No. 12-30423

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RONALD MITCHELL,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
JENNIFER LEVIN EICHHORN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

CERTIFICATE OF INTERESTED PERSONS

No. 12-30423
United States v. *Ronald Mitchell*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Kerry Cuccia, counsel for Ronald Mitchell;

2. Dwight Doskey, counsel for Ronald Mitchell;

3. Jennifer Levin Eichhorn, Attorney, Appellate Section, Civil Rights Division, U.S. Department of Justice;

4. Gregory M. Kennedy, Assistant U.S. Attorney, U.S. Attorney's Office, Eastern District of Louisiana;

5. Christopher Lomax, Attorney, Criminal Section, Civil Rights Division, U.S. Department of Justice;

6. Ronald Mitchell, defendant;

7. Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice;

8. Jessica Dunsay Silver, Principal Deputy Chief, Appellate Section, Civil Rights Division, U.S. Department of Justice.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney for the United States

STATEMENT REGARDING ORAL ARGUMENT

The United States notes appellant's request for oral argument. The United States does not believe oral argument is necessary in this case, but will certainly participate if this Court believes it would be helpful to resolve the issues.

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STATEMENT OF JURISDICTION

This appeal is taken from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. On April 11, 2012, the district court entered final judgment. On April 19, 2012, the defendant filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether there was sufficient evidence of the falsity of defendant's deposition testimony to support the defendant's conviction for perjury under 18 U.S.C. 1621.

2. Whether there was sufficient evidence that defendant's false deposition testimony was capable of influencing a fact finder's assessment of a civil lawsuit against the defendant and others arising from defendant's role in the assault and death of a victim.

3. Whether the district court erred in concluding that defendant was not prejudiced under *Brady* v. *Maryland*, 373 U.S. 83 (1963), or abused its discretion in denying a continuance of trial, when the defendant had ample time to prepare and effectively used at trial witnesses' statements that were produced five days prior to trial.

4. Whether the district court abused its discretion in instructing jurors to continue deliberation a second day when the jurors reached verdicts on some but not all counts, there was an indication of a temporary impasse, and the jurors had deliberated only approximately eight hours.

5. Whether charges under 18 U.S.C. 1621 and 1512(c)(2) are multiplicitous.

STATEMENT OF THE CASE

On September 3, 2005, several days after Hurricane Katrina, Ronald Mitchell and Ray Jones, then-officers of the New Orleans Police Department (NOPD), were on patrol in a marked police car in front of the New Orleans Convention Center. See R. 542-543, 595, 598, 685, 687.[1] In the course of a confrontation between Mitchell and Danny Ray Brumfield, Sr., Mitchell, while sitting in the front passenger seat of the police car, shot and killed Brumfield. See R. 542, 567, 570, 601; see also R. 550, 553-554. Immediately after the shooting, Mitchell and Jones left the scene; Mitchell did not get out of the car and check Brumfield's condition or render any assistance. See R. 463, 468, 509, 542, 601, 693-695, 743-744, 750.

Members of Brumfield's family filed a civil lawsuit against Mitchell and others alleging Mitchell and the other defendants' acts and omissions constituted "intentional, willful, * * * reckless, or flagrant misconduct that caused the assault and death" of Brumfield. See Gov. Exh. 5 at 3, Complaint, *Deborah C. Brumfield, et.al.* v. *Officer Ronald Mitchell, et. al.*, No. 06-4834 (E.D. La.). As part of the

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[1] "R.E. __" refers to the Appellant's Record Excerpts by page number. "R. __" refers to the page number following the Bate-stamped "USCA5" on documents in the official record on appeal. Identical entries in the Record Excerpts and official record are separated by a forward slash (/). "Gov. Exh. __" refers to the United States' exhibit admitted at trial. "Br. __" refers to the page of appellant's opening brief.

civil suit, Mitchell and Jones were deposed on November 8, 2007, and June 4, 2008, respectively. See R. 263. Mitchell testified during his deposition that 1) Brumfield lunged at him while holding a shiny object, and 2) immediately after he shot Brumfield, he got out of the police car and checked Brumfield's pulse, and Brumfield was dead. R. 546, 552-554. Jones testified during his deposition that after Mitchell shot Brumfield, he (Jones) stopped the patrol car while Mitchell got out of the car to check on Brumfield. See R. 265; see also R. 21.

On September 30, 2010, a federal grand jury returned a six-count indictment charging Mitchell and Jones with perjury in violation of 18 U.S.C. 1621 and obstruction of justice in violation of 18 U.S.C. 1512(c)(2) based on their false deposition testimony. R. 13-23. Trial began on December 5, 2011, and included two days of testimony. R. 119, 134-135, 139, 163.[2] At the close of the government's case-in-chief, Mitchell moved for judgment of acquittal on sufficiency grounds. See R. 789; see also R. 135. The district court denied the

[2] The morning of trial, the defendant moved for a continuance based, in part, on the United States' recent production of prior statements by two witnesses, Africa Brumfield and David Augustin. See R. 124-133. While the district court stated that the United States failed to produce the material in a timely way, the district court also instructed the United States to make these witnesses available to the defendant for interview, approved a subpoena to obtain pertinent medical records for a third witness, ruled that the defendant was not prejudiced by the delayed production, and denied the motion for continuance. See R. 334, 340, 344-345, 350, 354-355.

motion. See R. 789. Mitchell renewed his motion after closing arguments, and again the court denied the motion. See R. 900-901; see also R. 139.

On December 8, 2011, the jury began deliberations at 11:40 a.m. and reported twice that it was deadlocked on two counts. See R. 139-142, 902, 904. After the first note, the district court directed the jury to continue deliberations. See R. 141. After the second note, which was received at approximately 8:00 p.m., the district court dismissed the jury for the evening and instructed them to return the following day to continue deliberations. See R. 906-907. Mitchell unsuccessfully moved for a mistrial based on one juror's apparent distress. See R. 908.

On December 9, 2011, after an additional hour of deliberations, the jury convicted Mitchell of perjury and obstruction of justice charges based on Mitchell's deposition testimony that, after shooting Brumfield, Mitchell got out of his police car and checked Brumfield's pulse (Counts Three and Four). See R. 163, 165. The jury acquitted Mitchell of perjury and obstruction of justice charges regarding Mitchell's testimony that Brumfield lunged at Mitchell while holding a shiny object (Counts One and Two). See R. 164. The jury also acquitted Jones of perjury and obstruction of justice based on his deposition testimony that, after Mitchell shot Brumfield, he (Jones) stopped the car while Mitchell got out of the car to check on Brumfield (Counts Five and Six). See R. 165-166.

After the verdicts, Mitchell filed motions for judgments of acquittal (R. 185-195) and a new trial. See R. 196-215. The United States opposed Mitchell's post-trial motions. See R. 216-237. The district court denied the motions. See R. 261-302.

On April 11, 2012, Mitchell was sentenced to 20 months' incarceration for each count to be served concurrently, to be followed by three years of supervised release. See R. 313-318. Judgment was entered on the same day. See R. 313-318. Defendant filed a timely notice of appeal on April 19, 2012. R.E. 73-74/R. 322-323.

STATEMENT OF FACTS

Viewed in the light most favorable to the government, the evidence presented at trial established the following:

1. The Shooting And Defendant's Initial Statement

On September 1, 2005, Brumfield had set up an area in an alcove outside an entrance to the Convention Center for his grandchildren and other members of his family to wait for assistance after Hurricane Katrina. See R. 592. By the evening of September 3, 2005, approximately 17 people, adults and children, members of Brumfield's family, neighbors, and friends of some relatives were part of Brumfield's group. See R. 456-458, 504, 591-592. The sidewalks and area around the Convention Center were full of people who were displaced after Hurricane

Katrina. See R. 452, 460. Brumfield's demeanor during September 3, 2005, was described as "tired," "as normal as you could seem under those circumstances," and "all right." R. 469, 594. Brumfield gave encouragement to his sister about their situation shortly before the incident that killed him. See R. 598.

On September 3, 2005, at approximately 9:30 p.m., Jones and Mitchell were driving in an NOPD patrol car down Convention Center Boulevard in the opposite direction of regular traffic patterns. See R. 595, 598, 685-687. A civilian truck with four NOPD officers, including officers Kendrick Allen and Kermanshiah Perkins, followed about one-to-three car lengths behind Jones and Mitchell. See R. 685, 689-690, 747, 749, 759. All of the officers had NOPD-issued guns and Mitchell also had his personally owned Mossberg 12-gauge shotgun. R. 683-684, 690.

Brumfield, while on the sidewalk, saw the marked police car approaching and he headed toward the car. See R. 507, 599, 761. Witnesses Chris Howard, Africa Brumfield, and Steve Banka were on the sidewalk of the Convention Center and had a clear view of the incident involving Jones, Mitchell and Brumfield. See R. 483, 502, 596, 598, 659. The police car's lights or ambient light provided sufficient opportunity for these witnesses to see what happened even though other areas nearby were dark. See R. 459, 461, 509, 512, 529-530, 615-616, 663.

Officers Allen and Perkins also had a partial view of the incident from the truck they were riding in. See R. 692-695, 748-750.

Brumfield moved from the sidewalk towards the marked police car; he was waving his arms above his head in an apparent effort to get the officers' attention. R. 507, 599, 616. Howard, who was sitting in a chair near the street, heard Brumfield ask the officers when the buses would arrive to take them away. See R. 459, 462, 470. Howard heard officers yell at Brumfield to get out of the street. See R. 462.

Brumfield was standing in the street facing the front of the marked police car See R. 479-480, 600, 620. As the police car kept moving forward slowly, Brumfield did a standing jump on to the hood of the police car. See R. 480, 543, 600, 621-622, 748, 758, 761. Given the car's movement forward and Brumfield's lack of balance and means to hold on, Brumfield was unsteady and in continuous motion as he slid across the hood of the car toward the passenger side. See R. 463, 467, 749; see also R. 508. Brumfield's hands were empty. See R. 465, 470, 510. While sliding off the car or just as he fell off the car, Mitchell, who remained sitting in the passenger seat, fired his shotgun through the open passenger window of the car. See R. 463, 467-468, 508, 546, 552. Mitchell shot Brumfield in his back left shoulder. See R. 567. Around the same time that Brumfield was on the hood of the car or when he was shot, the police car swerved to the left. See R.

692-693, 720, 723, 742, 750. Brumfield was less than two feet away from Mitchell when he was shot. R. 569, 572. The entire incident between Brumfield and Mitchell lasted about a minute or so. See R. 495, 532-534, 640.[3] According to Banka, Howard, and Africa B., there was only the one shot that Mitchell fired and struck Brumfield. See R. 469, 511, 528, 601. Notwithstanding a crowd, there was absolute silence immediately after Brumfield was shot. R. 511, 633. Brumfield fell to the ground on his back, bled profusely, and died almost immediately. See R. 463-465, 519, 570. Banka went up to Brumfield's body immediately after he was shot and there was no weapon, no scissors, or any other item on the ground near Brumfield. See R. 465, 474, 511.

These five witnesses (Banka, Howard, Africa B., Officers Allen and Perkins) agreed that immediately after Mitchell shot Brumfield, Jones just "kept going" and drove away from the scene with Mitchell. R. 463, 468, 509; see R. 601, 605, 626, 749-750, 765-766.[4] Neither the defendant nor Jones got out of the police car after the shooting and neither officer examined Brumfield's condition or

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[3] At one point, Howard estimated the encounter could have lasted five minutes but he made clear he was not sure on the time frame. See R. 478, 527. At another point, Howard stated that the conversation between Mitchell and Brumfield lasted "just seconds." R. 495.

[4] The defense called one witness, David Augustin, who also testified that after Brumfield was shot, the police car kept on driving and did not stop. See R. 794-795.

rendered him any assistance. See R. 468, 509, 601, 630, 633. The truck with the four NOPD officers that was behind Jones and Mitchell also "accelerated" and sped away from the area immediately after the shooting. R. 760; see R. 693-695, 750. Officer Allen explained that both the patrol car and the truck accelerated quickly to leave the scene after the shot; otherwise, the truck Allen was in would have hit Jones' police car. See R. 743. After leaving Convention Center Boulevard, the two groups of officers convened at the Crescent City Bridge. R. 695, 750.

Brumfield's body remained on the sidewalk where he fell to the ground. See R. 511. Approximately 15 NOPD officers, including SWAT officers, did not return to Brumfield's body until several hours after he was shot. See R. 610, 703, 705-706. The police officers, some of whom were in battle dress uniforms and had large rifles, formed a circle to cordon off the area around Brumfield's body. See R. 610, 705-707, 740, 744-745. Africa B., who was with other family members and close to Brumfield's body, could not see what officers were doing inside the circle. See R. 611. The police took some photographs at the scene and one photo showed a pair of scissors near Brumfield's head. See R. 614. These are the same scissors that Africa B. had given to Brumfield two days before he was killed, and which Brumfield had used the day before he was killed to cut cardboard for his

grandchildren to lay upon. See R. 594-595, 799. These scissors were not on the ground immediately after Brumfield was shot. See R. 465, 474, 511.

About a month after the shooting, NOPD Sergeant Keith Joseph, Sr., took Mitchell's statement regarding the shooting. See R. 767-768, 770, 777, 780. During this interview, Mitchell stated that after he shot Brumfield, the crowd was "acting erratic" and he and Jones left the scene. R. 770. Mitchell further informed Joseph that he and Jones met up with the officers in the truck at the Crescent Bridge, they waited to speak with a supervisor, and then a group of officers returned to the Convention Center, at which time an officer checked Brumfield's medical condition. See R. 771-772.

2. The Civil Lawsuit And Defendant's Deposition Testimony

On August 25, 2006, Brumfield's mother, son, and daughter filed a civil lawsuit against Mitchell, the NOPD, former Mayor Ray Nagin, and former Superintendent of the NOPD Eddie Compass alleging federal claims under 42 U.S.C. 1983 and tort claims under Louisiana law based, in part, on the actions that caused Brumfield's death. See R. 445-446; Gov. Exh. 5. The suit alleged that Mitchell's shooting and failure to render medical assistance to Brumfield and defendants' failure to follow NOPD policies violated the plaintiffs' constitutional rights and numerous state laws, including wrongful death, assault, and intentional

infliction of emotional distress, which, if proven, entitled plaintiffs to compensatory and punitive damages. See. Gov. Exh. 5 at 2-5.

As part of civil discovery, Mitchell was deposed. See R. 538-556. Under oath, Mitchell stated that after he shot Brumfield, he got out of the police car, checked Brumfield's pulse, and concluded Brumfield was dead. See R. 553-555. More specifically, the following exchange occurred during his deposition and is the basis of Counts Three and Four:

> Q: Okay. Was that the point where you discharged your weapon?
> A: Yes.
> Q: What happened then?
> A: I got out of the car.
>
> * * *
>
> Q: Then what happened [after you shot him]?
> A: He fell down. I got out of the car to see if he was alive or not.
>
> * * *
>
> Q: Okay. So you get out of your car to check Mr. Brumfield, and what happened? What did you see?
> A: No signs of life.
> Q: And how did you determine that?
> A: I put my two fingers to his throat, the side of his throat, and checked for a pulse.
> Q: Okay. How long did that take?
> A: Maybe five seconds. Five to ten.
>
> * * *
>
> Q: Okay. You stayed by the body five seconds, you said?
> A: Five to ten.

R. 553-555.

3. The District Court's Decision Denying Acquittal Or A New Trial

On April 3, 2012, the district court issued its Order and Reasons denying defendant's motions for acquittal and for a new trial. See R.E. 24-65/R. 261-302. The district court first held that there was sufficient evidence for the jury to conclude that the defendant falsely testified during his deposition that he got out of the police car after he shot Brumfield to check Brumfield's pulse, and that this deposition testimony was material to the then-pending civil suit to support his conviction under 18 U.S.C. 1621. See R.E. 31-48/R. 268-285. The district court acknowledged that several witnesses gave different descriptions of events leading up to the shooting, but further noted that at least five witnesses, including police officers and civilians, consistently stated that Mitchell never got out of his car and never checked Brumfield's pulse immediately after Mitchell shot Brumfield. See R.E. 32-37/R. 269-274. The district court concluded that "[t]he jury could credit this consistent testimony regarding the falsity of Mitchell's statements," and therefore find that Mitchell's "statements were false." R.E. 37/R. 274.

The district court, citing *United States* v. *Holley*, 942 F.2d 916, 923 (5th Cir. 1991), further held that Mitchell's statements "were not only material to matters properly the subject matter of the civil deposition, but also that his answers were material to the outcome of the lawsuit in which his deposition was taken." R.E. 45/R. 282; see R.E. 39/R. 276. The district court explained that the civil suit raised

claims of excessive force, denial of medical care, and intentional and reckless conduct that warranted punitive damages. See R.E. 46/R. 283. The court held that Mitchell's false testimony that he left his car to check Brumfield's pulse was material because, if believed by the jury, this testimony would make Mitchell's version of events more likely, and make it more difficult to conclude that he used excessive force or acted with callous disregard for Brumfield's medical condition and protected rights. See R.E. 46-47/R. 283-284.

The district court also concluded that there was sufficient evidence to support Mitchell's conviction under 18 U.S.C. 1512(c)(2). See R.E. 48-50/R. 285-287. The court recognized that the purpose of a deposition is to obtain evidence that either is admissible at trial or would lead to admissible evidence. See R.E. 49/R. 286. The district court observed that, had Mitchell testified honestly, his testimony would have been admissible to help establish the plaintiffs' claims of a denial of medical care and punitive damages. See R.E. 49-50/R. 286-287. By testifying falsely, the district court concluded that the jury had sufficient basis to find that Mitchell "interfered" with the judicial process since he foreclosed the plaintiffs' search for relevant evidence. See R.E. 50/R. 287.

The district court also denied Mitchell's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33(a). See R.E. 50-65/R. 287-302. Mitchell asserted five claims: he repeated his challenge that his statements were not

material and did not obstruct justice; and he claimed that the witnesses were not credible; the United States violated his rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963); a mistrial was warranted after the jury announced they were deadlocked; and the verdicts were multiplicitous. See R.E. 51/R. 288. Based on its ruling on the motion for acquittal, the district court similarly rejected the challenge to the quantum of evidence regarding materiality and obstruction of justice. See R.E. 51-52/R. 288-289. Second, while noting that the court may reassess the witnesses' credibility, the court reiterated that the witnesses' testimony was consistent on the falsity of Mitchell's statements. See R.E. 52-53/R. 289-290. Third, the district court rejected Mitchell's claim that the district court improperly denied a continuance of the trial after the government, five days before trial, disclosed new evidence regarding David Augustin and Africa B. See R.E. 54/R. 291. The district court had instructed the government to make these witnesses available. See R.E. 55/R. 292. The court held that the defendant had ample time to interview the two witnesses and make adjustments in trial strategy, and therefore he was not prejudiced by the government's late disclosure to warrant any delay of the trial. See R.E. 55-57/R. 292-294. Fourth, the district court ruled that a mistrial was not warranted after the jury reported that it was deadlocked on certain counts, and that it was within its discretion to have the jury return to deliberate the following day. See R.E. 57-61/R. 294-298. Finally, the district court held that the

charges under 18 U.S.C. 1512(c)(2) and 1621 are not multiplicitous since each provision includes an element not included in the other. See R.E. 61-64/R. 298-301.

SUMMARY OF ARGUMENT

1. Five witnesses testified that Mitchell (and other NOPD officers) fled the scene immediately after Mitchell shot Brumfield, and that Mitchell did not get out of his car to check Brumfield's condition. Defendant's focus on the differences in witnesses' recollections of other facts relating to the confrontation between Mitchell and Brumfield are not a basis for this Court to reject the jury's verdict. See *United States* v. *Ramos-Cardenas*, 524 F.3d 600, 605 (5th Cir.), cert. denied, 555 U.S. 908, and 555 U.S. 949 (2008). When viewed in the light most favorable to the verdict, there is more than sufficient evidence for reasonable jurors to find beyond a reasonable doubt that Mitchell falsely testified in his deposition that, after he shot Brumfield, he got out of the police car and checked Brumfield's pulse. See *United States* v. *Bennett*, 664 F.3d 997, 1011 (5th Cir. 2011), vacated on other grounds, No. 11-9711, 2012 WL 1190577 (U.S. June 29, 2012).

2. Materiality under 18 U.S.C. 1621 is established by showing that the misrepresentation had a tendency or was capable of influencing a decision maker. See *United States* v. *Forrest*, 623 F.2d 1107, 1112 (5th Cir.), cert. denied, 449 U.S. 924 (1980). Similarly, an act will "obstruct, influence[], or impede[]" a proceeding

if, *inter alia*, it has a tendency to influence a decision maker's assessment. 18 U.S.C. 1512(c)(2); see *United States* v. *Sharpe*, 193 F.3d 852 (5th Cir. 1999), cert. denied, 528 U.S. 1173, 528 U.S. 1180, and 530 U.S. 1229 (2000). Brumfield's survivors filed a civil suit against Mitchell and others based on the shooting and Brumfield's death and alleged violations of federal and state law, including intentional infliction of emotional distress, and "malicious * * * intentional [and] outrageous" acts that warranted compensatory and punitive damages. Gov. Exh. 5 at 3. There was ample evidence that Mitchell's false deposition testimony (testimony that after he shot Brumfield, he got out of his car to check Brumfield's pulse) had a tendency to influence the fact finder's assessment of these civil claims. Moreover, there was ample evidence that Mitchell's false testimony had a tendency to influence the purpose of the deposition, which included identifying Mitchell's actions and assessing his credibility. See *United States* v. *Holley*, 942 F.2d 916, 923 (5th Cir. 1991).

3. The district court did not err when it concluded that Mitchell was not prejudiced under *Brady* v. *Maryland*, 373 U.S. 83 (1963), based on the production of two witness statements shortly before trial. The most significant factor in assessing prejudice under *Brady*, and whether a district court abuses its discretion in denying a continuance, is whether the defendant had an opportunity to and did effectively use the evidence in issue. See *United States* v. *Walters*, 351 F.3d 159,

170 (5th Cir. 2003); *United States* v. *McDonald*, 837 F.2d 1287, 1289 (5th Cir. 1988). Here, defendant had ample time to interview the witnesses, who were already known to him. More importantly, defendant effectively used the statements at trial, as established by the extensive cross-examination of Africa B.'s various inconsistent statements, the examination of Augustin, and Mitchell's acquittal on two counts, for which Augustin's testimony was central.

4. The district court has broad discretion to ask a jury to continue deliberations when it reaches a temporary impasse. See *United States* v. *Gordy*, 526 F.2d 631, 635-636 (5th Cir. 1976). Here, when there were indications that the jury had resolved some counts but reached a temporary impasse on others, and had only deliberated approximately eight hours, the district court was well within its discretion to advise the jury to rest and return the next day and continue deliberations. See *ibid.* Moreover, the district court did not abuse its discretion when it chose not to conduct individual voir dire or declare a mistrial when a juror was distressed at the time the district court advised the jury, as a whole, to rest and return the next day to resume deliberations.

5. Convictions for obstruction of justice under 18 U.S.C. 1512(c)(2) and perjury under 18 U.S.C. 1621 may be based on the same acts. See *United States* v. *Soape*, 169 F.3d 257, 266 (5th Cir.), cert. denied, 527 U.S. 1011 (1999). The two offenses are not multiplicitous because each offense requires proof of an element

that is not required for the other. See *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Perjury requires proof of a statement that is both material and under oath, neither of which is required for obstruction of justice. Proof that an act "obstructs, influences, or impedes" is not required to prove perjury. While the same evidence and similar legal standard may establish materiality under Section 1621 and obstruction or influence under Section 1512(c)(2) in some circumstances, as here, there are several means by which a defendant can "obstruct[], influence[], or impede[]" to violate Section 1512(c)(2) that are different than proof of materiality. Defendant's argument fails because the assessment of multiplicity is properly based on the elements of the offenses, not the application of the statutes to a particular case. See *United States* v. *Flores-Peraza*, 58 F.3d 164, 166-167 (5th Cir. 1995), cert. denied, 516 U.S. 1076 (1996).

ARGUMENT

I

THE EVIDENCE OF THE FALSITY OF DEFENDANT'S DEPOSITION TESTIMONY WAS MORE THAN SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION FOR PERJURY

A. Standard Of Review

In this Court's review of the sufficiency of the evidence, given defendant's timely objections, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); see *United States* v. *Bennett*, 664 F.3d 997, 1011 (5th Cir. 2011), vacated on other grounds, No. 11-9711, 2012 WL 1190577 (U.S. June 29, 2012). The Court must accept all credibility choices and reasonable inferences made by the trier of fact which tend to support the verdict. See *ibid.*; *United States* v. *Asibor*, 109 F.3d 1023, 1030 (5th Cir.), cert. denied, 522 U.S. 902, and 522 U.S. 1034 (1997). In other words, the inquiry is "limited to whether the jury's verdict was reasonable, not whether [the appellate court] believe[s] it to be correct." *United States* v. *Williams*, 264 F.3d 561, 576 (5th Cir. 2001). Furthermore, "it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *United States* v. *Ramos-Cardenas*, 524 F.3d 600, 605 (5th Cir.), cert. denied, 555 U.S. 908, and 555 U.S. 949 (2008); see *United States* v. *Loe*, 262 F.3d 427, 432 (5th Cir. 2001), cert. denied, 534 U.S. 1134 (2002).

B. The Jury Reasonably Concluded That Mitchell's Deposition Testimony Was False To Support His Conviction For Perjury

Count Four of the Indictment charged that Mitchell violated 18 U.S.C. 1621 by making a willful, false, material statement under oath during his deposition in a federal civil lawsuit (the Brumfield family's civil suit against him, NOPD, and others) by stating falsely that, after he shot Brumfield, he got out of the police car

and checked Brumfield's pulse. See R.E. 14-15/R. 18-19.[5] Mitchell asserts (Br. 18-22) that various discrepancies in the witnesses' testimony regarding Mitchell's confrontation with Brumfield prevent a reasonable jury from concluding that the defendant falsely testified in his deposition. However, given the ample, consistent testimony of multiple witnesses on the critical fact in issue and the deference due the jury's credibility determinations, Mitchell's claim is without merit. See *Bennett*, 664 F.3d at 1012; *Loe*, 262 F.3d at 432.

At trial, five witnesses – Christopher Howard (R. 463, 468), Steven Banka (R. 509), Africa B. (R. 601), Officer Allen (R. 693-695, 743-744), and Officer Perkins (R. 750) – unequivocally and consistently testified that after Mitchell shot Brumfield, Mitchell's patrol car sped away from the scene, and Mitchell did not get out of his car immediately after the shooting to check Brumfield's pulse or condition. For example, Howard testified that after Brumfield was shot, no one got out of the car to check on Brumfield because the police car "kept going. It was speeding on. It just kept going." R. 468. Banka similarly testified that after Brumfield was shot, Mitchell's police car "[k]ept going," and neither Mitchell nor

[5] To establish perjury under 18 U.S.C. 1621, the United States must prove: (1) false testimony (2) under oath (3) concerning a material matter (4) "with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States* v. *Dunnigan*, 507 U.S. 87, 94 (1993); see *United States* v. *McKenna*, 327 F.3d 830, 838 (9th Cir.), cert. denied, 540 U.S. 941 (2003); *United States* v. *Holley*, 942 F.2d 916, 923 (5th Cir. 1991).

any other officer got out of the car to check Brumfield's condition. R. 509. As Officer Allen explained, the second car (in which he was a passenger) "swiftly" fled the scene after Mitchell's shooting and the first car led the way; otherwise, if Mitchell had gotten out of the car, Allen's car would have run right into Mitchell's car. R. 695; see R. 693-965. Defendant's assertion (Br. 21) that this consistent testimony is merely a "coincidence [that] does not establish a reliable fact" is simply without merit. Defendant has not and cannot undermine the weight and significance of this collective testimony and the deference owed the jury's credibility determinations and verdict. See *Bennett*, 664 F.3d at 1012.

Moreover, Mitchell himself, approximately one month after the incident, told NOPD Sergeant Joseph that other officers checked Brumfield's medical condition when they *returned* to the scene hours after the shooting. See R. 771, 777, 780. At trial, Sergeant Joseph testified about his interview of Mitchell and his report of this interview. See R. 770-772; see also R. 773-781. Sergeant Joseph recalled that Mitchell told him that the crowd in front of the Convention Center was "acting erratic" so he (Mitchell, with Jones) left the scene right after the shooting. See R. 770-771. At trial, the following query took place:

> Q: Did [Mitchell] ever say that he got out of the car and checked on the person who he shot?
> A: No, sir, not at that time. They didn't check on anyone.

R. 771.

Mitchell now parses (Br. 22) Sergeant Joseph's testimony and report to argue that Mitchell never told Sergeant Joseph that he got out of the car immediately after the shooting. A rational juror could reject Mitchell's spin and conclude, based on Joseph's testimony, that Mitchell told Sergeant Joseph that he did not get out of the car after the shooting. However, even if the jury accepted Mitchell's characterization that Mitchell made *no* comment to Sergeant Joseph about whether he checked on Brumfield after the shooting, this interpretation still does not warrant an acquittal. A rational jury could conclude that even if Mitchell did not tell Sergeant Joseph whether he checked Brumfield's condition immediately after he was shot, the reasonable inferences from Mitchell's other comments to Joseph are that: (1) Mitchell did not, in fact, get out of the car; (2) Mitchell's description of the purportedly "erratic" behavior of the crowd was his excuse, at that time, for their immediate flight from the scene, and (3) Mitchell's specific reference to the later examination by officers when they returned to the scene was the first time an officer checked on Brumfield. Since Mitchell considered it important enough to state that officers examined Brumfield on the return to the scene, a reasonable jury also could conclude that Mitchell would have considered it important enough to state that he checked on Brumfield immediately after the shooting if he had actually done so. See *Bennett*, 664 F.3d at 1012; *Ramos-Cardenas*, 524 F.3d at 605 (deference given to witness's testimony that

supported convictions notwithstanding impeachment). Thus, there are multiple, reasonable inferences to be drawn from Sergeant Joseph's testimony that support the jury's verdict. See *Loe*, 262 F.3d at 434 (reversing acquittal when reasonable inferences of circumstantial evidence supported the jury's conviction).

To be sure, some of the witnesses at trial disagreed on several details regarding the confrontation between Mitchell and Brumfield. For example, some witnesses disagreed on whether Brumfield approached the police car from the sidewalk directly in front of the convention center or across the street from the convention center. Compare R. 462, 472 and R. 525. One witness believed Brumfield was shot through the windshield (see R. 625, 630) yet there was only a small crack and no bullet hole in the windshield. See R. 701-702, 725. Witnesses also gave varied descriptions of Brumfield's position on the car's hood, including "flailing" around or lying prone on the hood and sliding sideways. Compare R. 467, 481 and R. 601-603, 623-624.

These descriptions, however, are not a basis for acquittal or concluding that the jury was incapable of finding consistent testimony on any fact. These discrepancies are tangential and therefore not essential to the jury's verdict that Mitchell lied when he said he got out of the car to check Brumfield's pulse. A jury's credibility determinations commonly require resolution of disputed descriptions and a witness's testimony may be accurate on some matters and not

accurate on others. The jury's determinations, including its verdict that Mitchell lied about getting out of his car to check Brumfield's pulse, must receive deference by this Court. See *Bennett*, 664 F.3d at 1012 (inconsistencies in witnesses' testimony "do not overcome our deferential standard of review of credibility determinations"); *Asibor*, 109 F.3d at 1030.

Accordingly, based on the five eyewitnesses' testimony and Sergeant Joseph's testimony, the jury had, at a minimum, a reasonable basis to conclude that Mitchell falsely testified at his deposition that, immediately after he shot Brumfield, he got out of the police car to check Brumfield's pulse. See *United States* v. *Brown*, 459 F.3d 509, 529 (5th Cir. 2006) (sufficient evidence to establish falsity), cert. denied, 550 U.S. 933 (2007); *Loe*, 262 F.3d at 432 (deference to the jury's assessment of witnesses' credibility and conflicting evidence); see also *United States* v. *Wallace*, 597 F.3d 794, 800-801 (6th Cir. 2010) (sufficient evidence, including witnesses' testimony that was contrary to defendant's version, supported a reasonable jury's finding of false testimony).

II

THERE WAS SUFFICIENT EVIDENCE THAT DEFENDANT'S FALSE DEPOSITION TESTIMONY WAS CAPABLE OF INFLUENCING OR OBSTRUCTING THE BRUMFIELD SURVIVORS' CIVIL LAWSUIT

Mitchell asserts (Br. 23-26) that his deposition testimony was not material to the civil lawsuit brought by Brumfield's survivors and, therefore, his convictions

for perjury and obstruction of justice should be dismissed. Mitchell's claim is without merit. He mischaracterizes the nature of the civil lawsuit and ignores this Court's precedent that broadly defines the scope of materiality for perjury, particularly when committed in the context of a civil deposition. See *United States* v. *Holley*, 942 F.2d 916, 923 (5th Cir. 1991).[6] Moreover, there was sufficient evidence that defendant's false statement satisfied Section 1512's element to "obstruct[], influence[], or impede[]" a proceeding because his false statement had the likely or probable impact of interfering with the civil suit. See *United States* v. *Sharpe*, 193 F.3d 852, 865 (5th Cir. 1999).

A. Standards Of Materiality Under 18 U.S.C. 1621 And Obstruction Under 18 U.S.C. 1512(c)(2)

For purposes of 18 U.S.C. 1621, a defendant's statement is material if the statement "was capable of influencing the tribunal on the issue before it." *United States* v. *Forrest*, 623 F.2d 1107, 1112 (5th Cir.) (interpreting Section 1621), cert. denied, 449 U.S. 924 (1980); see *United States* v. *Brown*, 459 F.3d 509, 529 (5th Cir. 2006) (citing *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995), which addresses "materiality" under 18 U.S.C. 1001, to define "materiality" under 18

[6] Defendant erroneously refers (Br. 23) to the "district court's materiality finding." Materiality is an element found by the jury, see *United States* v. *Gaudin*, 515 U.S. 506, 518-519 (1995), as the jury was instructed to do here. See R. 155-156. The standard of review of the sufficiency of the evidence is set forth on pages 19-20, *supra*.

U.S.C. 1623), cert. denied, 550 U.S. 933 (2007); *United States* v. *McKenna*, 327 F.3d 830, 839 (9th Cir.) (materiality standard is the same under 18 U.S.C. 1621 and 1623), cert. denied, 540 U.S. 941 (2003); *United States* v. *Salinas*, 923 F.2d 339, 340-341 (5th Cir. 1991) ("uniform understanding" of "materiality" under Section 1623 is whether the concealment or falsehood "would have the natural effect or tendency to influence" the decision maker) (citation omitted). The United States need not prove that the decision maker was, in fact, influenced or actually hindered in any way by the falsehood. See *Brown*, 459 F.3d at 529 (citing *United States* v. *Abrams*, 568 F.2d 411, 421 (5th Cir.), cert. denied, 437 U.S. 903 (1978)); *Salinas*, 923 F.2d at 341 (the question is "not whether the court *would* have made a different decision if the truth had been told [by the defendant], but whether the district court *might* have made a different decision if the truth had been told"). Materiality is determined at the time of the defendant's statement. See *United States* v. *Gremillion*, 464 F.2d 901, 905 (5th Cir.), cert. denied, 409 U.S. 1085 (1972).

Significantly, materiality broadly encompasses not only matters central to a determination of guilt, but also testimony that is "relevant to any subsidiary issue or [wa]s capable of supplying a link to the main issue under consideration." *Brown*, 459 F.3d at 530 n.18 (citing *United States* v. *Griffin*, 589 F.2d 200, 207 (5th Cir.), cert. denied, 444 U.S. 825 (1979)); see *Forrest*, 623 F.2d at 1112 (the

statements "need only be material * * * to any proper matter of inquiry not just to the main issue") (quoting *Gremillion*, 464 F.2d at 905); see also *Wallace*, 597 F.3d at 801 ("A false declaration satisfies the materiality requirement if a truthful statement might have assisted or influenced the … jury in its investigation.") (citation omitted). Furthermore, in the context of a civil deposition, materiality is not limited to admissible evidence, but also includes matters properly the subject of a deposition and within the parameters of the rules of civil discovery. See *Holley*, 942 F.2d at 923.

While 18 U.S.C. 1512(c)(2) does not have a materiality standard, a defendant attempts to "obstruct[], influence[], or impede[]" a proceeding if, *inter alia*, the action can have the "natural and probable effect of interfering with that proceeding." *United States* v. *Johnson*, 553 F. Supp. 2d 582, 626 (E.D. Va. 2008) (internal quotations marks and citation omitted); see *Sharpe*, 193 F.3d at 865 (interpreting Section 1503).[7] Thus, the capability or potential to influence the proceeding can satisfy different elements of Sections 1621 and 1512(c)(2). See *ibid.*; *Forrest*, 623 F.2d at 1112.

[7] As the district court noted, 18 U.S.C. 1503's catch-all provision, "[w]hoever corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice," is very similar to the text of Section 1512(c)(2). See R. 285-286.

Defendant's various assertions (Br. 25-26) – all without citation – that his statement must address or influence "one of those essential elements of the plaintiffs' cause of action," affect a "just outcome" of the underlying proceeding, or lead to admissible evidence to satisfy Sections 1512(c)(2) or 1621 are simply contrary to the precedent discussed herein. See *Brown*, 459 F.3d at 529-530; *Holley*, 942 F.2d at 923.

B. Mitchell's False Deposition Testimony Was Capable Of Influencing The Civil Lawsuit

Here, the civil complaint alleged that the police car in which Mitchell was a passenger struck Brumfield and threw him onto the car's hood, Mitchell shot Brumfield, the police car ran over Brumfield after the shooting, and Mitchell failed to render any aid to Brumfield after the shooting. Gov. Exh. 5 at 3-4. The complaint asserted that the civil defendants' (including Mitchell's) actions constituted "malicious, intentional, willful, outrageous, or flagrant misconduct." Gov. Exh. 5 at 3. The plaintiffs sought relief for "tortuous acts and civil rights violations," including due process and equal protection claims, under 42 U.S.C. 1983 and "Louisiana statutory, decisional and constitutional" claims, including intentional infliction of emotional distress. Gov. Exh. 5 at 2. Plaintiffs also sought "constitutional, statutory, or decisional" remedies. Gov. Exh. 5 at 2.

Defendant's false deposition testimony that, immediately after the shooting, he got out of his car, went to Brumfield, checked Brumfield's pulse, and

determined that Brumfield was dead are purported facts that directly challenge allegations central to the civil suit. See *Wallace*, 597 F.3d at 801 (defendant's prior trial testimony denying use of a false name and address is "certainly relevant to the jury's central inquiry" of whether defendant participated in a drug conspiracy with an alias); *Brown*, 459 F.3d at 529-530 (defendant's false statements regarding his knowledge and understanding of a business agreement were "material" to the grand jury's assessment of the terms of the agreement and who was "culpable" for that agreement).

Defendant's assertion (Br. 24-26) that this Complaint solely reflects a wrongful death and assault claim ignores the text of the Complaint. The Complaint alleged, "Mitchell shot Danny Ray Brumfield, Sr., through the windshield with a shotgun. The officers did not leave their vehicle, nor did they attempt to render assistance to Mr. Brumfield. The squad car ran over Brumfield's body and left the scene." Gov. Exh. 5 at 4.[8] If a fact finder believed that Mitchell

[8] The district court reasonably concluded that the civil plaintiffs pled, *inter alia*, claims of excessive force, wrongful death, and violation of due process by the failure to render medical assistance, and sought compensatory and punitive damages based on the "intentional" and "outrageous" acts. See Gov. Exh. 5 at 2-3; R.E. 40-48/R. 277-285; see also *Zaffuto* v. *City of Hammond*, 308 F.3d 485, 489 n.4 (5th Cir. 2002) (civil complaint interpreted broadly to include constitutional claims notwithstanding failure to identify amendments by name). Whether defendant attempted to render aid to Brumfield immediately after he was shot is relevant to the issue of whether he acted with deliberate indifference or was

(continued…)

was responsive to Brumfield's condition after the shooting, a fact finder is more likely to conclude that Brumfield acted in self-defense and his actions were justified, rather than conclude that Mitchell used unreasonable force followed by immediate flight. Thus, a rational juror could have found that defendant's deposition testimony about what he purportedly did after he shot Brumfield had a "natural tendency to influence, or was capable of influencing" a decision maker's assessment of the strength or veracity of plaintiffs' claims. *Gaudin*, 515 U.S. at 509.

Furthermore, Mitchell's false statements were, at a minimum, material to matters that were the subject of his deposition. See *Holley*, 942 F.2d at 923; see also *Wallace*, 597 F.3d at 801; *McKenna*, 327 F.3d at 840 (defendant's false statement in a deposition was capable of affecting the court's assessment of the witness's veracity, and therefore was material). A purpose of Mitchell's deposition was to seek his version of the events that led to Brumfield's death and the aftermath. His responses could be used as admissions, could identify other sources of information or evidence, could affect a fact finder's assessment of his credibility, and could shape the litigation going forward. See *McKenna*, 327 F.3d

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(…continued)
reckless, or as the civil plaintiffs' asserted, his actions were "intentional" and "outrageous." Gov. Exh. 5 at 3.

at 840; Fed. R. Civ. P. 26(b), 30. By asserting, falsely, that he got out of the car to check Brumfield's condition, Mitchell's testimony clearly was within the scope of the subject of the deposition. See *Holley*, 942 F.2d at 923. Because his false testimony created a dispute that would need to be resolved by the fact finder, it also had the potential to influence the outcome of the proceedings. See *ibid.*

Similarly, the jury's conviction under Section 1512(c)(2), which includes a finding that Mitchell's statement could impede the civil lawsuit, is consistent with this Court's precedent that a defendant's false denial of actual knowledge and false testimony to a grand jury can be the basis of obstruction of justice under Section 1503's catch-all provision. See *Brown*, 459 F.3d at 530-531 ("[W]e see no principled reason that justifies different treatment of [defendant's] untruthful testimony and denials of knowledge."); *United States* v. *Williams*, 874 F.2d 968, 977 (5th Cir. 1989); *Griffin*, 589 F.2d at 204. A false denial of knowledge and misleading, false statements regarding facts critical to a grand jury investigation will impede the investigation because that false statement "had the effect of closing off entirely the avenues of inquiry being pursued." *Brown*, 459 F.3d at 531 (quoting *Williams*, 874 F.2d at 981). So, too, defendant's false description of his actions after he shot Brumfield ended any further inquiry regarding defendant's actual flight from the scene and "hindered the [fact finder's] attempts to gather evidence * * * as effectively as if [the defendant] refused to answer the question at

all." *Brown*, 459 F.3d at 531 (quoting *Griffin*, 589 F.2d at 204). Just as a consequence of false testimony is inherently "proof of the impediment" and obstruction of a proceeding under Section 1503, this Court should similarly conclude that is so under Section 1512(c)(2). *Brown*, 459 F.3d at 531. The motions for acquittal based on lack of materiality for 18 U.S.C. 1621 and failure to establish that defendant "obstruct[ed], influence[d], or impede[d]" a proceeding under Section 1512(c)(2) must be denied. See *Williams*, 264 F.3d at 576; *Holly*, 942 F.2d at 923.

III

THE DISTRICT COURT CORRECTLY REJECTED DEFENDANT'S *BRADY* CLAIM AND REQUEST FOR CONTINUANCE DUE TO THE BELATED PRODUCTION OF WITNESSES' STATEMENTS

A. Standard Of Review

This Court reviews challenges under *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), *de novo*. See, *e.g.*, *United States* v. *Senegal*, 371 F. App'x 494, 500 (5th Cir.), cert. denied, 131 S. Ct. 198 (2010); *United States* v. *Edwards*, 442 F.3d 258, 264 (5th Cir.), cert. denied, 548 U.S. 908 (2006). When the government has not suppressed material, this Court will assess "only whether [the defendant] suffered any prejudice as a result of the prosecution's tardy disclosure." *United States* v. *Neal*, 27 F.3d 1035, 1050 (5th Cir.), cert. denied, 513 U.S. 1008 (1994), and 513

U.S. 1179 (1995); see *United States* v. *McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985).

This Court reviews a denial of a continuance for an "abuse of [] discretion resulting in serious prejudice." *United States* v. *Stalnaker*, 571 F.3d 428, 439 (5th Cir. 2009). This Court assesses "the totality of the circumstances" regarding the denial of a continuance, including: "(a) the amount of time available to the defendant" (including the time after late disclosure of evidence); "(b) the defendant's role in shortening the time needed; (c) the likelihood of prejudice from the denial; * * * (e) the complexity of the case; [and] (f) the adequacy of the defense provided at trial." *Ibid.* (quoting *United States* v. *Walters*, 351 F.3d 159, 170 (5th Cir. 2003)); see *United States* v. *McDonald*, 837 F.2d 1287, 1289 (5th Cir. 1988).

B. Because The Defendant Was Not Prejudiced By The Late Production Of Two Witnesses' Statements, He Did Not Establish A Brady *Violation And The District Court Did Not Abuse Its Discretion In Denying Defendant's Request To Delay Trial*

1. The Legal Standards, Materials In Issue, And District Court Rulings

Mitchell asserts (Br. 12-18) that a new trial is warranted because the district court abused its discretion in (a) finding no *Brady* violation and (b) denying a continuance of trial based on the government's late disclosure of two witnesses'

statements.[9] Because the defendant "effective[ly] use[d]" the statements in his defense, he was not prejudiced by the belated production. *Walters*, 351 F.3d at 169. Thus, the district court did not err in its *Brady* analysis or abuse its discretion in denying a continuance. See *ibid.*; *McDonald*, 837 F.2d at 1289.

To establish a *Brady* violation, the defendant must show that evidence was withheld by the government, the evidence was favorable to the defendant, and the evidence was material or prejudicial. See *Senegal*, 371 F. App'x at 500. As noted, when documents are not withheld but produced belatedly, the issue is whether the defendant is prejudiced by this late production. See, *e.g.*, *ibid.*; *McKinney*, 758 F.2d at 1050. The controlling factor in assessing the potential prejudice under *Brady* as well as the district court's discretion to deny a continuance due to the late production of discovery materials is whether counsel is able to provide an effective defense. See *Neal*, 27 F.3d at 1050; *McDonald*, 837 F.2d at 1289-1290; *McKinney*, 758 F.2d at 1050 (cases cited).

Moreover, this Court has held repeatedly that the production of exculpatory or impeachment evidence *at trial* did not violate *Brady* because the defendant still could conduct an effective cross-examination with the newly-produced evidence. See, *e.g.*, *Senegal*, 371 F. App'x at 499-501 (notice of a witness's status as a paid

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[9] As set forth above, see p. 33, *supra*, the defendant cites the wrong standard for review of a *Brady* claim.

government informant during the witness's direct testimony did not violate *Brady* because the defendant still received the information with enough time to prepare his cross-examination, and therefore he was not prejudiced); *United States* v. *Barraza*, 655 F.3d 375, 381 (5th Cir. 2011), cert denied, 132 S. Ct. 1590 (2012); *Neal*, 27 F.3d at 1050; *McKinney*, 758 F.2d at 1041, 1049-1050. In *McKinney*, *id.* at 1050, this Court found no *Brady* violation when the defendant used material produced during trial "effectively during cross examination and thoroughly impeached [the witness's] credibility." Similarly, in *McDonald*, this Court upheld the denial of a trial continuance when the defendant received discovery materials four days before trial since defense counsel effectively cross-examined witnesses and there was no showing that the defense was lacking or hindered due to limited time to prepare. See 837 F.2d at 1289-1290.

Here, five days before trial, the government produced Africa B.'s grand jury testimony and a Federal Bureau of Investigation (FBI) 302 report summarizing a prior statement by David Augustin. See R. 330. Ten days prior to trial, the government had orally informed defense counsel of the discrepancy in Augustin's prior statement to the FBI. See R. 236-237, 336-337. The FBI report stated that Augustin said Brumfield had scissors in his hand at the time of his confrontation with Mitchell. See R. 336, 803. In his subsequent grand jury testimony, Augustin clarified that Brumfield had scissors in his *possession* the day he died. See R. 806,

810. In the grand jury, Africa B. stated, *inter alia*, that at one point during the confrontation with Mitchell, Brumfield had a "look of fury" (which she did not describe in other statements), and she believed that Brumfield was shot through the car's windshield. See R. 348, 621-622.

Defendant filed his motion for a continuance on the morning of the first day of trial. See R. 124-126. At the hearing, the district court stated that government counsel should have produced the witnesses' statements earlier than it did. See R. 331, 336, 349. The court also stated, however, that the defendant had sufficient time to interview Africa B. and Augustin during the five days since receipt of the statements and prior to this hearing, and that defendant would have additional opportunities to conduct interviews during the government's case-in-chief. See R. 333-334, 349. In addition, defendant was well aware of these witnesses prior to the production of these statements, including some of their prior, inconsistent statements. See R. 332-334, 346. The district court instructed the government to make these witnesses available to the defendant for an interview. R. 350, 356. Significantly, the district court stated and the defendant agreed that the statements

in issue would affect his strategy to *cross-examine* these witnesses. See R. 347, 349.[10] The court ruled as follows:

> [t]his kind of cross-examination, you know, when you have this a week before trial, I think you can manage it. The standard is whether or not you can deal with it reasonably. * * * I believe that it is of a nature that can be used reasonably by the defense, with the accommodations that I have ordered. I do not believe that there's going to be prejudice because of this and I'm going to deny the continuance.

R. 349, 355.

In its opinion denying defendant's request for a new trial, the district court reiterated that the defendant had ample time since receipt of the late-released statements to interview the two witnesses and make adjustments in trial strategy, and therefore he was not prejudiced by the late disclosure to warrant any delay of the trial or a new trial. See R.E. 55-57/R. 292-294.

2. The Defendant Effectively Used The Evidence At Trial

Defendant argues (Br. 13-18) that the analysis of a *Brady* claim differs depending on whether the defendant is arguing that he was denied an opportunity to conduct an effective cross-examination or was denied an opportunity to present

[10] Acknowledging the inconsistencies in anticipated testimony among witnesses and an individual witness's own, prior, inconsistent statements, the district court stated that the defendant has "plenty to defend the case on." R. 386.

a purported, new theory of the case or his "best" defense.[11] This alleged distinction is not supported by the caselaw. First, defendant cites no cases (see Br. 13-18) – and the United States is not aware of any – that supports defendant's argument that the government violated *Brady* because he was prevented from presenting his "best" defense as compared to an "effective" defense. Second, as discussed above, this Court has held repeatedly that the issue with belated disclosure of evidence is whether the defendant has a sufficient opportunity to put the evidence to "effective use" at trial. *Walters*, 351 F.3d at 169 (cases cited); see *McKinney*, 758 F.2d at 1049-1050. Significantly, while the "effective use" standard has been applied frequently to impeachment evidence, see, *e.g.*, *ibid.*, this Court has also applied this standard to the government's belated production of exculpatory evidence, including a third party's potential guilt – which potentially provided a new defense

[11] In his *post*-trial motion (and here), defendant asserts that he would have argued that Africa B. and David Augustin were lying when they were deposed for the civil litigation, and not just making various inconsistent statements. However, during the pretrial hearing, defendant agreed with the district court that the issue was how the recently-produced statements could be used to *cross-examine* the witnesses. See R. 347, 349. Given the thoroughness of the cross-examinations, defendant has not shown that there was a reasonable likelihood that the trial's result would have been different. While the witnesses' motivations (or lack thereof) may be different for lying versus inconsistent recollections, the impact of arguing that witnesses were lying is not substantially different than defendant's assertions here that the witnesses' trial testimony is so inconsistent with their prior statements as to be deemed unreliable and untrustworthy.

theory. See *Walters*, 351 F.3d at 169 (cases cited).[12] Defendant's claim (Br. 17) that *Walters* is "immaterial" to this Court's assessment of his claim is without merit.

Defendant's extensive cross-examination of Africa B. and Augustin, including use of the statements in issue, and defendant's acquittal on two charges for which Augustin's testimony was central, reflect how defendant put the evidence "to effective use," and therefore he was not prejudiced under *Brady*. *Walters*, 351 F.3d at 169 (cases cited). At trial, defendant cross-examined Africa B. on her various statements, including her grand jury testimony. See R. 613-629; see also R. 630-646. Counsel cross-examined Africa B. about her trial testimony that Brumfield was "ticked off" by what she described as the police car's second approach towards him as compared to her grand jury testimony that Brumfield was "furious * * * [had a] look of fury on his face" during the confrontation with Mitchell. R. 621-622; see R. 623.[13] Counsel also challenged Africa B.'s trial

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[12] In *Walters*, 351 F.3d at 164, 169, the government provided evidence of a third party (Botts) who made threats about bombs, which was one of the charges against the defendant. While the defendant already was aware of other individuals besides Botts who made threats and comments about bombs, this evidence identified a new, potential defense.

[13] Africa B. testified that the police car made brief contact with Brumfield twice (the first time accidentally) before Brumfield jumped on to the hood of the police car. R. 600.

testimony that Brumfield may have been hit a third time by the police car while, in the grand jury, she stated that Brumfield was not hit a third time by the police car. See R. 624. Counsel also cross-examined Africa B. on her perceptions that are not consistent with other testimony, including physical evidence: her belief that Brumfield was shot through the windshield, that the police car drove over Brumfield as it left the scene, and that Brumfield fell off the driver's side of the police car after he was shot. See R. 625, 627-628.

Defendant's questioning of Augustin focused on his statement to the FBI that Brumfield had scissors in his hand during the confrontation with Mitchell, and his grand jury testimony that Brumfield *possessed* the scissors the day he died, but without mentioning that he held it in his hands during the confrontation. See R. 799-805, 811-818. To clarify Augustin's confusing trial testimony, the United States stipulated that Augustin did not discuss whether Brumfield had scissors in his first grand jury appearance. See R. 815. In addition, while Augustin stated that he did not recall telling an FBI agent that Brumfield had scissors in his hand during the confrontation (see R. 803-804), the government stipulated that the FBI agent who wrote the report would have testified that he recorded accurately what he believed Augustin stated during the interview. See R. 818.

Defendant's exposition and highlights of Africa B.'s and Augustin's multiple, inconsistent statements to various sources, including the FBI and the

grand jury, are examples of the "effective use" of belated disclosures that refute any claim of prejudice under *Brady* or need for a continuance. *Walters*, 351 F.3d at 169; *McDonald*, 837 F.2d at 1289-1290; *McKinney*, 758 F.2d at 1050. In addition, Augustin was the primary witness who discussed Brumfield purportedly holding scissors in his hands during the confrontation, which was evidence central to Counts One and Two. Thus, it is likely that defendant's examination of Augustin was critical to the jury's acquittal on those counts. Defendant's acquittal belies his *Brady* claim. See *Offineer* v. *Kelly*, 454 F. App'x 407, 419 (6th Cir. 2011) (a defendant cannot establish a *Brady* violation when he has been acquitted) (citing cases); *Morgan* v. *Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999) ("Regardless of any misconduct by government agents before or during trial, a defendant who is acquitted cannot be said to have been deprived of the right to a fair trial."); see also *Alexander* v. *McKinney*, 692 F.3d 553, 556 (7th Cir. 2012) (noting court's doubt that a *Brady* claim can be established when a defendant is acquitted).[14]

Finally, the "totality of the circumstances" supports the district court's conclusion that a continuance of trial was not warranted. See *Stalnaker*, 571 F.3d at 439; *McDonald*, 837 F.2d at 1289-1290. The defendant was well aware of

[14] Of course, acquittal is not essential to refute a *Brady* claim based on the belated production of evidence. See, *e.g.*, *Neal*, 27 F.3d at 1050.

Africa B. and Augustin as witnesses and some of their inconsistent statements well before trial. See R. 332-334, 346. Moreover, as the district court noted, the defendant had ample opportunity to interview these witnesses before trial or before their testimony. See R. 333-334, 349. Most importantly, the defendant made "effective use" of the material. *Walters*, 351 F.3d at 169; see *United States* v. *Lewis*, 476 F.3d 369, 387 (5th Cir.) (no abuse of discretion in denial of a trial continuance, even when counsel had only 10 days' preparation, when counsel "effectively challenged" the witnesses and made "intelligent arguments" on behalf of his client), cert. denied, 550 U.S. 975 (2007). Thus, the district court's denial of defendant's request for a continuance of trial was not "arbitrary nor unreasonable." *Stalnaker*, 571 F.3d at 439.

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY TO CONTINUE DELIBERATIONS

A. Standard Of Review

This Court reviews challenges to a district court's advisements to the jury on deliberations, and whether to grant a mistrial, for an abuse of discretion. See *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978); *United States* v. *Starling*, 571 F.2d 934, 940 (5th Cir. 1978).

B. The District Court Appropriately Advised The Jury To Continue Deliberations

The defendant claims (Br. 11, 28-29) that the district court abused its discretion in (1) instructing the jury to continue deliberations after the jury gave a second note expressing its inability to reach a verdict on all counts, and (2) not individually questioning a juror who began crying during the court's instructions to the jury to return the next day to continue deliberations. These claims are without merit. Given the short time that the jury deliberated and indications that the jury reached a temporary impasse on some but not all claims, the district court acted well within its discretion to instruct the jury, as a whole, to continue deliberations after a night's rest and deny a mistrial based on one juror's reaction.

1. The Jury's Deliberations And The Court's Instructions

Jury deliberations began on December 8, at 11:40 a.m. See R. 139. After approximately four hours of deliberation, the foreperson sent a note to the court that stated, "[w]e have a decision on 4 of the 6 counts. We are deadlocked on the other two[.] Any suggestions? [signed]." R. 140; see R. 902; R.E. 58/R. 295. The district court responded with a written note reminding the jury of her prior instructions regarding the duty to deliberate and asked that they continue to deliberate "in an effort to reach an agreement if you can do so." R. 141. Later that evening, the jury sent a second note that stated, "[w]e are unable to reach a verdict

on 3 and 4[.] I do not foresee any movement at this time. We have deadlocked. [signed]" R. 142; see R. 904.[15]

In response to the second note, the district court orally acknowledged to the jury the lengthy and tiring proceedings of the entire week, and instructed the jury to go home, rest, and return the next morning to resume deliberations. See R. 906-907.[16] The district court also denied Mitchell's motion for a mistrial based on a juror who began crying at the same time the jury was instructed to return the next day. See R. 908. The district court noted that in 17 years, it had never dismissed a jury after one day of deliberations, particularly when it was known that they had reached a verdict on some counts. See R. 907-908. Moreover, the district court stated there was no indication as to the reason for the juror's distress; the juror's reaction may just as easily been due to personal reasons rather than the court's instruction to continue deliberations. See R. 907.

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[15] Defendant's assertion that the jury reached interim decisions of *acquittal* on four counts (Br. 11) and that the jury voted to acquit Mitchell on Counts One and Two (Br. 28) during deliberations is not supported by the jury's notes. The second note states only that they had not reached a verdict on Counts Three and Four. There is no specific reference to any counts in the first note. Therefore, there is no basis to assume that their interim votes as of the first note were consistent with the status of the partial verdict by the second note, or that the status by the second note was consistent with the jury's final verdict.

[16] The district court dismissed the jurors at 8:20 p.m. (see R. 139) so it is likely that the foreperson sent the second note a short time before dismissal, and approximately three or four hours after the first note. See R.E. 58/R. 295.

The jury reached a verdict on all counts after deliberating approximately one hour the following morning, December 10, 2011. See R. 163. In its post-verdict opinion, the district court ruled that a mistrial based on the jury's notes was not warranted, and that its instructions to the jury to continue deliberations were well within the court's discretion. See R.E. 59-61/R. 296-298.

2. The District Court's Instructions Were Appropriate And A Mistrial Was Not Warranted

The district court has "broad discretion" to determine whether to grant a mistrial based on a jury's reported deadlock. See *Arizona*, 434 U.S. at 509. A mistrial should only be granted when there is a showing of "manifest necessity," *id.* at 505; that is, granted only "with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Id.* at 506 n.18 (quoting *United States* v. *Perez*, 22 U.S. 579, 580 (1824)). This Court has explained that a district court should consider several factors in assessing whether to grant a mistrial, including the "length of the trial, the complexity of the issues involved[,] * * * the length of deliberations," and the jury's communications, including whether it expressed a "hopeless[] deadlock[]" or indicated a "present inability to agree." *United States* v. *Gordy*, 526 F.2d 631, 635-636 (5th Cir. 1976). Thus, a district court did not abuse its discretion in ordering a jury to "continue * * * deliberations" when the jury had deliberated approximately seven hours. *United*

States v. *Fields*, 483 F.3d 313, 338 (5th Cir. 2007), cert. denied, 552 U.S. 1144 (2008).

In contrast, notwithstanding the deference due the district court, this Court found that a district court abused its discretion and prematurely granted a mistrial after a jury had deliberated only five and one-half hours after a trial that lasted approximately six hours. See *Gordy*, 526 F.3d at 633, 636; see *Starling*, 571 F.2d at 939 (district court abused its discretion to grant mistrial when the foreperson requested additional time for deliberations and there was no indication that the jury was deadlocked). Moreover, this Court has upheld a district court's decision to issue an *Allen* charge, including when the charge was given after as much as seven days of deliberations. See *United States* v. *Heath*, 970 F.2d 1397, 1405-1406 (5th Cir. 1992).

Here, the trial lasted approximately three days and the jury heard testimony from 12 witnesses. The defendant correctly agreed (Br. 28) that the district court "[a]ppropriately" instructed the jury to continue deliberations in response to the first note seeking guidance. See R. 141. The foreperson's second note stated that the jury did not agree on resolution of Counts 3 and 4, and stated "I do not foresee any movement at this time." R. 142. Given this text, the limited time that passed since the jury began deliberating and its initial query, its ability to reach a verdict on the majority of the counts thus far, and the time of day – the jurors had been

working for almost 12 hours – it was wholly appropriate for the district court to send the jurors home and ask them to resume their duties the next day. See *Gordy*, 526 F.2d at 636-637; R. 139, 819; cf. *Starling*, 571 F.2d at 939. The temporal aspect of the foreperson's report of the status of deliberations – *i.e.*, that they were deadlocked "*at this time*" – did not express a permanent inability to agree on a verdict or that further discussions would be futile, and further supports continued deliberations. R. 905; see *Gordy*, 526 F.2d at 636-637.

There is no basis for the defendant's assertion (Br. 29) – again, without any citation – that the district court abused that discretion because it did not conduct a specific inquiry of the foreperson or the juror who was crying. Cf. *United States* v. *Rasco*, 123 F.3d 222, 230-231 (5th Cir. 1997) (court has great discretion to determine whether individual voir dire is necessary to assess jurors' potential exposure to midtrial publicity), cert. denied, 522 U.S. 1083 (1998). Given the broad discretion given to the district court to assess whether a mistrial is warranted, see *Arizona*, 434 U.S. at 509-510, the district court's remarks to the jury reflect appropriate, thoughtful attention to all of the jurors' circumstances and sensitivities:

> And it is my decision to ask you to go home and get a good night's sleep and come back first think in the morning after you have had a good night's sleep and deliberate, see if you can deliberate some more with an eye toward whether you can reach unanimous verdicts on all counts.

> I think everybody is tired. It's been a long week. It's been a long day. And I ask you to go home and get some rest and come back and give it a try in the morning. I understand everybody is doing their conscientious best and I appreciate your service and ask you to come back tomorrow morning.

R. 906. Accordingly, the defendant's motion for a mistrial should be rejected.

V

DEFENDANT'S CONVICTIONS FOR PERJURY AND OBSTRUCTION OF JUSTICE ARE NOT MULTIPLICITOUS

A. Standard Of Review

This Court reviews timely claims that an indictment includes multiplicitous counts *de novo*. See *United States* v. *Soape*, 169 F.3d 257, 265 (5th Cir.), cert. denied, 527 U.S. 104 (1999); see also *United States* v. *Stovall*, 825 F.2d 817, 821 (5th Cir. 1987). For purposes of this appeal, we concede that the district court's waiver of defendant's untimely motion in the district court and review of the defendant's motion on the merits (see R.E. 61-64/R. 298-301) renders the defendant's motion timely for purposes of this Court's review.[17]

[17] A defendant must challenge the form of an indictment, including assertions that claims are multiplicitous, prior to trial, although a district court may grant relief for the defendant's failure to do so for good cause. See Fed. R. Crim. P. 12(b)(3) and (e). Here, the defendant first challenged the indictment after his conviction. See R. 207-208.

B. Defendant's Convictions Are Not Multiplicitous

The defendant's claim (Br. 27-28) that the obstruction and perjury convictions are multiplicitous has no merit because each provision requires proof of an element that is not contained in the other statute. See *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932); *Soape*, 169 F.3d at 266-267; *United States* v. *Maggitt*, 784 F.2d 590, 599 (5th Cir. 1986).[18]

Under *Blockburger*, 284 U.S. at 304, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." If each statute contains an element that the other does not, the Court will presume that Congress intended to define two distinct and separate offenses. See *Soape*, 169 F.3d at 266; *Maggitt*, 784 F.2d at 599-600 (finding the absence of legislative intent to preclude simultaneous prosecution for witness tampering and retaliation). In practical terms, "the fact that a defendant is charged twice in an indictment for the same conduct does not necessarily mean he is being charged with the same offense." See *id.* at 599. Moreover, "[t]he focus in determining the issue of multiplicity is on the statutory elements of the offenses, not on their application to the facts of the

[18] Defendant has not cited any opinion specifically addressing obstruction and perjury to support his claim of multiplicity. See Br. 27.

specific case." *Soape*, 169 F.3d at 266; see *United States* v. *Lankford*, 196 F.3d 563, 577 (5th Cir. 1999) (quoting *Soape*, 169 F.3d at 266), cert. denied, 529 U.S. 1119 (2000); *United States* v. *Flores-Peraza*, 58 F.3d 164, 167 (5th Cir. 1995), cert. denied, 516 U.S. 1076 (1996).

To establish perjury under 18 U.S.C. 1621, the government must prove: (1) false testimony (2) under oath (3) concerning a material matter (4) "with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States* v. *Dunnigan*, 507 U.S. 87, 94 (1993); see *United States* v. *McKenna*, 327 F.3d 830 (9th Cir.), cert. denied, 540 U.S. 941 (2003); *United States* v. *Holley*, 942 F.2d 916, 923 (5th Cir. 1991). In contrast, the elements of obstruction of justice under 18 U.S.C. 1512(c)(2) are: (1) an attempt (2) to "corruptly" (3) "obstruct[], influence[], or impede[]" (3) any official proceeding. 18 U.S.C. 1512(c)(2).

Perjury requires proof that the statement is made under oath, yet that is not an element for obstruction under Section 1512(c)(2). See 18 U.S.C. 1621. In addition, the government must prove that a statement is false and material under Section 1621, yet neither element is required to prove obstruction of justice. See *United States* v. *Langella*, 776 F.2d 1078, 1082-1083 (2d Cir. 1985) (requirement to prove falsity and materiality under 18 U.S.C. 1503 does not apply to prove perjury under 18 U.S.C. 1623), cert. denied, 475 U.S. 1019 (1986); *United States*

v. *Lewis*, 876 F. Supp. 308, 311-312 (D. Mass. 1994) (elements of 18 U.S.C. 1623 and 1503 are not multiplicitous). Further, obstruction requires proof of defendant's corrupt intent, but that is not required to establish perjury. See 18 U.S.C. 1512(c)(2). And proof of an effort to "obstruct, influence and impede" is not required to prove perjury. Accordingly, the existence of elements for Section 1621 that are not required for Section 1512(c)(2), and elements for Section 1512(c)(2) that are not essential for Section 1621, satisfy *Blockburger*, and therefore defeat defendant's claim that these provisions are multiplicitous even though both charges stem from the same acts. See *United States* v. *Bridges*, 717 F.2d 1444, 1449-1451 (D.C. Cir. 1983) (18 U.S.C. 1503 and 1623 "each contain an element not in the other [provision]."), cert. denied, 465 U.S. 1036 (1984); *Langella*, 776 F.2d at 1082-1083; *Lewis*, 876 F. Supp. at 311-312; see also *United States* v. *Dupre*, 117 F.3d 810, 818 (5th Cir. 1997) (bank fraud (18 U.S.C. 1344) and false statements to a financial institution (18 U.S.C. 1014) that are the basis of the bank fraud are not multiplicitous), cert. denied, 522 U.S. 1078 (1998); *Maggitt*, 784 F.2d at 599-600 (violations of 18 U.S.C. 1512 (witness tampering) and 1513 (retaliation) are not multiplicitous). The distinct elements of each offense confirm that obstruction of justice and perjury address "separate evils." *United States* v. *Stovall*, 825 F.2d 817, 822 (5th Cir. 1987).

Defendant's focus (Br. 27) on whether *his* actions establish that the two counts are multiplicitous is misplaced. While the element to "obstruct[], influence[], or impede[]" *can* be established by a defendant giving a false statement, as defendant did here, overlapping proof in *some* circumstances does not establish multiplicity for two statutes. See *Flores-Peraza*, 58 F.3d at 166-167. There are multiple means by which a defendant may "obstruct[], influence[], or impede[]" an official proceeding, including creation of false documents, see *United States* v. *Reich*, 479 F.3d 179, 185-186 (2d Cir.), cert. denied, 552 U.S. 819 (2007), and the removal or destruction of documents. See *United States* v. *Mann*, 685 F.3d 714, 722 (8th Cir. 2012), petition for cert. pending, No. 12-480 (filed Oct. 15, 2012). As this Court explained, "[t]he question for the court to determine is *not* * * * whether [defendant's] specific violation of [statute A] necessarily encompassed or included his specific violation of [statute B], but whether *all* violations of [statute A] constitute violations of [statute B]." *Flores-Peraza*, 58 F.3d at 167 (8 U.S.C. 1326(a) and 8 U.S.C. 1325(a), the latter of which includes three means of violation, are not multiplicitous even when proven by the same actions). Thus, the fact that Section 1512(c)(2) can be violated by various acts, including an act that simultaneously violates Section 1621 (or Section 1623), does not establish multiplicity. See *ibid*.

CONCLUSION

The district court's convictions and judgment should be affirmed.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Jennifer Levin Eichhorn
JESSICA DUNSAY SILVER
JENNIFER LEVIN EICHHORN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2012, by filing the foregoing Brief for the United States as Appellee with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, I caused to be served a true and correct copy of the foregoing brief. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Furthermore, when the Court requests seven hard copies of the brief to be mailed, I will also mail, via First Class Mail, two hard copies of the brief to counsel of record.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,804 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Date: November 30, 2012