected His Substantial Rights

(Responsive To Point III.A. Of Defendant's Brief)

1. Background

Sammie Williams, Davis's partner in 1994 and friend since 1990, testified about Davis's and Hardy's relationship at the eligibility phase. SR 5708-5709. He affirmed that "Davis would protect Paul Hardy as he did various criminal activities." SR 5718. Williams' testimony included the following:

> Q. Do you know Paul Hardy?
>
> A. Yes.
>
> Q. How did you come to know Paul Hardy?
>
> A. Len Davis introduced me to him.
>
> Q. Was he a friend of Len Davis?
>
> A. Yes.
>
> Q. What did Paul Hardy do?
>
> A. He was known in the Florida project where he resided as a drug dealer and a killer.

SR 5718.

Leon Duncan, Davis's former partner who had been convicted on drug charges as a result of the FBI sting, testified about Davis and Hardy at the selection phase. Of particular relevance here, Duncan testified about a conversation that he and Davis had about Hardy during a cookout at Davis's house. In laying the foundation for this testimony, the prosecutor established that Duncan was familiar with Hardy:

> Q. First off, did you know at that point who Paul Hardy was?
>
> A. Yeah, I knew who Paul Hardy was.
>
> Q. How did you know Paul Hardy?
>
> A. Because I handled some cases involving Paul Hardy before and I had altercations with Paul, an altercation with Paul Hardy.
>
> Q. First off, what kind of cases had you handled?
>
> A. I handled murder, shooting with Paul Hardy.
>
> Q. I take it he was not the victim, he was the defendant?
>
> A. Right, he was the defendant.
>
> Q. And had you had any – you said you had had an altercation with Paul Hardy?
>
> A. That's correct.

SR 6136-6137. Duncan further testified that he confronted Davis when he learned that he had invited Hardy to the cookout. Duncan asked Davis:

> What the fuck are you doing hanging out with a cold-blooded killer like Paul Hardy? And he said, man, *Paul Hardy ain't never killed nobody that didn't deserve to die*. Who the fuck are you or Paul Hardy to decide who lives or die? And he made the statement, well, Dunc, you just don't understand the game. I said, fuck the game, we talking about people's lives. And he said, you see, that's your problem now.

SR 6138 (emphasis added).

Davis now claims that the district court plainly erred in admitting Williams' statement that Hardy was known as "a killer" and Duncan's testimony about Hardy's status as a defendant in cases involving "murder" and "shooting." Davis did not object to these statements in the district court.

2. The Admission Of Williams' And Duncan's Testimony Was Not Plain Error

"The Federal Death Penalty Act . . . erects very low barriers to the admission of evidence at capital sentencing hearings." *Fields*, 483 F.3d at 343 (citation omitted). "Since the need to regulate the scope of testimony is less at the penalty phase than at the guilt phase of trial," *ibid*., the Federal Rules of Evidence do not govern FDPA sentencing procedures. Under the FDPA, "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the

issues, or misleading the jury." 18 U.S.C. 3593(c). "Therefore, the defendant and the government may introduce any relevant information during the sentencing hearing limited by the caveat that such information be relevant, reliable, and its probative value must outweigh the danger of unfair prejudice." *United States* v. *Jones*, 132 F.3d 232, 241 (5th Cir. 1998), aff'd on other grounds, 527 U.S. 373 (1999). The Supreme Court has refused to impose "unnecessary restrictions" at death penalty hearings because it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg* v. *Georgia*, 428 U.S. 153, 203-204 (1976).

a. The Testimony Was Relevant

Both witnesses' testimony was relevant to the aggravating factor of future dangerousness, which the government argued in the selection phase. The testimony shows Davis maintained a friendship with Hardy despite his involvement in killing. Duncan's testimony in particular shows that Davis acknowledged Hardy's reputation and defended his killings. This suggests that Davis is capable of fostering further criminal associations and conspiracies. In addition, Davis's willingness to associate with someone reputed to be a killer helps counter his arguments that he served admirably in fighting crime as a police officer.

The contested evidence also was relevant to rebut Davis's claim in the eligibility phase that he did not plan or commit a murder, and the similar argument in the selection phase that residual doubt about his guilt was a mitigating factor. SR 5751, 5894, 6049. Hardy's reputation and prior acts helped explain why Davis would turn to Hardy to carry out a murder. Duncan's testimony about Davis's knowledge of Hardy's murderous reputation also supports the claim that he would hire Hardy as a hit man. As this evidence would be relevant to guilt, see Fed. R. Evid. 404(b), it was relevant to rebut a claim of residual doubt about guilt. See *United States* v. *Escobar de Jesus*, 187 F.3d 148, 169 (1st Cir. 1999) (evidence otherwise inadmissible may be relevant to show the nature of the relationship between coconspirators), cert. denied, 528 U.S. 1176 (2000).

The Sixth Circuit addressed an analogous circumstance in *United States* v. *White*, 788 F.2d 390 (6th Cir. 1986). The defendant in *White* claimed that testimony about a codefendant's prior arson should not have been admitted. The court deemed it relevant, however, to show why the defendant would hire the codefendant to burn down a house. *Id.* at 395. The testimony "gives rise to an inference, when combined with other evidence, that the two did in fact commit the crime" charged. *Ibid*.

Indeed, this Court has already determined that similar evidence is relevant to Davis's guilt. In Davis's initial appeal, the Court reviewed Davis's challenges to testimony that "defendant Hardy committed other murders, that Hardy was a drug dealer, and that Hardy possessed many guns." *Causey*, 185 F.3d at 418. The testimony included the assertion that Hardy killed eight people. *Ibid*. This Court rejected Davis's argument stating that

> [e]vidence that Davis and Hardy were involved in illegal activities that included violent crimes and drug dealing was relevant to prove both opportunity and motive under the Government's theory of the case, which was that Hardy was willing to execute Groves and Davis was able to order that execution, because of their mutual involvement in these activities, and because of Davis's status as a police officer.

Id. at 419.

As the district court stated when reviewing Davis's motion to exclude evidence of his prior unadjudicated conduct involving Hardy, "[t]he conviction in the case at bar proves that Davis committed at least one act of murder through the intermediary Paul Hardy. Evidence that demonstrates the relationship between Davis and Hardy and proves the existence of a pattern or practice of such violence and abuse of his position as a police officer is highly relevant." SR 4465. Leaving out evidence of Davis's and Hardy's relationship and bad acts "could

likely skew the view of the jury to afford a rosier picture of the defendant than is true." SR 4465 (internal quotation marks and citation omitted).

b. The Testimony Was Reliable

The test for reliability is less stringent in FDPA sentencing proceedings than in the guilt phase of criminal trials. For example, this Court has held expert testimony is admissible in FDPA sentencing hearings even if the testimony does not satisfy the test for reliability required for admission of expert evidence under Federal Rule of Evidence 702. *Fields*, 483 F.3d at 341-343. Another example is hearsay, which is admissible in FDPA sentencing proceedings even if it would be inadmissible in the guilt phase of criminal trials under the Federal Rules of Evidence. *Id*. at 330 n.16.

Williams' and Duncan's testimony is sufficiently reliable to justify its admission in a FDPA sentencing proceeding. Contrary to Davis's assertion (Br. 42), the government laid an adequate foundation at the sentencing hearings for the challenged testimony. Both Williams and Duncan explained that they personally knew Hardy and had dealings with him, thus providing a sufficient basis for them to testify about Hardy's reputation as a killer and (in the case of Duncan) Hardy's role in killings and shootings. Duncan gave specific reasons for calling Hardy a killer; he explained that he had handled "murder" and "shooting" cases in which

Hardy was involved. SR 6136-6137. Contrary to Davis's suggestion, the fact that Hardy had not been convicted of killing anyone other than Kim Groves does not render inadmissible Duncan's testimony about Hardy's involvement in other homicide cases. This Court has held a sentencer may consider unadjudicated offenses. *Brown* v. *Dretke*, 419 F.3d 365, 376-377 (5th Cir. 2005), cert. denied, 546 U.S. 1217 (2006). The evidence further showed that both Williams and Duncan had been partners with Davis on the police force, thus bolstering the inference that they would be familiar with Hardy, who had such a close relationship with Davis. See SR 5616 (noting that Hardy and Davis saw each other "probably every day").

Furthermore, Davis cites no cases reversing convictions where the defendant argues for the first time on appeal that trial testimony lacked a foundation. This objection is particularly problematic when made late, as it deprives the government of an opportunity to lay further foundation. See *United States* v. *Solomonson*, 908 F.2d 358, 362 (8th Cir. 1990) ("Here, the proper objection was to the form of, or the lack of foundation for, the questions. Had [defendant] objected on these grounds, the district court could have required the government to lay further foundation. Had the government been unable to lay the foundation, the district court should have excluded the testimony.").

The reliability of Williams' testimony was bolstered by his eyewitness account of events that indicated Hardy was involved in a murder. *United States* v. *Webster*, 162 F.3d 308, 320 n.5 (5th Cir. 1998) (noting testimony supporting aggravating factors was reliable where "based on first-hand observations"), cert. denied, 528 U.S. 829 (1999). Williams explained that while driving home from work he had seen the aftermath of Carlos Adams' murder in the Florida project. He heard shots and saw Hardy running away. SR 5719-5720. Because he believed Hardy must be involved, Williams chose not to intervene as an officer and instead called Davis. SR 5720-5722. When pressed by Davis, Hardy admitted that he was, in fact, at the scene of the shooting. LD-4. The jury heard tapes of conversations that backed up Williams' recollections. SR 6154-6155; LD-2; LD-3; SR 5241.[8]

Taken as a whole, Williams' testimony supports an inference that Hardy was involved in killing prior to Groves' death. At the very least, it is reliable evidence that Hardy had a reputation for being involved in killing because it

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[8] The tapes were not introduced until the second phase. Williams summarized their contents in the first phase. The court had access to the tapes, however, in making its decisions about the reliability of evidence. The tapes were available for the defendant to use in impeachment if Williams' testimony varied from them. And by the time the jury was called upon to make a decision about future dangerousness or determine aggravating factors that Davis claims this evidence tainted, the jury had also reviewed the tapes.

shows that other people – including Davis and Williams – thought Hardy was involved with the Adams murder. Indeed, the defense acknowledges (Br. 45) that Davis "thought Hardy was involved" in the incident.

Davis's own comments bolstered Williams' and Duncan's testimony about Hardy. In response to Duncan's assertion that Hardy was a cold-blooded killer, Davis said Hardy never killed anyone who did not deserve to die, strongly suggesting that Davis had first-hand knowledge that Hardy had previously killed and first-hand knowledge of the circumstances surrounding those killings.

It is not the case, as defendant asserts (Br. 50 & n.31), that Davis's own statement was unreliable and hearsay. Even if the Federal Rules of Evidence applied, it would be admissible as an admission of a party opponent. See Fed. R. Evid. 801(d)(2)(A) (a party's own statement is admissible if offered against him); Fed. R. Evid. 801(d)(2)(B) (another person's statement is admissible as admission by a party opponent if the party "has manifested an adoption or belief in its truth"). Contrary to Davis's argument, his statement is not hearsay within hearsay. On its face, Davis's comment did not indicate that he was simply relaying someone else's statement about Hardy. Rather, Davis's comment suggests that he was reporting his first-hand knowledge of Hardy's activities.

Additional factors confirm that the testimony was sufficiently reliable. In particular, the district judge at Davis's sentencing hearing was the same judge who presided over the 1996 trial of Davis and Hardy and reviewed more extensive evidence of Hardy's murders. See SR 1134-1135, 1431-1437; see also *Causey*, 185 F.3d at 418 (quoting Steve Jackson's testimony, April 16, 1996 Tr. 177, that Hardy was "not to be trusted. He done killed seven people from the neighborhood, seven neighbors, then killed another in the neighborhood."). Because reliability of testimony can be, and often is, determined based on evidence that a judge hears outside the presence of the jury, cf. Fed. R. Evid. 104(a), the testimony from the 1996 trial gave the judge sufficient grounds to assess the reliability of Williams' and Duncan's testimony about Hardy's reputation as a killer and his actual participation in killings.

The adversary system, including the availability of cross-examination, helps to ensure reliability. "Though the FDPA states that the Federal Rules of Evidence do not apply at capital sentencing, it also provides that a defendant may rebut any information received at a hearing and must be given a fair opportunity to present argument as to the adequacy of the information presented to establish the existence of any aggravating or mitigating factor." *Fields*, 483 F.3d at 338. Davis had ample opportunity to cross-examine both witnesses under oath and to challenge

their knowledge of Hardy's activities and reputation. *Webster*, 162 F.3d at 321 (concluding, in an FDPA case, that evidence was sufficiently reliable because, among other things, the defendant "had the opportunity to confront and challenge each of the witnesses"). Accordingly, the adversary system provides the primary means to test reliability of evidence in the sentencing hearings. *United States* v. *Lee*, 374 F.3d 637, 648 (8th Cir. 2004) (under the FDPA, "admission of more rather than less evidence during the penalty phase increases reliability"), cert. denied, 545 U.S. 1141 (2005).

c. The Risk Of Prejudice Did Not Outweigh The Testimony's Probative Value

Williams' and Duncan's testimony was not unfairly prejudicial in relation to its probative value. The testimony concerned *Hardy's* actions and reputation, not Davis's own, thus reducing its prejudicial impact. More importantly, the challenged testimony was far less inflammatory than the graphic evidence the jury properly heard about Davis planning Groves' murder, enlisting Hardy as the trigger man, rejoicing at news of her death, planning to have Hardy murder Nathan Norwood if he pursued a complaint, and actively using his position as a police officer to counsel and protect Hardy and his crew so that they could engage in violence without fear of arrest. SR 5733-5736, 5736; LD-9; LD-13; LD-14; LD-

15; LD-16; LD-17; LD-18; LD-20; LD-21. In light of this other evidence that the jury heard, the probative value of Williams' and Duncan's testimony was not "outweighed by the danger of creating unfair prejudice," 18 U.S.C. 3593(c), and, in any event, the admission of the testimony was not plain error affecting Davis's substantial rights.

D. The Prosecutor's Cross Examination Of The Defense Expert Was Not Reversible Error

(Responsive To Point III.B. Of Defendant's Brief)

1. Background

Davis called Dr. Thomas Streed to testify as an expert on the effects of stress on law enforcement officers and "police trauma syndrome" and to explain how stress on the job might have negatively impacted Davis's behavior. SR 6191, 6202, 6211-6213, 6248, 6259, 6261-6263. Streed discussed Davis's achievements and challenges as an officer. The defendant introduced crime statistics to show Davis's district was the most violent in the city and questioned Streed about the figures. SR 6253-6254. One chart that the defense introduced included city-wide totals, broken down by type of crime, for 1994 and 1995, including the percentage of change for the two years. Def. Exh. 50. Another chart showed 1994 crimes by type and police district. Def. Exh. 50.

In response, the prosecutor attempted to show that Streed's theories were irrelevant because he knew little about Davis's particular case. Streed admitted on cross-examination that he had never interviewed any of Davis's supervisors, colleagues, or girlfriend about his behavior. SR 6269-6279. The prosecutor asked Streed about his knowledge of the Fifth District, Davis's disciplinary record, and other officers who been convicted in the drug sting along with Davis. SR 6272-6274. The prosecutor asked Streed about people involved in Davis's case, including Hardy, Causey, and a man named "Poonie." SR 6277. Streed explained who Hardy and Causey were and said he had seen references to Poonie in the file. SR 6277. The prosecutor then asked Streed whether he was "aware that Paul Hardy and Poonie had a war in the Florida project back in 1994." SR 6277.

The prosecutor also mentioned the defense's crime statistics, asked Streed if he believed in "coincidences," and stated that the homicide rate for the Fifth District was "a record." SR 62776-6277. He asked Streed if he knew which housing project was the smallest, in population, in 1994 and – when Streed said he did not know – the prosecutor said it was the Florida project. SR 6277-6278. The prosecutor stated that "the Florida housing project led all other projects with 23 homicides" in 1994, and that the Florida project had four homicides in 1995. SR 6278. The defense made no objection to this line of questioning.

2. Standard Of Review

A district court's decision to permit a line of cross-examination is typically reviewed for abuse of discretion. *Smith Bowman*, 76 F.3d at 636; *Crosby*, 713 F.2d at 1075. But where, as here, the defendant failed to object to the prosecutor's comments or questions during cross-examination, this Court applies plain-error review. *Jones*, 527 U.S. at 387-389.

3. The Prosecutor's Remarks Were Not Reversible Error

Davis now complains that the prosecutor's questions about the "war" between Poonie and Hardy and crime statistics for the Florida housing project were reversible error. He claims that the prosecutor's statements "misle[d] jurors into believing" that Hardy "ran a gang of killers responsible for almost 20 homicides." Br. 42. Davis is mistaken.

The prosecutor's questions about Poonie appropriately tested Streed's knowledge of Davis's case using evidence in the record. The prosecutor's questions showed Streed knew only basic information about Hardy and Causey and could not even identify Hardy's rival, Poonie. This suggested that Streed did not understand Davis's unusual position in the criminal networks of the Fifth District or the Florida project and how it might have affected his behavior.

A prosecutor is allowed to ask questions in cross examination provided he has "some good-faith factual basis for the incidents inquired about." *United States* v. *Bright*, 588 F.2d 504, 512 (5th Cir.) (citation omitted), cert. denied, 440 U.S. 972 (1979). He may not "ask a question which implies a factual predicate which the examiner knows he cannot support by evidence or for which he has no reason to believe that there is a foundation of truth." *United States* v. *Jungles*, 903 F.2d 468, 478 (7th Cir. 1990) (citation omitted). However, "[t]hat does not mean that the basis in fact must be proved as a fact before a good faith inquiry can be made." *United States* v. *Nixon*, 777 F.2d 958, 970 (5th Cir. 1985). "[T]he government does not have a duty in every case to introduce the factual predicate for a potentially prejudicial question posed on cross-examination." *Jungles*, 903 F.2d at 478. This principle "receives even more play where there is no contemporaneous objection to the cross-examination." *Ibid*.

Here, the prosecutor had a good-faith basis for believing that a "war" existed between Poonie and Hardy and, accordingly, his questions were permissible. Prior to the prosecutor's remark, Williams had testified that Poonie was "another drug dealer, killer, that liv[e]d in the Florida housing project, also an enemy of Paul Hardy." SR 6159. In addition, the jury had heard evidence that when Davis called Causey, a member of Hardy's crew, in October 1994 to see if

he was responsible for a murder Davis came across, Davis told Causey the murder had happened "[r]ight on Poonie turf," and suggested that Causey usually did not venture onto that "side" of the Florida project. LD-23. Furthermore, documents previously submitted to the court showed that the government had evidence Hardy asked Davis to provide him with the addresses of Poonie's family members so that Hardy could harm them. SR 1131, 1136, 1568, 2513-2514, 2774, 4284, 4464; LD-28.[9] Although these latter events were not discussed at trial, the court had previously ruled them admissible and they support the prosecutor's good-faith basis for asking his questions. SR 4463-4465.

Davis has not shown that, even if the reference to Poonie were clear error, it affected his substantial rights. *United States* v. *Jackson*, 549 F.3d 963, 975 (5th Cir. 2008), petition for cert. filed (Feb. 13, 2009) (No. 08-8713). The statement did not add to what the jury already knew, and the prosecutor did not mention Poonie in any of his arguments. In any case, the court instructed the jury that counsel's statements were not evidence. SR 6020; accord SR 5492-5493, 5514, 5564, 6020, 6323, 6051.

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[9] It does not appear that LD-28 was ever played to the jury, and the record is unclear whether it was submitted, along with the other tapes, for their use during deliberations. See SR 5242. In any case, the court had access to the tape, and it could provide a basis for the prosecutor's good-faith belief underlying his questions.

Nor has Davis shown that the prosecutor committed reversible error in making limited references to the Florida project crime statistics. The Florida project statistics to which the prosecutor referred during cross-examination were not introduced into evidence. But the prosecutor had a good-faith basis to believe the facts underlying his questions, as these statistics had been published in 1995. See *Murder Rate Decreases In Housing Complexes; Community Policing Cited*, The Times Picayune, Jan. 7, 1996 ("[N]owhere has the decrease been more dramatic than in Florida, where killings fell from 23 in 1994 to 4 last year."). Nor did the statistics for the Florida project contradict the broader crime statistics that the defense itself introduced. Those statistics showed the number of homicides in 1994 in the Fifth District (in which the Florida project was located) and revealed a sharp decline in the number of homicides in the city as a whole between 1994 and 1995. Def. Exh. 50.

Even assuming that the reference to the Florida project statistics were improper and even assuming that such error were clear or obvious, the prosecutor's remarks about the statistics would not warrant reversal under a plain-error standard. Even under those circumstances, this Court would not have the discretion to reverse Davis's sentence unless Davis could demonstrate that the remarks *both* (1) prejudiced his substantial rights *and* (2) "seriously affected the

fairness, integrity or public reputation of judicial proceedings." *Jackson*, 549 F.3d at 975; accord *Puckett* v. *United States*, 129 S. Ct. 1423, 1429 (2009).

Contrary to Davis's argument (Br. 54; see also Br. 41), the prosecutor's brief references to the statistics during cross-examination did not communicate to the jury that "Hardy and Davis were responsible for * * * almost 20 killings in 1994." Br. 54; see also Br. 41. The prosecutor never mentioned the Florida project crime statistics in his arguments to the jury; the evidence was mentioned only once during cross-examination. See *United States* v. *Insaulgarat*, 378 F.3d 456, 464 (5th Cir.) ("[N]othing like [the erroneous comment] was mentioned again during trial or closing arguments.") (citation omitted), cert. denied, 543 U.S. 1013 (2004). Furthermore, the district judge cut off the line of questioning before it was complete, and the prosecutor did not divulge the date of Hardy's arrest in cross-examining Streed.

The reference to the statistics was an isolated occurrence with little effect, especially in the context of a lengthy trial. See *Montoya* v. *Collins*, 955 F.2d 279, 287 (5th Cir.), cert. denied, 506 U.S. 1036 (1992) ("an isolated comment in a sea of evidence" at a death penalty hearing was harmless); *Koch* v. *Puckett*, 907 F.2d 524, 528 (5th Cir. 1990) ("[E]ven if it were impermissible, such an isolated comment would constitute harmless error."). The resentencing trial covered more

than 800 pages of transcript and included numerous additional exhibits and wiretap recordings; the prosecutor's statements about which Davis now complains – those pertaining to the Florida project crime statistics and the war between Poonie and Hardy – together make up no more than eight lines of text in the voluminous trial transcript. SR 6277-6279. Given the complexity of the trial, it is clear that the alleged "error did not influence the jury, or had but very slight effect." *United States* v. *Lane*, 474 U.S. 438, 460 (1986) (citation omitted); see also *United States* v. *Gallardo Trapero*, 185 F.3d 307, 320-321 (5th Cir. 1999) (concluding that prosecutor's improper remarks did not "unduly prejudice[]" defendants' case; "[g]iven the strident advocacy on both sides of this case and the numerous witnesses, pieces of evidence, and issues placed before the jury," the prosecutors' statements did not "overshadow[] what had come before"), cert. denied, 528 U.S. 1127 (2000).

Furthermore, the district court repeatedly cautioned jurors that "any statements, objections, or arguments made by the lawyers are not evidence." SR 6020; accord SR 5514, 5492-5493, 5564, 6020, 6051, 6323. This Court "presume[s] that such instructions are followed unless there is an overwhelming probability that the jury will be unable to follow" them and unless "there is a strong probability that the effect of the improper statement is devastating."

Gallardo Trapero, 185 F.3d at 321 (internal quotations marks and brackets omitted and citations omitted). The prosecutor himself reminded the jury in Davis's case that "[w]hat we say is not evidence." SR 5972. This Court has repeatedly held that a prosecutor's improper remarks do not prejudice the defendant's substantial rights where, as here, the district judge instructed the jury that attorneys' statements are not evidence. *United States* v. *Armstrong*, 550 F.3d 382, 403 (5th Cir. 2008), petition for cert. filed (Mar. 16, 2009) (No. 08-9339); *Gallardo Trapero*, 185 F.3d at 323; see also *United States* v. *Fletcher*, 121 F.3d 187, 197 (5th Cir.) (even in cases of preserved error, an instruction that "what the attorneys say is not in evidence" is sufficient to render error harmless), cert. denied, 522 U.S. 1034 (1997), overruled on other grounds by *United States* v. *Cotton*, 535 U.S. 625 (2002).

Defendant's failure to object to the questions further suggests that, in context, they were not harmful. As this Court noted in *Nixon*, "counsel's conspicuous failure to object * * * leads us to conclude that defense counsel either did not believe, at the time the questions were asked, that they were prejudicial or chose to minimize their impact by simply remaining silent." 777 F.2d at 971 n.19.

The cases Davis cites (Br. 59-61) do not support his request for reversal. In *Berger* v. *United States*, 295 U.S. 78, 88 (1935), the Supreme Court overturned

convictions for multiple, serious incidents of misconduct under an abuse of discretion standard. Counsel in *Berger* misstated facts, put words in the mouth of witnesses, "bull[ied]" witnesses and argued with them, accused witnesses of lying, accused defense counsel of aiding criminal behavior, assumed facts not in evidence, and referred to out-of-court statements. *Id*. at 84. Any error that might have occurred here does not rise to that level. Moreover, cases involving the government's vouching for the credibility of witnesses, offering personal assessments of the strength of the evidence, or using perjured evidence are also inapplicable, as they involved misconduct far more serious than any that allegedly occurred in this case. See Br. 61 (citing *Gallardo Trapero*, 185 F.3d at 320; *United States* v. *Anderson*, 574 F.2d 1347, 1355 (5th Cir. 1978)).

Nor is this case like *Harris* v. *Spears*, 606 F.2d 639, 642 (5th Cir. 1979), where the prosecutor cross-examined defendant extensively about the statements of a crucial eyewitness who was never called to testify. The facts that the prosecutor revealed to the jury in *Harris* directly contradicted defendant's self-defense theory.

Davis's case is also unlike *United States* v. *Meeker*, 558 F.2d 387 (7th Cir. 1977) (see Br. 61). There, the Seventh Circuit found error where the prosecutor asked improper questions of four witnesses. The questions contained false

information creating "an inexcusable distortion of the facts," and the misconduct constituted a "pronounced and persistent" pattern, "with a probable cumulative effect." *Id.* at 389-390 (citation omitted). The isolated reference to the crime statistics in Davis's case is nothing like the "pronounced and persistent" pattern of misconduct denounced in *Meeker*.

E. Even If The Claimed Errors Had Affected The Jury's Reasoning, They Did Not Affect The Outcome Of The Case

The evidence of the relevant aggravating factors was so overwhelming that the jury would have found those aggravating factors even in the absence of the Florida project statistics or the references to Poonie. As this Court has noted, "the magnitude of the prejudicial effect of the prosecutor's remarks should not be weighed in a vacuum." *United States* v. *Gracia*, 522 F.3d 597, 602 (5th Cir. 2008). The prosecutor's statements were most relevant to the aggravating factors that Davis used his police position to endanger the health and safety of others and posed a threat of future dangerousness.

There was other, stronger evidence for each of these factors. Relevant to both, Davis and Hardy had been convicted of offenses involving the murder of Groves and the jury heard evidence that they were involved in other criminal activity. Their premeditated, execution-style murder and Davis's leadership in a

massive drug conspiracy likely outweighed, in the jurors' minds, the Florida project crime statistics. See *Bernard*, 299 F.3d at 478 n.9 (holding that witness's statement likely "did not inflame the jury's passions more than did the facts of the crime") (citation and internal brackets omitted). In addition, the jury reviewed tapes showing Davis actively protected Hardy and Causey and advised them on how to commit crimes with impunity, knowing they were engaged in violence and killing.

Specifically relevant to show Davis's use of his police position to endanger others are the facts that he acted under color of law in killing Groves, see *United Causey*, 185 F.3d at 413-416, and did so because she pursued a complaint against him in his capacity as an officer. *Id*. at 415-416. In addition, Davis met with Hardy and his associates to discuss their plan at the police station and used his police car to take Hardy to Groves' neighborhood where the two could look for her. Davis used his police radio to follow up on the crime and check whether Groves died. See pp. 19-21, *supra*. During the drug conspiracy, Davis recruited other officers to guard purported drug shipments, and he and his coconspirators worked in what they believed was the drug business while armed and in uniform. See pp. 15, 34, *supra*. Davis also used his police uniform, light, and badge to

better protect his cousins from arrest while transporting drugs and convinced another police officer to "invest" in his cousin's drug business. See p. 14, *supra*.

In addition, the jury heard compelling evidence of Davis's future dangerousness. See Argument I, pp. 29-39, *supra*. Davis most clearly showed his potential for dangerousness in the careful plot to murder Groves, his plan to kill Nathan Norwood, and his willingness to help Hardy and others carry out and cover up violent acts. Davis has been involved in threatening behavior in prison, see pp. 36-37, *supra*, and prior to killing Groves, had engaged in violent or threatening conduct as a police officer. Def. Exh. 53A Tab 5N; Def. Exh. 53B Tab 8W. His lack of remorse and skills at subterfuge suggest he may be particularly likely and able to execute crimes even in prison. See pp. 33-35, *supra*.

The jury ultimately found all the aggravating factors and zero jurors found any mitigating factors. SR 5235-5236, 6332-6333; DRE Tab 8. These facts further show that the jury would have reached the same decision even without hearing the prosecutor's remarks during his cross-examination of Streed.

IV

THE INTRODUCTION OF THE VICTIM-IMPACT EVIDENCE AND THE PROSECUTOR'S ARGUMENTS RELATED TO IT WERE NOT PLAIN ERROR

The government introduced victim-impact testimony from the victim's daughter, Jasmine Groves, in the selection phase. The prosecutor referred to portions of this testimony during closing arguments.

Davis contends (Br. 71-82) that portions of the testimony and arguments violated his right to remain silent and due process rights. Specifically, Davis challenges (1) Jasmine Groves' testimony and the prosecutor's argument concerning lack of remorse; (2) the testimony expressing Groves' feelings about Davis and the crime; and (3) the testimony that Groves feared Davis would continue appealing indefinitely. Contrary to Davis's argument, this testimony and the prosecutor's related arguments were not plain error.

A. Standard Of Review

Davis did not object to the victim-impact testimony or the related arguments by the prosecutor, and thus his claims are reviewed for plain error. See pp. 42-43, *supra*.

B. Background

In 2001, the United States provided notice that it would seek to establish, as one of the non-statutory aggravating factors at resentencing, that Kim Groves' murder "created harmful emotional distress upon her three children and other members of her family." SR 2775; DRE Tab 5. Davis moved to strike that aggravating factor (SR 4175-4176, 4184-4187), but the district court denied the motion. SR 4459-4460, 4466-4467. It was thus clear before the sentencing proceedings began that the government planned to introduce victim-impact evidence.

On June 9, 2005, the Groves family wrote a letter asking the Department of Justice not to pursue the death penalty against Davis. SR 4931-4933. The letter explained that the family believed a life sentence would be "more profound and more significant" as it would force Davis to "spend the rest of [his life] facing the direct consequences" of his act. SR 4932. The letter was signed by Kim Groves' mother, father, son, and two daughters (including Jasmine Groves).

In light of the letter, the government moved before the resentencing trial to exclude the Groves family's personal views about Davis's sentence. SR 4921-4929. The court denied the motion, holding that, if the government presented victim-impact evidence, the family's letter must be admitted "to provide the jury

with a full and fair view of the impact of Ms. Groves[']s death on her family." SR 4977. The government affirmed its intentions to present victim-impact testimony, SR 4921, 5354, and so it was clear before the sentencing trial began that the letter's contents would be admitted.

At the penalty trial, Davis maintained his innocence. SR 5090, 6347. During voir dire, jurors were told that "Mr. Davis maintains his innocence of these crimes." SR 6386. At the eligibility phase, Davis gave an opening statement, acting pro se. SR 5515-5564. He stated that his convictions were flawed and that the sentencing jurors were the only ones who would hear the "untold facts." SR 5515, 5525. Davis told the jury in his opening statement that neither he nor Paul Hardy was a murderer. SR 5549. He claimed that Groves had "enemies" "due to [her] unfortunate lifestyle," and asserted that eyewitnesses identified her boyfriend as her killer. SR 5521, 5525, 5555-5556. Davis claimed that he and Hardy had planned, at most, to frame Groves in a drug deal, not to kill her. SR 5524-5525, 5529.

Davis also told the jury in his opening statement that he had rejoiced at Groves' death. He explained that he considered Groves a criminal. SR 5551. There was "no love lost between myself and Kim Groves," he told the jury; "she had made a false complaint, involved me in a criminal matter that I wasn't guilty

of, and, yes, I considered Kim Groves to be a criminal victim of violence and when she was killed I celebrated." SR 5553.

At the eligibility phase, the government introduced tape recordings in which Davis expressed jubilation over Groves' death. In one recording, he gloated over the killing: "Man, that 'ho was dead when she left the scene. Fuck that 'ho! Goody for that bitch! Goody, goody, goody. Rockhead 'ho!" SR 5985; LD-20.

Later, at the selection phase, Jasmine Groves, one of the victim's daughters, testified about the murder's impact on her life. She was 12 years old when her mother was shot, and she explained that Davis "took my whole childhood from me." SR 6176; DRE Tab 12. She attended therapy after the murder and experienced severe pain from her emotions, including physical symptoms and suicidal thoughts. SR 6176-6177; DRE Tab 12. Her entire testimony, including cross-examination and redirect, covered less than nine pages of the transcript. SR 6174-6182; DRE Tab 12.

After Groves answered introductory questions about herself and her family, the prosecutor asked her to read a short letter she had written to Davis. SR 6176-6177; DRE Tab 12. It filled less than two pages in the trial transcript. Groves described sorrow over her mother's death, the continuing emotional struggles she suffered as she sought "peace," and her hatred for Davis, who "messed up [her]

whole life." SR 6176-6177; DRE Tab 12. She expressed pain at Davis calling her mother "a rock-head ho." SR 6177; DRE Tab 12. "At one time I felt in my heart it would make me happy for you to sit in jail for the rest of your life," Jasmine Groves read, "[t]o take time to think about what you've done." SR 6176; DRE Tab 12. She added: "You know what hurts most is that over ten years, you did not even once say sorry. How could you not be sorry?" SR 6176; DRE Tab 12. Davis's counsel did not object to Jasmine Groves' testimony or to her reading the letter.

On cross-examination, the defense asked Jasmine Groves about the family's letter to the Department of Justice and her feelings about Davis's punishment. SR 6178-6181; DRE Tab 12. The defense attorney suggested that a life sentence would mean "that Mr. Davis could spend the rest of his life thinking about what he did." SR 6180; DRE Tab 12. Groves nodded. Counsel also suggested that the Groves family requested that Davis be sentenced to life imprisonment so that the family could "have some closure" and the matter would be "[o]ver once and for all." SR 6180; DRE Tab 12. Groves agreed. When defense counsel asked if that was "still true," Groves answered "[h]e don't deserve it." SR 6181; DRE Tab 12.

On redirect, the prosecutor asked Groves to explain the change of heart she had experienced since signing the Groves family letter to the Department of

Justice. Groves explained that, when she signed the letter, she believed that if Davis had to "sit there" in prison the rest of his life, he would "think about what he took from me." SR 6181; DRE Tab 12. But by the time of her testimony, she concluded that Davis did not deserve a life sentence "because he [didn't] care." SR 6181; DRE Tab 12. When the prosecutor asked her whether she thought Davis was "thinking about [her] mom," she shook her head and explained that it had "[b]een over 11 years and he [had] not once said sorry." SR 6181; DRE Tab 12. When asked about her former feelings that a life sentence "would mean things would end" (SR 6181-6182; DRE Tab 12), Groves explained:

> I thought it would be over, no more court, no more nothing, so I can get on and deal with it and accept it. There's nothing I can do and nothing I can change. But he can keep appealing and keep going through this for the rest of our life. * * * I'm going to keep going through every court day.

SR 6182; DRE Tab 12.

During his opening summation, the prosecutor briefly mentioned Jasmine Groves' testimony. He told the jury that "Jasmine Groves was right, [Davis] doesn't care. * * * Jasmine was right." SR 6297; DRE Tab 13. The prosecutor made no other reference to Jasmine Groves' testimony in his opening summation and did not mention the fact that Davis had not apologized for his crime. See SR 6291-6297; DRE Tab 13.

In closing arguments, defense counsel asserted that the Groves family did not want Davis to receive the death penalty. "The Groves family doesn't want vengeance," counsel asserted. SR 6306. "They wrote to the Attorney General and said we want him to have life in prison." SR 6306. "Who wants the vengeance? The government." SR 6306. In discussing Jasmine Groves' testimony, defense counsel stated, "you could tell how con[fl]icted she was. * * * [S]he doesn't want to hate. She wants to forgive." SR 6306.

In response, the prosecutor said the family members' letter "was a sign of their frustration with the length of the legal process" and said he did not "believe it is a statement of what punishment they would want in a perfect system." SR 6314; DRE Tab 14. He pointed out that Jasmine Groves had "told you that life was too good for the defendant and she told you why. He didn't have the decency to apologize. And he doesn't care, she said." SR 6314-6315; DRE Tab 14. The prosecutor continued: "And she is right. For if the defendant thinks of Kim Groves at all, it is only to ponder how he could have done this murder better. That's how he thinks about her." SR 6315; DRE Tab 14. He reminded jurors that it was "not [their] job" to return a verdict that simply reflected the family's wishes. SR 6315; DRE Tab 14.

C. Davis Has Not Demonstrated Plain Error

1. The Testimony And Argument Were Proper

The Constitution places two types of restrictions on the ability of a prosecutor to comment on a defendant's silence. First, the Self-Incrimination Clause of the Fifth Amendment prohibits the prosecution from commenting on the defendant's failure to testify at trial. *Griffin* v. *California*, 380 U.S. 609, 614-615 (1965). Second, the Due Process Clause prohibits the government from trying to draw an inference of guilt from the defendant's silence if the decision to remain silent was in reliance on *Miranda*[10] warnings. *Doyle* v. *Ohio*, 426 U.S. 610, 617-618 (1976); *United States* v. *Garcia Flores*, 246 F.3d 451, 455 (5th Cir. 2001). *Doyle* prohibits the prosecutor from using the defendant's silence either as substantive evidence of guilt or to impeach the defendant's exculpatory story. *United States* v. *Solis*, 299 F.3d 420, 444 n.69 (5th Cir.), cert. denied, 537 U.S. 1060 (2002); *United States* v. *Shaw*, 701 F.2d 367, 381 (5th Cir. 1983), cert. denied, 465 U.S. 1067 (1984).

But the Constitution "does not prohibit prosecutors from commenting on a defendant's post-arrest silence for *all* purposes." *United States* v. *Reveles*, 190 F.3d 678, 684 (5th Cir. 1999); see also *United States* v. *Salinas*, 480 F.3d 750, 757

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[10] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

n.4 (5th Cir.), cert. denied, 128 S. Ct. 487 (2007) ("The general rule of *Doyle* is not absolute."). At least two exceptions exist that apply here.

First, neither *Griffin* nor *Doyle* prohibits a prosecutor from referring to the defendant's silence "where [such reference] is *not* used to impeach the defendant's exculpatory story, or as substantive evidence of guilt," but rather is "a fair response to defense counsel's argument" or to the defense's evidence. *United States* v. *Martinez Larraga*, 517 F.3d 258, 268 (5th Cir. 2008) (finding no *Doyle* violation) (citation and quotation marks omitted); accord *United States* v. *Robinson*, 485 U.S. 25, 26, 31-34 (1988) (finding no *Griffin* violation where prosecutor's reference to defendant's failure to testify was in response to defense argument).

When the prosecutor elicited testimony from Jasmine Groves about Davis's failure to apologize and then referred to that testimony during closing arguments, he was appropriately responding to an issue that the defense had injected into the case. As Davis admits (Br. 82-83 n.47), the defense invited inquiry into Jasmine Groves' views on whether Davis should receive the death penalty. The defense did this in two ways: "by opposing the government's pretrial motion to keep out opinion testimony [regarding family members' views] about the appropriate punishment," and by "presenting evidence and argument that Jasmine [Groves]

and other family members had written to the Attorney General urging him not to pursue a capital resentencing against Davis." Br. 82-83 n.47.[11]

Jasmine Groves' testimony about Davis's failure to apologize was relevant both to explain why she favored the death penalty for Davis and why she had changed her mind after signing the family's letter asking the Department of Justice not to seek a death sentence. Having injected the issue of the family members' views into the case, the defense cannot legitimately complain on appeal about the prosecutor's efforts to ensure that the jury understood the basis for Jasmine Groves' views.

This testimony and the prosecutor's reference to it in closing arguments were "*not* used to impeach the defendant's exculpatory story, or as substantive evidence of guilt." *Martinez Larraga*, 517 F.3d at 268 (citation and internal quotations marks omitted). Indeed, the testimony that Davis never apologized for

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[11] The prosecutor elicited some of this testimony from Jasmine Groves before the defense mentioned the Groves family letter to the jury. But even if Jasmine Groves had not mentioned Davis's failure to apologize during her direct examination, the defense undoubtedly would have brought the contents of the Groves family letter to the jury's attention – either by cross-examining Jasmine Groves about the letter or introducing the substance of the letter through a defense witness. The letter was an unusual and powerful piece of evidence for Davis. In light of the district court's pre-trial ruling that the letter would be admissible if the government presented *any* victim impact evidence, the defense undoubtedly would have introduced the Groves family letter one way or the other.

Groves' murder is entirely consistent with his claimed defense of innocence, which he emphasized to the jury. See *Shaw*, 701 F.2d at 384 (finding no *Doyle* violation where reference to defendant's silence "was not used to impeach [his] exculpatory story, or to ask the jury to draw an inference of guilt"). The jury, which knew that Davis still maintained he had nothing to do with Groves' death, surely was not surprised to learn that Davis had never apologized for her murder.

Second, in a sentencing proceeding, references to a defendant's silence are permissible where, as here, the comments on silence are used for some purpose other than to establish the facts of the underlying crime for which the defendant is being sentenced. See *Mitchell* v. *United States*, 526 U.S. 314, 329-330 (1999); *United States* v. *Ronquillo*, 508 F.3d 744, 748-749 (5th Cir. 2007), cert. denied, 128 S. Ct. 2458 (2008).

In *Mitchell*, the Supreme Court held that a sentencing judge may not draw adverse inferences about the underlying *facts of the crime* from a defendant's silence at sentencing. 526 U.S. at 329. Importantly, however, the Court expressly left open the "separate question" whether the Constitution allows reliance on a defendant's silence in determining "a lack of remorse" or in deciding whether a defendant is entitled to credit for "acceptance of responsibility" under the Sentencing Guidelines. *Id*. at 330; see also *id*. at 338 (Scalia, J., dissenting)

(noting that majority left "open the possibility that the acceptance-of-responsibility Sentencing Guideline escapes the ban on negative inferences").

This Court in *Ronquillo* addressed a question that *Mitchell* left open. Applying *Mitchell*, this Court found no constitutional violation where, at sentencing, the district court referred to the defendant's silence in expressing doubt that he was remorseful. *Ronquillo*, 508 F.3d at 749. The defendant in *Ronquillo* pleaded guilty to drug offenses, but failed to cooperate with the government "by providing 'names' and 'information'" related to his involvement in the drug business. *Id.* at 747-748. Based on the defendant's refusal to provide this information to the government, the court at sentencing noted "its doubt concerning whether [the defendant] was repentant for his crime." *Id.* at 749. This Court rejected defendant's argument that the court's reference to his silence violated his constitutional rights. Unlike in *Mitchell*, this Court held, the judge in *Ronquillo* did not use the defendant's failure to cooperate with the government to draw any adverse inferences about "the facts of the offense" for which he was being sentenced. *Ibid.* (internal quotation marks omitted).

Although *Ronquillo* was not a capital case, its reasoning is fully applicable here. As this Court has emphasized, the scope of the constitutional right to remain silent does not turn on the fact that the defendant faces the death penalty. *Battie* v.

Estelle, 655 F.2d 692, 700 n.17 (5th Cir. 1981). "Nothing in the history of the privilege [against self-incrimination] demonstrates that it was intended to afford any special protection in capital cases, and none of the values the privilege is designed to protect reflect concern for the accuracy of trial results." *Ibid*.

Other courts of appeals "have readily confined *Mitchell* to its stated holding, and have allowed sentencing courts to rely on, or draw inferences from, a defendant's exercise of his Fifth Amendment rights for purposes other than determining the facts of the offense of conviction." *Lee* v. *Crouse*, 451 F.3d 598, 605 n.3 (10th Cir.), cert. denied, 549 U.S. 1037 (2006). The Sixth Circuit, for example, found no error where, in imposing sentence, the district court took into account the defendant's refusal to undergo a polygraph test and to complete a psychosexual evaluation. *United States* v. *Kennedy*, 499 F.3d 547, 552 (6th Cir. 2007), cert. denied, 128 S. Ct. 1648 (2008). The sentencing judge in *Kennedy* did not violate defendant's constitutional right to remain silent because "the district court plainly considered [defendant's] refusal to complete testing in determining his propensity for future dangerousness, rather than in determining facts of the offense." *Ibid.*

Here, as in *Ronquillo*, the references to Davis's failure to apologize were not used to draw inferences about the underlying offense for which he had been

convicted. Instead, as previously noted, the testimony and arguments about his lack of remorse explained Jasmine Groves' views on whether Davis should receive a death sentence and why she had changed her mind about the appropriate penalty – issues that were proper responses to the defense's decision to inject into the case the family members' views on whether Davis should get the death penalty.[12]

Lack of remorse is widely accepted as relevant in sentencing, and courts of appeals in death penalty cases have permitted the government to present evidence about a defendant's failure to express remorse. For example, the prosecutor in *Williams* v. *Chrans*, 945 F.2d 926, 951 (7th Cir. 1991), elicited the following testimony from a probation officer at the defendant's death penalty hearing:

> Q. Okay. When you spoke with [the defendant] * * * did the defendant ever express to you any remorse for what he had pled guilty to and what he had done?
>
> * * *
>
> A. * * * He did not express any remorse.
>
> Q. Nor did he express any feelings of remorse?
>
> A. No, he did not.

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[12] Nor were the statements in this case fundamentally unfair under *Wainwright* v. *Greenfield*, 474 U.S. 284 (1986). That case involved use of silence to rebut a defense to guilt, not use of silence to draw an inference about a matter collateral to, or distinct from, guilt – like lack of remorse.

Id. at 953 & n.47; see also *id.* at 950. The Seventh Circuit rejected the argument that the probation officer's testimony was an improper comment on defendant's right to remain silent. *Id.* at 953.

Similarly, in *United States* v. *Lee*, 274 F.3d 485, 495 (2001), cert. denied, 537 U.S. 1000 (2002), the Eighth Circuit found no error in a death penalty case when the prosecutor elicited testimony from a psychologist that the defendant had failed to express remorse. The court concluded that this testimony "fell within the wide boundaries set for the admission of evidence at capital sentencing hearings." *Ibid.*

In *Sims* v. *Brown*, 425 F.3d 560 (9th Cir. 2005), cert. denied, 549 U.S. 833 (2006), the court found no reversible error where the prosecutor repeatedly emphasized, during the penalty phase of a capital case, that the defendant had failed to express remorse during his interviews with police officers after he received *Miranda* warnings or during interviews with a psychiatrist. *Id.* at 586-589; see *id.* at 588 (during closing argument, prosecutor asked rhetorically: "Has [defendant] yet come out and said to anyone that tearfully that he is sorry for what happened, that he thinks about it every day, that he can't sleep at night?"); see also *id.* at 565, 567, 569-570. The Ninth Circuit rejected defendant's claim that these remarks about lack of remorse were an impermissible comment on his failure to

testify at his death penalty trial. *Id.* at 588 (distinguishing *Beardslee* v. *Woodford*, 358 F.3d 560, 587 (9th Cir.), cert. denied, 543 U.S. 842 (2004), which construed a prosecutor's remarks about defendant's lack of remorse as an impermissible comment on his failure to testify, but nonetheless found the error harmless). See also *Gaskins* v. *McKellar*, 916 F.2d 941, 951 (4th Cir. 1990) (finding no constitutional error where the prosecutor stated in closing argument that "[defendant] has announced to the Court that he is going to make a speech to you as well. I want [defendant] when he comes up to tell you what in his character caused him to murder each of these people. * * * [Defendant] has shown no remorse. No emotion. He has shown you nothing."), cert. denied, 501 U.S. 1269 (1991).

The cases Davis cites do not compel a different result. None of the controlling cases he cites involved a situation where, as here, the prosecutor was referring to lack of remorse as a legitimate response to an issue injected into the case by the defendant. In *Gholson* v. *Estelle*, 675 F.2d 734 (5th Cir. 1982) (see Br. 80), this Court reversed a sentence where the prosecutor relied on extensive, surprise testimony from psychiatrists who had evaluated defendants before trial. Some of the examination was without the court's permission, counsel's knowledge, or *Miranda* warnings. *Id*. at 742. Importantly, *Gholson* was decided

before *Mitchell* and this Court's application of *Mitchell* in *Ronquillo*. Nor is *Lesko* v. *Lehman*, 925 F.2d 1527, 1540 (3d Cir.), cert. denied, 502 U.S. 898 (1991), applicable here. It was also decided before *Mitchell* and is not consistent with this Court's decision in *Ronquillo*.

Finally, Davis points to no controlling case reversing a sentence based on victim-impact testimony or related arguments that the defendant did not apologize. Thus, even if there were error, Davis has not shown that it was "clear" or "obvious" error – one of the showings he must make under the plain-error standard. See *Puckett* v. *United States*, 129 S. Ct. 1423, 1429 (2009).

2. Davis Has Not Shown That Any Error Affected His Substantial Rights

Even if Jasmine Groves' testimony and the prosecutor's arguments were an impermissible comment on Davis's silence, Davis has not met his burden of showing that the alleged errors affected his substantial rights. Where the issue has been preserved for appellate review, an improper comment on a defendant's silence "must have a 'clear effect' on the jury before reversal is warranted." *United States* v. *Sylvester*, 143 F.3d 923, 930 (5th Cir. 1998). Davis has not demonstrated that the alleged impropriety had a "clear effect" on the jury, and thus he necessarily has failed to make the heightened showing of prejudice required for reversal under a plain-error standard.

As previously explained, the comments on Davis's lack of remorse were completely consistent with Davis's defense that he was innocent and had nothing to do with Groves' death. See *United States* v. *Smith*, 635 F.2d 411, 413 (5th Cir. 1981) (concluding that comment on defendant's silence was harmless because it "in no way undermined any exculpatory defense offered by appellant"). Consequently, the statements that Davis lacked remorse did not offer any information that was new to the jurors; they would naturally assume that Davis had never apologized for a crime he was still claiming he did not commit.

To the extent the jury considered lack of remorse in assessing Davis's future dangerousness or the negative impact of his crime on Jasmine Groves, other more powerful evidence at trial overshadowed Groves' testimony and the prosecutor's statements. More than once, Davis expressed jubilation at Groves' death during recorded telephone conversations that were played for the jury. SR 5511, 5551, 5553; LD-18; LD-20. This chilling evidence, combined with Davis's assertions of innocence at the resentencing trial, was undoubtedly much more powerful than a third-party's statement that she had never known him to offer an apology.

3. There Has Been No Miscarriage Of Justice

Davis has not demonstrated a miscarriage of justice, a prerequisite for reversal under a plain-error standard. *United States* v. *Acosta*, 475 F.3d 677, 681

(5th Cir. 2007). Even where admission of evidence would otherwise be plain error, a defendant may not obtain reversal where he either "instigates such admission, or attempts to exploit the evidence." *United States* v. *Leach*, 918 F.2d 464, 467 (5th Cir. 1990), cert. denied, 501 U.S. 1207 (1991).

Defendant tried to use the family's feelings about the death penalty to his own advantage. He opposed efforts to exclude the family members' opinions and used their letter to suggest that they wanted him to "spend the rest of his [life in prison] thinking about what he did." SR 6180; DRE Tab 12. Under these circumstances, Jasmine Groves' testimony and the prosecutors' arguments about lack of remorse hardly resulted in a miscarriage of justice.

D. The Testimony And Argument About Davis's Thoughts Were Not Plain Error

Davis also argues (Br. 75-76, 81 n.46, 105) that the prosecutor erred by (1) asking Jasmine Groves whether the defendant was "thinking" about her mother and (2) arguing that Davis "thinks of Kim Groves" only "to ponder how he could have done this murder better." SR 6181, 6315; DRE Tab 12 & 14. Here again, the defendant "exploit[ed]" such evidence. *Leach*, 918 F.2d at 467. The defense based its arguments for life imprisonment on the family's wishes and suggested in cross examining Jasmine Groves that Davis would "spend the rest of his life" in

prison "thinking about what he did." SR 6180; DRE Tab 12. Only after this did the prosecutor question Jasmine Groves about Davis's "thinking." The prosecution's questions and arguments were thus proper responses to issues raised by the defense.

E. Jasmine Groves' Statements About Her Emotional Struggles Were Not Plain Error

Davis claims (Br. 82) that Jasmine Groves improperly "addressed Davis by name; repeatedly expressed her hatred for him; and also commented on the crime, including how her mother 'did not have a chance' and was 'more than a rock-head ho.'" Davis did not object to any of this testimony at trial, and thus his claims are reviewed for plain error.

"[E]vidence about the victim and about the impact of the murder on the victim's family" is relevant at the sentencing phase of a capital case, and "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). The FDPA provides that the government may present victim-impact testimony "concerning the effect of the offense on the victim and the victim's family," including "the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information." 18 U.S.C. 3593(a). Such evidence is admissible even

though it is "inflammatory by nature," *United States* v. *Sampson*, 486 F.3d 13, 46 (1st Cir. 2007), cert. denied, 128 S. Ct. 2424 (2008), and may be presented "unless it is so unduly prejudicial that it renders the trial fundamentally unfair." *United States* v. *Fields*, 483 F.3d 313, 340 (5th Cir. 2007) (citation and internal quotation marks omitted), cert. denied, 128 S. Ct. 1065 (2008). Ordinarily, however, a victim's relatives are not permitted to offer opinions and characterizations of the defendant or his crime. *Booth* v. *Maryland*, 482 U.S. 496, 508-509 (1987), overruled in part by *Payne*, *supra*; *United States* v. *Bernard*, 299 F.3d 467, 480 (5th Cir. 2002), cert. denied, 539 U.S. 928 (2003).

The victim-impact testimony that Davis challenges on appeal was a proper response to the defense. As previously noted, the defense concedes (Br. 82-83 n.47) that it invited inquiry into the family's position on Davis's fate. The testimony at issue here – including Jasmine Groves' expression of hatred for Davis – helps explain why she favored the death penalty for Davis and why she changed her mind after signing the letter to the Department of Justice. Having opened the door to this type of evidence, the defense cannot legitimately complain about the prosecution's effort to give the jury an accurate view of Jasmine Groves' feelings on the subject.

Moreover, when viewed in context, Jasmine Groves' description of her hatred toward Davis was an attempt to describe the suffering that she experienced as a result of her mother's murder – suffering that includes her own emotional struggle with her feelings toward defendant. This is appropriate victim-impact evidence in a death penalty case because it describes "the specific harm caused by the crime in question," *Payne*, 501 U.S. at 825, and explains "the effect of the offense on * * * [a member of] the victim's family." 18 U.S.C. 3593(a). Jasmine Groves explained that she was troubled by her anger and hatred towards Davis and was struggling to overcome those feelings: "At times, I hate you and at times I wish I can forgive you. Then there are times I hate you for making me hate you, because I believe no human should hate another person." SR 6176; DRE Tab 12. During closing arguments, defense counsel recognized the unwanted emotions that Jasmine Groves had to grapple with because of her mother's death:

> That lovely little lady, you could tell how convicted [*sic*] she was. What did she say in that letter that she wrote? I hate you Len Davis because you make me hate. And she doesn't want to hate. She wants to forgive, she wants her mother back.

SR 6306.

Moreover, allowing Jasmine Groves to address defendant by name was not improper, much less plain error. Her remarks were far less inflammatory than

those at issue in *United States* v. *Barnette*, 390 F.3d 775, 798 n.7, 801 (4th Cir. 2004), vacated on other grounds, 546 U.S. 803 (2005). In *Barnette*, the victim's mother directly addressed the defendant who had killed her daughter, asking him: "How could you do that, Marc? * * * How can you kill my baby? Why you kill (sic) my baby, Marc? She loved you, you know that. She never mistreated you, Marc." 390 F.3d at 798 n.7. The Fourth Circuit concluded that these statements "did not offer 'characterizations and opinions about the crime [or] the defendant,'" but instead, "described the trauma that [the victim's mother] has suffered due to the murder of her only daughter." *Id.* at 800 (citation omitted).

Nor did Jasmine Groves improperly "comment[] on the crime" (Br. 82) by saying that her mother "did not have a chance" and was "more than a rock-head ho." With regard to the first statement, which is misleadingly truncated in Davis's brief, Jasmine Groves testified that her mother "did not have a chance *to think about her mistakes in life*" (SR 6177; DRE Tab 12) (emphasis added) – a reference to the tragedy of her life being cut short, not to the circumstances of the murder itself. See *Payne,* 501 U.S. at 816 (affirming death sentence where prosecutor argued that the young victim "never had the chance to grow up."). The other comment simply conveyed to the jury the loss caused by her mother's murder: "So you see, she was more than a rock-head ho. To me she was my mother." SR

6177; DRE Tab 12. There was nothing remotely inappropriate about that comment.

Even if the testimony were improper, Davis has not shown that it affected his substantial rights. This Court found no prejudice even from the more extensive testimony offered by the victims' four parents in *Bernard*, 299 F.3d at 480-481, who contrasted the hard-hearted murderers with their religious victims, explored the defendants' motives, and otherwise "characterize[d] the [defendants], and offer[ed] opinions about the nature of their crime." The court found the erroneous statements outweighed by "the pathos of the admissible impact on the parents." *Id.* at 481. Surely, if such statements from multiple witnesses did not infect the trial with unfairness, Groves' brief statements did not. *Id.*; see also *Payne*, 501 U.S. at 832 (A "brief statement did not inflame [the jury's] passions more than did the facts of the crime.").

Furthermore, as in *Bernard*, any risk of prejudice here "was mitigated by the district court's instructions to the jurors not to be swayed by passion, prejudice or sympathy." 299 F.3d at 481. See SR 6337; DRE Tab 15 ("you must avoid any influence of passion, prejudice or undue sympathy"). As this Court has emphasized, it will "presume that the jury followed its instructions." *Bernard*, 299 F.3d at 481.

F. Jasmine Groves' Statements About The Legal Process Were Not Plain Error

Davis claims (Br. 83) his death sentence should be reversed because Jasmine Groves mentioned his ability to appeal. This was not improper, much less plain error, as the statements responded to the defendant's use of the Groves family letter by explaining Jasmine Groves' wishes. The defense suggested, and Jasmine Groves agreed, that, in its letter, the Groves family sought a life sentence "[s]o that [it] could have some closure." SR 6180; DRE Tab 12. In response, the prosecutor questioned Groves about her change of mind. She gave several reasons, explaining that she originally believed that if Davis received a life sentence "it would be over, no more court, no more nothing, so I can get on and deal with it and accept it. * * * But he can keep appealing and keep going through this for the rest of our life." SR 6182; DRE Tab 12. Because defense counsel questioned Jasmine Groves on her change of mind, Davis cannot now object to Groves' being given the opportunity to explain the change. See *Leach*, 918 F.2d at 467 (holding that defendant cannot complain about evidence whose admission he invited).

Davis speculates (Br. 84) that Jasmine Groves' testimony misled jurors to think that he would continue his appeals for "a half-century" if sentenced to life imprisonment. There is no reason to believe the jury would have taken literally

Groves' statement that Davis could keep appealing "for the rest of our life." SR 6182; DRE Tab 12. (Defense counsel, who failed to object, apparently did not interpret it as a literal statement.) The jury most likely viewed Jasmine Groves' comment as an expression of her frustration rather than an expert prognosis on future litigation in Davis's case.

Finally, Davis argues that Jasmine Groves' reference to appeals "misle[d] the jury as to its role in the sentencing process" (Br. 84-85) by suggesting that jurors could vote for the death penalty without having to worry that it would ever be carried out. Groves' testimony cannot plausibly be interpreted as sending such a message. This is not a case like *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), where the prosecutor and trial judge in a capital case "misled the jury to believe that the responsibility for sentencing the defendant lay elsewhere." *Romano* v. *Oklahoma*, 512 U.S. 1, 8 (1994). Indeed, the jury instructions in this case ensured that jurors fully understood their weighty responsibility in deciding whether Davis would live or die. Specifically, the judge instructed the jury that

> You must now consider whether imposition of a sentence of death is justified for either or both of these crimes, or whether Mr. Davis should be sentenced to life imprisonment without the possibility of release or a lesser sentence for commission of either or both of these crimes. *This decision is left exclusively to you, the jury*. If you unanimously determine that the defendant should be sentenced to

> death, or to life imprisonment without possibility of release, *the Court is required to impose that sentence*.

SR 6328; DRE Tab 15 (emphasis added); accord SR 6329-6330, 6337; DRE Tab 15; see also SR 6338; DRE Tab 15 ("You are called upon to decide whether Mr. Davis should live or die."). And defense counsel hammered the point home, telling jurors they should not assume that if they "make a mistake, some appellate court will take care of it. * * * You and you alone determine whether or not death is given." SR 6298-6299. Under these circumstances, Groves' brief reference to appeals could not plausibly have misled the jury about its awesome responsibilities.

V

THE PROSECUTORS' CLOSING ARGUMENTS AT THE SELECTION PHASE WERE NOT REVERSIBLE ERROR

Davis contends (Br. 89-106) that portions of the prosecutors' closing arguments at the selection phase were improper and require reversal of his death sentence. This contention is meritless.

A. Standard Of Review

If a party preserves an objection to a closing argument, the district court's rulings on the matter are reviewed for abuse of discretion. *United States* v. *Griffin*, 324 F.3d 330, 361-362 (5th Cir. 2003). Under this deferential standard of

review, "[i]mproper prosecutorial comments constitute reversible error only where 'the defendant's right to a fair trial is substantially affected.'" *United States* v. *Bernard*, 299 F.3d 467, 488 (5th Cir. 2002), cert. denied, 539 U.S. 928 (2003) (citation omitted). "A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *Ibid.* (citation omitted). "The factors relevant to this inquiry are: '(1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of the defendant's guilt.'" *Ibid.* (citation omitted). In reviewing a prosecutor's arguments, the Court should keep in mind they "are seldom carefully constructed in toto before the event" and that any inappropriate remark fished out of a transcript will not necessarily have an impact on "a jury, sitting through lengthy exhortation." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646-647 (1974).

"This already narrow standard of review is further constrained" if the defendant failed to object to the prosecutor's arguments in the district court. *United States* v. *Holmes*, 406 F.3d 337, 356 (5th Cir.), cert. denied, 546 U.S. 871 (2005). Absent an objection, this Court reviews the prosecutor's arguments only for plain error. *Ibid*. See pp. 42-43, *supra*.

With one exception,[13] Davis failed to object below to the portions of the prosecutors' closing arguments that he now challenges on appeal. Therefore, except for one of the arguments discussed in Subsection G (pp. 136-137, *infra*), the prosecutors' arguments at issue here are reviewed only for plain error.

B. Overview

As explained below, the prosecutors' arguments were not improper. But, even if some of the remarks were inappropriate, reversal would be unwarranted under a plain-error standard because none of the statements "substantially affected" Davis's "right to a fair trial," *Bernard*, 299 F.3d at 488, much less "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Jackson*, 549 F.3d 963, 975 (5th Cir. 2008), petition for cert. filed (Feb. 13, 2009) (No. 08-8713). The district court frequently reminded jurors that counsel's arguments and statements "are not evidence." SR 5492-5493, 5514, 5564. This Court has found repeatedly that such instructions minimize the prejudicial impact that a prosecutor's improper arguments might otherwise cause. See, *e.g.*, *United States* v. *Ramirez Velasquez*, 322 F.3d 868, 875 (5th Cir.), cert. denied, 540 U.S. 840 (2003); *United States* v. *Gamez Gonzalez*,

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[13] Davis did object to the prosecutor's statement that "[t]he death penalty was an act for murderers like this and murderers like Len Davis. You will never see a more cold, calculated killing." SR 6320; DRE Tab 14.

319 F.3d 695, 701 (5th Cir.), cert. denied, 538 U.S. 1068 (2003); *Bernard*, 299 F.3d at 488. Furthermore, overwhelming evidence supported the government's aggravating factors, and thus the jury would have reached the same verdict in the absence of the prosecutors' statements.

C. The Prosecutors Committed No Error, Much Less Plain Error, In Pointing Out That A Life Sentence Would Be Inadequate Punishment Because Davis Was Already Serving A Life Sentence On Another Offense

During their arguments at the selection phase, prosecutors told the jury that sentencing Davis to life imprisonment for his convictions under 18 U.S.C. 241 and 242 would not, as a practical matter, punish him for those offenses because he was already serving a life sentence on an earlier drug conspiracy offense. SR 6296-6297, 6318-6319; DRE Tab 13 & 14. The prosecutors' statements were a valid response to defense counsel's arguments.

It was defense counsel, not the prosecutors, who first notified the jury at the selection phase that Davis was already serving a life sentence for a prior drug conspiracy conviction. Defense counsel advised the jury that because of his previous life sentence, "no matter what happens, [Davis] will be spending the rest of his life in prison." SR 6065. Later, defense counsel argued that "Davis *is going to get punished very severely no matter what you decide*." SR 6077 (emphasis added); see also SR 6067 (urging jury to consider whether Davis is "someone that

we can punish very severely with a sentence of life in prison"). "He is going to wake up every morning for the rest of his life when he is told to wake up, in a cell about six feet by nine feet," defense counsel argued. SR 6077. "He is going to eat what he is fed and not make a single move without the permission of armed guards. Wherever he goes, gates are going to clang and lock behind him and he will never, ever get out." SR 6077. Later, in urging the jury to select a life sentence rather than the death penalty, defense counsel emphasized that she was asking jurors "to impose a sentence that is *very severe*." SR 6077 (emphasis added).

The prosecutor was justified in responding to defense counsel's assertions that imposing a life sentence for the killing of Kim Groves would be a "very severe" punishment. The government permissibly explained to the jury that, in fact, a life sentence for Davis in this case would not be a severe punishment because, as defense counsel had emphasized to the jury, Davis was already going to spend the rest of his life in prison on the drug conspiracy charge under conditions imposing severe restrictions on all of his activities.

Other appellate courts have found no error, or at least no reversible error, when prosecutors made analogous arguments in other death penalty cases. See, *e.g.*, *Rodden* v. *Delo*, 143 F.3d 441, 446-447 (8th Cir.), cert. denied, 525 U.S. 985

(1998); *Spivey* v. *Head*, 207 F.3d 1263, 1277-1278 (11th Cir.), cert. denied, 531 U.S. 1053 (2000); *State* v. *Thomas*, 158 S.W.3d 361, 414-415 (Tenn.), cert. denied, 546 U.S. 855 (2005); *People* v. *Prince*, 156 P.3d 1015, 1097 (Cal. 2007), cert. denied, 128 S. Ct. 887 (2008).

In *Rodden*, for example, the Eighth Circuit affirmed the defendant's death sentence for the second in a pair of murders. 143 F.3d at 444, 448. At a previous trial, the defendant was found guilty of the first murder and sentenced to life imprisonment without the possibility of parole for 50 years; in the second trial, he was found guilty of the second murder and sentenced to death. *Id.* at 444. The prosecutor argued to jurors at the second trial that if they refused to impose the death penalty and, instead, awarded the same sentence that defendant received at the first trial – *i.e.*, life imprisonment without the possibility of parole for 50 years – the defendant would "get the murder of the second person free." *Rodden*, 143 F.3d at 446. The Eighth Circuit found no error, concluding that "[i]n context, the prosecutor's statements about the second murder being free urged the jury to impose additional punishment for the additional crime." *Id.* at 447.

Other courts have reached similar conclusions in analogous cases. In *Spivey*, the Eleventh Circuit found no reversible error where the prosecutor argued that a "verdict of life imprisonment will not add one day of punishment" for a

defendant who had already received a life sentence for another murder conviction. 207 F.3d at 1277-1278. Likewise, the Tennessee Supreme Court found no plain error in *Thomas*, where the prosecutor argued that choosing a life sentence rather than the death penalty would be tantamount to saying "[l]et's just forget this murder" and that the victim's death "should be a freebie." 158 S.W.3d at 414-415. That court determined that the defense opened the door for the prosecutor's comments by arguing that a death sentence was inappropriate because defendant was already serving a sentence that would keep him in prison until at least age 80. *Id*. at 414. Finally, in *Prince*, the California Supreme Court found no impropriety where the prosecutor argued that a life sentence for a defendant who murdered six victims would mean that five of the murders were "freebies," in light of the fact that the minimum penalty for one murder was life imprisonment. 156 P.3d at 1097 (disagreeing with *People* v. *Kuntu*, 752 N.E.2d 380 (Ill. 2001), cited at Br. 93-94).

Contrary to Davis's assertion (Br. 92), the decision in *Sumner* v. *Shuman*, 483 U.S. 66 (1987), does not support his contention that the prosecutors' statements were improper. *Sumner* did not address the propriety of a prosecutor's remarks. Instead, the Court held that a state cannot categorically mandate the death penalty for murderers already serving a life sentence. *Id.* at 85. Even if a defendant is already in prison for life, the Court concluded, the Eighth

Amendment requires that he or she "be able to present any relevant mitigating evidence that could justify a lesser sentence" than death. *Ibid.* Here, Davis was permitted to present mitigating evidence, and the jury made an individualized determination after weighing Davis's evidence against the government's aggravating factors. Davis thus received the "individualized-sentencing procedures" mandated by the Eighth Amendment. *Ibid*.

Davis is also mistaken in asserting (Br. 92-93) that the prosecutors' arguments communicated to jurors that they should "ignore the court's instructions to determine [the] sentence on the basis of the aggravating and mitigating evidence." In his opening statement at the selection phase, the prosecutor reminded the jury they should weigh mitigating factors against the government's evidence of aggravating factors. SR 6052. Later, in his closing argument, the prosecutor addressed each of the defense's proffered mitigating factors in detail. SR 6314-6318; DRE Tab 14.

At any rate, the district court's jury instructions alleviated any risk of prejudice. The court instructed the jury that "[t]he law permits you to consider and discuss only those aggravating factors specifically claimed by the government," SR 6330; DRE Tab 15, and after listing those factors, the court again emphasized

that those were the "only" aggravating factors the jury could consider. SR 6331; DRE Tab 15.

D. The Prosecutors Did Not Act Improperly, Much Less Commit Plain Error, In Responding To Defense Counsel's Suggestion That A Verdict Imposing The Death Penalty Would Be Comparable To Murder

In closing argument, defense counsel tearfully suggested that, if jurors voted for a death sentence, they would not be "just delivering a verdict in a legal case," but would instead be "killing" Davis and would bear "responsibility" for his death. SR 6298. Indeed, defense counsel went so far as to suggest that the jury's role in Davis's death would be analogous to his responsibility for the murder of Kim Groves:

> You have the power to kill a human being. We are not going to sugarcoat that.
>
> Now, counsel for the government may say, well, you're just delivering a verdict in a legal case, you are not killing anybody. No. They might as well argue that Len Davis can't be responsible for the death of Kim Groves because he didn't pull the trigger. According to their theory, Paul Hardy pulled the trigger. Well, you can't argue that just because you won't be the one to strap him on the gurney and put the needle into the vein and push in the poison that you don't have a responsibility. Because you do.

SR 6298.

In response, the prosecutor forcefully rejected that comparison and urged the jury not to cower in the face of defense counsel's argument:

> Counsel talked to you in the beginning of his closing argument about killing. How dare he compare your dedication, your willingness to follow your sworn duty with the murderous rampage of Len Davis. It is a cheap trick and he is attempting to manipulate you. Don't let him. You are not here by choice, you are here because Len Davis is a murderer. He slaughtered Kim Groves. You are not killing Len Davis, you are enforcing the laws of the United States. You are bringing him to justice. That needs to occur. The government is confident you will not cower and you will not be intimidated.

SR 6313; DRE Tab 14. The prosecutor returned to this theme later in his argument:

> Do not confuse mercy with weakness. You have an obligation to uphold the law and that takes courage.
>
> * * * * *
>
> Certain crimes, regardless of mitigation, deserve the death penalty. The act is so reprehensible it demands a sentence of death. You see, ladies and gentlemen, this crime not only involved one victim, but 500,000 victims, the people of the city of New Orleans. And it was an insult on our entire criminal justice system. Do not capitulate, be vigilant. Your response to his behavior cannot be tepid, it cannot be timid, it must be certain and it must be in kind and it must express our outrage and unyielding commitment to the rule of law.

SR 6319-6321; DRE Tab 14.

Davis contends that this portion of the argument was improper in a number of respects. None of his contentions has merit, and he certainly has not demonstrated that reversal is warranted under a plain-error standard.

First, Davis incorrectly claims (Br. 95) that this portion of the prosecutors' argument "improperly told jurors they were legally duty-bound to return a death sentence, [and] that failing to do so would be cowardice." That is not a fair interpretation of the prosecutor's statements when read in context. Instead, the prosecutor's statements were a forceful, but permissible, response to defense counsel's suggestions that jurors were morally obligated to choose a life sentence to avoid culpability analogous to Davis's murder of Groves. See *United States* v. *Young*, 470 U.S. 1, 18 (1985) (finding prosecutor's comments permissible "in response to defense counsel's rhetoric"). By urging jurors "not [to] cower" (SR 6313; DRE Tab 14), not to be "timid" (SR 6321; DRE Tab 14), and to have "courage" (SR 6319; DRE Tab 14), the prosecutor was properly urging the jury to "not be intimidated" (SR 6313; DRE Tab 14) by defense counsel's attempt to compare a death sentence with murder. Indeed, the prosecutor's remarks here were far tamer than other references to "courage" that have been found permissible in a death penalty case. See *Davis* v. *Maynard*, 869 F.2d 1401, 1410 (1989) (finding no error where the prosecutor told jurors that if they did not impose a death sentence, they may "pick up the morning paper in a month or a week o[r] five years, and [find that defendant] has killed somebody else. How do you live with that? How do you say to yourself: You know, if I had had the *courage* to do

what was right and what the evidence compels and what the law requires, if I had had the *courage* to do it then, it wouldn't have happened.") (emphasis added), vacated, 494 U.S. 1050, reinstated in relevant part, *Davis* v. *Maynard*, 911 F.2d 415, 418 (10th Cir. 1990).

Nor did the prosecutor's remarks communicate to jurors that they were legally obligated to impose the death penalty or that they lacked discretion to choose a sentence of life imprisonment. It was not objectionable in the least for the prosecutor to tell jurors that they had "an obligation to uphold the law." SR 6319; DRE Tab 14. That was an accurate statement and, indeed, simply echoed the district court's admonition to the jury that it had an "obligation to strictly follow the applicable law." SR 6329; DRE Tab 15. Although the prosecutor made an innocuous reference to the jurors' "willingness to follow [their] sworn duty" (SR 6313; DRE Tab 14), he did *not* tell the jury that it had a "legal duty" to impose the death penalty. See Br. 98.

At any rate, even if the prosecutor's statements were ambiguous, the district court's jury instructions cleared up any confusion by making clear to the jury that it was not legally obligated to impose the death penalty. Specifically, the court told jurors they were "never required to impose a death sentence" (SR 6335; DRE Tab 15), that "even if you make the findings provided for by law, you are never

required to impose the death penalty" (SR 6047), that "you may decline to impose the death penalty without giving a specific reason for that decision" (SR 6047), that "the law does not assume that every defendant found guilty of committing the offenses here should be sentenced to death" (SR 6329; DRE Tab 15), that this decision "is left exclusively to you, the jury" (SR 6328; DRE Tab 15), and that "[a]ny one of you is free to decide that a death sentence should not be imposed in this case for any reason you see fit" (SR 6335; DRE Tab 15).

Contrary to Davis's argument (Br. 96), his case is nothing like *Viereck* v. *United States*, 318 U.S. 236 (1943). In that case, decided during World War II, the prosecutor invoked fearsome current events to sway the jury to convict the defendant, who worked for German publishers and had failed to properly register as an agent of a foreign principal. *Id.* at 239. In arguments to the jury, the prosecutor in *Viereck* emphasized the country was engaged in a "harsh, cruel, murderous war," that it was "a fight to the death," and that enemies were "at [that] very moment" plotting the jurors' death. *Id.* at 247 n.3. He compared jurors to soldiers fighting abroad, and he emphasized that "[t]he American people" were relying on the jury "for their protection." *Ibid*. He concluded by invoking his status as "a representative of your Government," urging the jury "to do [its] duty." *Ibid*. In Davis's case, the prosecutor did not refer to extraneous political events or

call on his status as a government representative. Thus, the prosecutor's statements here bear no resemblance to the improper attempts to further inflame the passions and prejudices of citizens whose emotions were already "stirred" by the country's participation in the war. *Id.* at 248.[14]

Nor are the prosecutor's arguments here comparable to those in *Weaver* v. *Bowersox*, 438 F.3d 832 (8th Cir. 2006); see Br. 97. In that case, as in *Viereck*, the prosecutor drew an analogy between jurors and soldiers who must have "the courage to kill," and he urged death as part of an effort in the "war on drugs." *Id.* at 840. He also reminded jurors of his responsibility as prosecutor to decide when to seek the death penalty. *Ibid*. The court recognized that comparisons between jurors and soldiers are especially troubling. "Soldiers have no choice but to kill," the court explained, and the reference to the "war on drugs" invited jurors to rely on specific, extraneous current events. *Id.* at 840-841. The prosecutor in Davis's case made no such analogies or arguments.

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[14] The prosecutor's request that the jury do its duty is not impermissible under *United States* v. *Young*, 470 U.S. 1, 5, 18 (1985), where the Court found harmless error in a series of comments, including an admonition that the jury "do its job." See also Br. 96-97. In that case, the prosecutor suggested the jury could do its "job" only by rejecting defendant's arguments and convicting him. The prosecutor in *Young* stated: "If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors." *Id.* at 5.

Next, Davis incorrectly suggests (Br. 95) that the prosecutor's argument communicated to the jury that it should ignore the defense's mitigating evidence. In fact, the prosecutor reminded the jury that the defense would have an opportunity to present evidence of mitigating factors and that the jury would be called on to weigh them against the aggravating factors. SR 6052. Later, in his closing argument, the prosecutor addressed the defense's proffered mitigating factors in detail, arguing that, on balance, the death penalty was the appropriate result given the facts of this case. SR 6314-6318; DRE Tab 14. In doing so, the prosecutor stressed to the jury that its "job [was] to consider all of the evidence." SR 6315; DRE Tab 14. Thus, when read in context, the prosecutor's arguments cannot plausibly be interpreted as telling the jury to ignore Davis's evidence of mitigating factors. See *United States* v. *Johnson*, 495 F.3d 951, 978 (8th Cir. 2007) (when read in context, prosecutor's statement that "intentional murder of children is an unspeakable evil * * * that cannot be mitigated by any evidence" did not tell jury to ignore mitigating evidence), cert. denied, 129 S. Ct. 32 (2008).

Finally, Davis argues (Br. 101) that the prosecutor's argument improperly attacked the integrity of defense counsel. When read in context, the prosecutor's argument was a legitimate, albeit forceful, response to defense counsel's suggestion that voting for the death penalty was comparable to murder. See SR

6313; DRE Tab 14. The prosecutor's comments did not impugn defense counsel's character or integrity but, rather, forcefully attacked her argument.[15] This was proper. See *United States* v. *Palmer*, 37 F.3d 1080, 1086 (5th Cir. 1994) (finding no impropriety where the prosecutor told jurors that defense counsel "wants to confuse you. He wants to throw up a smoke screen."), cert. denied, 514 U.S. 1087 (1995); *Dortch* v. *O'Leary*, 863 F.2d 1337, 1345-1346 (7th Cir. 1988) (finding no fundamental unfairness where the prosecutor, in referring to defense counsel's argument, told the jury that "today you have seen the biggest snow job in the courtroom"), cert. denied, 490 U.S. 1049 (1989).

E. The Prosecutors' Arguments Were Not Improper Appeals To Community Expectations

Davis contends (Br. 98-101) that the prosecutors made improper appeals to community expectations by noting the harms that Davis caused to New Orleans and its citizens, and by telling jurors that they were "the conscience of the community" and that the citizens of New Orleans "wait for you to give them justice." SR 6294, 6313-6314, 6320-6321; DRE Tab 13 & 14. When read in context, these statements were proper.

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[15] In contrast, Davis's counsel did impugn the integrity of the prosecutors, suggesting their use of the witness protection program was tantamount to bribery and that the prosecutors deserved to be indicted. SR 6304.

The references to the harms that Davis caused to the city and its citizens were directly relevant to aggravating and mitigating factors at issue in the case. One of the government's aggravating factors was that Davis "used his position as a police officer to affirmatively participate in conduct that seriously jeopardized the health and/or safety of other persons." SR 6331; DRE Tab 15. The evidence showed that Davis, acting through a hit man, murdered a woman because she pursued a complaint about police brutality, that he initially planned to murder Nathan Norwood if he followed through with a complaint against Davis, and that Davis protected and covered up for Hardy and Causey so that they could freely engage in their violent, and sometimes deadly, criminal activity in New Orleans without fear of being caught. By using his powers as a New Orleans police officer to engage in and facilitate such criminal activity, Davis harmed not only Kim Groves but the citizenry of New Orleans that he was sworn to protect. The prosecutor was entitled to point this out in urging the jury to find the aggravating factors.

The same conduct also undercut the defense's argument that one mitigating factor weighing against the death penalty was Davis's allegedly brave and honorable service as a police officer. SR 5230; DRE Tab 8; see also SR 6067. In

response, the government was entitled to argue that Davis's actions as a police officer harmed, rather than benefitted, the city and its citizens.[16]

This Court has found no error where a prosecutor made arguments that a defendant's crime affected the entire community. See *United States* v. *Robichaux*, 995 F.2d 565, 570 n.15 (5th Cir.) (prosecutor's argument that defendant's crime harmed "the State of Louisiana," the "taxpayers," and "the citizens"), cert. denied, 510 U.S. 922 (1993). See also *Thornburg* v. *Mullin*, 422 F.3d 1113, 1133-1134

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[16] Davis also asserts in a footnote (Br. 100 n.57) that the prosecutor erred in arguing that the jurors "speak for [Kim Groves]," SR 6312; DRE Tab 14, that they should return a death sentence for "every tear that Jasmine Groves cried," SR 6319; DRE Tab 14, and that "Jasmine Groves waits for [the jury] to give her justice," SR 6321; DRE Tab 14. Davis has waived this argument by raising it only in a footnote. See *Bridas S.A.P.I.C.* v. *Government of Turkmenistan*, 345 F.3d 347, 356 n.7 (5th Cir. 2003), cert. denied, 541 U.S. 937 (2004).

At any rate, courts have found no prejudicial error where prosecutors made similar victim-impact arguments. See *Payne* v. *Tennessee*, 501 U.S. 808, 815 (1991) (Prosecutor argued the victim's son "is going to want to know what type of justice was done. * * * With your verdict, you will provide the answer."); *Bland v. Sirmons*, 459 F.3d 999, 1027 (10th Cir. 2006) (no error where prosecutor argued "you have the chance to write the end of the story * * *. Does he get off with a lesser charge because no one's here to speak for [the victim]?"), cert. denied, 550 U.S. 912 (2007). The statements at issue here did not communicate to the jury that it had a civic duty to impose a death sentence, and so *Wilson* v. *Sirmons*, 536 F.3d 1064, 1120-1121, reh'g en banc granted, 549 F.3d 1267 (10th Cir. 2008) (Br. 100 n.56), is inapposite. Finally, the jury heard Jasmine Groves' emotional testimony, and the prosecutor's argument likely had little additional effect, especially in light of the district court's instruction that the jury "must avoid any influence of passion, prejudice or undue sympathy." SR 6337; DRE Tab 15.

(10th Cir. 2005) (finding "little, if any, impropriety" in a death penalty case where prosecutor told jurors that "[y]our decision here affects the lives of not only this defendant but other people in the community"); *United States* v. *Kopituk*, 690 F.2d 1289, 1342-1343 (11th Cir. 1982) (no impropriety where the prosecutor asked jurors "to help clean up" the area by getting rid of defendants whose crimes were "affecting the lives of people and everyone that works in these different cities"), cert. denied, 463 U.S. 1209 (1983).

Contrary to Davis's argument (Br. 98-101), the prosecutors' statements here did not impermissibly appeal to community sentiment. Although a prosecutor may not ask a jury to deliver a death sentence to satisfy "community expectations," *Whittington* v. *Estelle*, 704 F.2d 1418, 1423 (5th Cir.), cert. denied, 464 U.S. 983 (1983), that is not what the prosecutor did in this case. Rather, he stated that the community awaited justice, and that a death sentence was necessary to achieve justice in this case. See SR 6321; DRE Tab 14 ("The citizens of the city of New Orleans wait for you to give them justice. And justice can only be had by sentencing Len Davis to death.").

Such statements are permissible. The prosecutor in a capital case "may appeal to the jury to act as the conscience of the community." *Jackson* v. *Johnson*, 194 F.3d 641, 655 (5th Cir. 1999), cert. denied, 529 U.S. 1027 (2000); see also

Hicks v. *Collins*, 384 F.3d 204, 219 (6th Cir. 2004) (finding no prejudicial error in death penalty case where prosecutor argued that "the people in the community have the right to expect that you will do your duty"), cert. denied, 544 U.S. 1037 (2005). The prosecutor is also "permitted to state in closing argument what he believes has been established by the evidence and to comment fairly on it." *Whittington*, 704 F.2d at 1423. Thus, the prosecutor may argue that, based on the evidence, the death penalty is the only just result. Arguing that the community awaits justice and that a death sentence is just punishment is not the equivalent of arguing that the jury should impose a death sentence because the community desires or expects that result. See *Ward* v. *Dretke*, 420 F.3d 479, 498 (5th Cir. 2005) (no error where the "prosecutor did not state that the people of Williamson County were expecting or demanding a particular sentence"), cert. denied, 547 U.S. 1040 (2006); *Whittington*, 704 F.2d at 1423 (finding no prejudicial error where prosecutor stated that jurors "would be required to explain their verdict to their friends and neighbors and * * * would want to render a verdict of which they could be proud"; noting that prosecutor "did not say that the wishes of the community mandated a particular result"); *Coe* v. *Bell*, 161 F.3d 320, 351 (6th Cir. 1998) (concluding that prosecutor's statement – "[y]ou're here as representatives of this community, as representatives of justice to do your duty" – "was a far cry

from saying * * * that the community * * * demanded the death sentence"), cert. denied, 528 U.S. 842 (1999).

Even if this Court were to find the arguments improper, Davis has not shown that the prosecutor's brief remarks rose to the level of plain error that affected his substantial rights, much less that they seriously affected the judicial proceeding's fairness, integrity, or public reputation. When viewed in the context of the entire penalty proceedings, Davis cannot show that the prosecutor's arguments were "a crucial, critical, highly significant factor upon which the jury based its verdict." *Whittington*, 704 F.2d at 1425. The evidence supporting the government's aggravating factors was overwhelming, and *zero* jurors found any of the mitigating factors proposed by the defense. Moreover, the district court instructed jurors that "[a]ny one of you is free to decide that a death sentence should not be imposed in this case for any reason you see fit. You will not have to explain that reason." SR 6335; DRE Tab 15.

F. The Prosecutors' Arguments Did Not Improperly "Disparage" Davis

Davis argues (Br. 101-102) that the prosecutors improperly disparaged him by referring to him as "evil." Because Davis did not object to this remark below, plain error is the standard of review. See pp. 42-43, *supra*. The prosecutors' remarks, though forceful, were not improper, much less plainly erroneous.

As a general matter, a prosecutor's "use of colorful pejoratives" in referring to the defendant "is not improper" if supported by the evidence. *United States* v. *Fields*, 483 F.3d 313, 360 (5th Cir. 2007), cert. denied, 128 S. Ct. 1065 (2008); accord *United States* v. *Malatesta*, 583 F.2d 748, 759 (5th Cir. 1978), adhered to in relevant part on reh'g, 590 F.2d 1379, 1382 (5th Cir.) (en banc), cert. denied, 440 U.S. 962 (1979). The evidence in this case supports the prosecutor's characterization. One who defies his oath as a peace officer, recruits a hit man to kill an innocent woman, and then rejoices in her murder, see LD-20; LD-18; SR 5860-5861, 5985, 6297, can fairly be characterized as "evil." See *Kinder* v. *Bowersox*, 272 F.3d 532, 551-552 (8th Cir. 2001) (denying habeas relief and noting that Missouri Supreme Court had found no impropriety where prosecutor in death penalty case repeatedly called defendant "evil," and argued that "*[e]vil stares at you in the courtroom,* and I ask you to stare back and do not blink . . . . *We don't want to share our streets one day with evil. We cannot risk one day sharing our lives and our world with evil*.") (emphasis in original).[17]

Even if the remarks were improper and even if they were *plainly* erroneous, reversal would be unwarranted under the plain-error standard because Davis has

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[17] Indeed, defense counsel used the term "evil" to describe Sammie Williams, Davis's former partner: "If it happened the way the government says it happened, can you appreciate anybody more evil than Sammie?" SR 6308.

not shown that they affected his substantial rights, let alone that they seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The prosecutor's use of the term "evil" would not have had any greater prejudicial effect on Davis than did the many audio recordings played for the jury – recordings in which the jury heard Davis, in his own voice, methodically plotting Kim Groves' murder and then rejoicing when she was shot dead in the street. This is particularly so in light of the district court's instructions, which emphasized to jurors that counsel's arguments were not evidence, that they were to rely only on evidence admitted at trial in reaching their decision, and that they should not allow passion or prejudice to play any part in their decision. SR 5492-5493, 5514, 5564-5565, 6323, 6337-6338; DRE Tab 15; see also SR 5972 (prosecutor emphasizing that attorneys' statements are not evidence). See *Fields*, 483 F.3d at 360 (relying on similar instructions in concluding that, even if prosecutors acted improperly in calling defendant a "psychopath," defendant failed to show prejudice).

Indeed, courts have repeatedly found no reversible error where prosecutors described defendants in death penalty cases in pejorative terms that, if anything, were harsher and potentially more prejudicial than the reference to Davis as "evil." See *Darden* v. *Wainwright*, 477 U.S. 168, 179-183 & nn.7,12 (1986) (prosecutor called defendant "an animal," who "shouldn't be out of his cell unless he has a

leash on him," and said he wished defendant's face had been blown off with a shotgun); *Malicoat* v. *Mullin*, 426 F.3d 1241, 1256 (10th Cir. 2005) (prosecutor called defendant "evil" and "a monster"), cert. denied, 547 U.S. 1181 (2006); *United States* v. *Allen*, 247 F.3d 741, 775-777 (8th Cir. 2001) (prosecutor called defendant a "murderous dog"), vacated on other grounds, 536 U.S. 953 (2002); *Wilson* v. *Sirmons*, 536 F.3d 1064, 1118 (prosecutor called defendant an "animal," a "psychopathic killer," and "unadulterated evil" and suggested that he should be "put . . . down to sleep"), reh'g en banc granted, 549 F.3d 1267 (10th Cir. 2008) (cited by defendant, Br. 100 n.56); *Bland* v. *Sirmons*, 459 F.3d 999, 1025 (10th Cir. 2006) (prosecutor called defendant a "sniffling * * * coward," a "heartless and vicious killer," and a "violent and evil man"), cert. denied, 550 U.S. 912 (2007).

G. Prosecutors Did Not "Manufacture Inflammatory Facts" Or Engage In Improper "Vouching"

Davis argues (Br. 102-106) that, during their closing arguments, prosecutors "impermissibly manufactured inflammatory facts" and engaged in improper "vouching-type" arguments about the seriousness of Davis's criminal conduct. These claims are meritless.

At the outset, Davis largely repeats arguments he made in Argument III of his brief. Compare Br. 102-103 with Br. 41-65. Those arguments are meritless for the reasons explained in Argument III of this brief. See pp. 46-80, *supra*.

Next, Davis claims (Br. 103) that the prosecutors' closing arguments "manufactured an imaginary criminal history for him." Because Davis did not object to these arguments below, the prosecutor's remarks are reviewed only for plain error. When read in context, the prosecutors' statements were a permissible response to the defense argument and do not warrant reversal under a plain-error standard.

In argument, defense counsel sought to portray Davis as a basically good and idealistic person who, after years of on-the-job stress, went astray. SR 6067. According to the defense theory, Davis started off as "a good police officer" who received numerous commendations and who "save[d] lives" by risking his own. SR 6310. But the stress of working in a high crime area took its toll on Davis, his attorney argued, and "may have led him to this." SR 6307. Counsel noted Davis's drinking habits and recounted expert testimony about on-the-job pressures that will gradually "break" police officers. SR 6307.

In response, prosecutors vigorously disputed that on-the-job stress explained Davis's crimes or provided a valid reason not to impose the death penalty:

> Counsel talked to you about the character of Len Davis and his good deeds as a police officer. It is not an overstatement to say that Len Davis did more to hurt the NOPD than any officer whoever put on a uniform. He sullied the name and the reputation of the department and then has the audacity, the absolute audacity to ask you to consider his police work as a reason not to impose the death penalty. How dare he. Is the world turned upside down?
>
> You see, wearing the uniform doesn't make you a police officer; having integrity does. Len Davis was corrupt, opportunistic and vulgar long before he became a police officer. The stress of the job may cause you to have poor relationships, bad marriages and act violently against detainees and arrestees. It doesn't cause you to befriend drug dealers and murderers. Your common sense tells you that.

SR 6315-6316; DRE Tab 14. The prosecutor continued this theme, telling jurors that the audio recordings introduced into evidence "show a policeman who chose, made an absolutely free choice and chose the path of lawlessness, the path of violence. They show a man who embraced the criminal culture, reveled in it all the time, all the while disguised, disguised as a policeman." SR 6317; DRE Tab 14. The prosecutor further responded to the defense theory by asking jurors to focus on the evidence about Davis's actions during the days surrounding Kim Groves' murder:

> When you are determining the character of Len Davis consider, too, the week that Kim Groves was executed. * * * The defendant protected what he thought was a drug operation on October 12th. On October 13th, he unleashed Paul Hardy on Kim Groves. On October 14th, he accepts payment from JJ. On October 17th he calls Damon Causey to determine if he killed Christopher Williams. This is the one that we have the head shot conversation. And on October 19th, he is telling Causey when and how to commit his mayhem and murder, how to avoid detection.
>
> Len Davis was not a cop who became a drug dealer and a murderer. He was a drug dealer and a murderer who became a cop. Remember, he wanted to join JJ's organization. He was bad when he joined the force and nothing you have seen or heard in the last couple of weeks could lead you to believe that he is not still the same arrogant, cunning, manipulative criminal he was in 1994.

SR 6317-6318; DRE Tab 14.

The point of this argument was that on-the-job stress did not plausibly explain the seriousness or extent of Davis's criminal conduct, his close associations with other violent criminals, or his wholehearted embrace of the criminal culture. When viewed in context, the statement that Davis "was a drug dealer and a murderer who became a cop" (SR 6318; DRE Tab 14) was likely understood as nothing more than an assertion that Davis was a criminal, rather than a police officer, at heart – a conclusion bolstered by evidence that Davis wanted to leave his job as a police officer to join JJ's drug operation (see SR 6102, 6317-6318; DRE Tab 14).

Davis also appears to take issue with the prosecutor's assertions that Davis "was bad when he joined the force" (SR 6318; DRE Tab 14) and that he "was corrupt, opportunistic and vulgar long before he became a police officer" (SR 6316; DRE Tab 14). These statements, which were not objected to below, were permissible inferences from the evidence. The defense theory was that the accumulated stress of the job fundamentally changed Davis. But a wiretapped conversation between Davis and a friend undercut this theory. On the recording, the friend suggested that the reason that Davis was constantly cursing was because of his "stressful job" as a police officer. SR 6283. Davis denied that on-the-job stress had anything to do with it: "I can't put it on the job, I was a cursing mother fucker before I got on it." SR 6283. One also can reasonably infer from other evidence in the record that Davis had corrupt and even criminal inclinations before he joined the New Orleans Police Department. The extent to which Davis had "embraced the criminal culture" and "reveled in it" (SR 6317; DRE Tab 14) – including his leadership role in directing others to engage in violent criminal conduct, his casual conversations about killing (including laughing about victims being shot in the head), and his comfortable relationships with violent criminals – suggests that his involvement in crime was longstanding, rather than a recent reaction to work-related stress.

But, even if the prosecutor's arguments were improper, and even if they were *plain* error, they do not warrant reversal because Davis has not shown that they affected his substantial rights. The evidence before the jury included audio recordings in which Davis is heard plotting Kim Groves' murder, rejoicing in her death, laughing about murders of other victims, discussing his efforts to use his position as a police officer to protect Hardy's and Causey's violent criminal activity, and talking about his role in the drug conspiracy. LD-1; LD-6; LD-8; LD-9; LD-17; LD-18; LD-20. Compared with this powerful, direct evidence of Davis's criminal conduct, the prosecutors' vague statements that Davis was "bad" and "corrupt" before he became a police officer would not realistically have influenced the jury's verdict. See *Wilson*, 536 F.3d at 1117 (prosecutor's "misstatement" of the evidence during closing argument was not prejudicial in light of the "overwhelming evidence of [defendant's] guilt"); cf. *Bernard*, 299 F.3d at 478 n.9 (holding that witness's statement likely "did not inflame the jury's passions more than did the facts of the crime") (internal quotation marks and alteration omitted). Moreover, the court repeatedly reminded jurors that argument is not evidence (SR 5492-5493, 5514, 5564-5565, 5972), further minimizing any risk of prejudice. See *Scott* v. *United States*, 448 F.2d 581, 583 (5th Cir. 1971) ("an inadvertent misstatement of fact which is neither pronounced nor persistent

and where there is an instruction that the arguments of counsel are not to be treated as evidence, does not affect substantial rights"), cert. denied, 405 U.S. 921 (1972).

Next, Davis argues (Br. 104) that prosecutors made impermissible "vouching-type claims" about his criminal conduct. That argument is also meritless. Specifically, Davis complains about two statements by the prosecutor: (1) "It is not an overstatement to say that Len Davis did more to hurt the NOPD than any officer whoever put on a uniform"; and (2) "The death penalty was an act for murderers like this and murderers like Len Davis. You will never see a more cold, calculated killing." SR 6315-6316, 6320; DRE Tab 14. Davis objected below to the second statement but not the first.

Contrary to Davis's assertion (Br. 104) these two statements would not suggest to a reasonable jury that the prosecutors were referring to "special knowledge" about Davis that was outside the record. The statements were not phrased in the first person, and did not refer to the prosecutors' personal experience. Rather, a reasonable juror would recognize the statements for what they were – arguments about the reasonable inferences that one can draw from the abundant evidence in the record about Davis's planning of Kim Groves' murder,

his reaction to her death, and his use of his powers as a police officer to engage in criminal activity and to protect other violent criminals.

Even if the prosecutors' remarks were improper, however, Davis has not demonstrated that they "substantially affected" his "right to a fair trial," *Bernard*, 299 F.3d at 488 (citation omitted), let alone that they "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Jackson*, 549 F.3d at 975 (citations and internal quotation marks omitted). This Court has excused much more serious remarks where, unlike the present case, a prosecutor expressly relied on his own experience or personal opinion in assessing the relative heinousness of a crime.

In *Baiocchi* v. *United States*, 333 F.2d 32, 37 (5th Cir. 1964), for example, the prosecutor stated: "I've never in my own mind been more certain, absolutely certain, after working as hard on a case, never been more certain or as certain of guilt as in this case." This Court concluded that these remarks did not prejudice the defendant. *Id*. at 37-38.

Following *Baiocchi*, this Court upheld a defendant's conviction in *United States* v. *Shaw*, 701 F.2d 367, 390-392 (5th Cir. 1983), cert. denied, 465 U.S. 1067 (1984), despite the prosecutor's argument that "I have tried a lot of cases. I've been prosecuting seven years, kidnaping, rapes, every type offense you can have.

And all that time, I've never seen a colder, more cold-blooded, remorseless defendant."

Later, in a death penalty case, this Court found no fundamental unfairness where the prosecutor stated: "I deal with criminal cases every week, ladies and gentlemen, and I might submit to you that I don't ask for the death penalty in every case because they may not warrant it, but this case I'm asking for the death penalty." *King* v. *Puckett*, 1 F.3d 280, 286 (5th Cir. 1993).

The prosecutors' arguments in Davis's case, by contrast, did not invoke the prosecutors' personal experience or personal opinion about his guilt. If the arguments in *Baiocchi*, *Shaw*, and *King* were not prejudicial, the prosecutors' remarks in Davis's case certainly do not rise to the level of reversible error.[18]

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[18] In a footnote (Br. 104-105 n.60), Davis argues that the prosecutor impermissibly vouched for Williams by stating: "There is not one tape, not one conversation between Sammie Williams and Paul Hardy or Sammie Williams and Damon Causey where Sammie Williams is counseling them to commit their mayhem. Because if there was, Sammie Williams would be sitting at that table." SR 6294-6295; DRE Tab 13. Davis's argument is waived because he raised it only in a footnote. See *Bridas*, 345 F.3d at 356 n.7.

In any case, the statement was permissible and not prejudicial. Davis, arguing pro se, had already emphasized to the jury that prosecutors had told the judge in the drug conspiracy case "that they had no evidence, no evidence that Sammie Williams was involved in this case. And if they did * * * he would be

(continued...)

Defendant further asserts (Br. 105) that the prosecutor's argument included improper speculation about Davis's private thoughts. The prosecutor's remark was proper. One could reasonably infer from the evidence – especially Davis's exultation over Groves' death – that "if [he] thinks of Kim Groves at all, it is only to ponder how he could have done this murder better." SR 6315; DRE Tab 14. Moreover, the prosecutor's statement was a reasonable response to the defendant's suggestion that the jury should select a life sentence, instead of the death penalty,

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[18](...continued)
charged as a conspirator, that is a murderer in this case. And the defense agrees the government had no evidence against Sammie Williams." SR 5543; see also SR 5549. Moreover, the jury likely understood the prosecutor's comments as referring to the tapes in the record, which include conversations with Williams, but no statements by Williams counseling Hardy or Causey to engage in mayhem. Williams' phone was tapped, SR 6097, and several of the recorded conversations included him. See, *e.g.*, LD-1, LD-2, LD-5, LD-7, LD-15, LD-18. And because Davis bore the burden of proving, as a mitigating factor, that Williams was as culpable as Davis (SR 6332; DRE Tab 15), the prosecutor legitimately pointed out the absence of evidence to support the defense theory. See *Montoya* v. *Collins*, 955 F.2d 279, 287 (5th Cir.), cert. denied, 506 U.S. 1036 (1992); *United States* v. *Rosa*, 11 F.3d 315, 342 (2d Cir. 1993).

Finally, unlike *United States* v. *Gracia*, 522 F.3d 597, 601 (5th Cir. 2008) (see Br. 104-105 n.60), the present case involved no direct, "personal assertion by a prosecutor of a government witness's credibility." See also *id.* at 600 (prosecutor argued witnesses were "very, very credible," and would not "throw [their careers] away by * * * lying to you").

so that "Mr. Davis could spend the rest of his life thinking about what he did." SR 6180; DRE Tab 12.

Finally, Davis complains (Br. 105) that the prosecutor fabricated facts by telling the jury that Jasmine Groves will be haunted by "the vision of her mother lying on Alabo Street bleeding from her head." According to Davis, the record contains no evidence that Jasmine Groves actually saw her mother lying in the street. In fact, the evidence suggests that Jasmine Groves may have been present while her mother lay dead in the street. See SR 5602 (testimony that Kim Groves' daughter tried to approach her mother at the scene). But even if she was not there, the prosecutor's statement is nonetheless proper because the reference to a "vision" can simply mean that Jasmine Groves had a mental image of her mother's death from hearing the trial testimony, seeing the graphic photographs introduced into evidence, or reading media reports of the crime. See SR 5890, 5597; Gov. Exh. 9; Gov. Exh. 8; SR 6291; DRE Tab 13 (prosecutor described "pool of blood"), SR 509 (police report describing "pool of blood"), SR 5595 (Officer Washington's testimony that he found Groves in the street with her head wrapped in a blood-soaked towel); see also SR 460 (newspaper article describing Groves found in the street with a gunshot wound to the head). For these reasons, the

prosecutor's argument did not constitute error, much less plain error affecting Davis's substantial rights.

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY ON THE "SUBSTANTIAL PLANNING AND PREMEDITATION" AGGRAVATING FACTOR

For each of the two counts of conviction, the jury found that Davis "committed the offense after substantial planning and premeditation by him," a statutory aggravating factor making him eligible for the death penalty. SR 5140, 5142; DRE Tab 7; see 18 U.S.C. 3592(c)(9) (aggravating factor for substantial planning and premeditation); 18 U.S.C. 3593(e)(2) (aggravating factor is prerequisite for death sentence). Davis challenges the district court's jury instructions on "substantial planning and premeditation," contending that they may have misled the jurors to believe that "substantial" referred to the mere existence, rather than the magnitude, of the planning and premeditation. In fact, the court's instructions were correct and, in any event, do not constitute reversible error.

Because "[d]istrict courts enjoy substantial latitude in formulating a jury charge," this Court reviews "all challenges to, and refusals to give, jury instructions for abuse of discretion." *United States* v. *Webster*, 162 F.3d 308, 321-

322 (5th Cir. 1998) (FDPA case), cert. denied, 528 U.S. 829 (1999). "Technical errors will be overlooked, and the court's instructions will be affirmed, if the charge in its entirety presents the jury with a reasonably accurate picture of the law." *Id.* at 322. "A conviction will not be reversed for an alleged error in the instructions unless, when viewed in their entirety, they fail correctly to state the law." *Ibid.* "A refusal to give a requested instruction constitutes reversible error only if the proposed instruction (1) is substantially correct, (2) is not substantively covered in the jury charge, and (3) pertains to an important issue in the trial, such that failure to give it seriously impairs the presentation of an effective defense." *Ibid.*

In the capital sentencing context, an ambiguous jury instruction warrants reversal only if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" – a standard requiring more than a mere "possibility" that the instruction "impermissibly inhibited" the jury. *Boyde* v. *California*, 494 U.S. 370, 380 (1990); see also *United States* v. *Gonzales Balderas*, 11 F.3d 1218, 1223 & n.8 (5th Cir.), cert. denied, 511 U.S. 1129 (1994) (reaffirming the "reasonable likelihood" standard for ambiguous jury instructions). In making this determination, a reviewing court must analyze a challenged instruction in the

context of the overall jury charge, rather than in isolation. *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

Applying these standards, this Court should reject Davis's challenge to the jury instructions. The district court did not abuse its discretion in instructing the jury on the "substantial planning and premeditation" aggravating factor, and Davis has not demonstrated a reasonable likelihood that the jury applied the challenged instruction in a way that prevented consideration of relevant evidence.

At the eligibility phase, the district court gave the jury the following instructions on the "substantial planning and premeditation" aggravating factor:

> With respect to the factor of Mr. Davis' substantial planning and premeditation, more is required tha[n] simply that the killing was intentional and premeditated.
>
> A killing is committed after substantial premeditation when it is committed upon *substantial deliberation*. In short, the government must prove the defendant killed Kim Groves only after *substantially thinking the matter over* and deciding to do it beforehand. There is no requirement that the government prove that the defendant deliberated for any particular period of time in order to show substantial premeditation. It must, however, show that the defendant had enough time to become fully aware of what he intended to do and *to substantially think it over before he acted*.
>
> The government must also establish beyond a reasonable doubt that the killing was committed after substantial planning for you to find this factor proved. "Planning" means mentally formulating a method for doing something or achieving some end. *The words "substantial planning" should be given their ordinary, everyday*

> *meaning. "Substantial" planning requires a considerable amount of planning preceding the killing*.

SR 5182, 6027-6028 (emphasis added). Because these instructions were correct, and substantively covered Davis's requested instruction, they were not an abuse of discretion.

Davis primarily challenges (Br. 106-109, 111) the portion of the district court's instructions stating that "'[s]ubstantial' planning requires a considerable amount of planning preceding the killing." SR 6028. Davis argues (Br. 107) that the court should have told the jury that "substantial" required proof of "a considerable *or large*" amount of planning and premeditation. This challenge is meritless.

Davis's argument is foreclosed by this Court's decision in *United States* v. *Flores*, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996). In *Flores*, the district court had refused in instructing the jury to define the term "substantial" in the phrase "substantial planning and premeditation," an aggravating factor supporting imposition of the death penalty under 21 U.S.C. 848(n)(8) (repealed by Pub. L. No. 109-177, Tit. II, § 221(2), 120 Stat. 230, 231 (2006)). See 63 F.3d at 1373. The defendant in *Flores* argued that the term "substantial" was unconstitutionally vague and that "the district court's instructions failed to cure

this defect." *Ibid*. His reasoning was virtually identical to Davis's argument. The defendant in *Flores* maintained "that the term 'substantial' is vague because it is subjective and has different meanings: it can be used to refer either to something of high magnitude or to something that is not imagined or fanciful." *Ibid*.; compare Br. 107-109. This Court rejected his argument, concluding that, in context, "substantial" meant "a thing of high magnitude" and that "th[is] term alone, without further explanation, was sufficient to convey that meaning and to enable the jury to make an objective assessment." *Flores*, 63 F.3d at 1374.

The Court thus held that the term "substantial" as used in the statute was not unconstitutionally vague and that the district judge "did not err * * * by failing to further define 'substantial'" in the jury instructions. 63 F.3d at 1374.[19] Relying on *Flores*, this Court has rejected vagueness challenges to the "substantial planning and premeditation" aggravating factor under the Federal Death Penalty Act. *Webster*, 162 F.3d at 354 n.70; *United States* v. *Bourgeois*, 423 F.3d 501, 511 (5th Cir. 2005), cert. denied, 547 U.S. 1132 (2006).

The jury instruction in Davis's case – explaining that "[t]he words 'substantial planning' should be given their ordinary, every day meaning" (SR

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[19] Davis is thus incorrect in asserting (Br. 111 n.64) that the defendant in *Flores* "did not object to the wording of the jury instruction."

6028) – by itself discharged the court's responsibility under *Flores* to avoid an unconstitutional instruction. It follows that the court's further definition of "substantial" planning as "requir[ing] a considerable amount of planning preceding the killing" (SR 6028), cannot be constitutional error either. As with "substantial," the ordinary meaning of "considerable" in this context is "large in extent or degree." *Merriam Webster's Third New International Dictionary* 483 (1993). Because "considerable" is a synonym for "substantial" and is no more ambiguous in the context of the jury instructions than "substantial" standing alone, which *Flores* permits, the district court was not required to further elaborate on the meaning of "substantial" by adding the words "or large" to the jury instruction.

Indeed, Davis's assertion (Br. 109) that the jury would find "considerable" to be ambiguous without further clarification is contradicted by two other circuits, which have used the term "considerable" to define "substantial planning and premeditation" in death penalty cases. See *United States* v. *McCullah*, 76 F.3d 1087, 1110 (10th Cir. 1996) ("'Substantial' planning means planning which is considerable or ample for the commission of the crime at issue."), cert. denied, 520 U.S. 1213 (1997); *United States* v. *Tipton*, 90 F.3d 861, 896 (4th Cir. 1996) ("[S]ubstantial planning means planning that is considerable, or ample for the commission of a crime at issue in this case: murder."), cert. denied, 520 U.S. 1253

(1997). Given the district court's instructions, "'substantial' as a modifier of 'planning and premeditation' could only have been understood by the jury to mean a higher degree of planning than would have the words 'planning and premeditation' alone." *Tipton*, 90 F.3d at 896.

In attacking the jury instruction, Davis contends (Br. 109-110) that the prosecutor's closing argument misled the jury on the meaning of "substantial" by essentially reading the term out of the statute. Davis is mistaken. He singles out for condemnation the prosecutor's definition of "substantial planning and premeditation" as "thinking about what you're going to do and deciding to do it anyway" and "figuring out a way how to accomplish this murder" (SR 5973), and his description of the events preceding Groves' killing as "evidence of the defendant's premeditation, his planning with specific intent" (SR 5983).

These statements viewed in isolation provide a distorted picture of the prosecutor's closing argument. At the outset of his argument, the prosecutor stated to the jury that to get to the selection phase where it could consider imposing the death penalty, it must first determine that Davis committed his crime "after substantial planning and premeditation." SR 5973. The prosecutor defined this term as "substantial deliberation" and noted that "[i]n this particular case, [Davis] had a long time to think about it." SR 5973. The prosecutor subsequently

emphasized to the jury that "here, ladies and gentlemen, you find substantial planning and premeditation, because *long before the murder occurs, he's already thought this through*" (SR 5980) (emphasis added); the prosecutor then described in detail the hours Davis spent planning Groves' murder (SR 5980-5983).

The prosecutor reiterated the "substantial planning and premeditation" requirement three more times in his closing argument. See SR 5986 ("[T]here are certain things you have to believe, you have to swallow, in order not to find that [Davis] did it with specific intent required by the instructions and substantial premeditation and planning."); SR 5988 ("The evidence of intent and substantial planning and premeditation was simply overwhelming and they have been proven to you beyond a reasonable doubt."); SR 5989 ("You are here to decide whether the defendant intentionally murdered Kim Groves and whether he did so after substantial premeditation and planning, and the evidence is showing that he did.").

Davis's counsel reinforced the applicable standard by defining "substantial" in his closing argument to the jury as a "large amount." SR 6008-6009. The prosecutor's repeated and accurate references to the applicable standard, buttressed by defense counsel's closing argument, belie Davis's claim that the prosecutor misled the jury.

In any event, because "juries are presumed to follow their instructions," *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987), and jury instructions generally carry more weight than arguments of counsel, *Boyde*, 494 U.S. at 384, Davis's reliance upon the prosecutor's discussion of "substantial planning and premeditation" is misplaced. In its closing instructions, the court told the jury that "in determining what actually happened – that is, in reaching your decision as to the facts – it is your sworn duty to follow all of the rules of law as I explain them to you." SR 6018. The court then explained to the jury that it "must not substitute or follow your own notion or opinion as to what the law is or ought to be," but rather must "apply the law as I explain it to you, regardless of the consequences." SR 6018.

Moreover, the prosecutor emphasized to the jury at the outset of his closing argument that it was bound to follow the judge's instructions: "Her honor, Judge Berrigan, will instruct you on the law that is to be applied in the case. You must follow those instructions. You took an oath. You are bound by them. Please listen to each and every instruction." SR 5972. The prosecutor's closing argument, therefore, did not create the reasonable likelihood that the jury applied the court's instructions on "substantial planning and premeditation" in a way that prevented consideration of constitutionally relevant evidence.

No more persuasive is Davis's contention (Br. 108) that the district court created confusion for the jury on the meaning of "substantial" by instructing the jury that "[t]here is no requirement that the government prove that the defendant deliberated for any particular period of time in order to show substantial premeditation." SR 6028. Viewed properly in context within the overall jury charge, see *Cupp*, 414 U.S. at 146-147, the challenged instruction did not create a reasonable likelihood of confusing the jury. Immediately prior to the challenged instruction, the district court instructed the jury that "the government must prove the defendant killed Kim Groves only after *substantially* thinking the matter over and deciding to do it beforehand." SR 6028 (emphasis added). Right after the challenged instruction, the court reiterated that the government must "show that the defendant had enough time to become fully aware of what he intended to do and to *substantially* think it over before he acted." SR 6028 (emphasis added). Because "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might," *Boyde*, 494 U.S. at 380-381, they would have understood the challenged instruction to mean that although there is no precise cutoff time at which premeditation becomes substantial, Davis must have given substantial thought to his acts before proceeding in order for the aggravating factor to be applicable.

In sum, the district court did not abuse its discretion in instructing the jury on the "substantial planning and premeditation" aggravating factor, and Davis has not demonstrated a reasonable likelihood that the jury interpreted the instructions in an impermissible way.

Even if the district court abused its discretion by failing to add the phrase "or large" to its definition of "substantial," such error would be harmless beyond a reasonable doubt because the result would have been the same had the jury received the instruction advocated by Davis. See *Jones* v. *United States*, 527 U.S. 373, 402 (1999) (court may conduct harmless-error review of a death sentence by "consider[ing] whether the result would have been the same had the invalid aggravating factor been precisely defined"). The record contains abundant evidence that Davis engaged in a large amount of planning and premeditation for Groves' killing, beginning with the phone call to Williams at 1:00 a.m. on October 13, 1994, and ending with the confirmation of Groves' murder after 11:00 p.m. See pp. 17-20, *supra*. The jury thus necessarily would have found that Davis engaged in a "large" amount of planning and premeditation.

VII

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN INSTRUCTING THE JURY ON MITIGATING EVIDENCE OR IN DRAFTING THE VERDICT FORMS ON THAT ISSUE

Davis argues (Br. 115-130) that the district court's jury instructions and verdict forms prevented the jury from fully considering his mitigating evidence, thereby violating his Eighth Amendment rights. This argument is meritless. The district court did not abuse its discretion, much less commit plain error.

A. Standard of Review

As Davis concedes (Br. 129 n.74), he failed to object below to the verdict forms or the portion of the jury instructions pertaining to mitigation (see SR 6343-6344; DRE Tab 15), and therefore this Court's review is only for plain error. To prove plain error, Davis must "show (1) there was error, (2) the error was plain, (3) the error affected his 'substantial rights,' and (4) the error seriously affected 'the fairness, integrity or public reputation of judicial proceedings.'"[20] *United States* v.

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[20] Davis argues (Br. 129-130 & n.74) that a district court's error in instructing the jury on mitigating factors is a structural error that cannot be reviewed for harmlessness, and therefore, if this Court were to determine that the error is plain, it need not inquire into the remaining prongs of the plain-error test. This argument is without merit. Even assuming for the sake of argument that the error alleged here would not be subject to harmlessness review if the defendant had properly preserved an objection to it, the alleged error is subject to plain-error review – including an inquiry into whether it affected the defendant's substantial

(continued...)

Jones, 489 F.3d 679, 681 (5th Cir. 2007) (quoting *United States* v. *Olano*, 507 U.S. 725, 732, 734 (1993)). Even if Davis had properly preserved the issue, this Court's review would be highly deferential. See *United States* v. *Webster*, 162 F.3d 308, 321-322 (5th Cir. 1998) ("District courts enjoy substantial latitude in formulating a jury charge, and hence we review all challenges to, and refusals to give, jury instructions for abuse of discretion."), cert. denied, 528 U.S. 829 (1999).

B. Legal Analysis

The Eighth Amendment requires that, in a capital case, the sentencing jury be able to consider and give effect to the defendant's mitigating evidence. *Penry* v. *Johnson*, 532 U.S. 782, 797 (2001). In determining whether the jury instructions impermissibly limited consideration of mitigating evidence, an appellate court must ask whether there is "a reasonable likelihood that the jurors * * * understood the challenged instructions to preclude consideration of relevant mitigating evidence proffered by [the defendant]." *Buchanan* v. *Angelone*, 522 U.S. 269, 279 (1998) (quoting *Boyde* v. *California*, 494 U.S. 370, 386 (1990)).

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[20](...continued)
rights – where, as here, the defendant did not object below. This Court has explained that because "harmless error * * * is a rule of constitutional law, whereas plain error is a rule of appellate procedure[,] [a]n error not susceptible to harmless error review is nevertheless susceptible to plain error review if the defendant did not object at trial." *United States* v. *Phipps*, 319 F.3d 177, 189 n.14 (5th Cir. 2003).

The district court's closing instructions made clear to the jury that it had wide discretion to consider Davis's mitigating evidence. At the outset of its instructions on mitigating factors, the district court told the jury that "[y]ou must next consider *any* mitigating factors that may be present in this case." SR 5206, 6331 (emphasis added). The court then reiterated that "[i]n determining whether a sentence of death is to be imposed on a defendant, you may consider *any* mitigating factor, *including* the following," and listed seven categories of mitigating factors. SR 5207-5208, 6332-6334; DRE Tab 15 (emphasis added). The court subsequently instructed the jury that

> [t]he law permits you to consider *anything* about the commission of the crime or *about Mr. Davis' background or character* that would mitigate against the imposition of the death penalty. Thus, if there are *any* such mitigating factors, *whether or not specifically argued by defense counsel*, but which are established by a preponderance of the evidence, you are *free to consider them* in your deliberations.

SR 5209-5210, 6335; DRE Tab 15 (emphasis added).

The district court further instructed the jury that the presence of a mitigating factor was not even necessary for it to decline to impose the death penalty:

> I remind you that you are never required to impose a death sentence. For example, there may be something about this case or about the defendant that one or more of you are not able to identify as a specific mitigating factor, but that nevertheless persuades you that the death penalty is not appropriate. In addition, even where a sentence of death is supported by the evidence, the law has

> nevertheless given each of you the discretion to temper justice with mercy. Any one of you is free to decide that a death sentence should not be imposed in this case for *any reason* you see fit. You will not have to explain that reason.

SR 5210, 6335; DRE Tab 15 (emphasis added). There is no reasonable likelihood that the jury that heard these comprehensive instructions believed it was prevented from considering constitutionally relevant mitigating evidence. See *Webster*, 162 F.3d at 327 (jury charge that instructed jurors to consider any other mitigating factor, whether or not argued by defense counsel, "left no room for the jury to ignore constitutionally relevant evidence")

Davis's primary challenge to the district court's instructions and verdict forms is that the court took some of the individual mitigating factors that Davis had proposed and grouped them into combined categories. He contends that, because the factors were grouped into categories rather than listed individually, the jury was likely misled into believing that it had to find that all the factors listed in a category existed before it could consider any of those individual factors as mitigators. Specifically, Davis complains that it was improper for the court to group into three categories the individual factors relating to (1) his allegedly good acts as a police officer, (2) the culpability and punishment of other individuals, and (3) the allegedly stressful and dangerous conditions of his job.

With regard to the evidence of Davis's good acts as a police officer, the court gave the following instruction, which was listed as Section C of the mitigating factors on the verdict forms:

> As a police officer, Len Davis frequently risked his own life to apprehend criminal suspects, assist fellow officers and save innocent victims. Len Davis was a decorated police officer and received many commendations, including a purple heart, while with the New Orleans Police Department.

SR 5207-5208, 5230, 5235, 6333; DRE Tab 8.

As to the evidence of the culpability and punishment of other individuals, the court gave the following instruction, which was listed as Section A of the mitigating factors on the verdict forms:

> Other participants in one or more of the capital offenses who are equally or more culpable than Len Davis will not be punished by death, including, but not necessarily limited to, the following individuals: Sammie Williams, Steven Jackson, Damon Causey. Other participants in the capital offenses received reduced sentences as a result of plea agreements with the government. Other participants in the drug trafficking conspiracy are now eligible to receive reduced sentences as a result of their testimony against Mr. Davis and plea agreements with the government.

SR 5207, 5230, 5235, 6332-6333; DRE Tab 8.

Finally, with regard to the evidence of the stressful conditions of Davis's job, the court gave the following instruction, which was listed as Section D of the mitigating factors on the verdict forms:

> Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by the stress of working in a high crime area, being shot at on numerous occasions, including on one occasion being shot in the stomach while coming to the assistance of fellow officers.

SR 5208, 5230, 5235, 6333; DRE Tab 8.

The district court did not commit plain error in grouping individual mitigating factors by categories. A court "may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan*, 522 U.S. at 276. This authority to "shape and structure" consideration of mitigating factors necessarily includes the discretion to decide how best to organize and describe proposed mitigating factors in presenting them to the jury. This discretion gives courts considerable leeway to group closely related mitigating factors into a single category. See *State* v. *Anthony*, 555 S.E.2d 557, 598-601 (N.C. 2001) (finding no error where the judge combined 34 of defendant's proposed mitigating factors into nine categories before submitting them to the jury), cert. denied, 536 U.S. 930 (2002); *United States* v. *Wilson*, 493 F. Supp. 2d 520, 524-525 (E.D.N.Y. 2007) (consolidating related mitigating factors for jury's consideration during penalty phase of capital murder trial to "streamline" the jury charge and prevent any jurors from being swayed by quantity of factors offered rather than by their quality);

Singleton v. *State*, 783 So.2d 970, 977 & n.9 (Fla. 2001) (finding no error where trial court reasonably grouped several mitigating factors together and considered them); *Reaves* v. *State*, 639 So.2d 1, 6 (Fla.) ("We also find no abuse of discretion in the trial judge's finding of only three nonstatutory mitigating factors. Although [defendant] proffered nonstatutory factors in greater number, the judge reasonably grouped several proffered mitigating factors into three."), cert. denied, 513 U.S. 990 (1994).

When considered in the context of the jury instructions as a whole, the grouping of the mitigating factors into categories did "not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan*, 522 U.S. at 276. At the outset, we note that the court listed the individual factors within each category without linking them together with the conjunctive "and," thus undercutting Davis's contention that the jury would have believed that it must find the existence of all the mitigating factors within a category before it could give mitigating effect to any of them.

More importantly, any ambiguity on this point – either in the verdict forms or in portions of the jury charge – "was clarified when considered in light of the entire jury instruction." *Jones* v. *United States*, 527 U.S. 373, 393 (1999) (holding that jury charge as a whole dispelled confusion caused by verdict forms standing

alone) (citation omitted). The jury instructions explicitly and repeatedly instructed the jury that it could consider *any* mitigating factor established by the preponderance of the evidence, regardless of whether it was argued by the parties or listed on the verdict form. See SR 5206-5208, 6331-6332, 6335; DRE Tab 15. The last mitigating factor the district court gave the jury was a catch-all category that, when read in context with the jury instructions, would have reiterated to the jury that it could consider any factor it determined to be mitigating. SR 5208, 6333-6334; DRE Tab 15.

The district court also instructed the jury that it possessed wide discretion to decline to impose the death penalty even if a death sentence was supported by the evidence and could give credence to "something about this case or about the defendant that one or more of you are not able to identify as a specific mitigating factor, but that nevertheless persuades you that the death penalty is not appropriate." SR 5210, 6335; DRE Tab 15. Davis's counsel reinforced these instructions, defining "mitigating circumstances" in his opening statement as "*anything* in fairness and in mercy that you think are important to you as an individual" and "*anything* about a person's life and background that tell you about who the person is and help you in thinking about how you go about choosing

between these two most severe punishments of life and death." SR 6066-6067 (emphasis added).

When read in context, the court's instructions thus belie Davis's assertion that the jury charge established an "unacceptable risk that one or more jurors was unable to express his reasoned moral response to evidence that has mitigating relevance." Br. 127 (internal quotation marks omitted). Indeed, it is counterintuitive to believe that the district court would limit the jury's ability to consider an explicit mitigating factor while simultaneously giving it free rein to consider mitigating factors of its own creation. The court's instructions, therefore, "left no room for the jury to ignore constitutionally relevant evidence." *Webster*, 162 F.3d at 327.

In support of his argument (see Br. 119-120) that the jurors were misled, Davis emphasizes the fact that no jurors found the mitigating factors listed in Section C on the verdict form. He claims that two of the factors listed in Section C – that he risked his life in the line of duty on several occasions and that he had once been gravely injured when shot in the stomach – were uncontroverted, and thus the failure of jurors to find those factors shows that the court's grouping of the factors prevented the jury from fully considering his mitigating evidence. This claim is without merit.

Even if this Court possesses the authority to review a special verdict on mitigating factors, it "must accept the jurors' factual determinations unless no reasonable juror could have arrived at the conclusion reached by the juror in question." *United States* v. *Jackson*, 549 F.3d 963, 982 (5th Cir. 2008) (citation omitted), petition for cert. filed (Feb. 13, 2009) (No. 08-8713). In light of testimony by Leon Duncan (SR 6115-6116) that some letters of commendation that he and Davis received did not accurately describe what happened, the jury reasonably could have disbelieved the defense's accounts of Davis's allegedly valorous conduct on the job. See *Jackson*, 549 F.3d.at 983 & n.29 (noting that much of defendant's mitigating evidence was provided by childhood and current girlfriend, whom jury was free to disbelieve). Alternatively, the jury may have believed that Davis was shot in the stomach, but was not shot in the course of apprehending criminal suspects or assisting other officers, thus making the shooting non-mitigating. The jury's failure to find that any of the mitigating factors listed in Section C existed, therefore, does not evince any confusion regarding what factors it could consider as mitigators.

Davis also challenges (Br. 118, 122-124) the district court's rewording of some of the individual mitigating factors he proposed. The court's phrasing of the mitigating factors did not constitute plain error.

In place of Davis's proposed factor that "[o]n *several occasions*, Len Davis answered calls for assistance from fellow officers who were being shot at and assisted in apprehension of the suspects, putting his own life in danger to save the lives of his fellow officers" (SR 4967; DRE Tab 11) (emphasis added), the court instead instructed the jury that "[a]s a police officer, Len Davis *frequently* risked his own life to apprehend criminal suspects, assist fellow officers and save innocent victims" (SR 5207, 6333; DRE Tab 15) (emphasis added). Davis contends (Br. 118 n.68) that the court's substitution of "frequently" for "several" introduced a subjective component to this factor.

Contrary to Davis's assertion, the court acted within its discretion in using the term "frequently" in place of Davis's proposed term "several" to describe the number of times this mitigating event occurred. See *Buchanan*, 522 U.S. at 276 (state "may shape and structure the jury's consideration" of mitigating evidence so long as it does not preclude jury from giving effect to evidence); *Torres* v. *State*, 962 P.2d 3, 25 (Okla. Crim. App. 1998) (finding no abuse of discretion in court's modification of petitioner's requested instruction that did not alter substance of instruction and adequately reflected evidence), cert. denied, 525 U.S. 1082 (1999). Davis's semantic hair-splitting of the difference between these terms fails to show

a reasonable likelihood that the jury decided to disregard this evidence due to the court's word choice.

Even if the jury perceived a difference between "frequently" and "several," that difference would not have precluded the jurors from considering Davis's mitigating evidence. As noted, the court instructed the jury that it could consider *any* mitigating evidence, even if the evidence was not listed in the instructions or on the verdict form. Therefore, if the jury believed that Davis had risked his life on "several" occasions but had not done so "frequently," it still would have understood from the court's instructions that it could consider this evidence as a mitigating factor.

Davis also contends (Br. 122-124) that the district court improperly reworded the factor relating to which individuals were equally culpable as Davis. Davis proposed two instructions comparing him to other individuals: (1) that "[o]ther participants in one or more of the capital offenses will not be punished by death, including but not necessarily limited to the following individuals: Sammie Williams, Steve Jackson, Damon Causey" (SR 4966; DRE Tab 11); and (2) "Sammie Williams is equally or more culpable than Len Davis and he will not be punished by death" (SR 4967; DRE Tab 11). Instead of Davis's two proposals, the district court instructed the jury that "[o]ther participants in one or more of the

capital offenses who are equally or more culpable than Len Davis will not be punished by death, including, but not necessarily limited to, the following individuals: Sammie Williams, Steven Jackson, Damon Causey" (SR 5207, 6332; DRE Tab 15).

Davis contends (Br. 122-124) that the court's inclusion of Jackson and Causey in the instruction on equal culpability prevented the jury from considering their lesser sentences in mitigation because there was no reasonable argument that they were as culpable as Davis. This argument is meritless. The district court's language on culpability tracked the FDPA's wording of the mitigating factor on comparative culpability and punishment. See 18 U.S.C. 3592(a)(4). Moreover, contrary to Davis's assertion, the context of the instruction, which gave the jury wide discretion to consider *any* mitigating factor and *any* relevant evidence that would mitigate against a death sentence, see pp. 150-151, 154-155, *supra*, ensured that the jury could consider Jackson's and Causey's lesser sentences even if the jury did not believe they were equally culpable as Davis. Accordingly, Davis cannot show a reasonable likelihood that the jury believed it was precluded from considering the lesser sentences Williams, Jackson, and Causey received.

Davis also argues that the district court erred in placing one of the proposed mitigating factors – being shot in the stomach while on duty – in the on-the-job-

stress category rather than the good-acts-as-a-police-officer category. Instead of instructing the jury that "[w]hile answering a fellow officer's call for assistance, Len Davis joined in the chase of 3 armed men and was shot in the stomach" (SR 4967; DRE Tab 11), the court instructed: "Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by the stress of working in a high crime area, being shot at on numerous occasions, including on one occasion being shot in the stomach while coming to the assistance of fellow officers" (SR 5208, 6333; DRE Tab 15). The court's decision to locate the proposed mitigating factor in the category relating to the effects of stress on Davis's conduct was not plain error, but rather a permissible "structur[ing]" of the mitigation evidence. *Buchanan*, 522 U.S. at 276.

Finally, Davis asserts that the district court erred in excluding his proposed factor that "[a]s a police officer, Len Davis intervened and persuaded a woman who was threatening to commit suicide and/or kill him and his partner to surrender her gun." SR 4967; DRE Tab 11. This proposed factor was subsumed within the following mitigating factor that the court gave: "As a police officer, Len Davis frequently would risk[] his own life to * * * assist fellow officers and save innocent lives." SR 6333; DRE Tab 15. The district court did not plainly err, but

rather acted well within its discretion in deciding not to describe a specific incident that was already covered by another mitigating factor. See *Webster*, 162 F.3d at 327 (no constitutional error in refusing to submit defendant's proposed mitigating factors where many mitigating factors given to jury touched on omitted factors and court gave jury catch-all mitigating factor).

Even assuming, *arguendo*, that the district court's structuring of the mitigating evidence constituted an obvious error, reversal is unwarranted because Davis cannot show that the alleged error affected his substantial rights or, in other words, prejudiced him. The jury instructions as a whole told the jury that it could consider any mitigating factor, regardless of whether it was expressly listed in the instructions or on the verdict forms, and that it possessed wide discretion to decline to impose the death penalty. See pp. 150-151, 154-155, *supra*. Any error in structuring the mitigating factors, therefore, would not have prevented the jury from considering constitutionally relevant evidence.

The failure of Davis's counsel to object to the jury instructions on mitigation when given the opportunity to do so (see SR 6344; DRE Tab 15), further supports the conclusion that any error in such instructions was not prejudicial to Davis. Cf. *Curtis Publ'g Co.* v. *Butts*, 351 F.2d 702, 714 (5th Cir. 1965) (noting that counsel's failure to make contemporaneous objection to

opposing counsel's argument indicated that counsel "did not consider the arguments objectionable at the time they were delivered, but made their claim as an afterthought"), superseded by statute as stated in *Schafer* v. *Time*, Inc., 142 F.3d 1361 (11th Cir. 1998); *Brooks* v. *Kemp*, 762 F.2d 1383, 1397 n.19 (11th Cir. 1985) (en banc) ("Although counsel's failure to object to the argument does not bar our review of the claim in this case, the lack of an objection is a factor to be considered in examining the impact of a prosecutor's closing argument."), vacated, 478 U.S. 1016 (1986), reinstated, 809 F.2d 700 (11th Cir. 1987).

In sum, the district court's shaping and structuring of the instructions relating to Davis's mitigation evidence did not create a reasonable likelihood that the jury believed it was precluded from considering such evidence. The court's instructions and verdict forms therefore were not an abuse of discretion, much less plain error, and did not prejudice Davis's substantial rights.

VIII

THE LAW-OF-THE-CASE DOCTRINE BARS DAVIS FROM RELITIGATING THE *BATSON* CLAIM THAT THIS COURT REJECTED IN 1999 WHEN IT AFFIRMED HIS CONVICTIONS ON COUNTS 1 AND 2

Davis argues (Br. 130-177) that, at his 1996 guilt-phase trial, the prosecution exercised its peremptory strikes in a racially discriminatory manner, in

violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and its progeny. This Court considered and rejected this *Batson* claim in 1999 in affirming Davis's convictions on Counts 1 and 2. *United States* v. *Causey*, 185 F.3d 407, 412-413 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000). Now, a decade later, Davis seeks a second bite at the apple. He asks this Court to reconsider its rejection of his *Batson* claim and to vacate his convictions and remand for a new guilt-phase trial. The law-of-the-case doctrine bars relitigation of this belated claim, and Davis has failed to demonstrate that his case meets the exacting standards required for an exception to that doctrine.

A. Davis Seeks To Relitigate The Same Claim That This Court Rejected In The Previous Appeal

In appealing his convictions to this Court more than a decade ago, Davis claimed that the government violated *Batson* in exercising its peremptory strikes at the 1996 trial. See Brief for the Defendant/Appellant Len E. Davis at 40-46, *United States* v. *Causey*, 185 F.3d 407 (5th Cir. 1999) (Nos. 96-30486, 96-31171), 1997 WL 33484999, at *40-*46. Specifically, Davis alleged that "the government selectively questioned" African-American jurors, that the prosecution struck African-American jurors for reasons that applied to white jurors who were not challenged, and that the government's articulated reasons for the strikes were

"non-quantifiable." *Causey*, 185 F.3d at 413; Brief for the Defendant/Appellant Len E. Davis at 42, *Causey*, *supra*, 1997 WL 33484999, at *42. Damon Causey and Paul Hardy, Davis's co-defendants, raised similar *Batson* issues. See Original Brief on Behalf of Defendant-Appellant Damon Causey at 35-45, *Causey*, *supra*, 1997 WL 33488050, at *35-*45; Brief on Behalf of Defendant-Appellant Paul Hardy at 54-68, *Causey*, *supra*, 1997 WL 33769438, at *54-*68. The United States' brief in *Causey* contained a detailed, 32-page response to the defendants' *Batson* claims. See Brief for the United States at 46-78, *Causey*, *supra*.

The record in the prior appeal contained the juror questionnaires used by the parties in making peremptory strikes at the 1996 trial, and the parties in that appeal brought those questionnaires to the panel's attention. See Gov't Br., *supra*, at 60-62; Causey Br., *supra*, at 8 n.8, 40, 1997 WL 33488050, at *9 n.8, *40; Hardy Br., *supra*, at 9 n.8, 1997 WL 33769438, at *9 n.8. Judge DeMoss, who concurred in the *Causey* panel's rejection of defendants' *Batson* claims (compare *Causey*, 185 F.3d at 412-413 with *id*. at 423), discussed the contents of the questionnaires in the context of Causey's severance motion. See *id.* at 430-432 (DeMoss, J., concurring in part and dissenting in part).

After considering the parties' extensive *Batson* arguments, this Court upheld the district court's factual finding that the prosecutor's peremptory challenges were not racially discriminatory:

> Unless a discriminatory intent is inherent in the prosecutor's explanations, the reasons offered will be deemed race-neutral. * * * The Government's explanations were race-neutral and not outside the realm of credibility. Under the "great deference" standard of review, we affirm the district court's assessment of the Government's explanations for the exercise of its peremptory strikes.

Causey, 185 F.3d at 413.

In the present appeal, Davis does *not* base his *Batson* claim on the selection of the jury at his resentencing hearing. Instead, he seeks to reopen and relitigate a *Batson* claim pertaining to a *different* jury – the one that convicted him at his 1996 guilt-phase trial and the one that was the subject of the *Batson* claim that this Court rejected a decade ago.

The focus of Davis's *Batson* claim in the present appeal is seven African-American jurors – all of whom were the subject of either Davis's or his co-defendants' prior appeals.[21] The government's brief in *Causey* addressed the

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[21] Compare Br. 142-171 (alleging *Batson* violations regarding Green (Juror No. 12); Butler (No. 163); Dabney (No. 64); Williams (No. 41); Bartholemew (No. 6); Alvis (No. 30), and Mogilles (No. 99)), with Davis Br., *supra*, at 42-45, 1997 WL 33484999, at *42-*45 (Butler, Dabney, Williams, Bartholomew, Mogilles), and Causey Br., *supra*, at 35-45, 1997 WL 33488050, at *35-*45 (Green, Alvis);

(continued...)

prosecution's reasons for striking all seven of these jurors. See Gov't Br., *supra*, at 64-72.

This time around, however, Davis provides a more detailed factual analysis about each of the seven jurors that neither he nor his co-defendants bothered to present in their briefs in *Causey*. For example, Davis's brief in the present appeal compares the seven African-American jurors to 27 allegedly similarly-situated white jurors, only three of whom were mentioned in his brief in the previous appeal.[22]

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[21](...continued)
Hardy Br., *supra*, 54-68, 1997 WL 33769438, at *54-*68 (same).

[22] In Davis's present brief (Br. 143-171), he claims that 24 white jurors are similarly-situated to the seven African-American jurors: Becnel, Boudreaux, Bougnoyne, Callahan, Christopher, Cramond, Dubose, Fayard, Hunt, Irving, Lightfoot, Marshall, Mansfield, Morgan, Newman, Plaisance, Poché, Riggio, Russell, Scheyd, Turner, W. Williams, Ward, and Zinni. One juror Davis cites as comparable, Brignac, is African American; another he identifies as white, Rodrigue, did not specify his ethnic background on his juror questionnaire. Questionnaires 54 and 155; Br. 145 n.88, 149, 155, 156, 164. Davis's brief in the previous appeal mentioned only three of these jurors (Hunt, Mansfield, and Rodrigue), and discussed two others (Deroche and Walker) not mentioned in the present brief. Davis Br., *supra*, at 43-46, 1997 WL 33484999, at *43-*46.

B. The Law Of The Case Doctrine Bars Davis's Attempt To Resurrect His Batson *Claim To Attack The Convictions That This Court Affirmed A Decade Ago*

Under the "law of the case" doctrine, "an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *United States* v. *Williams*, 517 F.3d 801, 806 (5th Cir. 2008) (citation omitted); accord *United States* v. *Cervantes Blanco*, 504 F.3d 576, 587 (5th Cir. 2007); *United States* v. *Becerra*, 155 F.3d 740, 752 (5th Cir. 1998), abrogated on other grounds as stated in *United States* v. *Farias*, 481 F.3d 289, 292 (5th Cir. 2007). "This prohibition covers issues decided both expressly and by necessary implication, and reflects the jurisprudential policy that once an issue is litigated and decided, that should be the end of the matter." *United States* v. *Pineiro*, 470 F.3d 200, 205 (5th Cir. 2006) (citation and internal quotation marks omitted). "This rule is essential to the orderly administration of justice, as it is aimed at preventing obstinate litigants from repeatedly reasserting the same arguments and at discouraging opportunistic litigants from appealing repeatedly in the hope of acquiring a more favorable appellate panel." *Ibid*.

The principles of finality underlying the law-of-the-case doctrine are especially strong where, as here, a defendant's conviction was affirmed in a previous appeal but the case was remanded for purposes of resentencing only. See

Causey, 185 F.3d at 423 ("we * * * affirm Hardy's and Davis's convictions as to Counts 1 and 2; * * * and remand Hardy's and Davis's cases for resentencing"). In a capital case such as this, the resentencing involves a trial before a new jury, see 18 U.S.C. 3593(b)(2)(D); in many respects, the resentencing phase in this context is a distinct case from the earlier trial that produced the convictions that were upheld on appeal. Once the convictions are affirmed, the courts and the parties should be able to put aside the guilt phase and concentrate on the issues related specifically to resentencing. See *United States* v. *Frias*, 521 F.3d 229, 235 (2d Cir.) ("Because we affirmed [defendant's] conviction in [a previous appeal], [he] cannot now claim error in the jury instructions. Our remand was limited to resentencing."), cert. denied, 129 S. Ct. 289 (2008).

The interest in finality is particularly compelling where, as here, so much time has elapsed since the original trial and convictions. The offenses were committed in 1994, Davis was convicted in 1996, and this Court affirmed his convictions on Counts 1 and 2 in 1999. We are now 13 years away from the guilt-phase trial that is the focus of Davis's *Batson* claims.

To be sure, this Court has recognized a few narrow exceptions to the law-of-the-case doctrine. "[A] prior decision of this [C]ourt will be followed without re-examination . . . unless (i) the evidence on a subsequent trial was substantially

different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice." *Williams*, 517 F.3d at 806-807 (citations omitted); *Becerra*, 155 F.3d at 752-753.

None of these exceptions applies here. Davis does not rely on the first exception – the presentation of substantially different evidence at a subsequent trial – and it is clear this exception does not apply here. Davis does, however, argue that (1) there has been an intervening change in law, and that (2) this Court's previous rejection of his *Batson* claim was "clearly erroneous and would work a manifest injustice." Contrary to Davis's contentions, neither exception applies here.

1. The Supreme Court's Decisions In Miller-El II *And* Snyder *Did Not Change Controlling Law On* Batson *Claims*

Although "a dramatic shift" in the law may warrant an exception to the law-of-the-case doctrine under some circumstances, see *Williams*, 517 F.3d at 807 (noting that *Booker* wrought such a change), an intervening Supreme Court decision that "merely restate[s] and applie[s] * * * well-established legal doctrines" will not justify revisiting issues that a court of appeals decided in an earlier appeal, *ACLU* v. *Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008), cert. denied,

129 S. Ct. 1032 (2009); see also *United States* v. *Bell*, 988 F.2d 247, 251 & n.3 (1st Cir. 1993) (concluding that an intervening decision that reached a result that had been "suggested" in prior cases was "no bolt from the blue" and thus did not warrant an exception to the law-of-the-case doctrine). Davis has not demonstrated that any change in controlling law has occurred since this Court's earlier rejection of his *Batson* claim – much less a "dramatic shift," *Williams*, 517 F.3d at 807, or "bolt from the blue," *Bell*, 988 F.2d at 251 n.3.

Davis incorrectly contends that the Supreme Court's decisions in *Miller El* v. *Dretke*, 545 U.S. 231 (2005) (*Miller El II*), and *Snyder* v. *Louisiana*, 128 S. Ct. 1203 (2008), changed the controlling law on *Batson* claims, thereby justifying an exception to the law-of-the-case doctrine. In both *Miller El II* and *Snyder*, the Supreme Court determined, after analyzing the facts of those particular cases, that *Batson* violations had occurred. See *Miller El II*, 545 U.S. at 240-266; *Snyder*, 128 S. Ct. at 1208-1212. The Supreme Court's decisions in *Miller El II* and *Snyder* are applications of longstanding *Batson* principles to particular factual situations. Neither decision represents a change in controlling law governing peremptory challenges.

This Court has already recognized that *Miller El II* did not change controlling law. In *Murphy* v. *Dretke*, 416 F.3d 427, 439 (5th Cir. 2005), cert.

denied, 546 U.S. 1098 (2006), this Court explained that *Miller El II* "considered the type and quantum of record evidence required to demonstrate a *Batson* violation. The [Supreme] Court did not announce any new elements or criteria for determining a *Batson* claim, but rather simply made a final factual and evidentiary determination of that particular petitioner's *Batson* claim." The Fourth Circuit has reached the same conclusion, holding that "*Miller El II* did not alter *Batson* claims in any way." *Golphin* v. *Branker*, 519 F.3d 168, 186 (4th Cir.), cert. denied, 129 S. Ct. 467 (2008).

This conclusion is correct given the fact that *Miller El II* was decided under the restrictive criteria of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996); 28 U.S.C. 2254 (codified at 28 U.S.C. 2261 *et seq*.). AEDPA provides that a federal court cannot overturn a state court determination unless it "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d). Accordingly, because *Miller El II* itself "was a case under AEDPA, * * * the [Supreme] Court, simply following clearly established federal law as AEDPA

requires, could not have crafted a new legal standard." *Golphin*, 519 F.3d at 186. Indeed, the Supreme Court in *Miller El II* expressly based its holding on the lower court's erroneous determination of the facts under 28 U.S.C. 2254(d)(2). *Miller El II*, 545 U.S. at 240. As the Ninth Circuit has recognized, the Supreme Court's "holding means that the principles expounded in *Miller El* were clearly established Supreme Court law for AEDPA purposes at least by the time of the last reasoned state court decision in *Miller El*, handed down in 1992." *Kesser* v. *Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) (en banc).

Although *Snyder* was decided on direct review, not under AEDPA, the Supreme Court in *Snyder* did not purport to change the law on peremptory challenges. Rather, the Court simply applied *Batson* and its progeny to the facts presented in that case. See 128 S. Ct. at 1206-1208, 1212 (citing *Batson*; *Miller El II*; *Purkett* v. *Elem*, 514 U.S. 765 (1995); *Hernandez* v. *New York*, 500 U.S. 352 (1991)).

This Court's application of *Miller El II* and *Snyder* in AEDPA cases confirms that those Supreme Court decisions simply applied clearly established law and did not adopt new legal principles. AEDPA requires a federal court in reviewing state court convictions "to limit [its] analysis to the law as it was 'clearly established'" by Supreme Court precedent at "the time of the state court's

decision." *Wiggins* v. *Smith*, 539 U.S. 510, 520 (2003); accord *Yarborough* v. *Alvarado*, 541 U.S. 652, 660-661 (2004). Yet this Court has repeatedly applied *Miller El II*, *Snyder*, or both in AEDPA cases involving review of state court decisions that pre-dated *Miller El II* and *Snyder*. See *Reed* v. *Quarterman*, 555 F.3d 364, 367, 368 n.1, 370-382 & nn.4,12 (5th Cir. 2009) (applying *Miller El II* and *Snyder* where final state appeal was denied in 1998); *Murphy*, 416 F.3d at 430, 439 (applying *Miller El II* where state proceedings were completed in 2002); *Haynes* v. *Quarterman*, 561 F.3d 535, 537, 539-541 (5th Cir. 2009) (applying *Snyder* to AEDPA case where state proceedings were concluded no later than 2005). Thus, this Court's own practice confirms that neither *Miller El II* nor *Snyder* represented a change in controlling law.

Contrary to Davis's suggestion (Br. 134), neither *Miller El II* nor *Synder* changed the standard of appellate review for *Batson* claims. In rejecting Davis's *Batson* claim in the previous appeal, this Court applied the following standard of review: "the district court's decision on the ultimate question of discrimination is a fact finding, which is accorded great deference." *Causey*, 185 F.3d at 413. That standard of review is the one adopted by the Supreme Court in *Batson* itself, see 476 U.S. at 98 n.21, and reiterated by the Court in *Hernandez* v. *New York*, 500 U.S. 352 (1991), which stated that a "decision on the ultimate question of

discriminatory intent represents a finding of fact of the sort accorded *great deference* on appeal." *Id.* at 364 (plurality opinion) (emphasis added). The Court again noted in *Miller El* v. *Cockrell*, 537 U.S. 322 (2003) (*Miller El I*), that "[i]n the context of direct review" of *Batson* claims, "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded *great deference* on appeal." *Id.* at 340 (citing *Hernandez*, 500 U.S. at 364) (emphasis added). In *Snyder*, the Supreme Court reiterated the "highly deferential standard of review" applicable to *Batson* claims, 128 S. Ct. at 1209, and explained that "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Id.* at 1207.

In the wake of *Miller El II* and *Snyder*, this Court and others appropriately have continued to afford "the district court's findings the 'great deference' *Batson* requires." *United States* v. *Bolden*, 545 F.3d 609, 614 (8th Cir. 2008); accord *United States* v. *Brent*, 300 F. App'x 267, 272 (5th Cir. 2008) ("This court has consistently held that 'we must give *great deference* to the district court because findings in this context largely turn on an evaluation of the credibility or demeanor of the attorney who exercises the peremptory challenge.'") (quoting *United States* v. *Davis*, 393 F.3d 540, 544 (5th Cir. 2004)), petition for cert. filed (Mar. 16, 2009) (No. 08-9319).

Although Davis emphasizes the comparative-juror analysis that the Supreme Court discussed in *Miller El II* and *Snyder* (see Br. 135-137), such a comparison between minority jurors and non-struck white jurors is not a new development in law. A comparative-juror analysis has long been one factor among many that defendants may rely on to try to prove discriminatory intent under *Batson*. In 1993, this Court noted that, in trying to discredit a prosecutor's explanation for striking minority jurors, one way a defendant could establish a *Batson* violation was to show that "similar claims can be made about non-excluded jurors who are not minorities." *United States* v. *Bentley Smith*, 2 F.3d 1368, 1373-1374 (5th Cir. 1993). Indeed, Davis and his co-defendants presented a comparative-juror analysis when they raised their *Batson* claims in the earlier appeal that this Court decided in 1999, further confirming that such comparisons were a well-established part of the *Batson* landscape long before *Miller El II* and *Snyder* were decided.

For these reasons, the Supreme Court's decisions in *Miller El II* and *Snyder* did not change controlling law. Consequently, those decisions provide no justification for departing from the law-of-the-case doctrine.

2. The Prior Panel's Decision Was Not "Dead Wrong" And Works No Manifest Injustice

This Court has discretion to depart from the law of the case if convinced that its previous decision "was clearly erroneous and would work a manifest injustice." *Williams*, 517 F.3d at 807 (citation omitted). But this exception "is granted only in 'extraordinary circumstances.'" *United States* v. *Hollis*, 506 F.3d 415, 421 (5th Cir. 2007) (citation omitted). Davis cannot qualify for this "extraordinary" exception, *ibid*., because he has failed to demonstrate that allowing his previously-affirmed convictions to stand would constitute either clear error or manifest injustice, much less both.

"Mere doubts or disagreement about the wisdom of a prior decision of this or a lower court will not suffice" to qualify for this exception to the law-of-the-case doctrine. *Hollis*, 506 F.3d at 421 (citation omitted). "To be clearly erroneous, a decision must strike [this Court] as more than just maybe or probably wrong; it must be *dead wrong*." *Ibid.* (emphasis added).

Davis has not shown that this Court's rejection of his *Batson* claim was "dead wrong." This Court's prior opinion accurately summarized his and his co-defendants' *Batson* claims, correctly laid out the governing legal standard under *Batson*, and (as discussed above) applied the correct standard of review. See

Causey, 185 F.3d at 412-413. The Court made no misstatements of either law or fact. Moreover, in ruling on the *Batson* claim, the prior panel had all the jurors' questionnaires and the voir dire transcript before it. See *Causey*, 185 F.3d at 432 (DeMoss, J., dissenting in part); Gov't Br., *Causey*, *supra*, 53, 60-62. Thus, there is no reason to believe that the prior panel failed to consider the relevant evidence in its factual review.

Davis nonetheless seizes on this Court's statement in its previous opinion that "[t]he Government's explanations were * * * not outside the realm of credibility." *Causey*, 185 F.3d at 413; see Br. 132-134. His emphasis on this isolated statement is misplaced. This Court never stated that the mere fact that the prosecutor's explanations were within "the realm of credibility" was *dispositive* of the *Batson* analysis. This single ambiguous statement in the opinion does not even come close to showing that this Court's rejection of the *Batson* claim was erroneous, much less that it was "dead wrong."

What Davis is really seeking here is not the correction of an obvious error but, rather, a second chance to marshal the evidence in support of a *Batson* argument that this Court found unpersuasive the first time around. In their attempt at a do-over, his new appellate attorneys have presented a more detailed factual analysis of his *Batson* claim – an analysis that his prior counsel could have

performed last time had they believed it advantageous to do so. For example, in comparing jurors who were struck with those who were not, Davis's brief in the present appeal points to two dozen white jurors whom he never mentioned in his previous appeal. See p. 170-171 n.21, *supra*. Where a prior panel has ruled against a party, this Court will "decline to revisit the prior panel's conclusions merely because [the party] ha[s] thought of better arguments after the disposition." *Loa Herrera* v. *Department of Homeland Sec.*, 239 F. App'x 875, 880 (5th Cir. 2007).

At any rate, even if Davis could show that this Court was "dead wrong" in rejecting his *Batson* claim in 1999, he cannot also demonstrate the "manifest injustice" necessary to justify revisiting his now-affirmed convictions. Because he previously had the opportunity and incentive to provide the detailed factual analysis that he now seeks to present in support of his *Batson* claim, no injustice will occur in holding him to this panel's prior decision. We are aware of "no case where [this] [C]ourt (or any court, for that matter) has found that a prior opinion works a manifest injustice where the party claiming injustice had all the means and incentive to provide the relevant information in the first appeal," but failed to do so. *Becerra*, 155 F.3d at 755-756.

In addition, Davis had the advantage on remand of having his case heard by a new jury – a jury that he does not claim is tainted by any *Batson* violations. Although that sentencing jury on remand was not charged with reconsidering the first jury's decision on guilt *per se*, the second jury did find beyond a reasonable doubt that Davis engaged in the core criminality that formed the basis of his 1996 convictions. See SR 5180-5183. For example, the district court instructed the sentencing jury on remand that, for Davis to be eligible for the death penalty, the government "has the burden of proving to you beyond a reasonable doubt that the defendant intentionally caused the death of Ms. Groves and did so after substantial planning and substantial premeditation on his part." SR 5180 ("You are required to find, and specify in writing, whether the government has proven beyond a reasonable doubt that Mr. Davis intended to kill Kim Groves."). The jury was further instructed that, to find the statutory aggravating factor of substantial planning and premeditation, "the government must prove the defendant killed Kim Groves only after substantially thinking the matter over and deciding to do it beforehand." SR 5182. The fact that a second, untainted jury made these findings provides additional assurance that the Court's prior rejection of his *Batson* challenge did not result in manifest injustice.

IX

DAVIS'S *BRADY* AND *GIGLIO* CLAIMS ARE UNTIMELY; IN ANY EVENT, THE PROSECUTION DID NOT WITHHOLD MATERIAL EVIDENCE OF A WITNESS'S AGREEMENTS WITH THE GOVERNMENT IN VIOLATION OF *BRADY* OR *GIGLIO*

Davis argues (Br. 178-182) that the prosecution violated his rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972), by allegedly withholding material evidence about witness Sammie Williams and by allegedly eliciting false testimony from Williams at Davis's 1996 trial. He contends that these alleged violations mandate reversal of his 1996 convictions on Counts 1 and 2, which this Court upheld a decade ago in *United States* v. *Causey*, 185 F.3d 407 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000). These claims are time-barred and, at any rate, no *Brady* or *Giglio* violation occurred.

A. Davis Failed To Meet The Three Year Deadline For Raising His Brady *And* Giglio *Claims*

Davis's *Brady* and *Giglio* claims are untimely. This Court has held that the "proper avenue" for raising *Brady* and *Giglio* claims is a motion for a new trial filed in the district court under Federal Rule of Criminal Procedure 33. *United States* v. *Skilling*, 554 F.3d 529, 574-575 (5th Cir. 2009), petition for cert. filed, 77 U.S.L.W. 3645 (May 11, 2009) (No. 08-1394). Rule 33 requires that a motion for

a new trial based upon newly discovered evidence "be filed within 3 years after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1). This three-year time limit is jurisdictional. *United States* v. *Bowler*, 252 F.3d 741, 743 (5th Cir. 2001) (per curiam). In *Bowler*, this Court held that Rule 33, which was amended effective December 1, 1998, applied to cases pending on that date "insofar as just and practicable." *Id.* at 746; accord *United States* v. *Mojica Rivera*, 435 F.3d 28, 32-33 (1st Cir.), cert. denied, 547 U.S. 1032 (2006); *United States* v. *Ristovski*, 312 F.3d 206, 212 (6th Cir. 2002), cert. denied, 538 U.S. 979 (2003). This Court concluded that applying the three-year time limit would not be "just and practicable" in Bowler's case, as it would have required him to file his motion for new trial more than five months *before* the amended rule became effective. See 252 F.3d at 746.

Although Davis raised his *Brady* and *Giglio* claims in a motion for a new trial (SR 3069-3090), his motion was untimely under amended Rule 33. In contrast to *Bowler*, the guilt-phase jury in Davis's case rendered its verdict on April 26, 1996 (SR 2002-2007), giving Davis until April 26, 1999 – nearly five months after the amended rule took effect – to file a motion for a new trial. Davis did not file his motion for a new trial based upon *Brady* and *Giglio* until July

2001. Under these circumstances, it is just and practicable to apply amended Rule 33 to Davis's claim and find it time-barred.

B. Factual Background

In December 1994, Sammie Williams, Davis's police partner at the time of the crimes at issue here, was indicted for conspiracy to possess cocaine, with intent to distribute, and for carrying a firearm in the commission of that felony. These charges against Williams, combined, carried a potential sentence of 15 years to life imprisonment. Apr. 17, 1996 Tr. 5-6, 13.

Williams and his attorney, Blake Jones, subsequently met several times with Assistant United States Attorney (AUSA) Albert Winters, the supervising attorney in Davis's prosecution under 18 U.S.C. 241 and 242, to discuss Williams' possible cooperation with the government in the latter case. May 16, 2001 Evid. Hr'g Tr. 46. In one of the final meetings, on December 22, 1994, Williams' counsel requested a plea agreement with the government, which AUSA Winters refused. May 16, 2001 Evid. Hr'g Tr. 46. Instead, Winters told Williams and Jones that if Williams cooperated without an agreement, the government would make the federal witness protection program available to him. SR 3117 (Winters affidavit); May 16, 2001 Evid. Hr'g Tr. 47-48. Winters also informed Williams and Jones that if Williams "cooperate[d] and [the government] determine[d] it [wa]s

substantial, [the government would] consider filing the appropriate [Section 5K][23] motion with [the] sentencing judge" in the drug and gun case, but made "absolutely no promise" that it would file such a motion. May 16, 2001 Evid. Hr'g Tr. 48.

On April 26, 1995, Williams pleaded guilty to the drug and gun charges for which he was indicted. Apr. 17, 1996 Tr. 7. At the outset of his April 1996 testimony at Davis's trial in the present case, Williams denied having an agreement, written or otherwise, with the government in connection with his guilty plea. Apr. 17, 1996 Tr. 7. According to Williams, he and his counsel requested and received from his sentencing judge the opportunity to cooperate with the government before being sentenced. Apr. 17, 1996 Tr. 8.

In his April 1996 testimony, Williams also told the jury that he was "hoping that the government informs the judge of my cooperation and, as a result, he will give me a lesser sentence [in the drug and gun case] than he otherwise may impose on me." Apr. 17, 1996 Tr. 8; see Apr. 17, 1996 Tr. 87. Williams denied that the government promised him a lighter sentence and stated that the government did not guarantee him it would or would not submit a 5K letter on his behalf to his sentencing judge. Apr. 17, 1996 Tr. 8-9, 86-88.

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[23] U.S.S.G. 5K1.1.

During closing arguments at the guilt phase of Davis's 1996 trial, defense counsel repeatedly attacked Williams' credibility on the ground that he was trying to curry favor with the government by testifying to whatever the prosecution wanted him to say. Davis's attorney told the jury that Williams was "living the deal. He's someplace protected by the United States government or the Marshals Service – I don't know where and don't want to know where – but his girlfriend visits him, and guess who pays for it? The citizens of the United States." Apr. 22, 1996 Tr. 98. In addition, Davis's counsel claimed in his closing argument that the government had told Williams that he would receive a 5K letter that could potentially result in no prison time. Apr. 22, 1996 Tr. 99.[24] Davis's attorney further described Williams as a "parrot" who testified as the government desired and, consequently, was expecting a "nice reward." Apr. 22, 1996 Tr. 99. Counsel for Paul Hardy, Davis's co-defendant, argued in closing that because Williams had not yet received a sentence in his drug and gun case, the jury should "view his testimony as being completely suspect, as a person who knows what to say, knows what the government wants to hear to save his own soul." Apr. 22, 1996 Tr. 117.

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[24] As explained above, the United States had *not*, in fact, promised Williams a 5K letter.

The jury at the 1996 trial convicted Davis and the case proceeded to the penalty phase. During this phase, the district court barred any mention of the fact that Williams was in protective custody in prison, but allowed Davis's attorney to elicit testimony from Williams that he was in the federal witness protection program. Apr. 26, 1996 Tr. 71-72.

After Williams testified at the 1996 trial, the government filed a 5K motion on his behalf in his drug and gun case, which his sentencing judge granted, resulting in a five-year prison term. May 16, 2001 Evid. Hr'g Tr. 41, 48, 54.

After this Court remanded Davis's case for resentencing, he filed several motions claiming violations of *Brady* and *Giglio*. On April 5, 2001, Davis filed a motion to compel the government to turn over any plea agreement it had with Williams. SR 2895-2900. The district court held an evidentiary hearing on May 16, 2001, to determine whether the government promised Williams, or led him to believe, that he would be rewarded if he cooperated with the government in its prosecution of Davis. May 16, 2001 Evid. Hr'g Tr.

Several witnesses testified at the hearing, including Williams; Jones, the attorney who represented Williams in the drug and gun case; AUSA Winters; and two FBI special agents who had interviewed Williams. Williams, Jones, and Winters all testified at the hearing that Williams did not have a plea agreement

with the government for a reduced sentence and that the government merely told Williams that it would consider filing a 5K motion if it determined his cooperation to be substantial. May 16, 2001 Evid. Hr'g Tr. 35, 37-38, 42, 46-48, 55-56, 58, 82, 85-88.

FBI special agents Kathleen Adams and Lester Tamashiro interviewed Williams in December 1994 and January 1995, and, after those interviews, produced FBI 302 reports stating that Williams was debriefed "as a result of his entering into a plea agreement with the United States Government." SR 2977-2979. At the May 2001 evidentiary hearing, however, both Adams and Tamashiro testified that, when they wrote the 302 reports, they had merely assumed that Williams was cooperating pursuant to a plea agreement related to his drug and gun case because he met with them without an attorney. May 16, 2001 Evid. Hr'g Tr. 8, 10-11, 16, 27-29. Both agents also acknowledged that neither the prosecutor nor Williams told them that he had such an agreement and that they neither told Williams anything to lead him to believe that he had an agreement nor promised him anything in exchange for information. May 16, 2001 Evid. Hr'g Tr. 19-20, 31. Adams also testified that she knew, based upon subsequent discussions with FBI special agent Stanley Hadden and members of the United States Attorney's Office, that her assumption that Williams had a plea agreement with the

government was incorrect. May 16, 2001 Evid. Hr'g Tr. 12-13. Tamashiro testified that he recently learned of his mistaken assumption about Williams from Adams and members of the United States Attorney's Office. May 16, 2001 Evid. Hr'g Tr. 26-27.

Following the hearing, the district court issued a minute entry dated June 19, 2001, stating that it considered Davis's motion to have been satisfied. SR 3116.

Davis subsequently raised the *Brady* and *Giglio* claims in motions for a new trial. He filed the first such motion on July 9, 2001, claiming that he had newly discovered evidence that Williams had an undisclosed plea agreement with the government. SR 3069-3090. After hearing oral argument, the district court denied the motion without opinion on July 26, 2001. SR 3129. About one year later, Davis filed a motion to reconsider based upon a new Fifth Circuit decision that addressed *Brady* and *Giglio*. SR 3491-3504. The district court again held oral argument and denied the motion without opinion on November 6, 2002. SR 3589. Finally, on March 1, 2005, Davis filed a motion for a new trial based upon a new Supreme Court ruling that addressed *Brady* and *Giglio*. SR 3688-3715 (relying on *Banks* v. *Dretke*, 540 U.S. 668 (2004)). Again, the district court held argument (SR 4050-4056), and, on May 19, 2005, issued an order denying the

motion (SR 3996-3997). The district court reasoned that *Banks* offered no new ground to support Davis's *Brady* claims. SR 3996. The court also noted that it had conducted a thorough *in camera* review of the FBI 302 reports on Williams. SR 3996.

C. Standard of Review

"In general, [this Court] review[s] a denial or grant of a criminal defendant's motion for new trial for an abuse of discretion." *United States* v. *Sipe*, 388 F.3d 471, 478 (5th Cir. 2004). Where the basis for the new trial motion is the government's alleged violation of *Brady*, however, this Court has sometimes applied *de novo* review and other times has reviewed for abuse for discretion. See *Sipe*, 388 F.3d at 478-479 & nn.18, 19 (citing cases). Because the *Brady* determination is "inevitably a contextual inquiry, involving questions of both law *and* fact," this Court will examine the *Brady* question *de novo* while "proceed[ing] with deference to the factual findings underlying the district court's decision." *Id.* at 479. This standard applies to the *Giglio* issue as well. See *Hafdahl* v. *Johnson*, 251 F.3d 528, 533 (5th Cir.), cert. denied, 534 U.S. 1047 (2001).

D. The Government Did Not Violate Brady *Or* Giglio

Davis argues that the government violated his due process rights under *Brady* and *Giglio*. Specifically, Davis claims that the government had an

undisclosed plea agreement with Williams before the 1996 trial, that the government made promises to Williams about receiving a reduced sentence and participating in the witness protection program, that the prosecution withheld this information from the defense, and that Williams testified falsely about these matters in the 1996 trial. Most of the factual premises underlying Davis's argument are flawed, and, at any rate, he has failed to demonstrate that the government violated *Brady* or *Giglio*.

In *Brady* and *Giglio*, the Supreme Court set forth basic principles governing the circumstances in which the government must disclose its material understandings and agreements with witnesses and correct any misstatements regarding the same. The Court held in *Brady* that the Due Process Clause prohibits the prosecution from suppressing evidence favorable to the accused "where the evidence is material either to guilt or to punishment." 373 U.S. at 87. When a defendant seeks a new trial on the basis of a *Brady* violation, he must show that "(1) the prosecution did not disclose the evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material." *United States* v. *Fernandez*, 559 F.3d 303, 319 (5th Cir.) (quoting *United States* v. *Infante*, 404 F.3d 376, 386 (5th Cir. 2005)), cert. denied, 2009 WL 1283177 (June 8, 2009) (No. 08-1381). Evidence is "material" under *Brady* "only if there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985).

In *Giglio*, the Court held that the *Brady* rule covers evidence affecting the credibility of key government witnesses, including "any understanding or agreement [between the witnesses and the government] as to a future prosecution." 405 U.S. at 154-155. "A *Giglio* violation usually occurs when a cooperating witness denies having a plea agreement and the prosecutor fails to correct the misstatement." *United States* v. *Williams*, 343 F.3d 423, 439 (5th Cir.), cert. denied, 540 U.S. 1093 (2003). A witness's testimony is "material" in this context if false testimony regarding the agreement could "in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (internal quotation marks omitted).

Davis has not shown a violation of either *Brady* or *Giglio*. First, Davis incorrectly asserts (Br. 179) that Williams had a plea agreement with the government before he began cooperating with the FBI in 1994. The evidence refutes that contention. Williams, his attorney, the supervising attorney in the government's prosecution of Davis, and FBI special agents on the case all testified

under oath at the May 2001 evidentiary hearing that no such agreement existed.[25] Although FBI 302 reports from December 1994 and January 1995 state that Williams was debriefed "as a result of his entering into a plea agreement with the United States Government" (SR 2977, 2979), the FBI agents who submitted those reports later testified under oath at the May 2001 *Brady*/*Giglio* hearing that they mistakenly assumed that Williams was cooperating under a plea agreement. Thus, contrary to Davis's contention otherwise (Br. 179-180), there is unanimity among the relevant participants that no agreement existed at the time.

In support of his allegation that there was an undisclosed plea agreement, Davis points to the fact that the United States filed a 5K motion in the drug and gun case recommending a reduced sentence for Williams after he testified at Davis's 1996 trial. But this fact does not indicate that a plea agreement existed when Williams testified as a government witness in 1996. Cf. *United States* v.

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[25] These unrebutted denials distinguish Davis's case from *Tassin* v. *Cain*, 517 F.3d 770 (5th Cir. 2008) (cited Br. 182 n.23). In *Tassin*, this Court held that a trial is unfair "where a key witness has received consideration or potential favors in exchange for testimony and lies about those favors" and that a jury is entitled to know of an "understanding or agreement" between a key witness and the government as to a future prosecution. *Id.* at 778. In affirming the district court's determination that the government and the key witness had an understanding beyond a mere "hope or expectation" that she would receive a lenient sentence in exchange for her testimony, this Court noted that — in stark contrast to Davis's case — both the witness and her attorney testified after trial that such an understanding existed. *Id.* at 774-775, 779.

Molina, 75 F.3d 600, 602 (10th Cir.) (mere fact that prosecution witnesses entered into plea agreements after defendant's trial was not evidence that plea agreements were secretly reached prior to witnesses' testimony and improperly withheld from the defense in violation of *Brady* and *Giglio*), cert. denied, 517 U.S. 1249 (1996).

Next, Davis asserts (Br. 180-181) that Williams' 1996 trial testimony about his lack of an agreement with the government conflicts with testimony of AUSA Albert Winters. Winters testified at the May 2001 evidentiary hearing that the government told Williams that if he "cooperate[d] and [the government] determine[d] it [wa]s substantial, [the government would] consider filing the appropriate [Section 5K] motion with [the] sentencing judge" in the drug and gun case. May 16, 2001 Evid. Hr'g Tr. 48. Winters also stated that "there was absolutely no promise that [Williams] would get a 5K or a departure motion." May 16, 2001 Evid. Hr'g Tr. 47. There is no meaningful distinction between this testimony and Williams' trial testimony, in which Williams stated that the government did not promise or guarantee him anything but that he was "hoping that the government informs the judge of my cooperation and, as a result, he will give me a lesser sentence than he otherwise may impose on me." Apr. 17, 2001 Evid. Hr'g Tr. 8, 86-88. In essence, both Winters and Williams testified that the

government had not promised to file a 5K motion, but that Williams knew when he testified in 1996 that such a filing was possible.

The government's statement that it would "consider" filing a 5K motion on Williams' behalf if it determined his testimony was substantial is not a sufficiently definite understanding or agreement that must be disclosed pursuant to *Giglio*. See *Tarver* v. *Hopper*, 169 F.3d 710, 716-717 (11th Cir. 1999) (district attorney's statement to witness's attorney that witness's testimony "would be taken into consideration" with regard to possibility of reduction of charges against witness was not agreement or understanding that must be disclosed under *Giglio*); see also *Goodwin* v. *Johnson*, 132 F.3d 162, 187 (5th Cir. 1997) (holding that "nebulous expectation of help from the state" is not *Brady* material).

The government's representation to Williams that it would "consider" a 5K motion, moreover, is not material under *Brady* because its disclosure would not have affected the jury's ability to judge the credibility of Williams. The jury already knew from Williams' own testimony that he faced a potentially long prison sentence in his drug and gun case and that he hoped the government would find his testimony in Davis's prosecution to constitute substantial cooperation warranting the filing of a 5K motion in the drug and gun case. Counsel for both Davis and Hardy reiterated to the jury in their closing arguments at the guilt phase

of the trial that Williams had yet to be sentenced in the drug and gun case and was hoping to receive a lesser sentence as a result of his testimony. Indeed, Davis's attorney went even further, asserting in his closing argument that Williams was "living the deal" and claiming (incorrectly) that the government had told Williams that he would receive a 5K letter that could potentially result in no prison time. Apr. 22, 1996 Tr. 98. Accordingly, the government did not violate *Brady* or *Giglio* when it left untouched Williams' testimony that he did not have an agreement with the government for a reduced sentence.

Finally, Davis argues (Br. 180-181) that the government violated *Brady* and *Giglio* by allegedly failing to disclose to the defense that the government would allow Williams and his family to enter the Witness Protection Program if he chose to cooperate with the government. No violation occurred.

As this Court has noted, "the State bears no responsibility to direct the defense toward potentially exculpatory evidence that is either known to the defendant or that could be discovered through the exercise of reasonable diligence." *Sipe*, 388 F.3d at 478. Davis's attorney already knew that Williams was participating in the witness protection program at the time of the 1996 trial, as evidenced by his closing argument at the guilt phase of the trial that Williams was "living the deal" and being protected by the federal government at taxpayers'

expense. Apr. 22, 1996 Tr. 98. Because defense counsel already knew about Williams' participation in the witness protection program, the undisclosed information was not material under *Brady* or *Giglio*.[26]

In addition, disclosure of the details of Williams' witness protection participation was not material because it likely would have prejudiced Davis. It would suggest to the jury that he was dangerous and would have opened the door to the prosecution to elicit additional testimony from Williams explaining the need for him to go into the program. See *United States* v. *McMahan*, 495 F.3d 410, 422-424 (7th Cir. 2007), vacated on other grounds, 128 S. Ct. 917 (2008). In *McMahan*, the Seventh Circuit held that the government did not violate *Brady* when it failed to disclose to the defense that the government had relocated the witness's family and had given relocation funds to the witness himself after his release from jail. *Ibid.* The court of appeals reasoned that no *Brady* violation occurred because the evidence "cut[] both ways," *id.* at 424:

> If counsel had cross-examined [the witness] regarding the relocation of his family, the government would likely have been permitted to inquire about why the relocation was taking place – that is, that the family feared retaliation by the defendants. It is hard to see why such

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[26] Although *Giglio*'s "any reasonable likelihood" standard imposes a lower burden than *Brady*'s "any reasonable probability" language, see *Barrientes* v. *Johnson*, 221 F.3d 741, 756 (5th Cir. 2000), that difference is irrelevant in this case.

> information would be beneficial to the defendants or could possibly lead to a different verdict.

Ibid.

Other courts have also noted the prejudice that may befall a defendant from revealing to the jury that a government witness is participating in a witness protection program. For example, the Second Circuit in *United States* v. *Provenzano*, 615 F.2d 37, 49-50, cert. denied, 446 U.S. 953 (1980), noted that defense counsel chose not to cross-examine a witness on his receipt of benefits as part of the witness protection program, because the risk that the jury would infer that the witness feared the defendant outweighed any possible benefit of impeaching the witness. Another court, responding to a *Brady* claim, found that "[t]he State's promise to [a witness] that it would provide him with protection after the trial * * * would not have been favorable to [the defendant] even if it had been disclosed." *Bell* v. *Haley*, 437 F. Supp. 2d 1278, 1310 (M.D. Ala. 2005). The court reasoned that "[f]urther cross-examination, either about the contemporaneous protective custody or the possible future witness protection, would not have benefitted [the defendant] because it would only have served to emphasize that [the witness] was afraid that [the defendant] might kill him." *Id.* at 1310-1311. Yet another court noted, in addressing a *Brady* claim, that defense

counsel failed to cross-examine a witness on his current protective custody status "no doubt out of concern that such cross-examination might hurt his client by opening the door for the prosecution to develop before the jury the facts that necessitated [the witness's] protective custody." *Green* v. *Vacco*, 961 F. Supp. 46, 49 (W.D.N.Y. 1997). The court concluded that in light of defense counsel's strategic choice, the defendant could not show that the undisclosed evidence of the witness's *future* protection status "would have created a reasonable probability that the result of his trial would have been different." *Ibid.*

In sum, Davis has failed to demonstrate that any *Brady* or *Giglio* violation occurred. The defense already had most, if not all, of the information that Davis claims was improperly withheld. Moreover, Davis has not shown that the evidence or testimony at issue in his *Brady* and *Giglio* claims was material. Therefore, even if Davis had filed a timely motion for a new trial, he would not be entitled to relief.

X

THE LAW-OF-THE-CASE DOCTRINE BARS DAVIS FROM AGAIN CHALLENGING THE SUFFICIENCY OF THE EVIDENCE ON THE "COLOR OF LAW" ELEMENT OF THE TWO COUNTS OF CONVICTION THAT THIS COURT UPHELD IN 1999

In appealing his 1996 convictions for violating 18 U.S.C. 241 and 242, Davis argued that the evidence was insufficient to prove that he acted under "color of law." This Court rejected this argument in 1999 in affirming Davis's convictions under Sections 241 and 242. *United States* v. *Causey*, 185 F.3d 407, 415-416 (5th Cir. 1999). The law-of-the-case doctrine bars Davis from relitigating this issue. See *United States* v. *Cervantes Blanco*, 504 F.3d 576, 587 (5th Cir. 2007).

Contrary to Davis's assertion (Br. 183), the Supreme Court's decision in *United States* v. *Morrison*, 529 U.S. 598 (2000), is not an intervening change of law that would justify an exception to the law-of-the-case doctrine. In *Morrison*, the Supreme Court held that a portion of the Violence Against Women Act, 42 U.S.C. 13981, which provided a private cause of action for victims of gender-motivated violence, was not a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. 529 U.S. at 627. The Court noted that although the Fourteenth Amendment regulates only state action, Section 13981 was directed

at individuals who had committed criminal acts motivated by gender bias, even when the perpetrators were private actors and were not acting under color of state law. *Id.* at 626. *Morrison* has no effect on this Court's previous holding that the evidence was sufficient to show that Davis acted under color of law. *Morrison* did not change the standard for determining whether conduct qualifies as "state action," which, in the present case, is synonymous with action "under color of law."[27] Rather, the *Morrison* Court addressed Congress's constitutional authority to prohibit purely private conduct that does not qualify as state action or action under color of law.

Davis also suggests — without fully explaining the argument (Br. 182-183) — that *Morrison* calls into question the constitutionality of Sections 241 and 242 as applied to his conduct. This contention is meritless. The statutory provision that the Supreme Court invalidated in *Morrison* did not require any proof that the defendant was acting under color of law. Instead, the statute in *Morrison* had been applied to purely private conduct — specifically, one student's sexual assault of

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[27] "State action" and action "under color of law" are identical standards "[w]here, as here, deprivations of rights under the Fourteenth Amendment are alleged." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 & n.8 (1999); see DRE Tab 3; SR 862, 865 (alleging that constitutional right violated was the "right not to be deprived of liberty without due process of law," which arises under the Fourteenth Amendment).

another. By contrast, Section 242 explicitly requires a showing that the defendant acted under color of law, and Section 241 has been interpreted to contain a "color of law" requirement where, as here, the underlying constitutional right at issue has a state action requirement. See 18 U.S.C. 242; *United States* v. *Tarpley*, 945 F.2d 806, 808 & n.2 (5th Cir. 1991), cert. denied, 504 U.S. 917 (1992). Accordingly, *Morrison* is irrelevant here and provides no basis for this Court to depart from the law-of-the-case doctrine.

XI

THE LAW-OF-THE-CASE DOCTRINE FORECLOSES DAVIS'S ARGUMENT THAT THE INDICTMENT'S OMISSION OF FEDERAL DEATH PENALTY ACT ELEMENTS PRECLUDED THE GOVERNMENT FROM SEEKING THE DEATH PENALTY AT RESENTENCING

In *United States* v. *Davis*, 380 F.3d 821, 830 (5th Cir. 2004), cert. denied, 544 U.S. 1034 (2005), this Court held that the government's omission of Federal Death Penalty Act elements from the indictment was harmless error. To preserve the issue for further review, Davis argues (Br. 184) that this Court's decision in *Davis* was erroneous. The prior panel's ruling in *Davis* is the law of the case and bars defendant's argument. See pp. 172-174, *supra*.

XII

DAVIS HAS WAIVED HIS DOUBLE JEOPARDY ARGUMENT; IT IS ALSO BARRED BY THE LAW-OF-THE-CASE DOCTRINE AND, IN ANY EVENT, IS MERITLESS

In 1999, this Court upheld Davis's convictions on Counts 1 and 2, and the Supreme Court denied his petition for certiorari. *United States* v. *Causey*, 185 F.3d 407, 415-416 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000). Count 1 charged Davis with violating 18 U.S.C. 241 by conspiring to deprive the victim of her federally protected rights. SR 862-864; DRE Tab 3. Count 2 charged Davis with the substantive offense of depriving the victim of her federally protected rights under color of law, in violation of 18 U.S.C. 242. SR 864-865; DRE Tab 3.

Davis now argues (Br. 185-186) that the Double Jeopardy Clause allows his conviction on one, but not both, counts. He contends that, in effect, the jury instructions at his 1996 trial made Count 2 (the substantive violation of Section 242) a lesser included offense of the conspiracy charge in Count 1. Davis's argument is waived, is barred by the law-of-the-case doctrine, and, in any event, is without merit.

A. This Argument Is Waived And Is Barred By The Law Of The Case Doctrine

As a threshold matter, Davis has waived this argument. In his first appeal more than a decade ago, Davis did not challenge his convictions on the basis of

double jeopardy. "[A] party cannot raise an issue on appeal that could have been raised in an earlier appeal in the same case." *Ward* v. *Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 607-608 (5th Cir. 2004); accord *United States* v. *Castillo*, 179 F.3d 321, 326 (5th Cir. 1999), rev'd on other grounds, 530 U.S. 120 (2000). Because Davis failed to raise this double jeopardy challenge in his first appeal, he has waived this claim, and this Court should not consider it now.

Davis's argument is also barred by the law-of-the-case doctrine. He contends that, as a result of an alleged double jeopardy violation, either his Section 241 or his Section 242 conviction is invalid and must be reversed. But this Court upheld his convictions under Sections 241 and 242 nearly a decade ago. *Causey*, 185 F.3d at 415-416. The validity of both convictions is now law of the case and should not be revisited by this Court. See pp. 170-173, *supra* (discussing law-of-the-case doctrine).

Davis incorrectly suggests (Br. 185-186 & n.125) that this Court's decision in *United States* v. *Agofsky*, 458 F.3d 369 (5th Cir. 2006), cert. denied, 549 U.S. 1182 (2007), is an intervening change of law that either excuses his earlier failure to raise the double jeopardy issue or justifies an exception to the law-of-the-case doctrine. In fact, *Agofsky* did not change the law on double jeopardy; rather, the panel in *Agofsky* simply adhered to a 1987 decision of this Court, which predated

Davis's prior appeal by several years. See *id.* at 372 (adhering to *United States* v. *Gibson*, 820 F.2d 692 (5th Cir. 1987)). At any rate, *Agofsky* is irrelevant because it did not address the specific question Davis raises – whether the Double Jeopardy Clause protects a defendant from being convicted for both a substantive offense and a conspiracy to commit that offense. Consequently, *Agofsky* provides no basis for excusing Davis's waiver of his double jeopardy claim or for making an exception to the law-of-the-case doctrine.

B. No Double Jeopardy Violation Occurred

Davis's convictions for violating both 18 U.S.C. 241 and 242 do not violate the Double Jeopardy Clause. As the First Circuit has correctly held, no double jeopardy violation occurs where, as here, a defendant is convicted and punished for both a Section 241 violation resulting in death and a Section 242 offense resulting in death. *Catala Fonfrias* v. *United States*, 951 F.2d 423, 426-427 (1st Cir. 1991), cert. denied, 506 U.S. 834 (1992). "The language, structure and legislative history of the statutes at issue show 'in the plainest way,' that Congress intended them to define discrete, and separately punishable, crimes – even when the result of the statutory violations is death." *Id.* at 427 (citation omitted).

In the context of a single criminal prosecution, the question of what punishments may be imposed under the Double Jeopardy Clause is solely a

question of legislative intent; the Clause does not prohibit cumulative punishments when the legislature intends to authorize that result. *Garrett* v. *United States*, 471 U.S. 773, 779 (1985); *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983); *United States* v. *Severns*, 559 F.3d 274, 282-283 (5th Cir. 2009). Accordingly, when conduct violates two statutes, the defendant may be convicted and sentenced under both statutes at a single trial unless Congress intended only a single punishment. *Garrett*, 471 U.S. at 778-779; *Severns*, 559 F.3d at 282-283.

Congress ordinarily intends to allow multiple punishments for a conspiracy and an underlying substantive offense. See *Iannelli* v. *United States*, 420 U.S. 770, 777-778 (1978). "It has been long and consistently recognized by the [Supreme] Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. * * * And the plea of double jeopardy is no defense to a conviction for both offenses." *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946) (citations omitted); accord *United States* v. *Felix*, 503 U.S. 378, 389 (1992). When Congress amended Sections 241 and 242 in 1968 to add the "death results" language to both provisions, see *Catala Fonfrias*, 951 F.2d at 425, it did so against the backdrop of this well-established principle, thus raising the presumption that Congress intended multiple punishments for criminal conduct that violates both statutes. *Id.* at 427.

The district court adhered to this well-established distinction between conspiracies and substantive offenses in its jury charge at Davis's 1996 trial. The court instructed the jury that "in Count One, the defendants are not charged with violating the underlying substantive offense set forth in Count[] Two * * *. Rather, the defendants are charged with having conspired to do so, a separate offense, in violation of [18 U.S.C. 241]." SR 1909.

Contrary to Davis's assertion (Br. 185-186), the jury instructions did not make the Section 242 violation a lesser included offense of a Section 241 violation. The court's instructions made clear that, even in a "death results" case, each statutory provision contains an element not found in the other. Section 241 in this context requires a showing that death resulted from the conspiracy to deprive an individual of rights; the defendant need not have actually succeeded in bringing about the particular deprivation of rights that was the object of the conspiracy. See SR 1911-1913. In a "death results" case under Section 242, by contrast, there must be a showing that death resulted from the actual denial of civil rights; no proof of conspiracy is required. SR 1914-1915 (Section 242 instructions).

In any event, as the First Circuit correctly held in *Catala Fonfrias*, the Double Jeopardy Clause would not preclude punishing a defendant under both

statutes even assuming, for the sake of argument, that a Section 241 violation that results in death completely subsumes a Section 242 violation resulting in death. 951 F.2d at 426-427. Because Congress intended to authorize multiple punishments, it matters not whether, in a "death results" case, a Section 242 violation requires proof of an element that Section 241 does not.

XIII

DAVIS HAS WAIVED HIS ARGUMENT THAT THE INDICTMENT SHOULD HAVE ALLEGED A DEPRIVATION OF THE RIGHT TO "LIFE" RATHER THAN THE RIGHT TO "LIBERTY"; THE ARGUMENT IS ALSO BARRED BY THE LAW-OF-THE-CASE DOCTRINE AND, IN ANY EVENT, IS MERITLESS

Davis challenges (Br. 186) his 1996 convictions on Counts 1 and 2, claiming that the indictment was defective because it identified the relevant constitutional right as the right to "liberty," rather than the right to "life." This argument is barred by waiver and the law-of-the-case doctrine and, in any event, is meritless. His brief, which attempts to incorporate by reference the pleadings he filed in the district court, fails to adequately develop the argument; it is thus waived. See *United States* v. *Posada Rios*, 158 F.3d 832, 867 (5th Cir. 1998), cert. denied, 526 U.S. 1031 (1999); *Coury* v. *Moss*, 529 F.3d 579, 587 (5th Cir. 2008). The issue is waived for the additional reason that Davis never raised it in

his initial appeal to this Court.[28] The argument is also barred by the law-of-the-case doctrine because this Court affirmed his convictions on Counts 1 and 2 nearly a decade ago. See pp. 172-174, 206-207, *supra* (discussing waiver and law of the case).

At any rate, his argument lacks merit. This Court's decision in *United States* v. *Hayes*, 589 F.2d 811 (5th Cir.), cert. denied, 444 U.S. 847 (1979), confirms that a violation of the "death results" prong of 18 U.S.C. 241 or 242 can properly be charged as a willful deprivation of *liberty* under the Due Process Clause. See *id.* at 816, 820-822 & n.5. As Judge Dennis explained, "*Hayes* made it apparent that whether the victim of an assault lives or dies, the 'defined right' is liberty, rather than life." *United States* v. *Causey*, 185 F.3d 407, 439 (5th Cir. 1999) (Dennis, J., concurring), cert. denied, 530 U.S. 1277 (2000).

Contrary to Davis's undeveloped assertion (Br. 186), the decisions in *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), do not call into question the sufficiency of the indictment. In *Apprendi*

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[28] Davis alluded to this argument in a subsequent appeal, see Original Brief on Behalf of Defendant-Appellee-Cross-Appellant Len Davis at 23-27, *United States* v. *Davis*, 380 F.3d 821 (5th Cir. 2004) (No. 03-30077), 2003 WL 24002472, at *23-27, but this Court did not address it. See *United States* v. *Davis*, 380 F.3d 821 (5th Cir. 2004), cert. denied, 544 U.S. 1034 (2005). Davis's belated raising of the argument in that appeal does not excuse his failure to raise it in his first.

and *Ring*, the Supreme Court held that any fact that increases the penalty for an offense beyond the otherwise-prescribed statutory maximum, including a fact that increases the penalty to a possible sentence of death, must be submitted to the jury and proved beyond a reasonable doubt. See *United States* v. *Williams*, 449 F.3d 635, 644 n.16 (5th Cir. 2006) (summarizing holdings). Therefore, in a "death results" case under Section 241 or Section 242, the indictment must allege, and the jury must find beyond a reasonable doubt, that the willful deprivation of rights (or, in the case of Section 241, the conspiracy to commit such a deprivation) resulted in the victim's death. The indictment in Davis's case contained the "resulting in * * * death" allegation (see SR 863, 865; DRE Tab 3), and the jury at Davis's 1996 trial was instructed that it must find that death resulted in order to convict him of the Section 241 and 242 violations charged in the indictment (see SR 1912, 1914-1915). Davis's convictions for violating Section 241 and 242 thus fully complied with *Apprendi* and *Ring*.

XIV

DAVIS HAS WAIVED HIS ARGUMENT THAT THE SUPREME COURT'S DECISIONS IN *APPRENDI* AND *RING* RESULTED IN AN UNCONSTITUTIONAL "JUDICIAL REWRITING" OF 18 U.S.C. 241 AND 242; IN ANY EVENT, HIS ARGUMENT IS MERITLESS

Davis argues (Br. 187) that the Supreme Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Ring* v. *Arizona*, 536 U.S. 584 (2002), have effectively resulted in a judicial rewriting of 18 U.S.C. 241 and 242 in cases where death results. Davis contends that *Apprendi* and *Ring* transformed the "death results" sentencing factor of Sections 241 and 242 into an element of the offense in violation of the Separation of Powers doctrine, the *Ex Post Facto* Clause, and the Due Process Clause.

Davis has waived this argument because of inadequate briefing. The one paragraph Davis devotes to this issue, which attempts to incorporate by reference the pleadings he filed in the district court, fails to adequately develop the argument. See pp. 124 n.16, 211, *supra*.

At any rate, Davis's argument is without merit. To prevail on an *ex post facto* claim, a defendant "must show both that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he acted." *Johnson* v.

United States, 529 U.S. 694, 699 (2000). Neither *Apprendi* nor *Ring* made unlawful under Section 241 or 242 any conduct that was previously permissible, or increased the penalties for violations of those statutes. A violation of Section 241 or 242 that results in death still carries a maximum sentence of life imprisonment or death – the same penalty that existed before *Apprendi* and *Ring* were decided. Therefore, neither decision raises any *ex post facto* or due process concerns. See *Rogers* v. *Tennessee*, 532 U.S. 451, 459-460 (2001) (noting the fair notice concerns underlying both the Due Process and *Ex Post Facto* Clauses).

Nor did *Apprendi* or *Ring* infringe on Congress's powers by creating new criminal offenses that did not previously exist. The rule announced in these cases simply made clear that the "death results" component of Section 241 and 242 must be alleged in the indictment and found by the jury beyond a reasonable doubt. See pp. 212-213, *supra*. The conduct prohibited by Section 241 and 242 and the factor that triggers a possible death sentence – "death results" – are the same today as before the decisions in *Apprendi* and *Ring*. See *United States* v. *Lee*, 374 F.3d 637, 648-649 (8th Cir. 2004) (rejecting argument that "FDPA is unconstitutional after *Ring* because the Court exceeded its constitutional powers in that case by in effect creating a new common law criminal offense with elements never considered or enacted into law by Congress"), cert. denied, 545 U.S. 1141 (2005);

United States v. *Williams*, No. S100CR.1008(NRB), 2004 WL 2980027, at *12 (S.D.N.Y. Dec. 22, 2004) (rejecting argument that *Ring* rendered FDPA unconstitutional under separation of powers principles), aff'd, 506 F.3d 151 (2d Cir. 2007); *United States* v. *Mayhew*, 380 F. Supp. 2d 936, 943 (S.D. Ohio 2005) (rejecting defendant's argument that the only way to make FDPA constitutional in light of *Ring* "would be for this Court to overstep its authority by rewriting the statute"). Therefore, application of *Apprendi* and *Ring* to Sections 241 and 242 does not run afoul of separation-of-power principles.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2009, I served two copies of BRIEF FOR THE UNITED STATES AS APPELLEE, along with a pdf version of the foregoing on CD, by overnight delivery, on the following:

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CERTIFICATE OF COMPLIANCE

This brief exceeds the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The United States is filing, simultaneously with this brief, a motion to file an oversized brief of up to 49,599 words. The brief was prepared using WordPerfect 12 and contains no more than 49,599 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

APRIL J. ANDERSON
Attorney

Date: June 30, 2009

ADDENDUM

MINUTE ENTRY
BERRIGAN, J.
AUGUST 9, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	NUMBER: 94-381
LEN DAVIS	SECTION: "C"

JURY TRIAL
(Cont'd from 8/08/05)

COURT REPORTER: Karen Ibos
COURTROOM DEPUTY: Kimberly County

APPEARANCES: Michael McMahon and Mark Miller, Asst. U.S. Attorneys
Julian Murray and Carol Kolinchak, Counsel for Len Davis

PENALTY PHASE - PART 2
All present & ready.
Alternate jurors excused, subject to call, with thanks of the Court.
Jury retires for deliberation at 9:15 a.m.
Jury returns from deliberation at 11:42 a.m.
VERDICT: See Verdict Forms Attached
Neither party requested that jury be polled.
Court orders jury verdict be made judgment of the Court.
Deft to be sentenced at a later date.
Court adjourned.

JS-10: 0:30

___Fee_____
___Process_____
_X_Dktd_____
___CtRmDep__ka__
Doc.No._____

Judge Berrigan - Please clarify which is correct.

Count One - Part B

States: "... in prison."

On Pg 9 - Issues to be decided

States: "... while imprisoned."

Kellie Griffin Greene
for petitioner - 8/9/05

I apologize for the different terminology.
It's intended to mean the same thing.

Jay Berrigan

Judge Berrigan,

We have completed both Verdict Forms - Count One & Two -

Kelly P. Graffagnino
Foreperson
8/9/05

Juror #7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	NO. 94-381
LEN DAVIS	SECTION "C"

VERDICT FORM AS TO COUNT ONE

PART ONE - AGGRAVATING FACTORS

For each of the following aggravating factors, answer as to whether you unanimously find that the government has proven beyond a reasonable doubt that particular factor as to Count One:

A. Len Davis used his position as a police officer to affirmatively participate in conduct that seriously jeopardized the health and/or safety of other persons.

Unanimous Yes ✓
Not Unanimous ____

Proceed to B.

B. Len Davis poses a threat of future dangerousness to the lives and safety of other persons in prison.

Unanimous Yes ✓
Not Unanimous ____

Proceed to C.

C. The death of Kim Marie Groves has created harmful emotional distress upon her daughter.

Unanimous Yes ✓
Not Unanimous ____

Proceed to D.

D. Len Davis committed the offense for the purpose of preventing his victim, Kim Marie Groves, from, or retaliating against the victim for, providing information and assistance to law enforcement authorities in regard to the investigation or prosecution of the commission or possible commission of another offense.

Unanimous Yes ✓
Not Unanimous ____

Proceed to Part Two.

PART TWO - MITIGATING FACTORS

For each of the following factors indicate the number of jurors who find the factor established by a preponderance of the evidence as to Count One:

A. Other participants in one or more of the capital offenses who are equally or more culpable than Len Davis will not be punished by death, including, but not necessarily limited to, the following individuals: Sammie Williams, Steven Jackson, Damon Causey. Other participants in the capital offenses received reduced sentences as a result of plea agreements with the government. Other participants in the drug trafficking conspiracy are now eligible to receive reduced sentences as a result of their testimony against Mr. Davis and plea agreements with the government.

0 Jurors so find.

Proceed to B.

B. Although the evidence presented at trial was sufficient to prove Len Davis's guilt beyond a reasonable doubt, his guilt was not proved to an absolute certainty and there is residual doubt as to his guilt.

0 Jurors so find.

Proceed to C.

C. As a police officer, Len Davis frequently risked his own life to apprehend criminal suspects, assist fellow officers and save innocent victims. Len Davis was a decorated police officer and received many commendations, including a Purple Heart, while with the New Orleans Police Department.

0 Jurors so find.

Proceed to D.

D. Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by the stress of working in a high crime area, being shot at on numerous occasions, including on one occasion being shot in the stomach while coming to the assistance of fellow officers

0 Jurors so find.

Proceed to E.

E. Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by his partner, Sammie Williams, who had a history of committing violent crimes against the citizens of New Orleans.

0 Jurors so find.

Proceed to F.

F. Len Davis does not pose a threat of future dangerousness in prison.

0 Jurors so find.

Proceed to G.

G. Other factors in Len Davis's background or character mitigate against imposition of a death sentence.

0 Jurors so find.

Proceed to Part Three.

PART THREE - SENTENCE AS TO COUNT ONE

A. We, the jury, unanimously find that the aggravating factor[s] proved in this case sufficiently outweigh any mitigating factors so as to justify a sentence of death. We vote unanimously that Len Davis shall be sentenced to death as to Count One.

Unanimous Yes ✓
Not Unanimous _____

If you answered "Unanimous Yes" to A, proceed to Part Four.
If you answered "Not Unanimous" to A, proceed to B.

B. We, the jury, are not unanimously persuaded that a death sentence should be imposed in this case. However, we do unanimously agree that Len Davis should be sentenced to life imprisonment without possibility of release. Therefore, we hereby decide that Len Davis should be sentenced to life imprisonment without possibility of release as to Count One.

Unanimous Yes _____
Not Unanimous _____

If you answered "Unanimous Yes" to B, proceed to Part Four.
If you answered "Not Unanimous" to B, proceed to C.

C. We, the jury, do unanimously agree that Len Davis should be sentenced to imprisonment for a number of years lesser than life as to Count One.

Unanimous Yes _____
Not Unanimous _____

Proceed to Part Four.

PART FOUR - CERTIFICATE

By signing below, each of us individually hereby certifies that this Verdict represents his or her decision as to Count One and that consideration of the race, color, religious beliefs, national origin, or sex of Len Davis and of the victim, were not involved in reaching our respective individual decisions. Each of us individually further certifies that the same decision regarding a sentence would have been made no matter what the race, color, religious beliefs, national origin, or sex of the defendant or victim may have been.

FOREPERSON

New Orleans, Louisiana, this 9th day of August, 2005.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	NO. 94-381
LEN DAVIS	SECTION "C"

VERDICT FORM AS TO COUNT TWO

PART ONE - AGGRAVATING FACTORS

For each of the following aggravating factors, answer as to whether you unanimously find that the government has proven beyond a reasonable doubt that particular factor as to Count Two:

A. Len Davis used his position as a police officer to affirmatively participate in conduct that seriously jeopardized the health and/or safety of other persons.

Unanimous Yes ✓
Not Unanimous ____

Proceed to B.

B. Len Davis poses a threat of future dangerousness to the lives and safety of other persons in prison.

Unanimous Yes ✓
Not Unanimous ____

Proceed to C.

C. The death of Kim Marie Groves has created harmful emotional distress upon her daughter.

Unanimous Yes ✓
Not Unanimous ____

Proceed to D.

D. Len Davis committed the offense for the purpose of preventing his victim, Kim Marie Groves, from, or retaliating against the victim for, providing information and assistance to law enforcement authorities in regard to the investigation or prosecution of the commission or possible commission of another offense.

Unanimous Yes ✓
Not Unanimous ____

Proceed to Part Two.

PART TWO - MITIGATING FACTORS

For each of the following factors indicate the number of jurors who find the factor established by a preponderance of the evidence as to Count Two:

A. Other participants in one or more of the capital offenses who are equally or more culpable than Len Davis will not be punished by death, including, but not necessarily limited to, the following individuals: Sammie Williams, Steven Jackson, Damon Causey. Other participants in the capital offenses received reduced sentences as a result of plea agreements with the government. Other participants in the drug trafficking conspiracy are now eligible to receive reduced sentences as a result of their testimony against Mr. Davis and plea agreements with the government.

__0__ Jurors so find.

Proceed to B.

B. Although the evidence presented at trial was sufficient to prove Len Davis's guilt beyond a reasonable doubt, his guilt was not proved to an absolute certainty and there is residual doubt as to his guilt.

__0__ Jurors so find.

Proceed to C.

C. As a police officer, Len Davis frequently risked his own life to apprehend criminal suspects, assist fellow officers and save innocent victims. Len Davis was a decorated police officer and received many commendations, including a Purple Heart, while with the New Orleans Police Department.

__0__ Jurors so find.

Proceed to D.

D. Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by the stress of working in a high crime area, being shot at on numerous occasions, including on one occasion being shot in the stomach while coming to the assistance of fellow officers.

__0__ Jurors so find.

Proceed to E.

E. Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by his partner, Sammie Williams, who had a history of committing violent crimes against the citizens of New Orleans.

0 Jurors so find.

Proceed to F.

F. Len Davis does not pose a threat of future dangerousness in prison.

0 Jurors so find.

Proceed to G.

G. Other factors in Len Davis's background or character mitigate against imposition of a death sentence.

0 Jurors so find.

Proceed to Part Three.

PART THREE - SENTENCE AS TO COUNT TWO

A. We, the jury, unanimously find that the aggravating factor[s] proved in this case sufficiently outweigh any mitigating factors so as to justify a sentence of death. We vote unanimously that Len Davis shall be sentenced to death as to Count Two.

Unanimous Yes ✓
Not Unanimous _____

If you answered "Unanimous Yes" to A, proceed to Part Four.
If you answered "Not Unanimous" to A, proceed to B.

B. We, the jury, are not unanimously persuaded that a death sentence should be imposed in this case. However, we do unanimously agree that Len Davis should be sentenced to life imprisonment without possibility of release. Therefore, we hereby decide that Len Davis should be sentenced to life imprisonment without possibility of release as to Count Two.

Unanimous Yes _____
Not Unanimous _____

If you answered "Unanimous Yes" to B, proceed to Part Four.
If you answered "Not Unanimous" to B, proceed to C.

C. We, the jury, do unanimously agree that Len Davis should be sentenced to imprisonment for a number of years lesser than life as to Count Two.

Unanimous Yes _____
Not Unanimous _____

Proceed to Part Four.

PART FOUR - CERTIFICATE

By signing below, each of us individually hereby certifies that this Verdict represents his or her decision as to Count Two and that consideration of the race, color, religious beliefs, national origin, or sex of Len Davis and of the victim, were not involved in reaching our respective individual decisions. Each of us individually further certifies that the same decision regarding a sentence would have been made no matter what the race, color, religious beliefs, national origin, or sex of the defendant or victim may have been.

FOREPERSON

New Orleans, Louisiana, this 9th day of August, 2005.