No. 14-30995

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GREGORY MCRAE,

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

The United States does not oppose defendant's request for oral argument.

TABLE OF CONTENTS

PAGE

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. 3231. Gregory McRae (McRae) filed a timely notice of appeal. ROA.2901.[1] This Court has jurisdiction pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742.

[1] The citation "ROA.____" refers to the page number following the Bates stamp "14-30995." in the record on appeal.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying McRae's motion for a new trial and evidentiary hearing based upon evidence regarding McRae's mental state or pretrial publicity.

2. Whether the district court abused its discretion in declining to grant McRae a downward variance from the Guideline sentence.

3. Whether 18 U.S.C. 1519's reference to "any * * * tangible object" encompasses the destruction of ordinary physical evidence.

STATEMENT OF THE CASE

1. This case arises from the death of Henry Glover (Glover), a resident of New Orleans, on September 2, 2005, in the aftermath of Hurricane Katrina. ROA.1574-1587. That morning, as Glover and his family were preparing to evacuate New Orleans, he and Bernard Calloway (Calloway) went to a shopping center near their home to pick up some stolen items that had been left there by a cousin of Glover's girlfriend. ROA.1578. Although the precise details of the events that followed are in dispute, former New Orleans Police Department (NOPD) officer David Warren (Warren), who was guarding the center, later admitted that he shot at Glover with his personal rifle. ROA.1578-1579. Glover subsequently collapsed on a street behind the shopping center. ROA.1576-1578.

Help for Glover arrived when a Good Samaritan, William Tanner (Tanner) offered to take Glover, Calloway, and Glover's brother, Edward King (King), in his car to obtain medical attention for Glover. ROA.1578, 1582-1583. They placed Glover's body in Tanner's car and decided to go to the nearby Habans Elementary School, where Tanner knew the NOPD had set up a compound, and where Tanner believed Glover would receive medical assistance. ROA.1583.

Upon their arrival at Habans School, with Glover's body in the backseat, Tanner, King, and Calloway were ordered at gunpoint to exit the car. ROA.1586. An altercation with officers ended with the men in handcuffs, sitting on the ground. ROA.1586-1587. "The fatally wounded Glover," however, "remained silently in the backseat of Tanner's car, and no one rendered Glover medical assistance. The police officers, to the extent it was on their minds, apparently thought that Glover was already dead." ROA.1587.

It was at Habans School that McRae became involved in the course of events surrounding Glover's death. McRae was then an officer in the NOPD's Special Operations Division (SOD), present at Habans School that morning. ROA.6131-6132, 6139-6140. At some point after Tanner, King, and Calloway were ordered from the car, McRae moved Tanner's car into the schoolyard, and removed items from it, including a gasoline jug, jumper cables, and tools. ROA.1587. He

subsequently moved the car to another area of the Habans School property. ROA.1587. All the while, Glover's body remained in the car. ROA.1587.

Jeffrey Winn (Winn), Captain of the SOD, later arrived at the school and instructed Lieutenant Dwayne Scheuermann (Scheuermann), McRae's ranking officer in the SOD, and McRae to move Tanner's car, with Glover's body, to a more secure location away from the school. ROA.1587; see also ROA.6268. The officers were to park the car over a levee north of the school, near the Mississippi River. ROA.1587. McRae and Scheuermann left the school in separate vehicles; McRae drove Tanner's vehicle, and Scheuermann followed. ROA.1587. McRae arrived at the levee before Scheuermann. ROA.1587. He drove Tanner's car over the levee, down a ramp, and into an area of trees. ROA.1587. Once there, McRae got out of the car, tossed a lit road flare into the car, closed the door, and walked away. ROA.1587. As McRae walked up the levee to where Scheuermann sat in his vehicle, he looked back and saw that the flare was dying out. ROA.1587-1588. He then "walked back closer to the car, drew a pistol, and fired one shot into the car's rear glass. The shot ventilated the car. The car, with Glover's body, began to rapidly burn." ROA.1588.

Later that afternoon, Tanner, King, and Calloway were released from Habans School. ROA.4158, 4276-4277. McRae was present when Tanner was released. ROA.4159-4160. When Tanner asked McRae about his ID badge, which

McRae had taken from him earlier that day, McRae replied, "Nigga, it's with your car. That's where it's at." ROA.4160-4161. Before King and Calloway were released, an officer Calloway identified as "Schumacher" told them, "[Y]our brother and your brother-in-law had been shot for looting." ROA.4276.

It was not until two weeks later that Glover's charred remains were recovered and taken to the morgue. ROA.1588. "A coroner performed an autopsy on the remains in late October 2005, but they were not identified as those of Glover until April 2006. Glover's family was then able to bury him." ROA.1588. Witnesses testified at trial that of the hundreds of bodies recovered or autopsied after Hurricane Katrina, Glover's was the only one that had been burned. ROA.4918, 4935, 4953. Because only "charred fragments" of Glover's body remained, no complete autopsy could be done, or cause of death determined. ROA.4962-4965. And because McRae never wrote an official report of what he had done (ROA.6213), it was not until the FBI received a complaint from a reporter about the incident in February 2009 that a federal investigation was initiated (ROA.5430).

2. On June 11, 2010, a federal grand jury in the Eastern District of Louisiana returned an indictment charging McRae for his role in the events surrounding Glover's death. ROA.36-42. A superseding indictment was filed on August 6, 2010 (ROA.144-150), and a second superseding indictment was filed on

September 24, 2010 (ROA.266-272). McRae was charged with depriving Tanner and King of their right to be free from the use of unreasonable force by a law enforcement officer (Count 3), depriving Tanner of the right to be free from an unreasonable seizure of his car by a law enforcement officer (Count 4), and depriving Glover's family of the right to access the courts and seek legal redress for a harm (Count 5), all in violation of 18 U.S.C. 242; with destroying evidence with intent to impede and obstruct the investigation of Glover's death, in violation of 18 U.S.C. 1519 (Count 6); and with using fire to commit violations of 18 U.S.C. 242 and 1519, in violation of 18 U.S.C. 844(h) (Count 7).[2] ROA.266-269.

In November 2010, the case went to trial. ROA.3065. On December 9, 2010, McRae was acquitted on the unreasonable force count, but was convicted on all other counts. ROA.7516-7517. He was sentenced to 207 months' imprisonment, consisting of 87 months on Counts 4, 5, and 6, to run concurrently, and 120 months on Count 7, to run consecutively to Counts 4, 5, and 6, as well as $6000 in restitution. ROA.7567.

On his initial appeal from his convictions, McRae challenged the sufficiency of the evidence supporting his convictions for depriving individuals of the right to be free from unreasonable seizure and to seek legal redress for a harm in violation

[2] Four other NOPD officers were charged in the same indictment: Warren, Travis McCabe, Scheuermann, and Robert Italiano (Italiano). ROA.266-272. This appeal concerns only McRae.

of 18 U.S.C. 242, and the sufficiency of the evidence supporting his conviction for obstruction of justice in violation of 18 U.S.C. 1519. ROA.1607-1615. McRae also argued that 18 U.S.C. 1519 was unconstitutionally vague; that knowledge of a federal nexus was required to sustain a conviction under 18 U.S.C. 1519; and that his sentence under 18 U.S.C. 844(h) for use of fire or a firearm to commit a felony was unconstitutional on double jeopardy grounds. ROA.1615-1626. This Court reversed McRae's conviction for depriving individuals of the right to seek legal redress for a harm (ROA.1607-1612), but otherwise affirmed on all counts and remanded the case for resentencing (ROA.1612-1626, 1630-1631).

3. On remand, McRae moved the district court for a new trial, based upon what he alleged was newly discovered evidence. ROA.1857-1888. The new evidence he cited as the basis for his motion was (1) "the discovery of previously unknown blogging by highly placed members of the U.S. Attorney's Office (USAO) and newly emerging information that leaks of grand jury information came from the FBI," and (2) a report by licensed clinical psychologist Dr. William B. Janzen (Dr. Janzen) that was commissioned by Pretrial Services, which "concluded that McRae was 'clearly evidencing symptoms of post-traumatic stress disorder as a result of his experiences during and after Hurricane Katrina.'" ROA.1858-1859. McRae subsequently filed a supplemental memorandum supporting his motion for a new trial (ROA.2560-2564), made a request for an

evidentiary hearing (ROA.2582-2585), and filed a renewed motion for an evidentiary hearing (ROA.2596-2600) and an amended motion for a new trial, "formally requesting an evidentiary hearing at which former AUSA [(Assistant United States Attorney)] Michael Magner may be examined under oath" (ROA.2630).

On June 2, 2014, the district court denied McRae's motions for a new trial and evidentiary hearing. ROA.2658-2673. As recounted by the district court, the essence of McRae's motion for new trial concerning online commenting was that then-AUSA Sal Perricone (Perricone) "deliberately attempted to influence public opinion by posting critical anonymous online comments below and in response to online news articles about the New Orleans Police Department * * * and McRae." ROA.2662. McRae also argued that pretrial media coverage made clear that there had been "grand jury 'leaks,' in violation of Rule 6 of the Federal Rules of Criminal Procedure." ROA.2662.

Summarizing McRae's argument, the court stated that McRae alleged that in the months leading up to his trial, Perricone "went to work to sway public opinion by sullying [NOPD] from top to bottom," referring to the NOPD, in various comments to online articles, as being "corrupt, ineffectual, and totally dysfunctional." ROA.2662. As the date of the trial approached, Perricone made an online comment to an article about Lieutenant Scheuermann stating that "Mr.

Scheuermann[’s] behavior was admired by the NOPD and therefore tolerated. . . . If the Justice Department is serious, it will take whatever steps they have to rectify this problem – Now!!!” ROA.2662 (alteration in original). On the day before jury selection began, Perricone “posted a comment referring to NOPD officers as ‘a group of frustrated, numbed insensitive mutants with guns and badges.’” ROA.2662.

As McRae’s trial was in progress, on November 19, 2010, Perricone posted a comment to an article stating: “Let me see if I understand this: The cops, through[] their attorneys, admitted that they shot Glover and then burned the body in a car that belonged to another man, who was not arrested for anything…RIGHT??? GUILTY!!” ROA.2663 (alteration in original). Then, on November 23, “Perricone posted a comment criticizing AUSA Michael Magner’s cross-examination of Warren,” stating that the jury would “see through” the “theatrical exhibits” and “punish this silliness.” ROA.2663. McRae argued that “[a]round November 26, 2010, Magner began to suspect that a current or former AUSA was responsible for some of the online comments,” and that “[s]everal days after the jury entered its verdict against McRae, another AUSA suggested to Magner that the commenter might be Perricone.” ROA.2663.

McRae separately alleged that "newspaper articles indicate that grand jury leaks by the government" related to his case "began in June 2009 and continued up until the indictment was filed and unsealed on June 10, 2010." ROA.2663.

4. Citing the five prerequisites for granting a new trial on the basis of newly discovered evidence set forth in *United States* v. *Wall*, 389 F.3d 457, 467 (5th Cir. 2004), cert. denied, 544 U.S. 978 (2005), the district court held that McRae had failed to show that the evidence was material (prerequisite 4) and that, if introduced at a new trial, it would probably produce an acquittal (prerequisite 5). ROA.2661, 2663-2664. The court noted that the relevant questions were whether "a jury could properly consider [the evidence] in determining guilt or innocence in a new trial," and whether it would "probably produce a different verdict." ROA.2664 (alterations in original; citations omitted). Because the "evidence relative to online commenting, grand jury leaks, and a government cover-up" was "patently immaterial to the presentation of admissible evidence and the jury's consideration thereof," the court "easily" found that it "would not probably result in a different verdict." ROA.2664.

The court noted, however, that the evidence might nevertheless warrant a new trial if it undermined the fairness or integrity of the trial. ROA.2665. The court held that, here, it did not. The court found that the possibility "that jurors were potentially exposed to incrementally more media coverage or online

comments as a result of certain actions by the government" did "not give rise to reasonable grounds . . . to question the fairness of the trial or the integrity of the verdict." ROA.2665 (internal quotation marks and citation omitted). The district court observed that "[t]he parties were well aware of the ongoing media exposure when they proceeded with the lengthy questionnaire and voir dire process by which an impartial jury was empaneled," and noted that the "jury was expressly and repeatedly instructed to base its verdict solely on the admissible evidence." ROA.2665. The court held that McRae had not come forth with any information to show that the jury disregarded its instructions. ROA.2666. The court also observed that because AUSA Perricone commented under a pseudonym, "his online comments did not carry the government's imprimatur," and that "Perricone was not a part of the government's trial team in this case, nor an actual supervisor of the team." ROA.2665 n.35, 2662 n.17 (internal quotation marks and citation omitted).

The court further held that no evidentiary hearing was necessary on McRae's claims of government misconduct. ROA.2666. The court stated that while "McRae requests such a hearing to address '(a) who knew about the blogging and why they remained silent and (b) who were the reporters' sources for the Glover case-related newspaper articles,'" those matters did "not bear on the Court's determination of materiality and prejudice." ROA.2666-2667.

The court next turned to the question whether the records of McRae's visits with Dr. Janzen, whom he saw weekly from September-November 2010, as well as post-trial in mid-December 2010, constituted newly discovered evidence meriting a new trial. ROA.2667. Dr. Janzen produced reports and took notes that reflected that McRae was suffering from a high level of anxiety, chronic depression, and symptoms of post-traumatic stress disorder. ROA.2667. McRae described his trial counsel's failure to seek access to the reports as "inexplicable," arguing that they shed light on his state of mind on the day he burned Glover's body. ROA.2667-2668.

The court rejected McRae's claim that Dr. Janzen's notes and reports constituted newly discovered evidence. ROA.2668. The court found that McRae had "concede[d] that his counsel knew that [he] was undergoing psychological examination[,] but did not obtain any related documents." ROA.2668 (internal quotation marks and citation omitted). Information regarding "McRae's mental condition," the court stated, "including his diagnosis, was available before and during trial," and indeed, McRae's "trial counsel overtly employed a defense premised on McRae's mental condition." ROA.2668-2669. The court thus concluded that even if some of the information in Dr. Janzen's notes was newly discovered, it could have been discovered through the exercise of due diligence. ROA.2669.

Reviewing the evidence presented at trial, the court further held that because "extensive evidence, including voluminous testimony from McRae himself," was presented regarding McRae's state of mind at the time he burned Glover's body, he could not show that the jury probably would have acquitted him if presented with the additional evidence from Dr. Janzen. ROA.2672; see also ROA.2669-2672. The court concluded that no evidentiary hearing was required on the claim, and denied McRae's motion for a new trial. ROA.2672.

5. On August 15, 2014, the court resentenced McRae to 207 months' imprisonment, consisting of 87 months as to each of Counts 4 and 6, to run concurrently, and 120 months as to Count 7, to run consecutively to Counts 4 and 6, as well as three years of supervised release and $6000 in restitution. ROA.2895-2900.

SUMMARY OF ARGUMENT

McRae's convictions and sentence should be affirmed in all respects.

The district court did not abuse its discretion in denying McRae's motions for a new trial and evidentiary hearing on the basis of newly discovered evidence. The evidence McRae presented regarding his PTSD diagnosis was known to him during trial and could have been further uncovered through due diligence. Moreover, because of the cumulative nature of McRae's evidence regarding his PTSD diagnosis, and because the evidence of his guilt was overwhelming, the

district court did not err in finding that the evidence regarding this diagnosis would not have altered the outcome of the trial. The court also did not err in determining that evidence of pre- and mid-trial publicity was not newly discovered, not material, and would not have changed the outcome of McRae's trial. Pretrial news articles – one of which cited McRae's own trial counsel – cannot be said to be "newly discovered," and anonymous comments by a former AUSA would not have influenced the jury's decisionmaking.

The district court also did not abuse its discretion in denying McRae a downward sentencing variance. The court took into account the sentencing factors called for by 18 U.S.C. 3553(a), and determined that no downward variance was warranted. McRae nevertheless argues that the court made factfinding errors in sentencing him. In addition to being waived, however, these arguments constitute insufficiency-of-the-evidence claims aimed at the jury's verdict, rather than at the district court's sentencing determination.

Finally, because McRae failed to raise his due process challenge to 18 U.S.C. 1519 below, that argument is reviewed only for plain error. Under that standard, McRae cannot reasonably argue that, as a law enforcement officer, he did not understand that a vehicle and a corpse might constitute "tangible objects" for purposes of the statute. In any event, Section 1519 unambiguously covers the destruction of all physical evidence of this nature.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MCRAE'S MOTIONS FOR A NEW TRIAL AND AN EVIDENTIARY HEARING

A. Standard Of Review

A district court's decision whether to grant a new trial is reviewed for abuse of discretion. *United States* v. *Wall*, 389 F.3d 457, 465 (5th Cir. 2004), cert. denied, 544 U.S. 978 (2005). A motion for new trial on the basis of newly discovered evidence must be filed within three years of the verdict. Fed. R. Crim. P. 33(b)(1). A motion for new trial on any other grounds must be filed with 14 days of the verdict. Fed. R. Crim. P. 33(b)(2). Even when timely filed, however, motions for new trials are "disfavored" and are "reviewed with great caution." *United States* v. *Piazza*, 647 F.3d 559, 565 (5th Cir. 2011); *United States* v. *Gresham*, 118 F.3d 258, 267 (5th Cir. 1997), cert. denied, 522 U.S. 1052 (1998). A defendant making such a motion bears the burden of demonstrating that a new trial is warranted. *United States* v. *Soto-Silva*, 129 F.3d 340, 343 (5th Cir. 1997), cert. denied, 523 U.S. 1130 (1998).

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

detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal." These rules stem from the court's decision in *Berry* v. *State*, 10 Ga. 511 (Ga. 1851), and are known as the *Berry* factors. *Wall*, 389 F.3d at 467. This Court has held repeatedly that "[i]f the defendant fails to demonstrate *any one* of [the *Berry*] factors, the motion for new trial should be denied." *Wall*, 389 F.3d at 467 (emphasis added); see also *United States* v. *Freeman*, 77 F.3d 812, 817 (5th Cir. 1996) ("[The *Berry*] rule requires a defendant, moving for a new trial based on newly discovered evidence, to show that [each of the factors have been met].").

B. The District Court Did Not Abuse Its Discretion In Declining To Grant McRae A New Trial On The Basis Of His Post-Traumatic Stress Disorder Diagnosis

McRae moved the district court for a new trial based in part upon a diagnosis of post-traumatic stress disorder made by Dr. William B. Janzen. Appellant Br. 8. Although McRae began meeting with the psychologist on a weekly basis beginning before trial and continuing until he was incarcerated (ROA.2732-2761), and although the PTSD diagnosis was first made in September 2010, before trial had commenced (ROA.2756), McRae alleges that the first mention of the diagnosis that his lawyers would have seen would have been after trial in the Presentence Investigation Report. Appellant Br. 9. The district court

did not err, however, in finding that this evidence was not newly discovered, could have been discovered through due diligence, and would not have changed the outcome of McRae's trial. See *Wall*, 389 F.3d at 467 (defendant must demonstrate *all Berry* factors); see also *id*. at 466 (motion for new trial should not be granted unless failure to grant "would be a miscarriage of justice or the weight of evidence preponderates against the verdict"). On this record, the district court did not abuse its discretion in denying McRae's motion for a new trial.

1. The Evidence Of McRae's Psychological Condition Is Not Newly Discovered

McRae's motion fails the *Berry* test on its face, because the evidence regarding his diagnosis cannot be described as "new" or "unknown" to him before trial. McRae saw Dr. Janzen on a weekly basis starting before trial. ROA.2732-2761; see also Appellant Br. 8 n.30, 9. As McRae himself acknowledges, on September 23, 2010, before trial had started, Dr. Janzen wrote a session note saying that McRae had "delayed PTSD." ROA.2756; see also Appellant Br. 8 n.30. McRae's signature appears on the bottom of that note. ROA.2756; see also Appellant Br. 14.

The district court cited Dr. Janzen's session note in holding that the "information relative to McRae's mental condition, including his diagnosis, was available before and during trial." ROA.2685 & n.50 (discussing the September 23 diagnosis). Given this evidence, the court's holding was correct. *Freeman*, 77

F.3d at 817 (evidence not "newly discovered" when it was known to defendant during trial).

2. Dr. Janzen's Diagnosis Could Have Been Discovered Through Due Diligence

Even if McRae had not had actual knowledge of his diagnosis, the district court correctly held that the diagnosis could have been discovered through due diligence. McRae admits that his counsel was aware that he was undergoing psychological examination. ROA.1859 n.2. And McRae himself was well aware of his weekly appointments with Dr. Janzen. Even if McRae could claim ignorance about the significance of the examinations – a matter highly in doubt given that his own psychological condition was the centerpiece of his defense (see pp. 20-22, *infra*) – this would be due only to his own failure to obtain otherwise available information, *e.g.*, Dr. Janzen's notes or testimony. See *Wall*, 389 F.3d at 469 ("When a defendant becomes aware of evidence early in a trial, it is incumbent upon the defendant to seek a continuance or demonstrate efforts to obtain the evidence before it will be considered newly discovered.").

The cases McRae cites are inapposite. In *United States* v. *Massa*, 804 F.2d 1020, 1022 (1986), cert. denied, 488 U.S. 973 (1988), the Eighth Circuit held that evidence of a defendant's psychological condition was "newly discovered" when, although the details underlying the psychiatrist's judgment were known prior to trial, the defendant "did not know that an expert would opine that those details of

his life had so affected his mental state as to render him incapable of committing the crimes with which he was charged." Moreover, in *Massa*, the psychiatrist had formed his opinion "only after counseling [the defendant] for over eighteen months." *Ibid.* In McRae's case, Dr. Janzen's diagnosis in no way suggests that McRae was "incapable" of committing the crime in question. Nor does it suggest that McRae had PTSD at the time of the events in question, or that such PTSD drove his behavior. ROA.2732. This diagnosis was also made before McRae's trial had started. ROA.2756.

United States v. *Herrera*, 481 F.3d 1266 (10th Cir. 2007), actually suggests the *correctness* of the district court's decision. There, the court of appeals affirmed the denial of a motion for new trial where the district court found that the defendant, "while not knowing the precise diagnosis," was "well-aware during trial that he was experiencing certain physical symptoms," and had communicated as much to his attorney. *Id.* at 1270-1271. Here, McRae had not only communicated to his counsel that he was undergoing psychological examination, but the very diagnosis was available to him on a note he had signed. ROA.2685 n.50, 2756.

While McRae suggests that he would not have been given access to his own medical records even had he requested them – a matter that is purely speculative, given that he did not, in fact, make such a request – this does not excuse either the failure to ask, or his lack of diligence in seeking and presenting a psychological

assessment of his own in support of his own defense. See *United States* v. *Time*, 21 F.3d 635, 642 (5th Cir. 1994) (lack of due diligence where defendant had opportunity but failed to investigate matter); *United States* v. *Pena*, 949 F.2d 751, 758 (5th Cir. 1991) (lack of diligence where, even if a particular witness was unavailable, defendant failed to interview other witnesses who could have provided the same information). Indeed, the record contains a report prepared for McRae by John J. Muggivan, LCSW-BACS, which also opines on McRae's PTSD and experiences after the storm. ROA.2771-2789. In these circumstances, McRae's failure to develop such information during trial therefore should not be excused.

3. Evidence Of McRae's PTSD Would Not Have Changed The Outcome Of His Trial

The district court also held that "the evidence [of McRae's PTSD] would not probably produce an acquittal because the jury's rejection of McRae's *mens rea* defense was amply supported by the evidence presented at trial and the jury's credibility determinations." ROA.2669. The trial court's finding on this matter is fully supported by the record.

As noted, McRae's psychological state was central to his defense at trial. McRae testified at length about his state of mind at the time he burned Glover's body; his counsel told the court that he had suffered a "gradual deterioration" of his psyche. ROA.6138. McRae testified that in the aftermath of the storm, he experienced a feeling of "[h]elplessness. Complete helplessness." ROA.6149. He

described knowing about bodies trapped in houses; seeing bodies hit with boats; and having to step out of his own police boat into water contaminated with oil and floating bodies. ROA.6148-6149. He spoke of rescuing civilians, and having them die; of lacking any water or anything else to give them. ROA.6150-6151. He testified to feeling "lonely" and "scared," saying that he had sent his family north but had "no idea" if they had arrived. ROA.6152. On a few occasions, McRae broke down. ROA.6152-6154.

McRae further testified that by the time he burned Glover's body, he had been up for four days, and was "exhausted." ROA.6184. His co-defendant and ranking officer, Lieutenant Scheuermann, testified that it was "obvious" that McRae was having "serious issues with the storm." ROA.6412, 6268. McRae "looked exhausted" and "like he was just having problems." ROA.6412. Scheuermann testified that, after seeing McRae burn Glover's body and asking him what he was doing, McRae "said something to the effect of, 'They're rotting.' He kept going on about the bodies and things like that and, you know, the decaying and things like that." ROA.6409. Similarly, Winn, Captain of the SOD, testified that McRae was "deteriorating." ROA.6326.

The jury also heard testimony about McRae's mental condition from Dr. Cristobal Mandry, an emergency medical physician who was also an NOPD reserve officer at the time of the storm. ROA.4427, 4431. Dr. Mandry testified

about an incident after the storm where McRae tried to put together a barbecue for people at Habans School, which went wrong and nearly caught the building on fire. ROA.4464-4465. Dr. Mandry testified that after the flames were put out, McRae seemed to be breaking down, overwhelmed, and tearful. ROA.4466. McRae had been, in Mandry's assessment, trying to "make Habans like a home," and, like everyone else, was "depressed and tired and down." ROA.4465. Dr. Mandry said that he was surprised to see McRae crying, because he is a "big man and doesn't show emotion," and that to see McRae tearful "concerned" him. ROA.4466. His sense from McRae's demeanor was that he had "deteriorated," that "he was just -- he was beat." ROA.4466.

McRae's counsel also brought evidence of his mental condition into his closing arguments, reminding the jury of McRae's experience after the storm, "what he went through, what it did to him and the effect it had." ROA.7314. He reminded the jury that they knew "what [McRae]'s state of mind became, * * * because Dr. Mandry testified as to how he broke down. We know that he had to admit that he broke down at nights when he was working by himself a lot, when he didn't want to do it in front of the younger men." ROA.7317. McRae, counsel argued, "crumbled on September 2nd. * * * And it was that crumbled man that made the decisions that he made." ROA.7317.

On the other hand, the United States presented substantial evidence showing that McRae made a conscious, knowing decision to burn Glover's body, despite knowing that Glover was a homicide victim, and that there would be some kind of investigation of his death. See ROA.1588, 1619 n.17. For example, there was abundant evidence connecting McRae's actions to the earlier shooting of Glover at the mall, making clear his intent to obstruct an investigation.

The evidence showed that officers at Habans School knew or suspected that Glover's body might be connected to the earlier shooting at the mall. NOPD Officer Purnella Simmons (Simmons), who was present at the scene of Glover's shooting, testified that after hearing a call about a shooting victim at Habans School, she thought that the person who had been shot may have been taken to Habans, and went to the school to talk to her superior officers about the possible connection. ROA.5089-5091. When she arrived at the school, Glover's body was still in the backseat of the car. ROA.5091-5092. Simmons sought out NOPD Lieutenant Italiano and Captain David Kirsch, and told them that "David Warren had discharged his firearm over on DeGaulle and that he could have possibly shot someone and this could be the victim." ROA.5092.

Ronald Ruiz (Ruiz), another NOPD officer at the time of the storm, testified that on the morning of the shooting, he arrived at Habans School to see Glover's body in the backseat of a white car, and three other men seated on the sidewalk

near the rear of a police car. ROA.4588. Ruiz testified that he saw Lieutenant Italiano talking to McRae's ranking officer, Lieutenant Scheuermann, off to the side. ROA.4589. Italiano and Scheuermann were of equal rank, and McRae testified that it would be typical for a supervisor to get updates from another supervisor on the scene. ROA.6267-6268. McRae also testified that Scheuermann "got on the radio * * * [and] requested if anybody was working a possible shooting involving a white vehicle." ROA.6143. Italiano testified that when he first heard about the dead body in the backseat of the car, he thought it was probably connected to the shooting at the mall. ROA.6759.

Thereafter, McRae, Captain Winn, and Scheuermann discussed what to do with Tanner's car and Glover's body. ROA.6145. McRae testified that Winn said, "We have to get it out of here," and that he, Winn, and Scheuermann "spoke of a spot on the other side of the levee near the 4th District station by the Border Patrol compound." ROA.6145. McRae testified that after this conversation with Scheuermann and Winn, the plan was that he and Scheuermann would drive to a "location on the river side of the levee" where they would "leave the car and the body." ROA.6172. McRae testified, however, that he had "made a decision before [he] left Habans that [he] was going to burn the body in the vehicle." ROA.6172. He made this decision despite the fact that officers were using vehicles for parts after Katrina, that this car was drivable (ROA.6180-6181), and

that there were no houses or civilians around the levee area to whom Glover's body would otherwise be exposed (ROA.6234-6235).

The United States also presented extensive evidence from both McRae and others that the situation was handled in a way that differed substantially from the usual course of police business. ROA.6447-6448 (Scheuermann testifying that "what Officer McRae did, he shouldn't have d[one]," and that they were just "moving a car to a safe position until a body could eventually be recovered"). Indeed, McRae admitted that there was no legitimate law enforcement reason for burning Glover's body. ROA.6155; see also ROA.6326 (Winn, same); ROA.4389 (Jeff Sandoz, an NOPD sergeant assigned to the SOD, same). The record also showed that of the hundreds of people who died in the aftermath of Hurricane Katrina, only one body was burned – that of Henry Glover. ROA.4913-4918 (Jeffrey Dixon, a fireman hired to do body recovery after the hurricane, testifying that of the over 600 bodies he recovered after Katrina, only Glover's was burned); ROA.4935 (Istvan Balogh, a security consultant hired to work in New Orleans after Katrina, testifying that of all the bodies he saw after the storm, only Glover's was burned); ROA.4953 (Dana Troxclair, a forensic pathologist at the Orleans Parish coroner's office at the time of Katrina, testifying that of the 155 bodies she autopsied after the storm, Glover's was the only one that was burned). Despite testifying to seeing other bodies, and stating that by the time he burned Glover's

body he had "seen enough bodies," had "seen enough rot" (ROA.6148), McRae also has not claimed that he burned any other bodies after the storm.

The United States presented other evidence that McRae exhibited unusual behavior reflective of his consciousness of guilt. Alex Brandon, a photographer for the Associated Press who was a staff photographer for the Times Picayune during Katrina, testified that the situation at Habans School on the morning of Glover's death was "uncomfortable," and that McRae seemed agitated. ROA.4475-4476, 4483, 4485. Brandon recalled that as he approached the scene, McRae told him not to take any pictures, and that McRae's tone conveyed that it was "an order. I was told not to take pictures." ROA.4486-4487. Brandon could not recall another time in his career where he was told not to photograph a scene. ROA.4487. Brandon also testified that, on a day sometime after this, he and McRae were sitting together in the cafeteria at Habans, and he asked McRae what had happened with the car. ROA.4494. McRae replied, "NAT," shorthand for "necessary action taken," and made a motion with his hand around his throat, signifying that it was the end of the conversation and he did not want to discuss it further. ROA.4494.

Joseph Meisch, an NOPD lieutenant who had been transferred to the 4th District about a month before Katrina, also testified to McRae's behavior on the morning of Glover's death. ROA.4794, 4806-4809. Meisch was working near the

4th District compound that day, when he noticed a small car drive over the edge of the levee towards the river. ROA.4799-4805. As Meisch walked toward the gate of the station, he saw "thick, black smoke come up from behind the levee" in the area where the car had gone over the levee. ROA.4805. A few moments later, Meisch saw McRae running down the levee towards the Border Patrol station. ROA.4806. He testified that as McRae approached the station gate, he appeared to be laughing, "like a humorous or a nervous laugh." ROA.4808. When Meisch asked what was going on, McRae told him, "Don't worry about it." ROA.4807.

The United States also presented evidence that when McRae was interviewed about the incident by an NOPD detective over three years later, he failed to mention that he had burned the car or Glover's body. ROA.6283-6284. When asked at trial why he didn't speak up and offer this information, McRae stated that his "pride was in the way." ROA.6285.

Finally, the fact that Tanner, Calloway, and King were released from Habans School after McRae had returned from burning the car on the levee – with no questions ever asked about the circumstances under which Glover had died – is strong evidence that those present at Habans School knew what had happened to Glover. ROA.4158-4161, 4276-4277.

The jury heard all of this evidence: evidence of McRae's mental state, offered as his defense, and evidence that his behavior in burning Glover's body

was an intentional act to cover-up a crime, not an artifact of stress. Against this backdrop, the district court did not err in finding that the additional evidence that McRae was suffering from post-traumatic stress disorder would not have made a difference in the outcome. The direct and circumstantial evidence against McRae – much of it from his own testimony – far outweighs any potential impact of his psychological evaluation or diagnosis. That is particularly so with the evidence in question here, which provides only that, *at the time of the analysis*, McRae appeared to be traumatized and was suffering from *delayed* PTSD (ROA.2756); facts that add little further color to his behavior at the time he burned Glover's body five years earlier.

In evaluating a motion for new trial, this Court is "necessarily deferential to the trial court because the appellate court has only read the record and, unlike the trial court, did not see the impact of witnesses on the jury or observe the demeanor of witnesses." *United States* v. *Piazza*, 647 F.3d 559, 565 (5th Cir. 2011) (citation omitted). The Court has cautioned that it will "not revisit evidence" or "reevaluate witness credibility." *United States* v. *Tarango*, 396 F.3d 666, 672 (5th Cir. 2005). The district court here had a strong basis for its finding that evidence of McRae's PTSD diagnosis would not have changed the outcome of his trial, and, particularly in light of the deferential standard of review, there is no reason for this Court to disturb that finding.

C. The District Court Did Not Abuse Its Discretion In Denying McRae's Untimely Motion For A New Trial Or Evidentiary Hearing Based Upon Pretrial Publicity

McRae's motion for new trial was also based upon what he describes as prejudicial pretrial publicity, specifically, various remarks related to the Glover case made in the comments sections of articles in the online version of New Orleans' daily newspaper, the *Times-Picayune*. Appellant Br. 29-30; see also ROA.2680. These comments were later revealed to have been made by former AUSA Sal Perricone. Appellant Br. 29-30; see also ROA.2680. McRae further bases his motion upon what he alleges were governmental leaks of grand jury information that appeared in articles about Glover's death in 2009 and 2010. Appellant Br. 29-30; see also ROA.2680. He argues that such publicity caused the public to "gr[o]w accustomed to hearing of McRae's conduct as part of a cover-up," and affected the voir dire process by making "the district court's task of deciding which jurors could put aside their preconceptions harder." Appellant Br. 30, 34. These arguments are without merit.

1. Because The Evidence In Question Is Not "Newly Discovered," McRae's Motion Is Untimely

Federal Rule of Criminal Procedure 33 sets forth two specific timelines with regard to motions for a new trial. A motion based upon newly discovered evidence must be filed within three years of the verdict. Fed. R. Crim. P. 33(b)(1). A motion for new trial on any other grounds must be filed within 14 days of the

verdict. Fed. R. Crim. P. 33(b)(2). McRae does not argue in his brief on appeal that the articles and comments in question are "newly discovered." Nor could he, given that – as the district court correctly found – the parties were "well aware of the ongoing media exposure" surrounding the trial, and McRae has "never suggested that he was unaware that the online news articles relative to his trial included a function by which readers could post online comments." ROA.2682 & n.36; see also *Freeman*, 77 F.3d at 817 (evidence known to defendant not "newly discovered"). Indeed, McRae's own trial counsel was cited in one of the articles to which his motion referred. ROA.2030 (stating that "McRae's attorney, Frank DeSalvo, acknowledged this week that federal investigators believe McRae was involved in setting the car that held Glover's body afire").

Because McRae cannot reasonably allege that his knowledge of the articles in question is "newly discovered," his motion for new trial must be based on Rule 33(b)(2), with its 14-day post-trial timeline. Yet, it is undisputed that McRae's motion was not filed until December 5, 2013, several years after trial ended. ROA.1857. McRae has offered no explanation for this delay. *United States* v. *Isgar*, 739 F.3d 829, 841 (5th Cir.) (affirming district court's denial of a motion for new trial filed more than 14 days after the verdict, where the defendant did not argue that the untimeliness stemmed from excusable neglect), cert. denied, 135 S. Ct. 123 (2014).

Although McRae notes that Perricone's identity did not become known until March 2012, the issue of *who* made the *Times-Picayune* comments in question is irrelevant to the allegedly prejudicial effects of which he complains – all of which would have been apparent during the pendency of trial. Perricone's identity is thus immaterial. *Wall*, 389 F.3d at 467. To the extent McRae was concerned about the volume of news coverage or reader comments about the case, the public impression of the NOPD, or that jurors were prejudiced by exposure to articles published in the years before trial (Appellant Br. 31-35), he could have moved for a change of venue, a mistrial, or a new trial at the time of the events. See *United States* v. *Rodriguez-Lopez*, 756 F.3d 422, 430 (5th Cir. 2014) ("A defendant must assert a challenge to venue prior to trial if the indictment or circumstances known to the defendant make such a challenge apparent."); see also ROA.2682 n.37 (observing that McRae did not move for a change of venue).

Indeed, McRae's own assertions undermine the notion that any of this evidence is newly known to him. As he acknowledges, publicity about the case was the focus of the voir dire process. Appellant Br. 34; see also ROA.2682-2683. McRae also acknowledges that jurors were given a lengthy questionnaire, which included information about pretrial publicity. Appellant Br. 34 & n.98; see also ROA.2682 & n.36. Finally, he notes that the district court itself stated during jury selection that there had been a "tremendous amount of publicity in this case."

Appellant Br. 34. Any suggestion that he was unaware of the information in question (or could not have discovered it through due diligence – *e.g.*, reviewing the daily newspapers) thus cannot be credited.

Because McRae has offered no explanation for his delay, and because he does not argue that the pretrial publicity in question was previously unknown to him, his motion for a new trial should be rejected as untimely. *Isgar*, 739 F.3d at 841; *Wall*, 389 F.3d at 467 (if defendant fails to demonstrate any *Berry* factor, motion must be denied).

2. The Pretrial Publicity Did Not Change The Outcome Of The Case

In any event, the district court correctly held that the publicity in question would not have changed the outcome of the case. ROA.2664-2665.

As indicated, the issue of pretrial publicity was thoroughly addressed through the voir dire process. The district court forbade venire members from searching the Internet to obtain additional information about the case or from watching or reading any media reports of the case. ROA.3075 ("[Y]ou should not consult dictionaries or reference materials, search the Internet, Web sites, blogs, or use any other electronic tools to obtain information about this case to help you decide the case."); ROA.3456 ("Do not watch any media reports of the case. Do not read any media reports about the case. If a TV is on and you're walking by it, turn away or turn it off. I don't want you reading the newspaper tomorrow, to the

extent that any section may have an article about this case."); ROA.3456-3457 ("I don't do it, but tweeting, LinkedIn, YouTube, BlackBerry, whatever other technology I'm unsophisticated on, I do not want you doing any independent research with respect to this case, any of the participants in this case."). Prospective jurors were also given a lengthy questionnaire as part of the voir dire process. ROA.2682. That process should have resolved any of McRae's concerns about articles published about the Glover case pre-trial, and, in any event, as noted, he did not move for any relief.

Once empanelled, the jury was also repeatedly instructed not to read, view, or listen to any media accounts about the trial. ROA.3736 ("If any publicity about this case has come to your attention before this moment, you must strike it from your mind and completely disregard anything that has come to your attention outside this courtroom. From this moment on, you are not to read any newspapers or other print account of this trial, nor are you to view or listen to any television or radio reports of this trial."); ROA.3744 ("I'm going to repeat something I mentioned during the voir dire because it is important. * * * [Y]ou should not consult dictionaries or reference materials, search the Internet, Web sites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case."); ROA.6214 ("Now please, especially with respect to news reports, television, radio -- honestly, don't look at the newspaper, don't watch the

news, don't turn your radio on, okay? Listen to a CD or something like that. It's very, very important that you not be influenced by these types of extraneous * * * reports.").

Thus, only by disregarding these instructions would any juror have been exposed to Perricone's anonymous comments about the trial. As the Supreme Court held in *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000), however, a jury is presumed to follow a court's instructions. And McRae provides no evidence of any seated juror's actual exposure to public commentary.

But even if the jurors disregarded the court's instructions and read articles featuring Perricone's comments, those comments would not have changed the outcome of the case. See *United States* v. *Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979) (defendant must demonstrate that jurors or potential jurors were "actually prejudiced by the pretrial publicity"), cert. denied, 444 U.S. 1012 (1980). Perricone's comments were among many discussing the events surrounding the Glover trial. ROA.1895-1896 (1 of 33 comments); ROA.1941, 1944, 1946 (2 of 21 comments); ROA.1953, 1965 (1 of 71 comments); ROA.1968, 1969-1970 (2 of 13 comments); ROA.1981, 1987 (2 of 30 comments); see also ROA.1997-1998 (series of comments criticizing the prosecution's performance in the trial). Nothing about the comments identified Perricone as a government attorney or otherwise differentiated him from other commenters on the articles in question,

and he was neither a member nor a supervisor of the Glover trial team. ROA.2679 n.17. The district court thus did not err in holding that the possibility "that jurors were potentially exposed to incrementally more media coverage or online comments as a result of certain actions by the government does not give rise to 'reasonable grounds . . . to question the fairness of the trial or the integrity of the verdict.'" ROA.2682 (quoting *United States* v. *Williams*, 613 F.2d 573, 575 (5th Cir. 1980)).

Moreover, as stated above, pp. 23-27, the evidence of McRae's guilt was overwhelming. McRae admitted to key details of the crime in question, and the government presented substantial evidence speaking to his motivation. Perricone's comments – which there is no proof that the jury even saw – could hardly have been the factor swaying the outcome of the case. The district court did not err in declining to hold otherwise. *United States* v. *Geders*, 625 F.2d 31, 33 (5th Cir. 1980) (affirming district court's denial of motion for new trial where district court found there was overwhelming evidence of guilt and the evidence in question was immaterial).

3. Even If Perricone's Identity Or McRae's Theories About Reporters' Sources Can Be Characterized As The "New Evidence" In Question, The District Court Did Not Abuse Its Discretion In Denying The Motion For New Trial

McRae also argues that the subsequent revelation of Perricone's identity, and his unsupported speculation that certain articles stemmed from governmental

"leaks," entitle him to a finding of "presumed prejudice," and therefore a new trial. Appellant Br. 35. These arguments are similarly unavailing.

As the United States argued below, McRae has failed to make out a prima facie case that any evidence was "leaked" in violation of Federal Rule of Criminal Procedure 6(e) (rules for disclosure of grand jury proceedings). Much of the media coverage that McRae claims resulted from "leaked" information contains only general reporting. For instance, while McRae complains that "leaked" information "described Glover's remains in gruesome detail" (Appellant Br. 30), the article to which he refers attributes that information to New Orleans Coroner Frank Minyard. See ROA.1999 ("Coroner Frank Minyard has said his office's files show that the bones and clumps of flesh that remained of Glover -- and preserved in five biohazard bags, after collection by soldiers -- were pulled out of a car on the Algiers levee near the 4th District police station.").

Furthermore, the information McRae argues was "leaked" does not consist of any actual statements made before the grand jury. For the most part, it describes steps in the investigative process that were known to many people – including defense attorneys, subjects of and witnesses in the investigation, and other NOPD officials – who were not legally restrained from speaking to the press. The articles contain no apparent references to protected grand jury material, or to sources necessarily associated with the federal government.

Nor does McRae correctly represent the content of the articles in question. For example, the articles do not support his allegations that reporting "tied together the shooting of Glover at the shopping center, the alleged fabrication of the police report on the incident, and the burning of the Malibu with Glover's body inside," and that the information led the *Times-Picayune* to denounce "what it called a 'grotesque' and 'nauseating pattern': 'the growing suspicions of a possible police cover-up.'" Appellant Br. 30-31. The *Times-Picayune* article referring to a "possible police cover-up" discusses allegations pertaining to Warren's shooting of Glover, rather than anything related to McRae; nearly the entire article is focused on discrepancies in a report written about the shooting. ROA.2027-2028. And the other referenced article states that "[*i*]*t is not clear* whether the officers believed to be involved in the shooting and those who allegedly set fire to the car knew about each others' roles." ROA.2009 (emphasis added). In any event, neither of these articles points to prohibited government disclosures.

In *In re Grand Jury Investigation*, 610 F.2d 202, 213, 217 (1980), this Court held that for a defendant to make out a prima facie case that Federal Rule of Criminal Procedure 6(e) has been violated, "there must be a clear indication that the media reports disclose information about 'matters occurring before the grand jury,'" and "the article or articles must indicate the source of the information revealed to be one of those proscribed by Rule 6(e)," rather than "a witness who

testifies before the grand jury." Furthermore, "in the absence of any indication from the nature of the material disclosed that some likelihood exists that it did originate with the Justice Department," "disclosures * * * attributed to such vague origins as 'sources close to the investigation'" are insufficient to establish a prima facie case. *Id.* at 218. Given McRae's inability to meet the standards for a prima facie case under Federal Rule of Criminal Procedure 6(e), the district court did not err in declining to presume prejudice.

Nor does the prominence of this case as discussed in the many news articles in question entitle McRae to the finding of "presumed prejudice" that he seeks. The Supreme Court has made clear that "[p]rominence does not necessarily produce prejudice," and that "a presumption of prejudice * * * attends only the extreme case." *Skilling* v. *United States*, 561 U.S. 358, 381 (2010) (declining to presume prejudice in a high-profile case involving an Enron executive, despite extensive publicity). Juror impartiality, the Court reiterated, "does not require *ignorance*." *Ibid.* Thus, the Court held, "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Id.* at 384 (citation omitted). Only where media taint has caused trials to devolve into "kangaroo court proceedings" or where the defendant's "conviction [was] obtained in a trial atmosphere * * * utterly corrupted by press coverage" has the Court presumed prejudice. *Id.* at 379-380 (citations omitted).

The circumstances attending McRae's case were a far cry from such a prejudicial atmosphere. The articles he cites regarding the case contain general reporting, including a quote from his own attorney favorable to his case. ROA.2030. See *Skilling*, 561 U.S. at 383 n.17 ("[W]hen publicity is about the event, rather than directed at individual defendants, this may lessen any prejudicial impact.") (citation omitted). And, as discussed pp.32-34, *supra*, the district court took extensive steps to empanel an impartial jury, addressing pretrial publicity through the voir dire process, and on several occasions forbidding venire members from reading or watching media accounts about the trial. See, *e.g.*, ROA.3075, 3456, 3736, 3744, 6214.

Even assuming that the jury, once empaneled, read not only articles about the case, but also the comments sections where Perricone's remarks were found, this case bears little resemblance to the cases McRae cites in support of his motion. In *Henslee* v. *United States*, 246 F.2d 190, 191-193 (1957), this Court held that a defendant was entitled to a mistrial when, shortly before the case went to the jury, the AUSA *in charge of the defendant's prosecution* filed a paper styled as a "motion"; the "motion," however, was really a document with no explicable purpose within the proceedings, but which contained prejudicial information about the defendant. The contents of the so-called motion were subsequently widely reported in the press. *Id.* at 192. This Court held that "it should have been

apparent [to the AUSA] that for him to file this motion with the inclusion of the self-serving and irrelevant statements of offenses and crimes not comprehended in the indictment for which [the defendant] was on trial might well produce the highly unfortunate publicity that actually resulted." *Id.* at 193.

Similarly, in *United States* v. *Coast of Maine Lobster Co.*, 538 F.2d 899, 900 (1st Cir. 1976), the day before defendant's white-collar crime case was about the go to the jury, the U.S. Attorney appeared on television to remark that people who commit white collar crimes received inadequate jail sentences. The next day, a widely-read local newspaper ran a front-page story on the same topic, featuring a picture of the U.S. Attorney. *Ibid.* In response to defendant's motion for a mistrial, the district court determined that seven or eight jurors had seen the article and picture. *Id.* at 900-901. Remarking that "the supervising prosecutor, *who was known as such to the jury*, made a public statement in the media while the trial was pending" and that this was "publicity over which the chief prosecutor had control both as to subject matter and timing," the First Circuit held that defendant was entitled to a new trial. *Id.* at 901-903 (emphasis added). The court held that its ruling was "necessarily confined to the statements of a prosecutor who is closely associated with the particular case, *either because of his actual participation in it or because he is known by the jury to be an immediate supervisor of it*." *Id.* at 902 (emphasis added).

In this case, by contrast, there is no dispute that Perricone's comments were posted under pseudonyms. Appellant Br. 28-29; ROA.2682 n.35. Thus, as the district court found, his "online comments did not carry the government's imprimatur." ROA.2682 n.35. Far from being "front-page" news, the anonymous comments appeared as a small subset of the many comments under articles about the case. ROA.1895-1987; cf. *Maine Lobster*, 538 F.2d at 902 ("An obscure item on the inside pages of a newspaper, it needs hardly be said, is less likely to place pressure on a jury than a banner headline on the front page."). Moreover, Perricone was neither a member of the United States' trial team for the case, nor a supervisor of the team.[3] ROA.2679 n.17.

For these reasons, the district court did not abuse its discretion in denying McRae's motion for a new trial and request for an evidentiary hearing.

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[3] McRae also briefly mentions online commenting by two other former government attorneys, AUSA Jan Mann and an attorney in the Department of Justice's Civil Rights Division. See Appellant Br. 30-32. Along with comments by Perricone, this commenting was the subject of a motion for new trial that the district court granted in *United States* v. *Bowen*, 969 F. Supp. 2d 546 (E.D. La. 2013), currently on appeal by the United States to this Court (No. 13-31078). McRae does not cite any particular comments made by these attorneys regarding the Glover case, but, in any event, his arguments as to the prejudicial effect of any online postings made by these individuals must fail for the same reasons as stated above.

II

THE DISTRICT COURT DID NOT ERR IN DENYING MCRAE'S REQUEST FOR A SENTENCING VARIANCE

A. Standard Of Review

This Court's review of a sentence is bifurcated. *United States* v. *Scott*, 654 F.3d 552, 554 (5th Cir. 2011). The Court "first determine[s] whether the district court committed any significant procedural error, such as: (1) failing to calculate (or improperly calculating) the applicable Guidelines range; (2) treating the Guidelines as mandatory; (3) failing to consider the 18 U.S.C. § 3553(a) factors; (4) determining a sentence based on clearly erroneous facts; or (5) failing to adequately explain the chosen sentence, including an explanation for any deviation from the Guidelines range." *Id.* at 555 (internal quotation marks and citation omitted). At this first step, the Court "review[s] the district court's interpretation or application of the sentencing guidelines *de novo*, and its factual findings for clear error." *Ibid.* (citations omitted).

Next, "if the district court's decision is procedurally sound," the Court "consider[s] the substantive reasonableness of the sentence, considering the factors in 18 U.S.C. § 3553(a)." *Scott*, 654 F.3d at 555 (citation omitted). This review is "highly deferential," and this Court applies an abuse of discretion standard of review. *Ibid.* (citation omitted). "[W]ithin-Guidelines sentences enjoy a presumption of reasonableness, * * * rebutted only upon a showing that the

sentence does not account for a factor that should receive significant weight, * * * gives significant weight to an irrelevant or improper factor, or * * * represents a clear error of judgment in balancing sentencing factors." *Ibid.* (citation omitted).

B. The District Court Did Not Err In Denying McRae's Request For A Sentencing Variance

McRae was sentenced to 207 months' imprisonment, within the Guidelines range. ROA.2897; see also ROA.2875, 2886. The sentence is therefore entitled to a presumption of reasonableness. *Scott*, 654 F.3d at 555. McRae nevertheless contends that his sentence was procedurally flawed because it was based upon "a clearly erroneous factual finding that McRae intended to obstruct an investigation into Glover's death, regardless of whether he knew Glover had been shot by a police officer," and that it was "substantively unreasonable" because there was "no need for *any* imprisonment to deter recidivism or to protect the public." Appellant Br. 16-17. These arguments are without merit.

The record does not support McRae's allegation that the "district court's" finding that he burned Glover's body to obstruct an investigation was clearly erroneous. Appellant Br. 18. It was not the *district court's*, but rather the *jury*'s finding that McRae burned Glover's body to obstruct an investigation. McRae was convicted at trial of *precisely that offense*. ROA.1615. McRae concedes that the sufficiency of the evidence to support his conviction for obstructing a homicide

investigation – the crime of which he was convicted – is not properly at issue on this appeal. Nor does McRae suggest that he raised this issue below, or in his previous appeal to this Court. Appellant Br. 20. Accordingly, this issue is waived. See, *e.g.*, *United States* v. *Ogle*, 415 F.3d 382, 383-384 & n.1 (5th Cir.) ("[A]n argument not raised in appellant's original brief * * * is waived."), cert. denied, 546 U.S. 1079 (2005).

McRae's argument thus amounts to the circular notion that his conviction for the crime with which he was charged – destroying evidence that he knew was germane to a matter within the jurisdiction of the United States – somehow cannot be used to support his sentence for that very conviction; or the equally unsupportable notion that waived arguments regarding sufficiency of the evidence to support a conviction can nevertheless be the basis for an appellate holding that there was insufficient evidence to support the sentence imposed for that same offense. Either way, those arguments not only run contrary to reason, but also are entirely without precedent. McRae's claim of procedural error should therefore be rejected.

McRae's claim of substantive error is equally unavailing. Again, "within-Guidelines sentences enjoy a presumption of reasonableness," which can be rebutted only if the court did not properly account for or gave improper weight to a sentencing factor, or if the sentence represents a clear error of judgment. *Scott*,

654 F.3d at 555. McRae argues that the district court committed such an error of judgment by not giving enough weight to mitigating factors. Appellant Br. 26. The record reflects, however, that the district court properly considered relevant factors under 18 U.S.C. 3553.

During the sentencing hearing, the court stated that its sentencing of McRae presented a "formidable task." ROA.2889. On the one hand, the court recognized McRae's status as a "first responder," who, with the exception of burning Glover's body, presented no indication that he had served New Orleans "in other than an honorable way"; who had been "described in * * * warm and glowing terms * * * as a dedicated professional, exemplary husband, and caring father to a young child"; and who had presented evidence that he was working under "circumstances we cannot imagine." ROA.2889-2890.

On the other hand, the court noted that McRae had committed a "heinous" act: turning "Tanner's automobile * * * into Henry Glover's coffin"; burning his body despite believing one of his family members was present at the scene; and failing to ever document or own up to the burning, even as Glover's family continued to suffer, even as there had been news articles about the burned car on the levee, and even as he knew an investigation into what had happened to Glover was taking place. ROA.2889-2893. The failure to document the burning, or to speak up and bring some relief to the Glover family, the court observed,

"evidences cover-up as opposed to stress disorder. [McRae was] callous and cold-hearted for allowing the Glover family to continue to suffer as they wondered in despair what had happened to their beloved Henry." ROA.2893. Nor were McRae's actions spur-of-the-moment: as the court noted, he had "every opportunity to rethink [his] plan [to burn the body] while driving to the levee. When the flare did not provide the results [he] expected, [he] again had the opportunity to rethink [his] actions." ROA.2893. In short, the court made clear that it had considered and rejected McRae's arguments that this matter was just about a traumatized individual who "made a stupid decision." Appellant Br. 27.

As this Court has emphasized, "[a]ppellate review for substantive reasonableness is 'highly deferential,' because the sentencing court is in a better position to find facts and judge their import under the § 3553(a) factors with respect to a particular defendant." *United States* v. *Hernandez*, 633 F.3d 370, 375 (5th Cir.), cert. denied, 131 S. Ct. 3006 (2011). The district court did not err in finding that the sentence it imposed was necessary to reflect the seriousness of the offense, promote respect for the law, provide just punishment, and deter criminal conduct. ROA.2893-2894. Accordingly, this Court should affirm McRae's sentence.

III

MCRAE'S CONVICTION FOR VIOLATING 18 U.S.C. 1519 SHOULD BE AFFIRMED

A. Standard Of Review

Because McRae's argument regarding the scope of 18 U.S.C. 1519 was not raised in the district court, this Court reviews for plain error. *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). Under a plain error standard of review, this Court "will * * * reverse only if faced with an error that is so clear or obvious that it is not subject to reasonable dispute." ROA.1619-1620.

B. Section 1519 Prohibits The Destruction Of All Physical Objects

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

Section 1519 states that "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or

agency of the United States or any case * * * shall be fined under this title, imprisoned not more than 20 years, or both." The evidence presented at trial showed that McRae burned Tanner's car, and Glover's body, with the intent to impede, obstruct, and influence the investigation of the September 2, 2005, shooting that led to Glover's death. ROA.1615. McRae testified that he believed that Glover was a homicide victim (ROA.1619), and that by burning the car and the body, he limited the ability of the coroner to determine a cause of death, limited the ability to find out what happened to Glover, and potentially destroyed evidence of the crime. ROA.6206-6211.

Nevertheless, McRae now argues that he was "denied fair warning that his conduct violated § 1519 by the statute's failure to define 'tangible object,'" and that the statute's language is "too broad" to have put him on notice that he could not lawfully burn a body to impede a law enforcement investigation. Appellant Br. 35, 37.

Because McRae raises these arguments for the first time in this appeal, they are reviewed for plain error. Just as this Court in McRae's first appeal rejected his similar contentions regarding the constitutionality of Section 1519, it should do so again here. See ROA.1619-1623.

McRae cannot credibly argue that, as a law enforcement officer, he did not have fair warning that burning a vehicle and the body of a homicide victim might

fall within the purview of a statute aimed at preventing destruction of a "tangible object." See *Holder*, 130 S. Ct. at 2718-2719 (considering the vagueness of a statute based upon the facts at issue). Indeed, the dictionary definitions McRae cites would bring a vehicle and a body squarely within the meaning of the words "tangible object." Appellant Br. 37.

Relying on the Supreme Court's recent grant of certiorari in *United States* v. *Yates*, 733 F.3d 1059 (11th Cir. 2013), cert. granted, 134 S. Ct. 1935 (Apr. 28, 2014) (No. 13-7451), McRae contends that the phrase "tangible object" in Section 1519 should be limited to physical evidence of communications. Appellant Br. 35-39. Nothing in the statute's language, however, supports McRae's unduly narrow interpretation of this term. In the United States' view, Section 1519 unambiguously covers the destruction of all physical evidence. See Brief for the United States as Respondent in *Yates*, *supra*. In any event, regardless of the Supreme Court's eventual ruling in *Yates*, it can hardly be said that considering an automobile and a corpse to be tangible objects within the meaning of Section 1519 is "an error that is so clear or obvious that it is not subject to reasonable dispute." ROA.1620. Accordingly, McRae's plain error challenge to his Section 1519 conviction should be rejected.

CONCLUSION

This Court should affirm McRae's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2015, I electronically filed the foregoing Brief for the United States as Appellee with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Holly A. Thomas
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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Brief for the United States as Appellee:

(1) contains 11,499 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font; and

(3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

s/ Holly A. Thomas
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Date: February 23, 2015