No. 00-30624

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HARRISON DANIELS;
PATRICK SAYES;
JOHN SWAN,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes oral argument would be helpful to the Court, especially in light of the complex procedural history of this case.

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 18 U.S.C. 3231. Each of the defendants filed timely notices of appeal. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF ISSUES

1. Whether the district court clearly erred in finding that the indictment against Patrick Sayes was obtained with evidence wholly independent of Sayes' compelled statements.

2. Whether the district court erred in concluding that the prosecutors' exposure to Patrick Sayes' compelled statements did not require dismissal of the

indictment or disqualification of the prosecution team.

3. Whether the district court abused its discretion in denying the defendants' severance motions.

4. Whether the district court committed plain error or an abuse of discretion in giving supplemental jury instructions.

5. Whether the evidence was sufficient to allow a reasonable jury to find that the beating of the inmate deprived him of his Eighth Amendment right to be free from cruel and unusual punishment.

STATEMENT OF THE CASE

On May 25, 1999, a federal grand jury returned a three-count indictment charging Harrison Daniels, Patrick Sayes, and John Swan with acting under color of law to willfully deprive Rayfield Jackson of his civil rights, in violation of 18 U.S.C. 242. Count 1 of the indictment charged that Daniels and Swan beat Jackson and thereby willfully deprived him of his right to be free from cruel and unusual punishment. Count 2 charged Sayes with willfully depriving Jackson of his due process rights by permitting Daniels and Swan to beat him without intervening to prevent the attack. In Count 3, all three defendants were charged with willfully preventing Jackson from receiving medical care after the beating, thereby depriving him of his right to be free from cruel and unusual punishment (R-1 at 1-4).[1]

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[1] "R-__ at __" refers to the volume number of the Record on Appeal and the relevant page numbers of that volume. "Supp. R at __" indicates the page numbers of the Supplemental Record on Appeal. "3d Supp. R-__ at __" refers to the volume number of the Third Supplemental Record on Appeal and the relevant page

On January 21, 2000, a jury found Daniels guilty on Counts 1 and 3, Sayes guilty on Count 2, and Swan guilty on Count 1. Sayes and Swan were acquitted on Count 3 (R-2 at 364).

STATEMENT OF FACTS

A. The Beating Of Rayfield Jackson And The Denial Of Medical Care

On December 22, 1997, the defendants were employed as correctional officers at the Louisiana State Penitentiary at Angola ("Angola" or "prison"). On the day of the incident, the defendants were assigned to work in the prison's "Cuda" unit, where Rayfield Jackson was incarcerated (R-7 at 46; R-10 at 11-15). Daniels and Swan were corrections sergeants; Sayes, a lieutenant, was their supervisor (R-7 at 105). Jackson was 46 years old and suffered from chronic Hepatitis C, which required him to receive an interferon shot three times a week (*id.* at 13; R-9 at 223).

On the morning of December 22, 1997, defendant Daniels awoke Jackson so that he could be taken to the clinic for his injection (*id.* at 224-225; R-10 at 95-96). A verbal dispute arose between Daniels and Jackson over whether metal or plastic handcuffs would be used to restrain Jackson during his trip to the clinic. Daniels insisted on using metal restraints, even though Jackson was allergic to metal and was supposed to be restrained with plastic cuffs (R-7 at 47-48; R-9 at 42-43, 59, 226-227). As the argument escalated, defendant Daniels spit sunflower seeds at Jackson and threw a bucket of water on him (*id.* at 43-44, 225).

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numbers of that volume. "Br. __" indicates the page number of the relevant defendant's opening brief.

Jackson asked to see Lt. Sayes, the supervisor on duty (*id.* at 225-226). Sayes came to the tier where Jackson's cell was located and ordered Daniels to restrain Jackson with the metal handcuffs (*id.* at 44-45, 226-227). Shackles were also put on Jackson's legs and he was taken out of the cell (R-7 at 50; R-9 at 45, 92, 227, 237; R-10 at 52).

Daniels then began violently punching and kicking various parts of Jackson's body, including his groin, abdomen, and ribs (R-7 at 51-52; R-9 at 45-47, 92-94, 114-115, 140-142, 169, 227-228). Jackson was fully restrained with handcuffs and leg shackles during the beating (R-9 at 46, 81, 104; R-10 at 52). The attack took place in view of several other inmates housed on the tier (R-7 at 45-91; R-9 at 39-181). By his own admission, Sayes witnessed the beating but did not intervene to stop the attack (R-10 at 52-55). When Daniels momentarily stopped beating Jackson, Sayes asked Daniels whether he was finished with the inmate; Daniels said no, and told the lieutenant that he planned to "whip him some more" (R-9 at 47).

Daniels then took Jackson into the lobby, where defendant Swan joined Daniels in beating and kicking Jackson, who was lying on the floor still fully restrained (R-7 at 52-55, 91; R-9 at 47-49, 115-116, 123, 126, 131-132, 135, 228-229; R-10 at 23-24, 56-57). During the attack, Swan hit Jackson on the side of his head with a shoe, bursting his eardrum and causing blood to pour from his ear (R-9 at 229; R-10 at 24). Lt. Sayes witnessed the beating in the lobby, but did not intervene to stop it (*id.* at 57-59, 63). Indeed, at one point during the beating, Sayes told Daniels and Swan that "his grandmother could hit harder than that" (R-9 at

229). Some, but not all, eyewitnesses testified that Lt. Sayes also punched and kicked Jackson (R-7 at 53-55, 91; R-9 at 49, 116, 123, 126, 135). Later, at trial, Sayes admitted that the beating of Jackson was "wrong" and a violation of prison rules, and that he had the duty, as a lieutenant, to intervene to stop his subordinates from attacking the inmate (R-10 at 43-47, 58-59). At no time during the assault did Jackson pose a threat to the officers (*id.* at 52).

After the beating stopped in the lobby, the defendants ordered Jackson to crawl back to his cell on his knees, still in full restraints. While Jackson crawled, Daniels taunted him and kicked his back (R-9 at 50, 96-97, 117, 143-144, 230). When Jackson reentered his cell, he realized that he was severely injured. He was bleeding, could barely breathe, and was in severe pain (*id.* at 50, 52, 232). Over the next several hours, Jackson and other inmates on the tier told the defendants verbally and in writing that he needed medical attention for his injuries, but the defendants ignored each request (R-7 at 57-58; R-9 at 50-53, 97-99, 105-106, 117-118, 144-145, 157, 231, 244-245; R-10 at 68-70). When a medic visited Cuda unit that afternoon on his regularly scheduled rounds, Daniels prevented him from checking on Jackson (R-9 at 61, 98, 117-118, 144-145, 171).

When the next shift reported for duty, Daniels told his replacement that there had been a confrontation with Jackson but that everything was "okay now"; Daniels did not tell his colleague that Jackson was injured (*id.* at 183). Jackson did not receive medical attention until after midnight, nearly 14 hours after the assault (R-7 at 12, 62-63; R-9 at 210-211). He eventually was taken to the hospital where he received treatment for numerous life-threatening injuries, including a punctured

lung and a ruptured kidney (R-7 at 12-23). He also suffered broken ribs, several broken vertebrae, a ruptured eardrum, internal bleeding and multiple contusions (*id.* at 13-17).

B. The Prison Investigation And The Statements By Sayes

On December 23, 1997 – the day following the attack on Jackson – prison investigators interviewed Jackson, as well as other inmates on the tier who witnessed the beating (3d Supp. R-4 at 6-7, 14-17). Prison investigators also questioned Sayes, Daniels, and Swan, who initially denied any knowledge of the attack (*id.* at 7-8, 17).

On December 24, 1997, Sayes gave a brief, written statement to prison investigators after Burl Cain, the prison's warden, promised him that if he cooperated he would be demoted, but not fired, and that he would not be reported to the local prosecutor (*id.* at 24-26, 35-36, 38-40). In his statement, Sayes acknowledged seeing Daniels and Swan strike Jackson, but asserted that he (Sayes) left the scene "stunned" and "in disbelief" while the beating was still going on (R-3 at 107-108).

On January 13, 1998, Sayes was interviewed by the prison's lead investigator, Major Eric Sivula (*id.* at 75-106; 3d Supp. R-6 at 15-16, 21-22). Before making any statements, Sayes was advised orally and in writing of his *Miranda* rights, including the warning that anything he said could be used against him in court (R-3 at 104-105). He signed a statement acknowledging that he had been advised of those rights, that he understood them, and that he wished to make a statement without an attorney present (*ibid.*; 3d Supp. R-6 at 20-21 & Gov't Exh.

6).[2] During the interview, Sayes provided essentially the same information about the beating of Jackson that he had included in his December 24, 1997, written statement (compare R-3 at 77-99 with *id.* at 107-108).

C. The FBI Investigation

Angola warden Burl Cain then referred the matter to the FBI, which assigned Special Agent Rondaline Craft to the case (3d Supp. R-6 at 48-49). On January 14, 1998, Craft talked briefly by telephone with Major Sivula, the lead prison investigator, to arrange a visit to Angola. In that conversation, Sivula advised Craft that Sayes was cooperating with and had given statements to prison investigators – including a compelled statement protected by *Garrity v. New Jersey*, 385 U.S. 493 (1967) – but Sivula did not divulge the content of those statements to her (3d Supp. R-6 at 23-24, 52-53; 3d Supp. R-7 at 9-10). When she began her investigation, Craft had not read Sayes' statements or been exposed to their contents (3d Supp. R-6 at 54).

On January 21, 1998, Craft and FBI Special Agent Thomas McNulty visited Angola and met with Sivula (*id.* at 54-55). They stressed to Sivula that they wished to conduct the FBI investigation independently of the prison's investigation and that prison officials were not to divulge to the FBI the prison's investigative report or any witness statements given during the internal investigation (*id.* at 24, 52-55). Craft told Sivula that when he completed his internal investigative report, he should seal it in an envelope so that it could be

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[2] Exhibit 6 was introduced during the hearing of April 1, 1999 (3d Supp. R-6).

sent to the Department of Justice for redaction of *Garrity* material (3d Supp. R-7 at 8). He complied (*id.* at 10-12). In order to identify potential witnesses, Craft obtained the prison log books showing which correctional officers were on duty at the time of the beating, as well as "shower sheets" identifying the inmates who were housed on the tier the day of the beating (3d Supp. R-4 at 62-64; 3d Supp. R-6 at 75-76).

While at the prison on January 21, 1998, Craft and McNulty interviewed the victim, Rayfield Jackson, as well as two eyewitness inmates whom they located either from talking to Jackson or consulting the prison shower sheets (*id.* at 55-63). Jackson gave Craft and McNulty a detailed description of the beating, telling them that Sayes had witnessed the attack, had done nothing to try to stop it, and even encouraged it (*id.* at 56-58, 65; US Exh. 1 at 1-7).[3] The two other inmates that Craft and McNulty interviewed that day corroborated Jackson's account of the incident (3d Supp. R-6 at 60; US Exh. 1 at 10-14).

Before leaving the prison that day – but after the interviews with the victim and the two eyewitness inmates – Craft obtained from Sivula the personnel files of five corrections officers, including the defendants, whom Jackson had identified as being on duty the day of the attack (3d Supp. R-6 at 65-68, 89). Neither Sivula nor Craft was aware at the time that Sayes' personnel file contained a copy of the written statement Sayes had given to prison investigators on December 24, 1997 (*id.* at 26, 45, 86). Neither Craft nor McNulty looked at the files that day (*id.* at

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[3] Exhibit 1 was introduced at the hearing transcribed in R-5.

66-69). Craft later testified that she did not read Sayes' written statement until January 7, 1999, and did not learn of its contents until her investigation was complete (*id.* at 63-65, 73-75, 82-83, 85-86; 3d Supp. R-7 at 28-29). McNulty testified that he neither read nor learned the substance of any of Sayes' statements (3d Supp. R-4 at 70-71; 3d Supp. R-7 at 81-82). There was nothing in Sayes' statements that Craft had not learned from her interviews of the victim and the eyewitness inmates at the prison on January 21, 1998 (3d Supp. R-6 at 64-65; compare US Exh. 1 at 1-7 with R-3 at 75-108).

On January 26, 1998, six other FBI agents were enlisted to help with the investigation by interviewing 10 additional inmates who had witnessed the beating (3d Supp. R-6 at 70; 3d Supp. R-7 at 89-103, 105-107). Prior to the interviews, Craft gave each of the agents an overview of the case based on information she had learned from interviewing the victim (3d Supp. R-6 at 70-71). At that time, Craft had not been exposed to the content of Sayes' statements (*id.* at 71-74). When these six FBI agents interviewed the inmates, they were not aware of any statements that Sayes had made to prison investigators (3d Supp. R-7 at 90, 93, 96, 99, 102, 106-107). These FBI agents prepared 302 reports summarizing the information obtained in the interviews (US Exh. 1 at 15-43).

On February 26, 1998, Craft and Fred Menner, the Assistant United States Attorney handling the case, met with Sayes and his attorney, Henry Lemoine. When Menner advised Lemoine that Sayes was a target of the investigation, Lemoine orally divulged to Craft and AUSA Menner the entire content of the written statement that Sayes gave to prison investigators on December 24, 1997

(3d Supp. R-2 at 291-292; 3d Supp. R-6 at 80-81; 3d Supp. R-7 at 18-20, 71-74). This was the first time that Craft or the prosecutor had been exposed to the substance of Sayes' statements (3d Supp. R-2 at 291-292; 3d Supp. R-6 at 82-83; R-3 at 125).

D. The First Indictment

A federal grand jury ("First Grand Jury") began to hear evidence in this case in early 1998. Sayes' December 24, 1997, statement was never presented to the First Grand Jury (3d Supp. R-6 at 82-84). However, in July 1998, FBI Agent Craft listened to a tape recording of Sayes' January 13, 1998, interview, and then divulged the substance of that interview during her testimony before the First Grand Jury (*id.* at 73, 79-80). On July 28, 1998, the First Grand Jury returned a three-count indictment charging Daniels, Sayes, and Swan with violating 18 U.S.C. 242 by acting under color of law to willfully deprive Rayfield Jackson of his civil rights (3d Supp. R-1 at 2-4).

In response to Sayes' motion to dismiss, the district court held three evidentiary hearings pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), to determine whether the United States improperly used any compelled statements to obtain the indictment (3d Supp. R-4; 3d Supp. R-6; 3d Supp. R-7). The hearings focused on two statements that Sayes gave to prison investigators: (1) the December 24, 1997, statement, which the United States acknowledged was compelled within the meaning of *Garrity*, *supra*; and (2) the January 13, 1998, statement that Sayes gave after receiving a *Miranda* warning. The government argued that the January 13, 1998, statement was not compelled under *Garrity* and

thus its presentation to the grand jury was not improper (3d Supp. R-7 at 129-134).

After the district judge expressed concerns about the First Grand Jury's exposure to the January 13, 1998, statement, the United States moved to dismiss the indictment without prejudice, due to the risk that any conviction obtained under that indictment might be subject to challenge (3d Supp. R-3 at 448-449, 467-468). The district court granted the motion and dismissed the indictment against the three defendants without prejudice (*id.* at 480-489, 498-499).

E. The Second Indictment

In May 1999, the United States presented this case to a different grand jury ("Second Grand Jury"), none of whose members sat on the First Grand Jury (R-5 at 25). The only evidence presented to the Second Grand Jury was the testimony of a single summary witness, FBI Special Agent Daniel Fontenot (US Exh. A).[4]

Prior to his testimony, the government took special care to ensure that Fontenot was never exposed to any of Sayes' statements. Fontenot had recently transferred to the FBI's Baton Rouge office and knew nothing about the facts of the case (R-5 at 13-14, 21-22). As instructed, he refrained from discussing the case with other FBI agents previously involved in the investigation or with prison investigators (*id.* at 14-15, 21-22). To prepare him for his testimony, the prosecutors presented Fontenot with a packet of documents (US Exh. 1), instructed him to review only the items in the packet, and then to write up a factual

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[4] Exhibit A was attached to the United States' Response to Defendant's Motion to Dismiss Indictment (Docket Entry 33), filed under seal. See R-3 at 150.

summary based solely on those materials (R-5 at 11-12, 14-15). Only the following documents were contained in the packet reviewed by Fontenot: (1) five FBI 302 reports summarizing FBI Agent Craft's interviews with five individuals: the victim and two eyewitness inmates on January 21, 1998; another inmate on January 28, 1998; and the physician who treated the victim after the beating; (2) ten 302 reports summarizing the interviews with inmates that were conducted by the other FBI agents on January 26, 1998; and (3) transcripts of the testimony of four witnesses before the First Grand Jury: two eyewitness inmates (Gerald Watson and Edward Wise), who had previously been interviewed by FBI agents other than Craft, and the two Angola guards (John Hyde and Gerhard Doering) who relieved Sayes' co-defendants, Daniels and Swan, following the shift on which the beating occurred (US Exh. 1). These were the only materials Fontenot reviewed about the case before his grand jury testimony (R-5 at 15). These materials contained no reference to any statements given by Sayes, and Fontenot was unaware of any statements by Sayes at the time he testified before the Second Grand Jury (*id.* at 12-15, 22-23; US Exh. 1).

Fontenot was then called before the Second Grand Jury on May 25, 1999, where he read his factual statement and answered a few questions (R-5 at 12). No reference was made to Sayes' statements during the Second Grand Jury proceedings (*id.* at 23; US Exh. A). On May 25, 1999, the Second Grand Jury returned an indictment against the defendants that was identical in all respects to the first indictment (R-1 at 1-4).

The district court held another *Kastigar* hearing in response to Sayes'

motion to dismiss the second indictment (R-5). After the parties submitted post-hearing briefs, the district court issued an order denying Sayes' motion to dismiss the indictment (R-3 at 173-188). The court found that Sayes' statements of December 24, 1997, and January 13, 1998, to prison investigators were compelled and thus protected by *Garrity* (*id.* at 181-185). But the court also found that the United States had carried its burden of proving that the second indictment was obtained with evidence wholly independent of Sayes' compelled statements (*id.* at 174). Specifically, the court found that (1) the government had established that no direct or indirect use was made of either statement in connection with Agent Craft's interviews of the victim and the two eyewitness inmates on January 21, 1998; (2) the interviews of ten eyewitness inmates that other FBI agents conducted on January 26, 1998, were necessarily untainted because those agents had not been exposed to Sayes' statements; (3) the grand jury testimony of the two inmates was untainted because it was "substantially the same" as the statements that they had given to FBI agents (other than Craft) on January 26, 1998; and (4) the grand jury testimony of the two prison guards was "necessarily free from taint" because it pertained to events separate from Sayes' involvement in Jackson's beating (*id.* at 174-175). The court did hold, however, that the two compelled statements could not be used against Sayes at trial (*id.* at 173-174).

SUMMARY OF ARGUMENT

This Court should affirm the convictions of all three defendants.

1. The district court did not clearly err in finding that the United States satisfied its burden under *Kastigar v. United States*, 406 U.S. 441 (1972), by

showing that the evidence it presented to the Second Grand Jury was derived from sources wholly independent of Sayes' compelled statements. Sayes argues that the testimony of FBI Agent Dan Fontenot, the only witness to appear before the grand jury, was tainted because he had reviewed summaries of interviews that FBI Agent Rondaline Craft conducted on January 21, 1998, with the victim and two other inmates who witnessed the beating. But, as the district court found, the evidence shows that Craft made no direct or indirect use of Sayes' statements in conducting those interviews. And even if her interviews were tainted, the government satisfied its *Kastigar* burden by showing that other materials reviewed by Fontenot provided an independent source for each of the relevant facts in Sayes' statements.

2. Contrary to Sayes' argument, the prosecutors' exposure to his compelled statements does not require dismissal of the indictment or disqualification of the prosecution team. Sayes waived this argument because his own attorney was responsible for exposing the substance of the statements to the prosecution team. At any rate, a prosecutor's exposure to compelled testimony does not violate *Kastigar* where, as here, the government shows that the evidence it introduces against the defendant is derived from sources independent of the compelled statement.

3. The district court did not abuse its discretion in refusing to sever Sayes' trial from that of Daniels and Swan. Although defendants argued that their defenses were mutually antagonistic, they demonstrated little, if any, risk of prejudice from a joint trial. Moreover, the district court gave each of the jury instructions that the Supreme Court has found sufficient to protect against

prejudice in cases involving mutually antagonistic defenses. The interest in judicial economy also weighed heavily in favor of a joint trial.

4. Sayes challenges the court's supplemental jury instructions on "excessive force" and "willfulness." The objections he raises on appeal were not presented with sufficient specificity below, and thus the supplemental instructions will be reviewed only for plain error. Neither instruction was an abuse of discretion, much less plain error. Sayes asserts that the district court essentially instructed the jury that he permitted the beating and that his purpose or motive was irrelevant. This is a complete mischaracterization of the judge's statements, as is evident when they are viewed in their full context. Both supplemental instructions, when read as a whole and in light of the original jury charge, are correct statements of the law and are not misleading.

5. The evidence was sufficient to allow a reasonable jury to find beyond a reasonable doubt that Daniels and Swan deprived the victim of his Eighth Amendment right to be free from cruel and unusual punishment. Defendants argue that although a single, unauthorized assault of an inmate by a prison guard might violate the Due Process Clause of the Fourteenth Amendment, it cannot constitute an Eighth Amendment violation. The caselaw defendants cite for this proposition has been superseded by Supreme Court decisions that make clear that, in the context of excessive use of force against convicted inmates, the Eighth Amendment provides protection at least as great as the Due Process Clause. In any event, the evidence was sufficient to satisfy even the standard proposed by defendants because the beating was authorized by their supervisor, and the record

contains evidence from which the jury could infer that the attack was not an isolated incident.

ARGUMENT

I

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT THE EVIDENCE PRESENTED TO THE GRAND JURY WAS DERIVED FROM LEGITIMATE SOURCES WHOLLY INDEPENDENT OF PATRICK SAYES' COMPELLED STATEMENTS

A. Standard Of Review

The district court's determination that the grand jury evidence was derived from wholly independent sources is a factual finding subject to clearly erroneous review. See *United States v. Williams*, 859 F.2d 327 (5th Cir. 1988).

B. FBI Agent Craft Did Not Use Sayes' Statements In Interviewing Witnesses

Sayes' statement to prison investigators on December 24, 1997, was "compelled" within the meaning of *Garrity v. New Jersey*, 385 U.S. 493 (1967). The United States believes, however, that Sayes' statement of January 13, 1998, which he made after receiving *Miranda* warnings, was not compelled under *Garrity*.[5] Nonetheless, the district court concluded otherwise and we do not challenge that ruling on appeal. Without conceding the point, we will assume for the sake of argument that the January 13, 1998, statement – like that of December 24, 1997 – was protected by *Garrity*. The United States thus had the burden of

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[5] Contrary to Sayes' assertion (Br. 40), the United States does not concede that it acted improperly in presenting the January 13, 1998, statement to the First Grand Jury.

showing, by a preponderance of the evidence, that its evidence against Sayes was derived from legitimate sources independent of the compelled statements. *Kastigar v. United States*, 406 U.S. 441, 460 (1972); *United States v. Williams*, 809 F.2d 1072, 1082 (5th Cir.), cert. denied, 484 U.S. 896 (1987). The district court did not clearly err in finding that the United States met that burden. The court carefully sorted through the evidence and issued detailed factual findings (R-3 at 173-188) after receiving testimony from 21 different witnesses at four *Kastigar* evidentiary hearings (R-5; 3d Supp. R-4, -6 & -7).

At the outset, it is important to clarify the scope of Sayes' challenge to the district court's findings. Sayes is not arguing that the government *directly* presented his statements to the Second Grand Jury or that FBI Agent Dan Fontenot, the sole witness before that grand jury, was *directly* exposed to the statements. The undisputed evidence shows that no such direct use or exposure occurred. See pp. 12-13, *supra*. Nor does Sayes claim on appeal that the following materials reviewed by Fontenot were tainted: (1) the ten 302 reports of inmate interviews conducted on January 26, 1998, or (2) the transcripts of the testimony of four witnesses before the First Grand Jury. As the district court found, these materials are free from taint (R-3 at 174-175).

Rather, Sayes' argument is that Fontenot's testimony before the Second Grand Jury is tainted solely because he reviewed the 302 reports summarizing three interviews conducted by FBI Agent Rondaline Craft on January 21, 1998.[6]

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[6] Although Craft also participated in the interviews of two other witnesses

(continued...)

Those interviews were of the victim and two inmates who witnessed the beating: Lester Moran and Willis Thomas. The district court found that Craft did not directly or indirectly use Sayes' compelled statements in connection with those three interviews on January 21, 1998 (R-3 at 175), and that finding is not clearly erroneous.

Sayes' statements did not lead Craft to any of these witnesses. His statements do not refer to inmates Moran and Thomas (see R-3 at 75-108), and Craft testified that she located these inmates either from interviewing the victim or reviewing the prison shower sheets, which showed which inmates were housed on the tier the day of the attack. And the victim's identity was readily apparent even before Sayes made any statements to prison investigators.

Moreover, the government presented abundant evidence that Craft did not use Sayes' statements to shape the questioning of the victim or the two eyewitness inmates on January 21, 1998. Although Craft learned on January 14, 1998, that Sayes was cooperating with prison investigators and had made a compelled statement, she had not been exposed to the content of Sayes' statements when she conducted the interviews on January 21, 1998. Craft so testified under oath (3d Supp. R-6 at 61, 64, 82-83), and her testimony was supported by that of Major

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[6](...continued)
whose statements were read by Fontenot – Dr. James Hand and inmate Emmanuel Isaacson – Sayes does not argue on appeal that either of those interviews was tainted by Craft's participation. Dr. Hand was the physician who treated Jackson several hours after the beating and his statement does not refer to Sayes and does not pertain to Sayes' role in the beating (US Exh. 1 at 8-9). And the 302 report on Craft's interview with Isaacson is quite brief, provides no details about the beating, makes no reference to Sayes, and thus is clearly untainted (*id.* at 27).

Sivula, the prison's lead investigator, who confirmed that he did not divulge the substance of Sayes' statements to Craft (*id.* at 23-24).

Sayes emphasizes (Br. 29) that Craft received his personnel file on January 21, 1998, and that the file contained his December 24, 1997, compelled statement. But Craft did not obtain the personnel file until the end of the day on January 21, 1998, as she was leaving Angola *after* interviewing the victim and the other two inmates (p. 9, *supra*). Thus, Craft's receipt of Sayes' personnel file could not have influenced her earlier questioning of the three witnesses. Indeed, Craft testified that she did not read the statement in his personnel file until nearly a year later, on January 7, 1999, long after the investigation was complete (p. 9, *supra*).

Sayes attacks Craft's credibility by quoting a letter from the prosecutor about Craft's review of Sayes' personnel file (Br. 30). This letter does not support Sayes' position. The letter does not, as Sayes asserts (Br. 29-30), express the prosecutor's doubts about Craft's truthfulness. Moreover, nothing in the letter contradicts Craft's testimony that she did not read the December 24, 1997, statement until long after January 21, 1998. The letter is dated March 30, 1999, and refers to conversations with Craft that took place between January and March 1999. Even if Craft had read the entire personnel file (including Sayes' statement) by the beginning of 1999, that would be consistent with her testimony that she did not see the statement until long after she had completed the witness interviews nearly a year earlier, on January 21, 1998. Although Sayes suggests that the letter indicates that Craft lied about her review of the personnel file, he neglects to mention that Craft testified in detail about the letter and explained that some of the

information in it was the result of miscommunication between her and the prosecutors (3d Supp. R-6 at 84-91; 3d Supp. R-7 at 29-37). The district court, which heard this explanation and had ample opportunity to observe Craft's demeanor during her testimony, was in the best position to judge her credibility.[7]

In addition, Sayes asserts (Br. 30-31) that one of Craft's handwritten notes from her conversation with Major Sivula shows that she "had knowledge of the substance" of Sayes' statements prior to the interviews of January 21, 1998. But the note, which states that Sayes was present during the beating but made no effort to stop it, does not contradict the testimony of Agent Craft and Major Sivula that they did not discuss the contents of Sayes' statements. The district court found that Craft's notes indicate, at most, that Sivula may have related some of the basic, generalized findings of the prison's internal investigation to her (R-3 at 176). That information was readily available to prison investigators through sources other than Sayes' compelled statement (*ibid.*); by the time of the January 14, 1998, conversation between Sivula and Craft, the prison had already interviewed the victim and eyewitness inmates who had first-hand knowledge of Sayes' role in the attack (p. 6, *supra*).

But even if Craft had been exposed to the substance of Sayes' statements prior to the January 21, 1998, interviews, the government nonetheless demonstrated that those interviews were not tainted. Craft testified that she did

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[7] Sayes makes much of Craft's erroneous comment that the yellow folder containing the December 24, 1997, statement was marked "confidential" (Br. 30). During her testimony, Craft acknowledged that she was mistaken and explained the source of the confusion (3d Supp. R-6 at 86-87; 3d Supp. R-7 at 34-35, 62-64).

not use information derived from Sayes' statements in interviewing the witnesses on January 21, 1998 (3d Supp. R-6 at 61; p. 9, *supra*). Other evidence supports her testimony. She was accompanied to those interviews by FBI Agent McNulty, who testified that he was never aware of Sayes' statements (p. 9, *supra*), thus confirming that Craft never referred explicitly to Sayes' statements during the interviews. Moreover, the 302 reports that Craft prepared after those interviews contain virtually identical information regarding the assault on Jackson as the 302 reports drafted by the six FBI agents who were clearly unaware of Sayes' statements (compare US Exh. 1 at 1-11 with *id.* at 15-43). One can thus fairly conclude that Craft did not use Sayes' statements in any meaningful way to shape her questions during the interviews on January 21, 1998.

C. Even If Craft's Interviews Were Tainted, The Government Met Its Kastigar Burden

Even if (contrary to the testimony) Craft had reviewed and used Sayes' statements at the outset of her investigation, the United States could nonetheless satify its *Kastigar* burden by showing that it had other independent sources for each relevant fact contained in Sayes' statements. See *United States v. Cantu*, 185 F.3d 298, 303 (5th Cir. 1999). The government made this showing.

Sayes' statements revealed two things: that he observed his subordinates beating Jackson on the cell tier and in the lobby, and that he did not intervene to stop the assault. These facts are contained in clearly untainted documents reviewed by Agent Fontenot prior to testifying before the Second Grand Jury, including the ten 302 reports prepared by FBI agents other than Craft (US Exh. 1

at 15-16, 18-19, 21-23, 25-26, 29-30, 33-34, 38-39), as well as the grand jury testimony of Gerald Watson and Edward Wise, two inmates who witnessed the beating (*id.* at 110, 114-119, 140-144, 150, 155).[8]

Sayes asserts (Br. 32), however, that the only witnesses who stated that he was present during the beating in the lobby were the victim and inmate Willis Thomas, who were both interviewed by Agent Craft. That is incorrect. As the district court found, the statements and testimony of other eyewitness inmates (who were interviewed by agents other than Craft) "also plac[ed] Sayes in the lobby at the time of the beating" (R-3 at 175; see Exh. 1 at 22-23, 29, 38-39, 117-119). Although Fontenot testified that the lobby was outside the direct line of sight of inmates in their cells, a number of inmates testified that they either viewed the beating in the lobby using "peepers" (mirrors that inmates frequently use to look outside their cells) or heard Sayes talking in the lobby during the attack (*id.* at 22-23, 117-118).

In addition, the government can satisfy its *Kastigar* burden by showing that the discovery of the disputed evidence would have been inevitable even without the defendant's immunized statement. See *United States v. Turk*, 526 F.2d 654, 668 (5th Cir.), cert. denied, 429 U.S. 823 (1976); *United States v. Streck*, 958 F.2d 141, 145 (6th Cir. 1992); *United States v. Fisher*, 700 F.2d 780, 784 (2d Cir. 1983). The United States made such a showing here. Craft or any other FBI

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[8] The United States provided detailed documentation of these independent sources in a memorandum and chart filed under seal in the district court. See Docket Entry 33 at 19-24 & Exhibit B (R-3 at 150).

investigator inevitably would have discovered all the information elicited in the interviews on January 21, 1998, even if Sayes had not given any statements to prison investigators. The identities of the victim and the other inmates housed on the tier where the attack took place were apparent from prison records before Sayes gave his compelled statement on December 24, 1997. Even if Sayes had remained silent when questioned by prison officials, any competent investigator still would have located the victim and the inmates who witnessed the attack and would have asked each of them basic questions such as: What happened? Who did it? Who was present? Those simple questions would have elicited all the substantive information about Sayes' role in the attack that is contained in his statements. See *Turk*, 526 F.2d at 668 (refusing to assume that "cops were of the Keystone variety" and would not have discovered information on their own without defendant's immunized testimony).

It is especially significant that the three individuals questioned by Craft were eyewitnesses to the assault and thus had an independent source – their own first-hand observation – for the information about Sayes' involvement in the offense. An eyewitness's personal knowledge can serve as an independent source under *Kastigar* even when that eyewitness has been directly exposed to immunized testimony. *United States v. Koon*, 34 F.3d 1416, 1433 (9th Cir. 1994) (testimony of police officer who had been directly exposed to immunized statements was not tainted where officer "was an eyewitness to the events at issue in the trial and thus had independent personal knowledge of the events to which he testified"), rev'd in part on other grounds, 518 U.S. 81 (1996). The risk of taint in

the present case is even less than in *Koon* since there are no allegations that the three witnesses interviewed by Craft on January 21, 1998, had any direct exposure to Sayes' statements.

D. Even If There Were A Kastigar Violation, The Error Was Harmless

Even if the government uses compelled testimony in obtaining an indictment, the indictment and conviction will stand if such use was harmless beyond a reasonable doubt. See *United States v. Nanni*, 59 F.3d 1425, 1432-1433 (2d Cir.), cert. denied, 516 U.S. 1014 (1995); *United States v. Schmidgall*, 25 F.3d 1523, 1529 (11th Cir. 1994); *United States v. Serrano*, 870 F.2d 1, 16 (1st Cir. 1989). The government has proved that any error was harmless. As already explained, the government demonstrated numerous untainted sources of evidence for all the relevant facts mentioned in Sayes' statements, and the FBI inevitably would have discovered the information obtained from the witnesses interviewed by Craft even if Sayes had remained silent. Sayes thus finds himself in "substantially the same position" that he would have been in had he not made a compelled statement. *Kastigar*, 406 U.S. at 457-458. Any *Kastigar* violation before the grand jury also would be harmless because the district court granted Sayes' motion to suppress his compelled statements (R-3 at 173-174) and neither those statements nor the FBI 302 reports prepared by Agent Craft were introduced at trial. Because the material that Sayes claims was tainted was not introduced at trial, "any [alleged] misuse of the immunized testimony which may have occurred before the indicting Grand Jury was rendered harmless." *United States v. Rivieccio*, 919 F.2d 812, 817 (2d Cir. 1990), cert. denied, 501 U.S. 1230 (1991).

II

THE PROSECUTORS' EXPOSURE TO SAYES' STATEMENTS DID NOT REQUIRE DISMISSAL OF THE INDICTMENT OR DISQUALIFICATION OF THE PROSECUTION TEAM

Sayes argues (Br. 33-41) that the prosecutors' exposure to his compelled statements required dismissal of the second indictment and disqualification of the prosecution team from further participation in the case. Sayes has waived this argument and, at any rate, the district court properly rejected it (R-6 at 24). As noted in Section I, the government has satisfied its burden of showing that the evidence it presented to the grand jury was derived from sources wholly independent of Sayes' statements. No further showing is required under *Kastigar*.

A. Sayes Has Waived This Argument

As Sayes acknowledges (Br. 38), the "entire substance" of his statements was first exposed to the prosecution team on February 26, 1998, five months prior to the first indictment in this case. On that date, Sayes' counsel at the time, Henry Lemoine, met with Assistant U.S. Attorney Fred Menner and FBI Agent Craft and voluntarily related to them the content of Sayes' statement of December 24, 1997, which was substantively the same as his January 13, 1998, statement. This was the first time that the prosecution team had been exposed to the substance of any of Sayes' statements (see p. 10, *supra*).

Because Sayes' own attorney was responsible for the disclosure, Sayes has waived any legal basis for disqualifying the prosecution team or seeking dismissal of the indictment due to such exposure. In analogous situations, courts have held that a defendant cannot object to a judge's exposure to immunized testimony when

it was defense counsel who made the disclosure. *United States v. Velasco*, 953 F.2d 1467, 1471-1472 (7th Cir. 1992); *United States v. Smith*, 839 F.2d 175, 178 (3d Cir. 1988); *United States v. Patrick*, 542 F.2d 381, 392 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977). The same reasoning should apply here.

B. Exposure Of Prosecutors To Compelled Statements Does Not Violate Kastigar

Even if not waived, Sayes' argument is meritless. Although this Court has not directly addressed the question, a clear majority of Circuits that have decided the issue have concluded that mere exposure of a prosecutor to a defendant's compelled statement does not disqualify him or her from further participation in the case. See *United States v. Serrano*, 870 F.2d 1, 17-18 (1st Cir. 1989); *United States v. Rivieccio*, 919 F.2d 812, 815 (2d Cir. 1990), cert. denied, 501 U.S. 1230 (1991); *United States v. Harris*, 973 F.2d 333, 337-338 (4th Cir. 1992); *United States v. Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1992); *United States v. Montoya*, 45 F.3d 1286, 1292-1293 (9th Cir.), cert. denied, 516 U.S. 814 (1995); *United States v. Dynalectric Co.*, 859 F.2d 1559, 1578-1579 & n.26 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989). Thus, the majority view is that "a prosecution is not foreclosed merely because the 'immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial.'" *Serrano*, 870 F.2d at 17-18; accord *United States v. Mariani*, 851 F.2d 595, 600-601 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989).

That position is consistent with *Kastigar*, which focused on whether the *evidence* introduced against a defendant was directly or indirectly derived from

immunized statements. See *Kastigar*, 406 U.S. at 461 (Fifth Amendment "allow[s] the government to prosecute using evidence from legitimate independent sources"). Thus, as long as the government has independent sources for its evidence, the defendant suffers no constitutionally cognizable harm even if the prosecutor is exposed to the compelled statement. *Mariani*, 851 F.2d at 600-601; *United States v. Byrd*, 765 F.2d 1524, 1530 (11th Cir. 1985).

Where the government demonstrates that its evidence was derived from wholly independent sources, a further inquiry into how exposure to immunized testimony might have subconsciously affected a prosecutor's preparation for the grand jury or trial is at best a meaningless exercise. If the government has independent sources for all the evidence it introduces, then presumably the prosecutors would have developed the same litigation strategy even if the defendant had not given a compelled statement. *United States v. Crowson*, 828 F.2d 1427, 1432 (9th Cir. 1987), cert. denied, 488 U.S. 831 (1988).

Moreover, precluding the participation of any prosecutor who has been exposed to compelled statements could, in some cases, effectively grant the defendant *transactional* immunity, which *Kastigar* held is not required by the Fifth Amendment. 406 U.S. at 453. See *Serrano*, 870 F.2d at 17; *Mariani*, 851 F.2d at 600-601; *Crowson*, 828 F.2d at 1431-1432; *Byrd*, 765 F.2d at 1530. United States Attorney's Offices and other components of the Department of Justice will not always have the personnel and resources to continue with a prosecution if the original prosecution team, which may have spent months developing the case, is disqualified. This is especially true for smaller

prosecutors' offices. *United States v. Thevis*, 665 F.2d 616, 640 n.26 (5th Cir.), cert. denied, 459 U.S. 825 (1982).

As noted, this Court has not expressly decided whether *Kastigar* prohibits prosecutors from continued participation in a case after exposure to immunized testimony. But this Court's decisions suggest that a prosecution is proper as long as the evidence the government introduces is derived from an independent source. See, *e.g.*, *United States v. Seiffert*, 463 F.2d 1089, 1092 (5th Cir. 1972) (if "the evidence introduced by the Government * * * was not acquired through the direct or indirect use of [defendant's] testimony, the conviction shall stand"). The footnote in *Thevis*, *supra*, on which Sayes relies (Br. 36) is not to the contrary. That dictum in *Thevis* merely recognizes that replacement of the prosecution team after a grant of immunity might make it easier for the government "to prove that its evidence has not been tainted by the immunized testimony." *Thevis*, 665 F.2d at 640 n.26. We do not disagree, and that is the reason the United States generally tries to shield prosecutors from *Garrity* materials, *In re Grand Jury Subpoenas*, 40 F.3d 1096, 1103 (10th Cir. 1994), cert. denied, 514 U.S. 1107 (1995), and why we attempted to do so in this case. See p. 8, *supra*.[9] But the Court never suggested

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[9] Sayes cites (Br. 36-37) an outdated version of the U.S. Attorney's Manual which suggests that one way to meet the government's *Kastigar* burden might be to have "the prosecution handled by an attorney unfamiliar with the substance of the compelled testimony." U.S.A.M. § 1-11.400 (1985). That suggestion does not appear in the current version of the Manual, see § 9-23.400 (1997) (discussing *Kastigar*), but at any rate, even the old version of the Manual offers the suggestion only as an "example" of permissible methods of satisfying the *Kastigar* burden. Moreover, the Manual is intended only to provide internal guidance for Department of Justice employees and creates no enforceable rights. *Id.* § 1-1.100.

that replacement of the prosecution team was a constitutional requirement under *Kastigar*. As the Seventh Circuit has emphasized, "in order to avoid the use of immunized testimony * * *, it may be wise for the government to ask another attorney to take over [the] case. But that is the government's decision to make, not ours." *United States v. Palumbo*, 897 F.2d 245, 251 (7th Cir. 1990). See also *Dynalectric Co.*, 859 F.2d at 1578-1579 & n.26 (no *Kastigar* problem where lead prosecutor at trial was present during defendant's immunized grand jury testimony).

Sayes relies principally on the decisions in *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), and *United States v. Semkiw*, 712 F.2d 891 (3d Cir. 1983). But for the reasons explained above, the rationale of *McDaniel* and *Semkiw* is flawed, as several other circuits have emphasized. See *Serrano*, 870 F.2d at 17; *Rivieccio*, 919 F.2d at 815 & n.3; *Velasco*, 953 F.2d at 1474. Moreover, contrary to Sayes' argument (Br. 33), neither the Third nor the Eighth Circuit has adopted a *per se* rule prohibiting prosecutors from participating in the case after exposure to immunized testimony. The Eighth Circuit has limited *McDaniel* to its "unusual [factual] circumstances," and has rejected a *Kastigar* challenge to a conviction in which the prosecutor who tried the case also participated in the grand jury proceedings in which the defendant's immunized testimony was heard. *United States v. McGuire*, 45 F.3d 1177, 1182-1183 (8th Cir.), cert. denied, 515 U.S. 1132 (1995). The Third Circuit in *Semkiw* also declined to adopt a *per se* rule, 712 F.2d at 894-895, recognizing that its earlier decision in *United States v. Pantone*, 634 F.2d 716 (3d Cir. 1980), was still good

law. In *Pantone*, the Third Circuit held that *Kastigar* did not require disqualification of a prosecutor who had heard the defendant's immunized grand jury testimony. 634 F.2d at 718-723.

At any rate, *McDaniel* and *Semkiw* are factually distinguishable from Sayes' case. In *McDaniel*, the degree of exposure was much more extensive and potentially prejudicial than in the present case. See *McDaniel*, 482 F.2d at 307, 310 n.1, 311 (prosecutor read 472 pages of highly-incriminating testimony without realizing it was immunized). In *Semkiw*, the Third Circuit was concerned that the federal prosecutors had granted immunity to the defendant simply to gain a tactical advantage; there was evidence that the immunity grant was merely a ploy to subject the defendant to what was, in effect, a pretrial deposition. 712 F.2d at 892-893, 895. Here, by contrast, the federal government played no role in the state's decision to compel Sayes' statement under *Garrity.*

Sayes nonetheless argues that mere exposure of the prosecutors to his statements was prejudicial because it gave the government insight into his defense theory. But such a theoretical and intangible impact on the prosecutor's trial strategy is not an impermissible "use" of immunized testimony for purposes of *Kastigar*. *United States v. Bolton*, 977 F.2d 1196, 1199 (7th Cir. 1992). Obtaining insight into possible defense theories does not raise constitutional concerns. See *Williams v. Florida*, 399 U.S. 78, 83-85 (1970) (privilege against self-incrimination is not violated by a requirement that the defendant give advance notice of an alibi defense); *Cummings v. Evans*, 161 F.3d 610, 619 (10th Cir. 1998) ("It is well-settled that defendants may be required to disclose to the court

and to the state their defenses prior to trial."), cert. denied, 526 U.S. 1052 (1999); see also Fed. R. Crim. P. 12.1, 12.2, 12.3. At any rate, it would not have been difficult to anticipate Sayes' defense even if he had not made any compelled statements. In light of the prison records showing that he was on duty at the time of the assault and the overwhelming eyewitness testimony that he observed the attack, the government easily could have predicted that Sayes would acknowledge that the beating occurred in his presence but would try to downplay his involvement in and control over the attack. Consequently, any exposure to Sayes' statements was harmless.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' SEVERANCE MOTIONS

Defendants argue (Sayes Br. 41-51; Daniels Br. 13-16; Swan Br. 16) that the district court should have severed Sayes' trial from that of Daniels and Swan. They contend that severance was required because their defenses were antagonistic to the point of being mutually exclusive. That argument is meritless. Although there was some conflict between Sayes' defense and that of Daniels and Swan, the district court did not abuse its discretion in denying severance.

A. Standard Of Review

A denial of severance will be reversed only for abuse of discretion. *United States v. Peterson*, 244 F.3d 385, 393 (5th Cir. 2001). To demonstrate that the district court abused its discretion, "the defendant must show that: (1) the joint trial prejudiced him to such an extent that the district court could not provide

adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration." *Ibid.* Denials of severance "will rarely be disturbed on review." *United States v. Ballis*, 28 F.3d 1399, 1408 (5th Cir. 1994).

B. Discussion

"There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States*, 506 U.S. 534, 537 (1993). Joint trials not only are more efficient, but they also "generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability – advantages which sometimes operate to the defendant's benefit." *Richardson v. Marsh*, 481 U.S. 200, 210 (1987). Defendants are "not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540. Rather, they have the "heavy" burden of proving that they would suffer "specific and compelling prejudice" resulting in an unfair trial. *United States v. Mitchell*, 31 F.3d 271, 276 (5th Cir.), cert. denied, 513 U.S. 977 (1994).

The Supreme Court has made clear that the existence of mutually antagonistic defenses does not necessarily require severance. *Zafiro*, 506 U.S. at 540. Indeed, a joint trial is not necessarily prejudicial even "when two defendants both claim they are innocent and each accuses the other of the crime." *Ibid.* But even if the defendants show prejudice, Rule 14 of the Federal Rules of Criminal Procedure does not compel severance but, instead, "leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." *Zafiro*, 506 U.S. at 538-539. The Supreme Court has made clear that proper jury instructions

usually can cure any risk of prejudice that might arise when co-defendants accuse each other of the crime. *Id.* at 539.

Defendants have not carried their heavy burden of showing that the district court abused its discretion in denying severance. Sayes suffered no significant prejudice from a joint trial. Although Daniels' and Swan's theory was ambiguous throughout much of the trial, their defense by the end of the proceedings seemed to be that the attack on Rayfield Jackson did not occur on their shift and that they were not involved. Accepting that defense would not require the jury to believe that Sayes was guilty. Although Daniels' and Swan's attorneys questioned Sayes' credibility during cross-examination and in the opening and closing statements, they never accused him of participating in the attack on Jackson or committing any other criminal conduct (R-10 at 73-74, 81-89; R-8 at 131-154).

Although Sayes' theory was more damaging to Daniels and Swan, they also failed to show specific and compelling prejudice. If the court had granted a severance, Daniels and Swan could not have excluded Sayes' testimony if the government had decided to call him as a witness. See *Zafiro*, 506 U.S. at 540. Consequently, there is "no reason why relevant and competent testimony [from Sayes] would be prejudicial merely because the witness is also a codefendant." *Ibid.*; accord *United States v. Wilson*, 657 F.2d 755, 765-766 (5th Cir. 1981), cert. denied, 455 U.S. 951 (1982). Moreover, there was little finger-pointing by Sayes' counsel during opening and closing arguments. In his opening, defense counsel did not accuse Daniels and Swan of anything (R-8 at 85-87), and although, in the closing argument, he made an ambiguous reference to "what [Sayes] saw Harrison

Daniels do and John Swan do" (*id.* at 125), he did not attack either co-defendant (see *id.* at 119-131).

In any event, the jury instructions cured any risk of prejudice. The court gave each of the instructions that the Supreme Court and this Court have found sufficient to protect against prejudice in cases involving mutually antagonistic defenses. See *Zafiro*, 506 U.S. at 541; *United States v. Richards*, 204 F.3d 177, 195 (5th Cir.), cert. denied, 121 S. Ct. 73 (2000). The court instructed the jury: (1) that it must consider the evidence separately and independently for each defendant and each charge (R-8 at 184, 187-189); (2) that the government had the burden of proving beyond a reasonable doubt that each defendant committed the crimes with which he was charged (*id.* at 31-32, 42, 47, 69, 170, 187, 190); (3) that opening and closing arguments and other statements by lawyers are not evidence (*id.* at 41, 170-171); and (4) that the jury should draw no inference from a defendant's exercise of the right not to testify (*id.* at 169). The jury's verdict, which acquitted Sayes and Swan on Count 3 (R-2 at 364), indicates that jurors followed these instructions. Acquittal of "some defendants on some counts supports the conclusion that the jury sorted through the evidence and considered each count separately." *United States v. McKinney*, 53 F.3d 664, 674 (5th Cir.), cert. denied, 516 U.S. 901 (1995).

Moreover, defendants failed to show that the risk of prejudice outweighed the strong interest in judicial economy. The evidence that the United States introduced at trial established that defendants Sayes, Daniels, and Swan were full and active participants in the same criminal episode involving the severe beating

of Rayfield Jackson. Therefore, the prosecution's case against each defendant was based on the same witnesses, documents, and physical evidence. Moreover, due to the rather unusual circumstances of this case, most of the witnesses were inmates and personnel from Angola, a maximum security prison (R-7, R-9, R-10). This fact created a significant security and logistical burden for the federal government, the prison, and federal court personnel. Especially under these circumstances, the interest in judicial economy weighed heavily in favor of a joint trial.

Another factor weighing strongly against severance was the fact that the extent of the conflict between Sayes' defense and that of his co-defendants did not become apparent until well into trial. In their pretrial severance motions, defendants made conclusory assertions that their defenses would be antagonistic, but did not specify precisely what those defenses were or how they would conflict with their co-defendants' theories (see R-1 at 25-29, 62-63; R-3 at 198-200, 249-251; R-4 at 18-21; R-5 at 6-7). And in opening statements, neither Daniels nor Swan made clear what their defenses would be (see R-8 at 87-97), and indeed, Daniels' attorney told the jury: "unfortunately, I don't think I can tell you what the evidence is going to show" (*id.* at 88). When the defendants moved for a severance after trial began, Daniels' and Swan's attorneys again failed to advise the court what their theories were (R-7 at 43-45). Given that the defendants' theories of the case did not come into focus until well into the trial, the district court did not abuse its discretion in denying severance.[10]

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[10] Defendants primarily rely (Sayes Br. 41-45, 51; Daniels Br. 14-16) on *United*
(continued...)

IV

THE DISTRICT COURT DID NOT PLAINLY ERR OR ABUSE ITS DISCRETION IN GIVING SUPPLEMENTAL JURY INSTRUCTIONS

In response to questions from the jury, the district court gave two supplemental instructions, one focusing on "excessive force" and the other on "willfulness." Contrary to Sayes' argument (Br. 51-58), the district court did not commit reversible error in giving either instruction.

A. Standard Of Review

The district court "enjoys wide latitude in deciding how to respond to a question from the jury." *United States v. Mann*, 161 F.3d 840, 864 (5th Cir. 1998), cert. denied, 526 U.S. 1117 (1999). When evaluating the adequacy of supplemental jury instructions, this Court asks whether the district judge "was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it." *Ibid.* Even if a supplemental instruction, "taken alone, might tend to mislead or confuse the jury," reversal is unwarranted if the original and

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[10](...continued)
States v. Romanello, 726 F.2d 173 (5th Cir. 1984), *United States v. Crawford*, 581 F.2d 489 (5th Cir. 1978), and *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973). But it is doubtful that the results in those cases would be the same under the standard adopted by the Supreme Court in its 1993 *Zafiro* decision, which made clear that jury instructions usually will cure the risk of prejudice and thus obviate the need for severance in cases involving mutually antagonistic defenses. 506 U.S. at 539-541. At any rate, the antagonism among the co-defendants in those three cases was more pronounced and pervasive than in the present case. See *Romanello*, 726 F.2d at 178-180; *Crawford*, 581 F.2d at 491-492; *Johnson*, 478 F.2d at 1133.

supplemental instructions as a whole correctly state the law. *United States v. Eargle*, 921 F.2d 56, 58 (5th Cir.), cert. denied, 502 U.S. 809 (1991); accord *United States v. McCord*, 33 F.3d 1434, 1447 (5th Cir. 1994), cert. denied, 515 U.S. 1132 (1995).

If the defendant has properly preserved the issue for appeal, this Court will review the jury instructions for abuse of discretion. *Id.* at 1445. If not, the instructions will be reviewed only for plain error. *United States v. Caucci*, 635 F.2d 441, 447 (5th Cir.), cert. denied, 454 U.S. 831 (1981). As explained below, Sayes' challenges to the supplemental jury instructions were not properly preserved for appellate review, and thus the Court should reject the challenges absent plain error.

B. "Excessive Force" Instruction

The first supplemental instruction was prompted by two questions from the jury: "What is the definition of unlawful assault?" and "Is there a definition for reasonable force in handling inmates?" (Supp. R at 4). The judge responded by explaining that "[un]reasonable force" and "unlawful assault" (*ibid.*) were the equivalent of "excessive force" (Supp. R at 5-9), which the court then defined in a manner consistent with its earlier jury charge (compare Supp. R at 7-8 with R-8 at 182-183).

This instruction should be reviewed only for plain error. Although Sayes objected to the supplemental instruction in the district court, he did so on a ground different from the ones he now raises on appeal. At the conclusion of the supplemental instruction, Sayes' attorney stated: "I have to object to – I'm not

quite sure if we answered their question" (Supp. R at 10). He offered no other objection, did not explain why he believed the judge's answer was unresponsive, and failed to offer alternative language. Objecting to an instruction on one ground in the district court will not preserve for appellate review a different objection that was not specifically brought to the trial court's attention. See *Caucci*, 635 F.2d at 447.

At any rate, the district court's instruction was not an abuse of discretion, much less plain error. On appeal, Sayes challenges the supplemental instruction by quoting a short excerpt out of context (Br. 56) and then construing it as impermissibly advising the jury that "Sayes permitted the unlawful assault on Jackson" (Br. 58) and that his failure to intervene to stop the attack "*necessarily* constitutes his guilt, regardless of his intent" (Br. 56). This is a mischaracterization. The court was neither commenting on Sayes' role in the attack, nor suggesting that he was guilty, nor indicating that intent was irrelevant. Rather, the court was simply providing a short-hand summary of the charges in the indictment, including the allegation that Sayes unlawfully permitted the use of excessive force, so that the jury could understand how the supplemental instruction on excessive force was relevant to the various counts of the indictment. This is apparent when the challenged passage is read in context (see Supp. R at 8-9). And the jurors would have correctly understood that the judge was not directing them to reach a particular conclusion about Sayes' guilt or his role in the attack, especially in light of the judge's previous instructions that the jurors are the factfinders (R-8 at 41, 168, 170-171, 190), that statements in the indictment are

merely allegations and not evidence (*id.* at 31-32, 169, 175), and that the government had the burden of proving those allegations beyond a reasonable doubt (*id.* at 169-170, 187). Nor would a reasonable jury have interpreted the judge's short-hand summary of the indictment as eliminating the intent requirement under Count 2. In its original instructions, the court clearly and extensively advised the jury that proof of specific intent was necessary for conviction on each of the counts of the indictment (*id.* at 179-181).

Sayes also suggests (Br. 53-54, 56) that the district judge should have recharged the jury on the burden of proof and presumption of innocence when he gave the supplemental instruction. But this Court has held that a trial judge generally has no such duty and can limit the supplemental instructions to the question asked by the jury. *United States v. Ehrlich*, 902 F.2d 327, 330 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991); *United States v. Colatriano*, 624 F.2d 686, 690 (5th Cir. 1980).

C. "Willfulness" Instruction

Sayes also challenges the district court's supplemental instruction on "willfulness." He does not argue that any particular language in the instruction is legally erroneous but, rather, that the court improperly emphasized a portion of the charge favorable to the government over another passage favorable to Sayes (Br. 57-58). The effect, according to Sayes, was to suggest to the jury that his purpose or motive was irrelevant (Br. 58).

Although Sayes objected after the district court gave the supplemental instruction, the objection was not sufficiently specific to preserve the issue for

appellate review. Defense counsel's objection, in its entirety, was as follows: "I would just object to the court's emphasis on the last part as going beyond the written instruction, about finding that if a person did an act. That would be my objection" (Supp. R at 21-22). This objection is too vague to meet the requirements of Rule 30 of the Federal Rules of Criminal Procedure. A challenge to a jury instruction is not properly preserved for appeal unless the defendant states the basis for that objection with sufficient precision to permit the trial court to understand and correct the alleged flaw in the instruction. *United States v. Devine*, 934 F.2d 1325, 1342 (5th Cir. 1991), cert. denied, 502 U.S. 1065 (1992); *United States v. Bey*, 667 F.2d 7, 10 (5th Cir. 1982); *United States v. Madden*, 525 F.2d 972, 973 (5th Cir. 1976). Sayes did not claim below, as he now does on appeal, that the supplemental instruction would suggest to the jury that purpose or motive was irrelevant to a finding of willfulness. If Sayes had explained this specific concern, the district court would have had an opportunity to clarify the instruction before the jury retired to continue deliberating. Consequently, Sayes' challenge to the instruction was not properly preserved and thus should be reviewed only for plain error.

But even if Sayes had preserved the issue, he has not shown that the district court abused its discretion. The complete supplemental instruction, when considered together with the original jury charge, is a correct statement of the law and is not misleading. Most of the supplemental instruction merely repeats the definition of "willfulness" from the original jury charge, to which Sayes did not object (compare Supp. R at 19-21 with R-8 at 179-181). Moreover, as Sayes

acknowledges (Br. 57-58), the supplemental instruction contains his preferred language about purpose and motive. The court instructed the jury that willfulness means that the defendant "committed the act or acts with a bad purpose or evil motive, intending to deprive the victim of a right * * * secured by the Constitution" (Supp. R at 19). Virtually identical language appeared in the original jury charge (R-8 at 179).

Sayes complains, however, that the court "buried" the "bad purpose or evil motive" language "in the middle" of the supplemental charge, thus diluting its impact (Br. 57-58). But, as this Court has emphasized, a defendant has no right to dictate that language appear in any particular order in the instruction. *United States v. Stacey*, 896 F.2d 75, 77 (5th Cir. 1990).

Moreover, Sayes quotes a small portion of the supplemental charge out of context (Br. 57), thus leaving a misimpression about what the judge was saying about intent. The judge's statement must "not be viewed in a vacuum." *Eargle*, 921 F.2d at 58. As this Court has explained, even a "misstatement of the law" that "dilutes the specific intent requirement" is not reversible error "if the instruction as a whole suggests the appropriate standard to be applied." *United States v. Greer*, 939 F.2d 1076, 1089 (5th Cir. 1991) (prosecution under 18 U.S.C. 241), reinstated in relevant part on rehearing *en banc*, 968 F.2d 433, 434 (5th Cir. 1992), cert. denied, 507 U.S. 962 (1993). When the judge's statement is read in context, it is clear that the court was directing the jury's attention to a more detailed explanation of willfulness that it had given moments earlier in the supplemental instruction. In those earlier comments, the court properly instructed the jury that

although willfulness "means an act that is done voluntarily and intentionally and with the specific intent to do something that the law prohibits" (Supp. R at 19) – in other words, "with an intent to violate a right protected by the Constitution" (*ibid.*) – "it is not necessary to show or to prove that a defendant was thinking in constitutional terms at the time of the incident," and thus "[y]ou may find that a defendant acted with the requisite specific intent even if you find that he had no real familiarity with the Constitution or with the particular constitutional right involved" (*id.* at 20). Sayes does not contend that this language is erroneous and did not object to use of virtually identical wording in the original charge (see R-8 at 179-181; Supp. R at 3, 17). That instruction is plainly correct because the Supreme Court has made clear that defendants may act willfully for purposes of 18 U.S.C. 242 even though they "may not have been thinking in constitutional terms." *Screws v. United States*, 325 U.S. 91, 106 (1945) (plurality); accord *Clark v. United States*, 193 F.2d 294, 296 (5th Cir. 1951).

Sayes' challenge to the jury instruction is analogous to that in *United States v. Walsh*, 194 F.3d 37 (2d Cir. 1999), which also involved the prosecution of a corrections officer under 18 U.S.C. 242. There, the defendant argued that a charge on willfullness was erroneous because the judge stated at one point: "Now, that doesn't mean to say that the defendant knew there was a 14th amendment to the Constitution, *but simply that he did the act as charged in the indictment*." 194 F.3d at 52 (emphasis added). The court in *Walsh* concluded that, when read in context, this instruction was not erroneous because the jury had also been charged that "while it did not have to find that the defendant acted with knowledge of the

particular provision of the Constitution at issue, it had to find that the defendant 'intended to invade [an] interest protected by the Constitution.'" *Ibid.* The jury here was similarly instructed and thus the supplemental instruction, when read in context and in light of the original jury charge, was neither plainly erroneous nor an abuse of discretion.

V

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH AN EIGHTH AMENDMENT VIOLATION

Daniels and Swan argue (Daniels Br. 16-20; Swan Br. 10-15) that the district court should have granted their motions for judgment of acquittal because the evidence was insufficient to support a finding that the beating of Rayfield Jackson violated the Eighth Amendment. In fact, the government presented ample evidence from which a reasonable jury could find that Daniels and Swan deprived Jackson of his right to be free from cruel and unusual punishment.

A. Standard Of Review

The denial of a motion for judgment of acquittal is reviewed *de novo*. See *United States v. Garcia*, 242 F.3d 593, 596 (5th Cir. 2001). The Court must affirm if "a rational trier of fact could have found that the evidence established the essential elements of the crime beyond a reasonable doubt." *Ibid.* In making this assessment, the Court considers "the evidence, all reasonable inferences drawn therefrom, and all credibility determinations in the light most favorable to the prosecution." *Ibid.*

B. Discussion

Daniels and Swan contend that although the beating alleged in the indictment might constitute a denial of the Fourteenth Amendment right to due process, the attack did not meet the test for an Eighth Amendment violation. They base their argument on the decision in *George v. Evans*, 633 F.2d 413 (5th Cir. 1980) (*per curiam*). Their reliance is misplaced because *George* is no longer good law in light of intervening decisions by the Supreme Court and this Circuit. But even if *George* were still binding precedent, the evidence in the record was sufficient to support the jury's finding of an Eighth Amendment violation.

George was a civil action under 42 U.S.C. 1983, alleging that the plaintiff was deprived of his constitutional rights when prison guards beat him without provocation while he was an inmate. 633 F.2d at 414. This Court held that the district judge properly refused to instruct the jury on cruel and unusual punishment because the evidence would not support an Eighth Amendment claim. *Id.* at 414-415. Adopting the reasoning of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973), this Court stated that "punishment" for purposes of the Eighth Amendment "is an action by prison guards * * * that is applied to an inmate for a penal or disciplinary purpose and is at least apparently authorized or acquiesced in by high prison officials." 633 F.2d at 415. Thus, the Court noted, "a single, unauthorized assault by a guard does not constitute cruel and unusual punishment." *Id.* at 416. Nonetheless, the Court emphasized that such "use of undue force by a prison guard is actionable as a deprivation of fourteenth amendment due process rights." *Ibid.*

The rationale of *George* has been superseded by the Supreme Court's

decisions in *Graham v. Connor*, 490 U.S. 386 (1989), and *Whitley v. Albers*, 475 U.S. 312 (1986). *George* was premised on the notion that the Fourteenth Amendment provided broader protection than the Eighth Amendment for prison inmates who were victims of excessive force. See 633 F.2d at 416. But in *Graham* and *Whitley*, the Supreme Court made clear that, in the context of excessive force against inmates who have been convicted, the Fourteenth Amendment provides no greater protection than the Eighth Amendment. *Graham*, 490 U.S. at 395 n.10; *Whitley*, 475 U.S. at 327; accord *James v. Alfred,* 835 F.2d 605, 607 (5th Cir.), cert. denied, 485 U.S. 1036 (1988); *Petta v. Rivera*, 143 F.3d 895, 912 (5th Cir. 1998).

In light of this intervening change in the law, adhering to the rationale in *George* would deny a constitutional remedy altogether to post-conviction inmates who are subject to unauthorized uses of excessive force by prison guards. Yet this Court clearly did not intend such a result in *George* because it emphasized that a claim challenging such excessive use of force would be cognizable under the Constitution (albeit under the Fourteenth Amendment). This Court's intent in *George* to guarantee a constitutional remedy for victims of excessive, but unauthorized, uses of force can best be effectuated by holding that any excessive force claim that would satisfy the *George* standard under the Fourteenth Amendment also would meet the requirements for an Eighth Amendment claim. See *Pelfrey v. Chambers*, 43 F.3d 1034, 1036-1037 (6th Cir.) (rejecting *George*'s reading of the Eighth Amendment because of the change in the "legal landscape"), cert. denied, 515 U.S. 1116 (1995); *Walsh*, 194 F.3d at 48-49 (calling into

question the continued validity of *Johnson v. Glick*, *supra*, on which *George* relied).

Moreover, this Court's more recent caselaw suggests that *George*'s interpretation of the Eighth Amendment is no longer the law of this Circuit. For example, in *Flowers v. Phelps*, 956 F.2d 488, 489-491, superseded in part on other grounds, 964 F.2d 400 (5th Cir. 1992), this Court upheld a finding of an Eighth Amendment violation where three correctional officers at Angola (the same prison at issue here) handcuffed an inmate and then "proceeded to beat and kick [him] without provocation." 956 F.2d at 489, 491. Nothing in the *Flowers* opinion suggests that the three correctional officers had authorization from high-ranking prison officials at the time of the beating or that the attack was more than an isolated incident.

But even if *George*'s interpretation were still the law of this Circuit, the evidence introduced by the government would be sufficient to prove an Eighth Amendment violation. The attack on Jackson was authorized because Lieutenant Sayes, the supervisor of Daniels and Swan, implicitly and explicitly condoned the beating. He watched it for several minutes without intervening to stop it, and at one point even encouraged Daniels and Swan to escalate the attack by telling them that his "grandmother could hit harder than that" (R-9 at 229). And a number of eyewitnesses testified that Sayes himself hit and kicked the victim (p. 5, *supra*). The jury's conviction of Sayes for willfully permitting the use of excessive force confirms that the attack was authorized by a supervisory official. Moreover, Daniels told Jackson and the other inmates that the prison's warden had assigned

him to Cuda unit to "kick ass" and specifically to beat Jackson (R-9 at 58, 113, 115, 167, 230-231), thus conveying to the victim and the other prisoners at least the impression that the defendants had authorization from Angola's top official to engage in the attack. See *George*, 633 F.2d at 415 (focusing on whether excessive force was "at least *apparently* authorized") (emphasis added).

Swan argues, however, that Sayes is not a "high prison official" within the meaning of *George* and thus the attack must be considered unauthorized. Even if we ignore Daniels' comments about the warden, the authorization by Sayes was enough. The facts of this case are remarkably similar to those of *Hudson v. McMillian*, 962 F.2d 522 (5th Cir. 1992), in which this Court upheld a finding of an Eighth Amendment violation in a case involving prison guards' excessive use of force against an inmate at Angola, the same prison at issue here. In *Hudson*, two corrections officers placed an inmate in full restraints, then beat and kicked him, while their supervisor (a lieutenant) watched, did nothing to stop the beating, and told the officers "don't have too much fun." *Id.* at 522-523. Because Sayes held the same rank as the supervisor in *Hudson*, his approval of the beating was sufficient authorization for Eighth Amendment purposes.

Defendants argue, however, that *Hudson* is distinguishable because the trial court had found in that case that the beating was "not an isolated assault" because the defendants had attacked another inmate. See *Hudson v. McMillian*, 503 U.S. 1, 12 (1992). But there was ample evidence from which the jury could have inferred that the attack on Jackson was not an isolated incident. The victim testified that a few hours after the beating, Daniels came by his cell and started

"talking to me about all the other guys that they had whipped, and he said Warden Burl Cain sent him on that unit to clear things up. And if I didn't believe him, to ask all the guys on the tier. Why you think they so quiet?" (R-9 at 230-231; see also R-7 at 49-50). Moreover, the beating occurred in two stages in prominent locations in the prison. Jackson initially was beaten in the tier in front of several inmates, and then was taken to the lobby and attacked again. In total, the two-stage attack lasted several minutes. Such a prominent, prolonged attack cannot be dismissed as a mere isolated incident. Thus, even under *George*, the beating of Jackson qualified as cruel and unusual punishment.[11]

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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[11] Defendants' argument focuses only on the excessive force count of the indictment. Daniels does not challenge the sufficiency of the evidence to support his conviction on Count 3 for depriving Jackson of his Eighth Amendment right by denying him medical care after the beating. The evidence presented at trial showed that Daniels was aware of the seriousness of Jackson's injuries, rebuffed his repeated requests for medical attention, and actively intervened to prevent a medic from attending to the victim, thus delaying treatment for several hours (pp. 5-6, *supra*). This certainly qualifies as "deliberate indifference" to an inmate's serious medical needs, and thus is a violation of the Eighth Amendment. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2001, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE and a diskette containing the brief were served by first-class mail, postage prepaid, on each of the following:

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