No. 07-60732

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Appellee

v.

JAMES FORD SEALE

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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STATEMENT REGARDING ORAL ARGUMENT

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

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JURISDICTIONAL STATEMENT

A federal grand jury charged the defendant under 18 U.S.C. 1201(a) and (c). The district court had jurisdiction under 18 U.S.C. 3231. Final judgment was entered on September 18, 2007. The defendant filed a timely notice of appeal. This Court has jurisdiction to review the district court judgment under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying the defendant's motion to dismiss based on the statute of limitations.

2. Whether the district court erred in denying the defendant's motion to dismiss based on pre-indictment delay.

3. Whether the district court erred in denying the defendant's motion to suppress his 1964 statement to the FBI.

4. Whether the district court abused its discretion by allowing Dr. Hayne to give his expert opinion regarding the victims' cause of death.

5. Whether the district court abused its discretion by excluding the testimony of an attorney, Walter Beasley, to impeach his client, Charles Edwards.

6. Whether the district court abused its discretion by admitting evidence of the defendant's motive.

7. Whether the evidence was sufficient to support the jury's verdict.

STATEMENT OF THE CASE

On January 24, 2007, a federal grand jury in the Southern District of Mississippi returned an indictment charging the defendant, James Ford Seale, with two counts of kidnaping, in violation of 18 U.S.C. 1201(a), and one count of conspiracy to kidnap, in violation of 18 U.S.C. 1201(c), for his role in abducting

and killing two young, African-American men on May 2, 1964 (1 R. 25-29).[1]

The defendant filed numerous pretrial motions, including a motion to dismiss based on the statute of limitations (1 R. 43-48), a motion to dismiss based on pre-indictment delay (2 R. 427-442), a motion to suppress the defendant's 1964 statement to the FBI (2 R. 472-475), and a motion *in limine* to exclude some evidence of the defendant's motive (2 R. 814-821). After lengthy hearings, the court denied the motions (3 R. 58; 10 R. 419-420, 427-428; 16 R. 876, 896; 18 R. 1404; 19 R. 1611; 20 R. 1778).

The defendant was tried before a jury from June 4-14, 2007 (1 R. 17-18). The United States introduced the testimony of 27 witnesses, including an expert in forensic pathology, Dr. Steven Hayne, and one of the defendant's co-conspirators, Charles Edwards. The defendant objected to Dr. Hayne's testimony regarding the victims' probable cause of death as "not scientifically based" and "not within his realm as a pathologist" (19 R. 1664, 1678). At the close of the United States' case in chief, the defendant moved for judgment of acquittal, renewing his previous motions for dismissal and arguing that the United States failed to prove its case (22 R. 2233-2237). The court denied the motion (22 R. 2240).

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[1] Throughout this brief, "R." refers to the record on appeal, "Exh." refers to a trial exhibit, and "Br." refers to the defendant's initial appellant brief.

The defendant introduced the testimony of four witnesses, including his own expert in forensic pathology, Dr. James Lauridson. The defendant also sought to introduce the testimony of Edwards's attorney, Walter Beasley, for the purpose of impeaching Edwards (22 R. 2352, 2354). The district court did not permit Beasley to testify (22 R. 2369-2370). At the close of all the evidence, the defendant renewed his motion for judgment of acquittal, but the court denied the motion (22 R. 2400).

On June 14, 2007, the jury found the defendant guilty on all three counts of the indictment (2 R. 887; 23 R. 2559). On August 24, 2007, the court sentenced the defendant to a term of life imprisonment on each count (24 R. 32-33). The court also denied the defendant's motion for release pending appeal (24 R. 42). Final judgment was entered on September 18, 2007 (2 R. 925).

On November 28, 2007, this Court denied the defendant's motion for review of the district court's denial of release pending appeal.

STATEMENT OF THE FACTS

In 1964, the defendant, James Ford Seale, was a member of the White Knights of the Ku Klux Klan of Mississippi (17 R. 1174; 19 R. 1617-1619, 1648; 20 R. 1843, 1879-1881, 1892-1894). The Klan was a secret organization of white, "Christian" men formed to "promote the purity and integrity of the races of men"

(Exh. G-27 at 2). The Klan required its members to swear, among other things, that they would "wholeheartedly embrace the spirit of Christian militancy" (Exh. G-27 at 25-26; 17 R. 1169). Klan members also pledged to sacrifice themselves in "combat with the enemy"; to dedicate themselves "not only to combat Satan but God willing to triumph over his malignant forces and agents here on earth"; and to "die in order to preserve Christian civilization" (Exh. G-27 at 26; 17 R. 1169-1170). One of the Klan's primary goals was "to stop integration" and the Klan considered "black militants" to be its enemies (17 R. 1170-1171). So long as all of its members agreed, the Klan would do anything it thought had to be done to maintain "separation of the races," including using force or violence (17 R. 1171-1173).

The Klan required its members to take oaths of loyalty and secrecy (Exh. G-27 at 26). For example, Klan members had to swear that they would "cleave to [their] brethren in this order and their families above all others" and "defend and protect them against all * * * enemies both foreign and domestic" (Exh. G-27 at 26; 17 R. 1170). Additionally, Klan members were required to swear that they would "never be the cause of a breach of secrecy or any other act which may be detrimental to the integrity of the White Knights of the Ku Klux Klan of Mississippi" (Exh. G-27 at 27; 17 R. 1170).

The defendant belonged to the Bunkley klavern, a local chapter of the Klan in Franklin County, Mississippi (17 R. 1174; 20 R. 1892). The head of the Bunkley klavern was Clyde Seale, the defendant's father (17 R. 1157). Other members of the Bunkley klavern included Jack Seale, the defendant's brother, Charles Edwards, Archie Prather, and Curtis Dunn (17 R. 1157-1158, 1173-1176; 19 R. 1716; 20 R. 1892). At some point in the spring of 1964, members of the Bunkley klavern discussed rumors that "black militants" might be bringing firearms into Franklin County to start an insurrection (17 R. 1176-1177). To get more information, members of the Bunkley klavern decided to pick up an African American and question him (17 R. 1177). They decided to target a young man named Henry Hezekiah Dee, who they thought fit the profile of a Black Panther because he wore a black bandana over his head (17 R. 1177).

Henry Hezekiah Dee lived down the road from Charles Edwards (17 R. 1178). In 1964, Dee and his childhood friend, Charles Moore, were 19 years old (17 R. 1050; 20 R. 1913). After graduating from high school together, Dee went to Chicago to spend the summer with relatives and Moore left to attend Alcorn College (17 R. 1041, 1049; 18 R. 1461-1462). When Dee returned to Mississippi, he sported a new "process" hairdo, which he often covered with a bandana (17 R. 1049, 1066; 18 R. 1462-1463; 20 R. 1914). Neither Dee nor Moore was involved

in any militant activities or with any radical organization (17 R. 1071; 20 R. 1916).

On Saturday morning, May 2, 1964, Clyde Seale, Prather, and Dunn visited Edwards at his home (17 R. 1178). They told Edwards that they thought they had spotted Dee and they wanted Edwards to go with them to see if he could identify him (17 R. 1179). Edwards got in their truck and accompanied them to the bank in Meadville (17 R. 1179-1180). At the bank, they met the defendant, who was in his car (17 R. 1180). The men, still in their separate vehicles, saw Dee leave the bank and they followed him down the road (17 R. 1180). At some point, Moore joined Dee, and they began to hitchhike (17 R. 1180, 1182). The defendant stopped and asked Dee and Moore if they wanted a ride (17 R. 1182). At first, Dee and Moore appeared afraid, but the defendant asked them again and eventually they got in the defendant's car (17 R. 1182).

Edwards, Clyde Seale, Prather, and Dunn followed the defendant's car to the Homochitto National Forest (17 R. 1182). They took Dee and Moore to a deserted area of the forest to interrogate them about where the guns were being stored (17 R. 1184). When they arrived, the defendant held a sawed-off shotgun as Dee and Moore got out of the car (17 R. 1185). The defendant and others forced Dee and Moore to stand against a pine tree with their hands up on the tree (17 R. 1185-1186). Edwards, Clyde Seale, and Dunn began striking Dee and Moore with

switches and tree limbs (17 R. 1186). They struck Dee and Moore about 30 or 40 times each, over a period of about 30 minutes (17 R. 1186). Edwards, knowing that Dee and Moore would be killed, asked Dee if he was "right with the Lord" (17 R. 1187). Dee and Moore eventually told the men that guns were being stored at the First Baptist Church in Roxie (17 R. 1187).

The defendant and Dunn left the forest in the defendant's car (17 R. 1188). They took Dee and Moore, who were still alive after the beating, to Clyde Seale's place (17 R. 1188, 1195). Meanwhile, Edwards, Clyde Seale, and Prather returned to Meadville, where they met Franklin County Sheriff Wayne Hutto and members of the Mississippi Highway Safety Patrol (MHSP) (17 R. 1188-1189). Together, they proceeded to the First Baptist Church in Roxie, but the church was locked (17 R. 1190). The law enforcement officers sent others to find Preacher Clyde Briggs to unlock the church (17 R. 1190-1191).

That afternoon, Franklin County Deputy Sheriff Kirby Schell and an MHSP officer found Preacher Briggs in Crosby (18 R. 1353, 1430; Exh. G-32A). Schell told Briggs that they needed to see him in Roxie immediately (18 R. 1353-1355). Briggs followed the officers back to the First Baptist Church and unlocked it (18 R. 1354-1355). The officers searched the church but found no guns (17 R. 1191; 18 R. 1430; Exh. G-32A).

Edwards, Clyde Seale, and Prather left the church and dropped Edwards off at his home (17 R. 1191). Clyde Seale told Edwards to "keep [his] mouth shut" and that "everything would be [taken] care of" (17 R. 1191). Edwards understood Clyde Seale to mean that Dee and Moore would be killed (17 R. 1192-1193).

Clyde Seale returned home and called his other son, Jack, and a fellow Klansman named Ernest Parker (19 R. 1716), and asked them to come over (17 R. 1195). Meanwhile, the defendant duct-taped the mouths of Dee and Moore (17 R. 1196). When Jack Seale and Parker arrived, they put a piece of plastic tarp in the trunk of Parker's car to prevent blood from spilling on it and then placed Dee and Moore, who were still alive, inside the trunk of Parker's car (17 R. 1196-1197). The defendant, his father, his brother, and Parker took Dee and Moore to Parker's land on Palmyra Island (17 R. 1197).[2] To get to the island by car, the group had to cross the Old Mississippi River at Natchez and then drive through part of Louisiana (16 R. 1022-1026; 17 R. 1197; 19 R. 1656-1659, 1713-1714; 22 R. 2167, 2212-2213).

When they arrived at Palmyra Island, the defendant and the others tied Dee to a Jeep engine block (17 R. 1197-1198). The defendant and Jack Seale put Dee

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[2] Throughout the trial, Palmyra Island was also referred to as "Parker's Island" and "Davis Island" (19 R. 1713).

in a boat and rowed out into the river (17 R. 1198). They then rolled Dee and the engine block overboard into the river while Dee was still alive (17 R. 1198). The defendant and Jack Seale returned in the boat (17 R. 1198). The defendant and Parker tied various heavy objects to Moore, took him out on the boat, and then rolled him overboard into the river while he was still alive (17 R. 1199).

More than two months later, on July 12, 1964, a couple was fishing about 150-200 yards from Parker's land when the wife's hook got caught on part of a human vertebrae (16 R. 983, 1012, 1014; Exh. G-70). The vertebrae was attached to the lower half of a badly decomposed body, later identified as Moore, still dressed in blue jeans (16 R. 998-999, 1015; 17 R. 1089; 19 R. 1673-1674; Exh. G-70). The feet were bound with twine (16 R. 999-1000, 1016; 19 R. 1682; Exh. G-70). The next day, another body, later identified as Dee, was recovered about 40-50 yards away (16 R. 1019; 17 R. 1089; 19 R. 1675). On October 30, 1964, human ribs were recovered about 150 feet from Parker's land, along with two pieces of railroad track and two heavy metal rollers, all connected together with logging chains (18 R. 1333-1334). A human skull was recovered the following day (18 R. 1335-1336). Next to the skull, a Jeep engine block with a piece of logging chain attached to a shirt and more human remains were also recovered (18 R. 1336).

On November 6, 1964, the MHSP arrested the defendant and Edwards on state murder charges (22 R. 2195-2197). On January 11, 1965, the State moved to dismiss the charges for further investigation (2 R. 443-447). The defendant remained a free man until January 24, 2007, when the United States indicted him on kidnaping charges in the instant case (1 R. 25-29).

SUMMARY OF THE ARGUMENT

The district court properly denied the defendant's motion to dismiss based on the statute of limitations. In 1964, violations of the federal kidnaping statute, 18 U.S.C. 1201, were punishable by death and, consequently, were governed by 18 U.S.C. 3281, which provides that capital offenses may be prosecuted at any time without limitation. The defendant incorrectly argues that the Supreme Court's invalidation of the death penalty in *United States* v. *Jackson*, 390 U.S. 570 (1968), reclassified kidnaping as a non-capital offense, subject to a five-year limitation on prosecution under 18 U.S.C. 3282. Every court of appeals to address this issue has rejected the defendant's argument, concluding instead that the statute of limitations for capital offenses is tied to the serious nature of the offense rather than the severity of the penalty and, therefore, continues to apply even when the death penalty is not available. Kidnaping, therefore, remained a capital offense for limitations' purposes after *Jackson*. This Court's decisions in *United States* v.

Hoyt, 451 F.2d 570 (5th Cir. 1971), and *United States* v. *Kaiser*, 545 F.2d 467 (5th Cir. 1971), are not inconsistent with the district court's ruling.

The defendant's reliance on cases interpreting a 1972 amendment to the kidnaping statute is also misplaced. As the district court properly concluded, the 1972 amendment, which repealed the death penalty provision of the kidnaping statute, did not alter the limitations' period for kidnapings committed prior to that year because Congress did not make the amendment retroactive. The general saving clause preserved the statute's classification as a capital offense for limitations' purposes.

The district court also properly denied the defendant's motion to dismiss based on pre-indictment delay. The defendant failed to satisfy his burden of showing both bad faith on the part of the United States and actual and substantial prejudice resulting from the delay. Rather, the evidence showed that the delay in prosecution was due to insufficient evidence, and not to gain an unfair advantage. In addition, the defendant's list of deceased witnesses did not establish actual and substantial prejudice.

The district court properly denied the defendant's motion to suppress his 1964 statement to the FBI. The United States proved by a preponderance of the evidence that the defendant's statement was voluntary. Unlike the cases on which

the defendant relies, here the defendant did not ask to see a lawyer or anyone else; was not subject to prolonged or repeated questioning, but rather, made his statement within 30 minutes of being arrested; was not deprived of food or sleep; was not threatened or promised anything in return for his statement; and was not subjected to physical or mental coercion.

The district court did not abuse its discretion by allowing the United States' forensic pathologist, Dr. Hayne, to give his expert opinion on the victims' cause of death. The defendant did not object to Dr. Hayne's designation as an expert witness. The defendant's argument that Dr. Hayne's opinion should have been excluded because it was based improperly on non-scientific sources is incorrect. The defendant's own expert testified that Dr. Hayne's methodology was common to forensic pathologists. The defendant's argument is foreclosed by this Court's decision in *United States* v. *Avants*, 367 F.3d 433 (5th Cir. 2004).

The district court did not abuse its discretion by excluding the testimony of an attorney, Walter Beasley, to impeach his client, Charles Edwards. The district court found no evidence that Edwards waived his attorney-client privilege. Moreover, impeachment of Edwards's testimony by extrinsic evidence would have been improper because the defendant failed to elicit from Edwards a prior inconsistent statement.

The district court did not abuse its discretion by admitting evidence of the defendant's motive. This Court and other courts have upheld the admission of evidence of a defendant's racial animus and/or association with a white supremacist organization to prove an issue other than character. The district court held hearings on each piece of evidence and concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. In addition, the court provided a cautionary instruction to the jury to minimize any prejudice. The court also provided several detailed limiting instructions warning the jury that it could not consider evidence of other incidents of racial violence in Franklin County as proof of the defendant's guilt. Such evidence was admitted for the narrow purpose of corroborating the authenticity and credibility of Preacher Briggs' journal in connection with the search for firearms at his church. In light of the court's careful instructions, the defendant was not unfairly prejudiced by the evidence.

Finally, the evidence was sufficient to support the jury's verdict. Edwards testified credibly and his testimony was sufficient to prove the element of interstate commerce. Moreover, his testimony was corroborated by five other witnesses who testified that the only way to drive to Palmyra Island in Warren County, Mississippi, from other parts of Mississippi is through Louisiana. The district

court, therefore, properly denied the defendant's motion for judgment of acquittal.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS BASED ON THE STATUTE OF LIMITATIONS

In 2007, the defendant was charged and convicted under the federal kidnaping statute, 18 U.S.C. 1201, for acts he committed in 1964.[3] At that time, the statute provided that violations were punishable "by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend." 18 U.S.C. 1201(a)(1). Prosecution was governed by 18 U.S.C. 3281, which provides that "[a]n indictment for any offense punishable by death may be found at any time without limitation." Thus, in 1964, there was no limitation on prosecutions for violations of the kidnaping statute.

The defendant argues (Br. 17-29) that a 1964 violation of 18 U.S.C. 1201

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[3] The 1964 version of the kidnaping statute, 18 U.S.C. 1201(a), provided:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

should be considered "non-capital," and thus governed by the five-year statute of limitations provided by 18 U.S.C. 3282, because (1) in 1968, the Supreme Court struck down the death penalty provision of 18 U.S.C. 1201; and (2) in 1972, Congress repealed it. These arguments lack merit. Neither the Supreme Court's invalidation of the death penalty nor Congress's 1972 amendment to 18 U.S.C. 1201 had any effect on the statute of limitations for kidnapings committed in 1964.

A. Standard Of Review

This Court reviews *de novo* the district court's legal conclusions in relation to the statute of limitations. See *United States* v. *Gunera*, 479 F.3d 373, 376 (5th Cir. 2007).

B. The Supreme Court's Invalidation Of The Federal Death Penalty Did Not Change The Statute Of Limitations Applicable To Capital Crimes

As explained below, the Supreme Court's invalidation of the federal death penalty did not shorten the limitations' period for capital crimes. The statute of limitations for capital offenses is tied to the serious nature of the offense rather than the severity of the punishment. Accordingly, offenses "punishable by death," such as the kidnaping at issue in this case, retain their "capital nature" for limitations' purposes because Congress concluded that such crimes are so serious that offenders should always be prosecuted if they are caught.

1. The Supreme Court Did Not Alter Any Other Aspect Of The Federal Kidnaping Statute When It Struck Down The Death Penalty

In 1968, the Supreme Court decided *United States* v. *Jackson*, 390 U.S. 570, which declared unconstitutional the death penalty portion of the federal kidnaping statute. The Court held that the provision, which authorized only a jury to recommend punishment by death, was unconstitutional because it discouraged assertion of the Fifth and Sixth Amendment rights to trial by jury. See *id.* at 583-585. Rather than striking down the entire statute, the Court concluded that "the clause authorizing capital punishment [was] severable from the remainder of the kidnaping statute and that the unconstitutionality of that clause does not require the defeat of the law as a whole." *Id.* at 586. The Court explained that the death penalty's "elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." *Ibid.* The Court also reviewed the legislative history of the Act and found it "quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnaping cases would have chosen to discard the entire statute if informed that it could not include the death penalty clause now before us." *Ibid*.

In 1972, the Supreme Court decided *Furman* v. *Georgia*, 408 U.S. 238, 239-240, which held that procedures for imposing the death penalty in cases from Georgia and Texas violated the Eighth and Fourteenth Amendments. This holding

effectively invalidated the federal death penalty, as well as hundreds of other, similar death penalty schemes. See *id*. at 411 (Blackmun, J., dissenting) ("Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided.").

2. Following Jackson *And* Furman*, Some Statutes And Rules Applicable To Capital Cases Continued To Apply If They Were Tied To The Nature Of The Offense Rather Than The Potential Severity Of The Punishment*

The Supreme Court's invalidation of the death penalty did not automatically invalidate all statutes and rules applicable to capital cases. Just as kidnaping continued to be an offense after *Jackson*, see *Albaugh* v. *United States*, 448 F.2d 760, 761-762 (10th Cir. 1971), other crimes for which Congress had authorized the death penalty remained federal offenses after *Furman*, even though the death penalty could no longer be imposed. In both instances, courts recognized that certain statutes and rules applicable to capital cases continued to apply to kidnaping and other offenses "punishable by death," despite the unavailability of that punishment.[4] See, *e.g.*, *United States* v. *Watson*, 496 F.2d 1125, 1127 (4th Cir.

[4] In this respect, the defendant attempts to distinguish the post-*Furman* line of cases from the post-*Jackson* line of cases, pointing out that the plurality opinion in *Furman* did not foreclose all statutory schemes for imposition of capital

(continued...)

1973); *United States* v. *Goseyun*, 789 F.2d 1386, 1387 (9th Cir. 1986); *Smith* v. *Johnson*, 458 F. Supp. 289, 292 (E.D. La. 1977), aff'd, 584 F.2d 758 (5th Cir. 1978). To determine which statutes and rules continued to apply to capital offenses once the death penalty was no longer available, courts examined "whether the particular statute or rule in question derives from the nature of the offense, in which case it remains in effect, or the potential severity of the punishment, in which case it does not." *Goseyun*, 789 F.2d at 1387; see also *Watson*, 496 F.2d at 1127 (examining whether a particular rule or statute "relates primarily to the nature of the offense as it affects society" or "the nature of the risks or complexities facing the defendant at trial").

Thus, after *Jackson* and *Furman* were decided, courts generally refused to continue to apply statutes and rules that granted capital defendants certain

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[4](...continued)
punishment (Br. 25-27). This argument fails for two reasons. First, although *Jackson* excised the death penalty provision of 18 U.S.C. 1201, *Furman* rendered void all remaining death penalty provisions in federal law. Thus, the effect of *Jackson* and *Furman* was the same. Second, as courts sorted out which statutes and rules tied to capital cases continued to apply in the wake of *Furman* and *Jackson*, their approach was exactly the same in both situations. Indeed, in *United States* v. *Kaiser*, 545 F.2d 467, 475 (5th Cir. 1977), a post-*Furman* murder case relied on by the defendant, this Court addressed the continued applicability of the procedural protections granted capital defendants in 18 U.S.C. 3432. In concluding that the statute did not apply, this Court "found no compelling distinction between the instant issue and that in *Hoyt*," a post-*Jackson* kidnaping case that also addressed the continued applicability of 18 U.S.C. 3432. *Ibid.*

procedural protections from the death penalty. For example, courts declined to grant defendants the procedural protections provided by 18 U.S.C. 3432, requiring provision of witness and jury lists to the defendant before trial in capital cases, because "the purpose of [that] right is to reduce the chance that an innocent defendant would be put to death by providing a pretrial safeguard not available in noncapital criminal prosecutions." *United States* v. *Steel*, 759 F.2d 706, 709-710 (9th Cir. 1985); see also, *e.g.*, *United States* v. *Kaiser*, 545 F.2d 467, 475 (5th Cir. 1977); *Carter* v. *United States*, 388 F. Supp. 1334, 1336 (W.D. Penn.), aff'd, 517 F.2d 1397 (3d Cir. 1975) (table). Federal Rule of Criminal Procedure 24(b)(1), which provides 20 peremptory challenges to a defendant charged with a crime "punishable by death," has also been held inapplicable because it is "tied to the penalty formerly possible." *Goseyun*, 789 F.2d at 1387; see also, *e.g.*, *United States* v. *McNally*, 485 F.2d 398, 406-407 (8th Cir. 1973), cert. denied, 415 U.S. 978 (1974); *United States* v. *Hoyt*, 451 F.2d 570, 571 (5th Cir. 1971), cert. denied, 405 U.S. 995 (1972).

Similarly, some courts refused to grant capital defendants two attorneys, as required by 18 U.S.C. 3005, concluding that the sole purpose of the two-attorney rule is "to reduce the chance that an innocent defendant would be put to death because of inadvertence or errors in judgment of his counsel, and to attempt to

prevent mistakes that would be irrevocable because of the finality of the punishment." *United States* v. *Shepherd*, 576 F.2d 719, 729 (7th Cir.), cert. denied, 439 U.S. 852 (1978); accord *United States* v. *Dufur*, 648 F.2d 512, 515 (9th Cir. 1980), cert. denied, 450 U.S. 925 (1981); see also, *e.g.*, *Carter*, 388 F. Supp. at 1337; cf. *Watson*, 496 F.2d at 1128 (upholding applicability of 18 U.S.C. 3005 in a post-*Furman* murder case because the court was "unable to say, absent a clear legislative expression, that the possibility of imposition of the death penalty was the sole reason why Congress gave an accused the right to two attorneys," and also noting that "an alleged offense of the type for which Congress has purportedly continued the death penalty will be a complex and difficult case to prepare and try").

The same reasoning has been applied in cases where the government has waived the opportunity to seek the death penalty. See, *e.g.*, *United States* v. *Grimes*, 142 F.3d 1342, 1347 (11th Cir. 1998) (refusing to apply 18 U.S.C. 3005, 18 U.S.C. 3432, and Federal Rule of Criminal Procedure 24(b)(1), because a majority of circuits have held that "a defendant is not entitled to benefits he would otherwise receive in a capital case if the government announces that it will not seek the death penalty or the death penalty is otherwise unavailable by force of law"), cert. denied, 525 U.S. 1088 (1999); cf., *In re Quester Sterling-Suarez*, 306 F.3d

1170, 1175 (1st Cir. 2002) (advising that the learned counsel requirement of 18 U.S.C. 3005 should be granted "until it becomes clear that the death penalty is no longer an option").

In contrast, where the purpose of a particular statute or rule applicable to capital offenses derives from the serious nature of the offense rather than the potential severity of the punishment, courts continued to apply the statute or rule, even though the death penalty was unavailable. For example, in *United States* v. *Kennedy*, 618 F.2d 557 (9th Cir. 1980), the Ninth Circuit considered the continued applicability of 18 U.S.C. 3148, which formerly controlled the granting of bail in cases where the defendant was "charged with an offense punishable by death." The statute allowed a court to conclude that no condition of release would assure the defendant's appearance at trial or prevent him from posing a danger to others. The court held that the applicability of 18 U.S.C. 3148 to capital cases survived the Supreme Court's invalidation of the death penalty in *Furman* because it "derives from the nature of the offense charged and not the nature of the penalty." *Kennedy*, 618 F.2d at 559. In so holding, the court compared 18 U.S.C. 3148 to 18 U.S.C. 3146, which controlled the granting of bail in noncapital cases. The court explained:

> [T]he principal difference between § 3148 and § 3146 is that the court is allowed to consider dangerousness to others under the former but not under the latter. When Congress enacted § 3148, it must have concluded that when there was substantial evidence that the defendant had committed a crime then punishable by death, such as rape or murder, the defendant posed a danger to others sufficiently great to warrant a court to consider it in deciding whether to release a defendant before trial. It seems to have imposed different bail conditions on those charged with "capital" crimes because the underlying offense was different, not because the potential penalty was different. The reasons for allowing a court to consider the dangerousness of the defendant exists regardless of whether the death penalty can be imposed.

Ibid. The court therefore concluded the bail statute applicable to capital cases continued to apply after the Supreme Court invalidated the death penalty. See *ibid*.

3. Courts Have Uniformly Held That, Following Jackson *And* Furman, *Capital Cases Continued To Be Governed By 18 U.S.C. 3281 Because It Is Tied To The Serious Nature Of The Offense*

Like the bail statutes, Congress enacted two different statutes governing limitations on prosecution: one for capital offenses, 18 U.S.C. 3281, which provides no limitation, and another for noncapital offenses, which provides a five-year limitation. These statutes are "inextricably tied to the nature of the offense" and not to the potential severity of the punishment. *United States* v. *Manning*, 56 F.3d 1188, 1196 (9th Cir. 1995). The seriousness of capital offenses does not diminish simply because the death penalty becomes unavailable. Thus, as the district court in this case concluded (3 R. 57-58), 18 U.S.C. 3281 reflects

Congress's "judgment that some crimes are so serious that an offender should always be punished if caught." *Manning*, 56 F.3d at 1196; see also *United States* v. *Coon*, 411 F.2d 422, 425 (8th Cir. 1969) ("[I]n interpreting the statute of limitations, 'the statute must be considered in the light of the situation as it existed and presumably was known to Congress at the time of the passage of the statute.'" (citation omitted)).

Accordingly, as the district court observed (3 R. 57), every court of appeals faced with the question has concluded that capital crimes continue to be governed by 18 U.S.C. 3281, even where imposition of the death penalty would be unconstitutional. See *Manning*, 56 F.3d at 1196 (explaining that the unconstitutionality of the death penalty "did not affect the statute of limitations in sections 3281 and 3282, because those provisions derive their justification from the serious nature of the crime rather than from a concern about, for example, what procedural protections those who face a penalty as grave as death are to receive"); *United States* v. *Edwards*, 159 F.3d 1117, 1128 (8th Cir. 1998) (same), cert. denied, 528 U.S. 825 (1999); *United States* v. *Ealy*, 363 F.3d 292, 295-297 (4th Cir.) (affirming district court holding that "the limitations period depends on the capital nature of the crime, and not on whether the death penalty is in fact available for defendants in a particular case"), cert. denied, 543 U.S. 862 (2004); see also

Willenbring v. *Neurauter*, 48 M.J. 152, 179-180 (C.M.A. 1998) (relying on Ninth, Eighth, and Fourth Circuit case law upholding continued applicability of 18 U.S.C. 3281 to post-*Furman* capital cases to conclude that rape charge under Uniform Code of Military Justice may be found at any time, pursuant to unlimited limitations' statute applicable to crimes "punishable by death," even though imposition of the death penalty in that case was constitutionally prohibited).

4. This Court's Decisions In Hoyt *And* Kaiser *Do Not Foreclose Application Of 18 U.S.C. 3281 In This Case*

The defendant relies on this Court's decisions in *Hoyt* and *Kaiser* to argue that a 1964 violation of the kidnaping statute should be considered "non-capital" for limitations' purposes. The defendant's reliance on those cases is misguided because neither case addressed the continued applicability of 18 U.S.C. 3281 or any other rule or statute tied to the nature of offense. Instead, they dealt with procedural protections that were afforded a defendant who could be put to death.

In *Hoyt,* the defendant was charged and convicted of kidnaping after the Supreme Court decided *Jackson*. See 451 F.2d at 570-571. This Court affirmed the district court's decision not to grant the defendant 20 peremptory strikes, pursuant to Rule 24(b)(1), nor require the provision of witness and jury lists, pursuant to 18 U.S.C. 3432. See *id*. at 571. With respect to these procedural

protections, this Court held that "the lower court's treatment of the case as non-capital for all purposes was correct." *Ibid.* Relying on *Hoyt*, this Court reached the same conclusion in *Kaiser* when it refused to apply 18 U.S.C. 3432 to a post-*Furman* murder case. See 545 F.2d at 475 ("[T]he strict procedural guarantees of § 3432 were not properly applicable to this trial."). In so doing, this Court properly characterized *Hoyt* as holding "that federal kidnapping was no longer a capital offense triggering § 3432." *Ibid*. This Court "found no compelling distinction between the instant issue and that in *Hoyt*. As in that case, judicial excision of the death penalty provision renders [murder] non-capital for all purposes." *Ibid*.

Hoyt and *Kaiser* do not stand for the proposition that *Jackson* and *Furman* rendered kidnaping non-capital for limitations' purposes. On the contrary, *Hoyt* and *Kaiser* held that capital defendants are not entitled to the protections of Rule 24(b)(1) and 18 U.S.C. 3432, where the death penalty may not be constitutionally imposed. The language "non-capital for all purposes" in *Hoyt* and *Kaiser* must be read in context. Thus, "non-capital for all purposes" meant for the purpose of sentencing one to death and for the "purposes" at issue in those two cases: the application of Rule 24(b)(1) and 18 U.S.C. 3432. Indeed, in denying the defendant's motion to dismiss, the district court held that "the federal kidnapping statute yet must be accorded capital offense status when courts look to determine

the proper statute of limitations," concluding that language in *Hoyt* and *Kaiser* "which could appear to say otherwise is *dicta*" (3 R. 57). The court explained that *Hoyt* and *Kaiser* "were not squarely presented with the issue before this court and had no need within the context of their litigation to comment upon the matter" (3 R. 57).

Moreover, this Court's holdings in *Hoyt* and *Kaiser* fall neatly within the "nature of the offense versus severity of the penalty" analysis set forth above. They are consistent with other courts' holdings that such procedural protections generally do not apply in capital cases where the defendant is not actually subject to the death penalty. Indeed, in *Kaiser*, this Court explicitly relied on such cases, in addition to *Hoyt*, to support its holding. See 545 F.2d at 475 (citing cases addressing the applicability of various procedural protections for capital defendants). Contrary to the defendant's argument, therefore, *Hoyt* and *Kaiser* do not bar application of 18 U.S.C. 3281 in this case.

Accordingly, the Supreme Court's invalidation of the federal death penalty in *Jackson* and *Furman* did not shorten the limitations' period for capital crimes because 18 U.S.C. 3281 is tied to the serious nature of the offense rather than the severity of the punishment.

C. Congress's Repeal Of The Death Penalty For Violations Of The Federal Kidnaping Statute Did Not Affect The Statute Of Limitations Applicable To Kidnapings Committed Prior To 1972

The defendant next argues (Br. 24-25) that Congress's 1972 repeal of the death penalty for violations of the federal kidnaping statute renders pre-1972 violations of that statute noncapital for limitations' purposes. The defendant's argument fails.

1. The 1972 Amendment Does Not Apply Retroactively

In 1972, Congress passed the Act for the Protection of Foreign Officials and Official Guests of the United States which, *inter alia*, made several substantive changes to the federal kidnaping statute. See Pub. L. No. 92-539, Title II, § 201, 86 Stat. 1072. When the bill was first introduced, it restored the death penalty for kidnaping, but with some revisions aimed at achieving compliance with the Supreme Court's *Jackson* decision. See Letter from the Secretary of State and Attorney General, contained in H.R. Rep. No. 1268, 92d Cong., 2d Sess. and S. Rep. No. 1105, 92d Cong., 2d Sess. 4323 (1972). However, before final passage of the Act, the Court decided *Furman*. In response, Congress removed the death penalty from the final version of the bill "to avoid facial invalidity." 118 Cong. Rec. 27116 (Aug. 7, 1972) (statement of Rep. Poff). The United States concurs with the defendant that once the Act was signed into law, kidnaping became a

noncapital offense, and the applicable statute of limitations for kidnapings committed after passage of the amended statute became 18 U.S.C. 3282.

What the defendant fails to understand, however, is that the 1972 amendment did not apply to crimes committed before its passage. As this Court has held, "'the first rule of [statutory] construction is that legislation must be considered as addressed to the future, not to the past,' absent the clearly expressed intention of Congress." *United States* v. *Vanella*, 619 F.2d 385, 385 (5th Cir. 1980) (quoting *Greene* v. *United States*, 376 U.S. 149, 160 (1964)); *United States* v. *Winters*, 424 F.2d 113, 116 (5th Cir. 1970); see also *United States* v. *Mayfield*, 999 F.2d 1497, 1500 (11th Cir. 1993) ("Retroactivity is not favored in the law. Thus, congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." (internal quotation marks and citations omitted)), cert. denied, 510 U.S. 1179 (1994). The defendant has not offered this Court a single word of statutory text indicating that Congress intended any part of that Act to apply retroactively. Accordingly, the 1964 version of the federal kidnaping statute, and not the 1972 amended version, governs this case. See, *e.g.*, *United States* v. *Smith*, 354 F.3d 171, 173 (2d Cir. 2003) ("[I]t is the law at the time of the offense, including those provisions relating to [sentencing], that governs."); *United States* v. *Havener*, 905 F.2d 3, 5 (1st Cir. 1990) ("[A]s a general

matter, the 'law in effect' canon * * * does not ordinarily apply in the context of substantive criminal law."); *United States* v. *Schumann*, 861 F.2d 1234, 1238 (11th Cir. 1988) ("[T]he statute in effect at the time of the violation properly controlled the rights of the parties.").

In the absence of congressional intent to apply the law retroactively, the general saving clause, 1 U.S.C. 109, preserves 18 U.S.C. 1201 as it existed in 1964. The saving clause provides, in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. 109.[5]

The saving clause thus applies to repealed penalties, including Congress's repeal of the death penalty in the 1972 kidnaping amendments. Soon after the saving clause was enacted, the Supreme Court interpreted the terms "penalty,"

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[5] Although the clause's original intent was to save prosecutions pending at the time Congress repeals or amends a law, it also saves prosecutions commenced after the change in law for crimes committed prior to enactment of the new law. See, *e.g.*, *United States* v. *Brown*, 429 F.2d 566, 567-568 (5th Cir. 1970) (applying 1 U.S.C. 109 to prosecution under Federal Firearms Act of 1947 for violations on May 24 and July 7, 1968, where defendant was not indicted until December 30, 1968, 14 days after Congress repealed the Act).

"forfeiture," and "liability" to include "all forms of punishment for crime." *Warden, Lewisburg Penitentiary* v. *Marrero*, 417 U.S. 653, 661 (quoting *United States* v. *Reisinger*, 128 U.S. 398, 402-403 (1888)), reh'g denied, 419 U.S. 1014 (1974); accord *United States* v. *Blue Sea Line*, 553 F.2d 445, 448 (5th Cir. 1977). Thus, the saving clause operates to "bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense." *Marrero*, 417 U.S. at 661; accord *Blue Sea Line*, 553 F.2d at 448; see also, *e.g.*, *United States* v. *Jacobs*, 919 F.2d 10, 11 (3d Cir. 1990) (concluding that the saving clause bars retroactive application of amendment making probation available for defendants convicted of certain offenses), cert. denied, 499 U.S. 930 (1991); *United States* v. *Cook*, 890 F.2d 672, 676 (4th Cir. 1989) (same). Congress's 1972 amendment repealing the death penalty for violations of the federal kidnaping statute, explicitly replacing a death sentence with life imprisonment, falls squarely within the category of "ameliorative criminal sentencing laws."

The 1972 amendment is "ameliorative" even though *Jackson* constitutionally prohibited imposition of the death penalty under the prior version of the kidnaping statute. In "the general savings statute Congress did not merely save from extinction a liability incurred under the repealed statute; it saved the

statute itself." *Mayfield*, 999 F.2d at 1502 (quoting *De La Rama S.S. Co., Inc.* v. *United States*, 344 U.S. 386, 389 (1953)). In *Dobbert* v. *Florida*, 432 U.S. 282, 297 (1977), the Supreme Court considered a similar issue with respect to a defendant's *ex post facto* claim. In that case, the defendant was convicted of murder and sentenced to death. See *id.* at 283. On appeal, he argued that certain procedural changes made in Florida's death penalty statutes after he committed the murder but before he was prosecuted subjected him to trial under an *ex post facto* law. See *ibid.* One of his claims was that, at the time of the offense, there was no valid death penalty statute in effect because soon after the offense, the Florida Supreme Court declared unconstitutional the State's capital punishment laws in light of *Furman*. See *id.* at 288, 297. The Court rejected the defendant's argument, holding that the actual existence of the death penalty statute, before it was found to be unconstitutional, "served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder." *Id.* at 298. The Court explained:

> Whether or not the old statute would in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books

> provided fair warning as to the degree of culpability which the State ascribed to the act of murder.

Id. at 297.

Similarly, here, it is irrelevant that, before Congress repealed the death penalty for kidnaping but after the defendant committed the offense, the federal death penalty was declared unconstitutional. The existence of the kidnaping statute in effect at the time of the offense indicated Congress's view of the severity of kidnaping and served as an "operative fact" to warn the defendant that he could be prosecuted at any time without limitation.

Accordingly, the 1964 version of the kidnaping statute, which defined kidnaping as a capital crime, governs the instant case for limitations' purposes. See, *e.g.*, *Mayfield*, 999 F.2d at 1502 (applying statute of limitations applicable to version of criminal statute in effect at the time of the offense, even though that version was subsequently repealed); see also *Stoner* v. *Graddick*, 751 F.2d 1535, 1548 (11th Cir. 1985) (upholding application of unlimited statute of limitations for capital crimes in effect at the time of the offense as not violative of defendant's equal protection rights where shorter limitations applied to persons who committed the same crime after the death penalty was repealed).

2. The Cases Cited By The Defendant Do Not Control This Case

The defendant's reliance on the Fourth Circuit's two-paragraph *per curiam* decision in *United States* v. *Massingale*, 500 F.2d 1224 (4th Cir. 1974), is misplaced. The issue in *Massingale* was whether the defendants were entitled to 20 peremptory challenges under Rule 24(b)(1), and to a list of prosecution witnesses under 18 U.S.C. 3432. See 500 F.2d at 1224. In concluding that they were not so entitled, the court stated that the 1972 amendment, "which eliminated the death penalty, removed kidnaping from the classification of a capital offense." *Ibid.* The court engaged in no other analysis, and did not consider whether the amendment was intended to apply retroactively. It is not even clear that such analysis was necessary because the *per curiam* opinion fails to state whether the offense in that case occurred before or after 1972. See *ibid.* Assuming, however, that the offense occurred prior to passage of the 1972 amendment, *Massingale* is easily distinguishable from this case because it simply agreed with this Court and others that denied capital defendants the procedural protections of Rule 24(b)(1) and 18 U.S.C. 3432 after *Jackson* and *Furman*. See, *e.g.*, *Hoyt*, 451 F.2d at 571; *Goseyun*, 789 F.2d at 1387; *McNally*, 485 F.2d at 406-407. *Massingale*, therefore, is inapposite to the statute of limitations' issue in this case.

The defendant also relies on a district court case from New York, *United*

States v. *Provenzano*, aff'd, 423 F. Supp. 662 (S.D.N.Y. 1976), 556 F.2d 562 (2d Cir. 1977) (table). That case, however, misconstrued the effect of the 1972 amendment. The defendant in *Provenzano* was indicted in 1976 for a 1961 kidnaping. See *id*. at 663. The defendant moved to dismiss the indictment on the ground that it was barred by 18 U.S.C. 3282, the five-year statute of limitations applicable to non-capital crimes. See *id.* at 663-664. The court first considered the effect of the Supreme Court's invalidation of the death penalty clause in the kidnaping statute and agreed with other courts that federal kidnaping likely remained a capital offense for limitations' purposes even after *Jackson* because 18 U.S.C. 3281 was tied to the serious nature of the offense rather than to the death penalty itself. See *id.* at 666. The court concluded, however, that the 1972 amendment to the kidnaping statute precluded application of 18 U.S.C. 3281 to kidnapings committed prior to that year. See *id.* at 666-667.

In applying the 1972 amendment to the defendant's case, the court in *Provenzano* ignored the "first rule of construction," *Greene*, 376 U.S. at 160, by failing to review the amended statute's text or legislative history for evidence of retroactive intent. See, *e.g.*, *Smith*, 354 F.3d at 174 ("[I]n the absence of express congressional intent to apply a criminal statute retroactively, the date of the 'initial offense' is determinative of the applicable law."). Unlike the court in *Provenzano*,

the district court in this case correctly construed the 1972 amendment as "not consequential because the repeal was not made retroactive" (3 R. 58).

The court in *Provenzano* also misapplied case law interpreting the saving clause to incorrectly conclude that the saving clause could not preserve the pre-1972 version of 18 U.S.C. 1201 for limitations' purposes. See 423 F. Supp. at 667-669. The court relied on *United States* v. *Obermeier*, 186 F.2d 243, 256 (2d Cir. 1950), cert. denied, 340 U.S. 951 (1951), and *Bridges* v. *United States*, 346 U.S. 209, 227 (1953), which held that statutes of limitations are procedural rather that substantive and, therefore, fall outside the scope of the saving clause. Those cases, however, addressed statutes of limitations that had been expressly repealed. See *Obermeier*, 186 F.2d at 251; *Bridges*, 346 U.S. at 225. The 1972 amendment at issue here and in *Provenzano*, however, did not repeal any limitations' statute.[6] Rather, it repealed the death penalty, a substantive change that was clearly within the scope of the saving clause. See *Reisinger*, 128 U.S. at 402-403.

Moreover, *Provenzano* is inconsistent with subsequent Supreme Court case law. The court in *Provenzano* concluded that the saving clause could not have

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[6] Indeed, Congress has never repealed 18 U.S.C. 3281, despite the fact that imposition of the federal death penalty after *Furman* was unconstitutional in most cases for more than two decades, until Congress finally reenacted comprehensive death penalty legislation in 1994.

saved the death penalty language because that language was invalidated in *Jackson*. See 423 F. Supp. at 669. This holding directly conflicts with the Supreme Court's decision in *Dobbert*, issued shortly after the Second Circuit affirmed *Provenzano* in an unpublished decision. As already explained, under *Dobbert*, the subsequent invalidation of the law in effect at the time of the offense is irrelevant when comparing it with a new law to determine whether the new law is more onerous or whether it is ameliorative. See 432 U.S. 297-298; see also *De La Rama S.S. Co.*, 344 U.S. at 389 ("By the General Savings Statute Congress did not merely save from extinction a liability incurred under the repealed statute; it saved the statute itself."). Accordingly, *Provenzano* is no longer valid and, in any event, was wrongly decided.

In sum, Congress's 1972 amendment repealing the death penalty for kidnaping did not affect the statute of limitations applicable to kidnapings committed prior to that year because Congress did not make the amendment retroactive and because the general saving clause preserves the classification of the 1964 version of the kidnaping statute as a capital offense for limitations' purposes. Accordingly, the district court properly denied the defendant's motion to dismiss based on statute of limitations (3 R. 58).

II

THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS BASED ON PRE-INDICTMENT DELAY

The defendant, after losing his motion to dismiss based on the statute of limitations, filed a second motion to dismiss based on pre-indictment delay. The defendant argues (Br. 29-39) that the delay violated his due process rights. This argument lacks merit.

A. Standard Of Review

"The district court's factual determinations are reviewed only for clear error; its conclusions of law, *de novo*." *United States* v. *Avants*, 367 F.3d 433, 440 (5th Cir. 2004). Mixed questions of fact and law related to claims of pre-indictment delay under the Fifth Amendment are reviewed for clear error. See *United States* v. *Beszborn*, 21 F.3d 62, 66 (5th Cir.), cert. denied, 513 U.S. 934 (1994). Under the clear error standard, this Court will "defer to the findings of the district court" unless it is "left with a definite and firm conviction that a mistake has been committed." *Avants*, 367 F.3d at 441.

B. The Delay Did Not Violate The Defendant's Due Process Rights

The Supreme Court has made clear that "'the primary' protection against pre-indictment delay is the statute of limitations, and the due process clause has but a 'limited role to play.'" *United States* v. *Crouch*, 84 F.3d 1497, 1510 (5th Cir.

1996) (en banc) (quoting *United States* v. *Lovasco*, 431 U.S. 783, 789 (1977)), cert. denied, 519 U.S. 1076 (1997). This Court uses a two-part test for determining whether pre-indictment delay violates a defendant's due process rights. See *Avants*, 367 F.3d at 441. First, the defendant must show that the delay "was intentionally brought about by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other bad faith purpose." *Ibid*. Second, the defendant must show that "the improper delay caused actual, substantial prejudice to his defense." *Ibid*. The burden is on the defendant to satisfy both parts of the test. See *ibid*.

1. The Defendant Failed To Show Bad Faith

The defendant contends (Br. 31-33) that an internal Department of Justice (DOJ) memorandum dated January 12, 1965, proves that the United States acted in bad faith because it delayed prosecution in this case to gain a tactical advantage. The defendant's claim is incorrect as a matter of fact, as well as a matter of law.

The memorandum cited by the defendant explained that DOJ had "deferred prosecution to the State of Mississippi for the more serious crime of murder, however, the Department desired to keep abreast of the matter in the event the State of Mississippi fails to take prosecutive action" (2 R. 449). The memorandum also explained that the local district attorney in Meadville "advised that based on

conversations with MHSP investigators, he believes there is *insufficient evidence* at this time to present this matter to a Grand Jury" (2 R. 449) (emphasis added). The next sentence stated that the district attorney "expressed the belief that if more evidence could be developed to strengthen the case, it would be more advantageous to present the matter to a Grand Jury at a later date" (2 R. 449).

The defendant predicates his entire argument on use of the phrase "it would be more advantageous." It is clear from the whole sentence that the reason it would have been more advantageous to delay is that the district attorney believed he had insufficient evidence to proceed. Such a decision was hardly made to gain a tactical advantage over the defendant. On the contrary, "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *Crouch*, 84 F.3d at 1507 (quoting *Lovasco*, 431 U.S. at 795). Thus, to "prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been prejudiced by the lapse of time." *Ibid*. (quoting *Lovasco*, 431 U.S. at 796).

The defendant also asserts that because the United States possessed more evidence in 1965 than it does now, the delay must have been for the purpose of gaining a tactical advantage. This Court in *Avants* rejected a similar argument. See 433 F.3d at 442 (declining, as defendant urged, to infer that "because it is clear

there was a possibility of federal prosecution in the years following the murder but the Government elected not to prosecute * * * that it delayed in order to gain a tactical advantage, including awaiting the deaths of [the defendant's co-conspirators]").

Moreover, as the district court found (10 R. 419), the defendant's *post hoc* assessment of the United States' case in 1965 has no basis in the record. Subsequent DOJ and FBI memoranda expressed the United States' interest in prosecuting the defendant and his co-conspirators for kidnaping, but recognized the need for further investigation to establish federal jurisdiction under 18 U.S.C. 1201 (2 R. 697-705). An FBI memorandum dated August 5, 1965, stated that "the subjects in this case have all been hostile and furnished no information whatsoever in connection with this case, and * * * no information has been received from witnesses willing to testify" (2 R. 704). The memorandum concluded that it was "highly improbable" that the United States could establish that the kidnaping occurred in interstate commerce, a jurisdictional prerequisite to federal prosecution (2 R. 704). As counsel for the United States explained to the district court at the hearing, it was not until late 2006, when the court issued an order compelling Edwards to testify, that the United States had sufficient evidence to go forward

with its case against the defendant (10 R. 365-366).[7]

In rejecting the defendant's argument of bad faith, the district court found that "the defense's argument is at odds with the facts" (10 R. 419). Rather, the court found that the evidence "shows that the federal government sought to prosecute this case, but was frustrated in its attempts to do so by its determination of a lack of jurisdiction" (10 R. 419-420). Because the court's ruling is supported by the record, it should be affirmed. See *Avants*, 467 F.3d at 442 ("Considering the DOJ memorandum and the Government's explanation for why Avants was not prosecuted [until 2000 for a civil rights crime he committed in 1967], the district court's finding *no* bad faith by the Government was not clearly erroneous."). Accordingly, the district court properly concluded that the defendant failed to satisfy his burden under the first prong of the test.

2. The Defendant Failed To Show Actual And Substantial Prejudice

Because the district court properly concluded that the defendant failed to satisfy his burden under the first prong of this Court's two-part test, this Court

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[7] Indeed, Edwards, one of the "hostile" witnesses identified in the FBI memorandum (2 R. 704), testified that for more than four decades he refused to speak to anyone, including his wife, about what occurred on May 2, 1964 (17 R. 1148-1150, 1220; 21 R. 2066). Edwards, who was subjected to extensive cross examination on this matter, attributed his silence to his oath of loyalty to the Klan and to his fear of the defendant (17 R. 1272, 1280; 21 R. 2046, 2050).

need not address the second prong. See, *e.g.*, *Avants*, 367 F.3d at 442 (declining to consider defendant's prejudice argument where he was unable to demonstrate bad faith). In any event, the defendant's claims of prejudice (Br. 33-38) are without merit.

"The law is well settled that it is actual prejudice, not possible or presumed prejudice, which is required to support a due process claim." *Beszborn*, 21 F.3d at 66. "Without proof of actual prejudice resulting from the delay, a due process claim is merely speculative and cannot be maintained." *Ibid*. A defendant may not substitute for "an actual showing of prejudice" a list of "deceased witnesses [who] were merely potentially material to the defense." *Ibid*. Rather, a defendant must show that the deceased witnesses' testimony would have been "exculpatory in nature, or that it would have actually aided the defense." *Id*. at 66-67; accord *Crouch*, 84 F.3d at 1515.

The defendant here did not prove actual prejudice. Instead, the defendant provided the district court with a list of deceased or unavailable witnesses, 27 of whom he maintains in his initial brief "could have" provided relevant testimony (Br. 33-37). At the motion hearing, the defendant's investigator testified that "apparently a lot of these people don't have any firsthand information about what happened at all" (10 R. 322). With respect to the 27 individuals listed in the

defendant's brief, the investigator admitted that she did not know whether any of them, besides Lester Dickerson, would have provided exculpatory testimony for the defense and/or had any information that could not be derived from other sources (10 R. 325-348). As for Dickerson, the only witness that the defendant claims had any exculpatory information, the United States offered to stipulate to the admission of his statement (10 R. 333-334, 347).[8]

The defendant also failed to explain how he was prejudiced by the unavailability of physical evidence, such as the victims' human remains and personal effects, and the Jeep engine block and other metal scraps used to weigh them down before they were thrown in the river. Indeed, such evidence was equally unavailable to the United States, the party that bore the burden of proof. Nor did the defendant explain why such evidence was needed, given the availability of the original autopsy reports, photographs of the evidence, and other related documentation. The defendant, therefore, failed to prove actual and substantial prejudice. See *Beszborn*, 21 F.3d at 67 ("Vague assertions of lost witnesses, faded memories, or misplaced documents are insufficient to establish a due process violation from pre-indictment delay.").

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[8] Although Dickerson implicated Ernest Parker in a statement he made to the FBI in 1966, he did not exculpate the defendant (10 R. 333).

The district court properly concluded that the defendant failed to satisfy his burden under the second prong of the test. The court found no "actual prejudice" because there was no showing "that those who are deemed absent or those * * * deceased would have aided the defendant" (10 R. 420). The court's findings are supported by the record. Accordingly, the court did not err in denying the defendant's motion to dismiss based on pre-indictment delay.

C. The Defendant's Alternate Argument Is Foreclosed By Binding Circuit Precedent

The defendant argues (Br. 38-39), in the alternative, that this Court should reject its own two-part test for determining whether pre-indictment delay violates due process and instead, adopt a balancing test used by three other circuits. That test would require the defendant to first show actual prejudice and then balance such prejudice against the government's justification for delay. See *Avants*, 367 F.3d at 441 (citing *Howell* v. *Barker*, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016 (1990)). As already explained, the defendant in this case cannot show actual prejudice. Even if he could, the defendant's alternate argument is foreclosed by this Court's *en banc* decision in *Crouch*. See 84 F.3d at 1505-1514 (explaining the numerous reasons why this Court rejects the balancing test); accord *Avants*, 367 F.3d at 441.

III

THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS HIS 1964 STATEMENT TO THE FBI

The defendant argues (Br. 39-43) that the district court erred in denying his motion to suppress a statement he made to the FBI on November 6, 1964, because the statement was not voluntary.[9] The defendant's argument lacks merit.

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[9] The defendant in his motion to suppress argued that law predating *Miranda* v. *Arizona*, 384 U.S. 436 (1966), governs this case (2 R. 480; 8 R. 67; 10 R. 371). He requested a hearing on the issue of voluntariness, pursuant to *Jackson* v. *Denno*, 378 U.S. 368 (1964) (2 R. 473, 481). The United States and the district court also assumed, mistakenly, that *Miranda* did not apply (2 R. 708; 8 R. 71-72; 10 R. 421). See *Johnson* v. *New Jersey*, 384 U.S. 719, 734 (1966) (holding that the rule announced in *Miranda* applies to trials begun after the date of that decision). Because the defendant affirmatively argued to the district court, and continues to argue on appeal (Br. 40), that the admissibility of his 1964 statement is governed by pre-*Miranda* standards of voluntariness, the issue of whether his statement should have been excluded under *Miranda* is waived. See, *e.g.*, *United States* v. *Pope*, 467 F.3d 912, 918-919 (5th Cir. 2006) (The "failure to raise *specific issues or arguments* in pre-trial suppression proceedings operates as a waiver of those issues or arguments for appeal."); *United States* v. *Ragsdale*, 426 F.3d 765, 785 n.9 (5th Cir. 2005) ("We deem abandoned those issues not raised in an appellant's initial brief and we will not consider those issues not raised in the trial court."), cert. denied, 546 U.S. 1203 (2006); *United States* v. *Carreon-Palacio*, 267 F.3d 381, 389 (5th Cir. 2001) (concluding that defendant's argument that his statements should have been suppressed because he was not read his *Miranda* rights was not preserved for appeal because it was not raised during the suppression hearing); *United States* v. *Medina*, 887 F.2d 528, 533 (5th Cir. 1989) (declining to review defendant's argument that information obtained prior to *Miranda* warnings may not be considered in determining probable cause because the defendant failed to raise the issue in his suppression motion).

A. Standard Of Review

"On appeal, this Court must give credence to the credibility choices and findings of fact of the district court unless they are clearly erroneous. The ultimate issue of voluntariness, however, is a legal question, subject to *de novo* review." *United States* v. *Restrepo*, 994 F.2d 173, 183 (5th Cir. 1993) (citations omitted).

B. The Defendant's Statement Was Voluntary

The defendant argues that his 1964 statement was not voluntary because he: (1) was not warned of his right to remain silent; and because he was subjected to (2) repeated and prolonged questioning; (3) physical coercion; and (4) mental coercion, including improper appeal to his religious beliefs. The defendant's claims are unsupported by the record, and the cases relied upon by the defendant are clearly distinguishable.

The record evidence establishes that the defendant's 1964 statement was voluntary. "[T]he true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort." *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963) (quoting *Wilson* v. *United States*, 162 U.S. 613, 623 (1896)). At the hearing on the defendant's motion to suppress, the United States introduced the testimony of Edward Putz, one of the FBI agents who was present during the defendant's arrest in 1964 (8 R. 8). Putz testified as follows:

On the morning of November 6, 1964, he and fellow FBI agent, Leonard Wolf, accompanied two MHSP troopers, Nat Trout and Ford O'Neil, to execute a state arrest warrant (8 R. 8). Trout and O'Neil, as the lead investigators, were primarily responsible for arresting the defendant (8 R. 8). When they arrived at the defendant's home, the troopers knocked on the defendant's door and the defendant voluntarily opened it (8 R. 23). The troopers arrested the defendant and prepared to take him to Jackson for processing (8 R. 9-10). All four law enforcement officers and the defendant got into the car, with the defendant seated in the back next to Wolf (8 R. 11).

Once in the car, the officers asked the defendant a number of general questions about the murders of Dee and Moore, but he declined to answer (8 R. 12). About 30 minutes into the trip, Wolf said to the defendant:

> We know that on Saturday afternoon May 2, 1964, you picked up in your car HENRY DEE and CHARLES MOORE, two Negro boys from Roxie. You and CHARLES EDWARDS and others took them to some remote place and beat them to death. You then transported and disposed of their bodies by dropping them in the Mississippi River. You didn't even give them a decent burial. We know you did it, you know you did it, the Lord above knows you did it.

(2 R. 476; 8 R. 14). In response, the defendant said, "Yes, but I'm not going to admit it; you are going to have to prove it" (2 R. 476; 8 R. 14). The defendant also said, "I'm not going to say anything more" (8 R. 35). The defendant made no

other statement and offered no further information during the two-hour trip (8 R. 16).

At no point during the arrest or during the trip to Jackson did any of the officers, dressed in plainclothes, strike, threaten, brandish a weapon, struggle with, or make any promises to the defendant (8 R. 12, 15-17). At no point did the defendant resist arrest, ask for a lawyer, or exhibit any pain or injuries (8 R. 15-17). Finally, at no point after November 6, 1964, did anyone ever contact Putz about allegations of abuse or misconduct toward the defendant by any of the officers involved in his arrest (8 R. 17-18). Following Putz's testimony, the United States introduced into evidence the defendant's 1964 arrest photo, showing no injuries (8 R. 36-37).

In support of his motion to suppress, the defendant introduced an affidavit that he signed four months after his arrest (2 R. 477-479). The affidavit was prepared with the assistance of Franklin County Sheriff Wayne Hutto, a suspected Klan member and co-conspirator in the disappearances of Dee and Moore (2 R. 477-479, 719, 721; 8 R. 69; 20 R. 1902). The affidavit alleged that on November 6, 1964, MHSP trooper O'Neil hit or struck the defendant with his hands, but contained no other details, such as the time and location of the assault or any injuries to the defendant (2 R. 719). The defendant also introduced the testimony

of Jack Davis, an admitted white supremacist and fellow segregationist, who said that he observed a "red spot" on the defendant's rib cage either one day or one week after the defendant's arrest (8 R. 43-44, 51-54). Davis testified that the defendant told him that one of the FBI agents elbowed him (8 R. 55).

The district court credited Putz's testimony. It found that "[n]o appeal was made to the defendant's conscience in the instant case. The defendant made no admissions of any details regarding the crime in question and refused to say anything else on his way to Jackson" (10 R. 426). The court also rejected the defendant's claims of physical coercion, noting that "the defendant's arrest photo shows no physical injury," and that "the defendant did not file a complaint or affidavit about this allegation of physical abuse until March 1, 1965, over three months after his arrest" (10 R. 426). The court found that "[t]hese circumstances undermine the credibility of the argument concerning this matter" (10 R. 426-427). The court found the testimony of Jack Davis to be not credible and further found that the documentary evidence did not support the defendant's claim that he had been assaulted (10 R. 427). The court also noted that "the actual statement was obtained within 30 minutes of the defendant having been arrested" (10 R. 427). Finally, the court recognized the defiant nature of the defendant's statement, finding that "the content of the statement itself belies * * * any coercion or threat

or unwarranted interrogation" (10 R. 427). The court's findings are supported by the record. Accordingly, they are not clearly erroneous.

The defendant nevertheless contends that his statement was involuntary. None of the cases relied upon by the defendant, however, supports his claim. The defendant first cites *Haynes* v. *Washington* to argue that his statement was not voluntary because no evidence was introduced showing that he was warned of his right to remain silent.[10] *Haynes* does not support the defendant's argument. In that case, the defendant was held incommunicado for 16 hours and his repeated requests to call an attorney and his wife were denied until he finally signed a written confession. See 373 U.S. at 504. The Court concluded that the confession was not voluntary, explaining that the defendant was "[c]onfronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family." *Id.* at 514. The defendant "understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which it was made, the choice cannot be said to be the voluntary product of a free and unconstrained will." *Ibid.*

Although the Court acknowledged that the trial judge should have instructed

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[10] Putz testified that, although he did not recall hearing anyone warn the defendant of his rights, it would have been the responsibility of the MHSP troopers as the arresting officers, and not the FBI, to do so (8 R. 27-28).

the jury that it could consider whether the defendant was cautioned of his right to remain silent as one factor in evaluating the voluntariness of the defendant's confession, see *Haynes*, 373 U.S. at 516-517, that was not the basis of its decision. Rather, the Court concluded that the defendant's confession was induced by the unnecessarily long incommunicado detention and coercion resulting from the "consistent denials of his requests to call his wife, and the conditioning of such outside contact upon his accession to police demands." *Id.* at 514.

The defendant also relies on *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944), and *Payne* v. *Arkansas*, 356 U.S. 560 (1958), to argue that his statement was physically and mentally coerced. The defendant in *Ashcraft* was held incommunicado for 36 hours "without sleep or rest" while "relays of officers, experienced investigators, and highly trained lawyers questioned him without respite." 322 U.S. at 153. In *Payne*, the defendant was a "mentally dull 19-year-old youth" who was arrested without a warrant; held incommunicado for three days; denied counsel and access to others; denied food for long periods; and was told by the chief of police that "there would be 30 or 40 people there in a few minutes that wanted to get him." 356 U.S. at 567. The Court concluded that "[i]t seems obvious from the totality of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not

constitute an 'expression of free choice.'" *Ibid.* (footnotes omitted).

Finally, the defendant relies on *Brewer* v. *Williams*, 430 U.S. 387 (1977), which involved a violation of the Sixth Amendment right to counsel. The defendant in *Brewer* escaped from a mental hospital and kidnaped a little girl in Des Moines, Iowa. See *id*. at 390. The defendant, who fled to Davenport, Iowa, called long distance to retain counsel in Des Moines. See *ibid*. The attorney in Des Moines contacted police and arranged for the defendant to surrender himself in Davenport. See *id*. at 390-391. The defendant was represented by a second attorney at his arraignment in Davenport. See *id*. at 391. Both attorneys repeatedly told police that the defendant was represented by counsel and was not to be interrogated outside their presence. See *id*. at 392. The Davenport attorney was denied permission to accompany the defendant in the police car back to Des Moines. See *ibid*. During the 160-mile drive, a police detective, who knew that the defendant was mentally ill and deeply religious, repeatedly asked the defendant to show him where he hid the girl's body. See *id*. at 392-393. The detective told the defendant that the parents of the little girl "should be entitled to a Christian burial." *Id*. at 393. The defendant finally relented and directed him to the body. See *ibid*. The Supreme Court concluded that the detective violated the defendant's Sixth Amendment right because there was no evidence that defendant had waived

his right to assistance of counsel. See *id*. at 405-406.

All of the cases relied upon by the defendant are clearly distinguishable from this one. Unlike the defendants in *Haynes*, *Ashcraft*, and *Payne*, the defendant here was served with a warrant and was not subject to any prolonged detention or questioning. Moreover, the defendant did not ask to see a lawyer or anyone else, and was not deprived of food or sleep. In addition, the defendant was not threatened or promised anything in return for his statement, and he did not sign a written confession. Also, unlike the defendant in *Brewer*, there is no evidence that the defendant had retained counsel in Meadville or in Jackson. Moreover, there is no evidence that the defendant was mentally ill, or that Agent Wolf had any reason to believe that he was a deeply religious man. Indeed, voluntariness must be decided on a case-by-case basis, and this Court has never, as the defendant suggests, held that reference to a "decent burial" during a custodial interrogation is *per se* mentally coercive. Finally, the defendant in this case had not been formally arraigned before he made his incriminating statement and thus his Sixth Amendment right to counsel had not attached at that time. Accordingly, *Brewer*, a Sixth Amendment case, is inapposite. See 430 U.S. at 397-398 (declining to evaluate whether the defendant's statement was involuntary under the Fifth Amendment because the case must "be affirmed upon the ground that [the

defendant] was deprived of a different constitutional right[,] the right to assistance of counsel"). The district court, therefore, properly denied the defendant's motion to suppress (10 R. 427-428).

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING DR. HAYNE TO GIVE HIS EXPERT OPINION REGARDING THE VICTIMS' CAUSE OF DEATH

The defendant argues (Br. 43-49) that the district court abused its discretion by allowing Dr. Steven Hayne to give his expert opinion regarding the victims' cause of death because his opinion was not based on "scientific knowledge." The defendant's argument lacks merit.

A. Standard Of Review

"We review a district court's evidentiary rulings under an abuse-of-discretion standard so long as the party challenging the ruling makes a timely objection to the admission of the evidence. Otherwise, we apply the plain error standard." *United States* v. *Polasek*, 162 F.3d 878, 883 (5th Cir. 1998) (citations omitted). "Even if the district court erred in its rulings, such error can be excused if it was harmless." *Id*. at 885-886 (citation omitted). "A non constitutional trial error is harmless unless it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id*. at 886 (quoting *United States* v. *Lowery*, 135

F.3d 957, 959 (5th Cir. 1998)).

B. Dr. Hayne's Expert Opinion Was Properly Admitted

The defendant does not challenge Dr. Hayne's qualifications as an expert in forensic pathology. Indeed, the defendant accepted Dr. Hayne's designation as an expert (19 R. 1668). Rather, he argues that the district court abused its discretion by allowing Dr. Hayne to testify regarding the cause of the victims' deaths. The defendant contends that the testimony should have been excluded because Dr. Hayne improperly based his opinion on the testimony of Charles Edwards rather than on "scientific knowledge."

Dr. Hayne opined that the probable cause of the victims' death "would be consistent with freshwater drowning," but explained that the lack of soft tissue to analyze precluded a "definitive" conclusion (19 R. 1679). Dr. Hayne testified that in formulating his opinion, he relied on the autopsy reports of Dr. Bratley from July 1964 and on the anthropological reports of Dr. Angel from November 1964, and also on numerous photographs of the remains, to determine which body parts were recovered and the condition of remaining skeletal tissue (19 R. 1671-1685). From this examination, he was able to exclude certain possible causes of death (19 R. 1680-1682). Dr. Hayne also examined video footage of the recovery of the body found on July 13, 1964; a video interview of those involved in the recovery

effort; photographs of related physical evidence; and several FBI reports (19 R. 1669-1678). In addition, Dr. Hayne heard the in-court testimony of Charles Edwards (19 R. 1669, 1706). Although the defendant focuses on Dr. Hayne's consideration of Edwards's testimony, Dr. Hayne explained that his opinion was based only "in part" on Edwards's testimony (19 R. 1706). Such testimony, he further explained, provided only "augmented support" for his opinion, based on all of the reports, photographs, and other evidence, that freshwater drowning was the probable cause of death (19 R. 1709).

There was nothing unscientific about the methodology Dr. Hayne employed. The defendant's own expert witness, Dr. James Lauridson, testified that "interpreting evidence and interpreting scene circumstances" is one of the duties of a forensic pathologist (22 R. 2309), and that it is not unusual for forensic pathologists to rely on information beyond the scientific data in formulating an opinion (22 R. 2329, 2331). Under the Federal Rules of Evidence, "an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993). Additionally, under Rule 703, "the trial court should defer to the expert's opinion of what data they find reasonably reliable." *Peteet* v. *Dow Chem. Co.*, 868 F.2d 1428, 1432 (5th Cir.), cert. denied 493 U.S. 935 (1989).

Thus, an expert opinion may not be excluded simply because it relies on facts he heard at trial. See *id.* at 1432-1433 (holding that district court properly overruled objection that toxicologist improperly relied on information provided by plaintiff's counsel regarding plaintiff's exposure to herbicide in opining that plaintiff's cause of death was cancer resulting from herbicide exposure).

The district court instructed the jury that "[m]erely because [an expert] witness has expressed an opinion, does not mean, however, that you must accept this opinion. * * * You may accept it or reject it and give it as much weight as you think it deserves, considering the witness' education and experiences, the soundness of the reasons given for the opinion, and all other evidence in this case" (23 R. 2451). Moreover, the defendant vigorously cross-examined Dr. Hayne and presented his own expert who reached a different conclusion. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596; see also *United States* v. *14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996) ("*Daubert* makes clear * * * the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."). Thus, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to

be decided by the trier of fact." Fed. R. Evid. 704.

The defendant's argument is foreclosed by this Court's decision in *United States* v. *Avants*, 367 F.3d 433 (5th Cir. 2004). In that case, Dr. Hayne testified as an expert witness, and the defendant objected to his opinion regarding the victim's cause of death because it relied in part on the testimony and statements of other witnesses. See *id.* at 445-446. This Court held that the district court did not abuse its discretion in admitting Dr. Hayne's opinion, explaining that "Dr. Hayne was accepted by [the defendant] as an expert in forensic pathology. Expert witnesses are permitted, of course, to draw on a wide range of sources in forming their opinions. For example, Rule 703 does not require a 'personal examination' of the 'person or object of the expert's testimony.'" *Id.* at 447 (citations omitted). In addition, "Dr. Hayne testified that it was his practice as a pathologist to gather information other than through his own examinations." *Ibid.* Accordingly, under *Avants*, the defendant may not challenge the basis for Dr. Hayne's opinion. See *ibid*.

To the extent the defendant relies on Justice Diaz's concurring opinion in *Edmonds* v. *Mississippi*, 955 So.2d 787 (en banc), cert. denied, 128 S. Ct. 708 (2007), to challenge Dr. Hayne's qualifications as an expert witness, his challenge must be rejected. The *Edmonds* decision was issued before the trial in this case,

yet the defendant accepted Dr. Hayne as an expert in forensic pathology without objection. Moreover, this Court's 2004 opinion in *Avants* certainly put the defendant on notice that Dr. Hayne routinely relies on a wide array of both scientific and non-scientific sources in forming his expert opinions. The defendant, therefore, should not be heard to argue that the district court erred in allowing Dr. Hayne to testify as an expert witness. See Fed. R. Evid. 103(a) ("Error may not be predicated upon a ruling which admits * * * evidence unless * * * a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparently from the context."); accord *Avants*, 367 F.3d at 445.

C. Harmless Error Analysis

If this Court concludes that the district court erred in admitting Dr. Hayne's expert opinion on the probable cause of death, this Court should find such error harmless. The defendant is unable to show that Dr. Hayne's testimony had a "substantial and injurious effect or influence in determining the jury's verdict." *Polasek*, 162 F.3d at 886 (internal quotation marks and citation omitted). Indeed, the United States introduced overwhelming evidence that the victims in this case were drowned. For example, Edwards testified that the defendant tied the victims to various weights and then threw them in the river while they were still alive (17

R. 1198-1199). Former Navy diver James Bladh testified that the weights described by Edwards were recovered along with the victims' human remains (18 R. 1333-1336). In addition, John Rogan and Renford Talbert Williams, who assisted in the recovery of the victims' remains in July 1964, testified that Dee's body was found in the river with twine around his feet (16 R. 998-999, 1015; 17 R. 1089). Finally, the defendant's own expert witness agreed with Dr. Hayne that the manner of death was homicide and also testified that he could not rule out drowning as the cause of death (22 R. 2341-2349). Given all this other evidence, it is unlikely that Dr. Hayne's testimony substantially influenced the jury. Accordingly, the court did not commit reversible error by admitting Dr. Hayne's expert opinion.

V

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING THE TESTIMONY OF AN ATTORNEY, WALTER BEASLEY, TO IMPEACH HIS CLIENT, CHARLES EDWARDS

At trial, the defendant attempted to call as a witness Edwards's attorney, Walter Beasley, to impeach Edwards with respect to a written statement he gave to the FBI implicating the defendant. The defendant argues (Br. 49-54) that Beasley should have been permitted to testify because Edwards waived his attorney-client privilege. The defendant's argument lacks merit.

A. Standard Of Review

"The application of the attorney-client privilege is a question of fact, to be determined in light of the purpose of the privilege and guided by judicial precedents. The clearly erroneous standard of review applies to the district court's factual findings. [This Court] review[s] the application of the controlling law *de novo*," and "the district court's rulings on the admissibility of evidence for an abuse of discretion." *United States* v. *Campbell*, 73 F.3d 44, 46-47 (5th Cir. 1996) (internal quotation marks and citations omitted).

B. Edwards Did Not Waive His Attorney-Client Privilege

It is a "bedrock principle that the attorney-client privilege is the client's and his alone. If the client wishes to waive it, the attorney may not assert it, either for the client's or for his own benefit." *United States* v. *Juarez*, 573 F.2d 267, 276 (5th Cir.), cert. denied, 439 U.S. 915 (1978). According to defense counsel, Beasley called her to say that Edwards was prepared to recant his 2006 statement to the FBI (22 R. 2354). Defense counsel sought to have Beasley testify to impeach Edwards (22 R. 2352, 2354). The district court held an evidentiary hearing at which Beasley sought to be disqualified as a witness on attorney-client privilege grounds (22 R. 2355, 2359). Beasley, who had represented Edwards since July 26, 2006 (22 R. 2359), testified that Edwards never authorized him to

call defense counsel about the statement (22 R. 2363). He also testified that Edwards did not recant it (22 R. 2361). The court told defense counsel that before Beasley could be questioned about whether the alleged phone conversation had occurred, Edwards would have to be recalled and the court would need to question him on whether he was asserting or waiving his attorney-client privilege with respect to that matter (22 R. 2263-2264). The defendant declined the court's offer to recall Edwards.

The district court, therefore, properly concluded that Edwards did not waive his attorney-client privilege. The court explained, "I have no testimony from Edwards that he waived the attorney-client relationship. This witness here says that he did not" (22 R. 2366). The court observed that defense counsel never asked Edwards on cross examination whether he authorized his attorney to speak with defense counsel outside his presence (22 R. 2367). The court's finding that Edwards did not expressly waive the privilege was not clearly erroneous.

The defendant contends that Edwards implicitly waived the privilege because, according to defense counsel, Edwards knew that Beasley was talking to the defendant's attorneys about his testimony. As the district court found (22 R. 2366), however, the defendant produced no evidence that Edwards intended to disclose any communication between himself and Beasley. The defendant failed to

question Edwards about this matter on cross examination and then declined the court's offer to recall Edwards. Accordingly, the district court did not abuse its discretion by excluding Beasley's testimony on this ground (22 R. 2369-2370).

C. The Defendant Failed To Lay A Foundation For Impeaching Edwards With Beasley's Testimony

Even if Edwards had waived his attorney-client privilege, Beasley's testimony was inadmissible to impeach Edwards. "It is well-settled that evidence of a prior inconsistent statement is admissible to impeach a witness." *United States* v. *Devine*, 934 F.2d 1325, 1344 (5th Cir.), cert. denied, 502 U.S. 929 (1991). However, "[p]roof of such a statement may be elicited by extrinsic evidence only if the witness on cross-examination denies having made the statement." *Ibid*.; see also Fed. R. Evid. 613(b) ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."). The defendant in this case failed to elicit a prior inconsistent statement from Edwards regarding his written statement. Accordingly, the district court did not abuse its discretion by excluding Beasley's testimony to impeach Edwards on this matter (22 R. 2369-2370).

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF THE DEFENDANT'S MOTIVE

The defendant challenges the admission of evidence that goes to the defendant's motive, including: (1) a 1964 letter from the defendant to the editor of the *Franklin Advocate* newspaper, expressing strong racial animus and opposition to civil rights laws; (2) testimony of Reverend Robert Middleton, the defendant's former pastor, that in 1963 the defendant advocated violence against African Americans; (3) testimony of Linda Ann Luallen, the defendant's former daughter-in-law, that the defendant was proud of his membership in the Klan and had strong negative opinions about African Americans; (4) testimony of Don Irby, a friend of the defendant's son, that the defendant often talked about being in the Klan; (5) the journal of Preacher Clyde Briggs, memorializing the search for firearms at his Roxie church on May 2, 1964, and describing other incidents that occurred in the community around that same time; and (6) testimony of Chastity Briggs-Middleton, Preacher Briggs' daughter, corroborating the incidents described in the journal. The defendant argues (Br. 54-63) that the evidence was inadmissible under Federal Rule of Evidence 402 because it was not relevant, and that it should have been excluded under Rules 403 and 404(b) because its prejudicial effect

outweighed its probative value. The defendant's arguments lack merit.

A. Standard Of Review

This Court reviews a district court's evidentiary rulings for abuse of discretion. See *United States* v. *Sanders*, 343 F.3d 511, 517 (5th Cir. 2003). Review of admission of Rule 404(b) evidence is "highly deferential." *United States* v. *Anderson*, 976 F.2d 927, 929 (5th Cir. 1992). This Court "will not lightly second-guess a district court's decision to admit relevant evidence over a Rule 403 objection," and will disturb such a decision "'rarely' and only when there has been 'a clear abuse of discretion.'" *United States* v. *Fields*, 483 F.3d 313, 354 (5th Cir. 2007) (quoting *United States* v. *Maggitt*, 784 F.2d 590, 597 (5th Cir. 1986)), cert. denied, 128 S. Ct. 1065 (2008).

B. The Evidence Was Relevant And Did Not Unfairly Prejudice The Defendant

Rule 402 provides that relevant evidence is generally admissible, and evidence that is not relevant must be excluded. Rule 403 states that relevant evidence "*may* be excluded if its probative value is *substantially* outweighed by the danger of *unfair* prejudice" (emphasis added). Rule 404(b) provides that "[e]vidence of other * * * acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible * * * [to prove] motive, opportunity, intent, preparation, plan, knowledge, identity,

or absence of mistake or accident."

This Court applies a two-part test for admitting evidence under Rule 404(b): "First, it must be determined that the extrinsic * * * evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [R]ule 403." *United States* v. *Beechum*, 582 F.2d 898, 911 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979). However, "Rule 403's scope is narrow. '[T]he application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.'" *Fields*, 483 F.3d at 354 (quoting *United States* v. *Pace*, 10 F.3d 1106, 1116 (5th Cir. 1993), cert. denied, 511 U.S. 1149 (1994)).

The defendant incorrectly asserts that the evidence in this case is not relevant to the crimes charged. The indictment alleged that the defendant conspired with other members of the Klan, a violent white supremacist organization, to kidnap two men because of their race and because the Klan suspected the men of bringing firearms into the county as part of a civil rights insurrection (1 R. 25-29). As set forth in greater detail below, the *Franklin Advocate* letter and the testimonies of Middleton, Luallen, and Irby were relevant to these allegations because they were

probative of the defendant's racial animus and of his membership in the Klan. Additionally, Preacher Briggs' journal was relevant because it was probative of the search for firearms at the Roxie church, an overt act alleged in the indictment and which led to the victims' deaths. The defendant seems to concede that the entries describing the search were relevant, but challenges the admission of unrelated incidents described in the journal and by Briggs' daughter. Those incidents were not offered as proof of the defendant's guilt in the crimes charged, but rather, to corroborate the authenticity and credibility of the journal as a whole. Accordingly, the evidence was admissible.

The defendant also incorrectly asserts that because the evidence was "racially inflammatory," it was unfairly prejudicial and therefore should have been excluded. This Court and other courts have upheld the admission of evidence that may be considered "racially inflammatory" or otherwise offensive to show a defendant's motive, intent, or identity. See, *e.g.*, *United States* v. *Black*, 685 F.2d 132, 134 (5th Cir.) (affirming admission of Nazi and Confederate flags in case charging defendants with conspiracy to overthrow a friendly government to show military nature of defendants' group and to rebut defendants' contention that their motive was to defend America), cert. denied, 459 U.S. 1021 (1982); *United States* v. *Dunnaway*, 88 F.3d 617, 618-619 (8th Cir. 1996) (affirming admission of

evidence of defendant's membership in white supremacist group and racist views in case charging him with a skinhead conspiracy under 18 U.S.C. 371, to show defendant's identity, purpose, and intent). Moreover, the Supreme Court recently reaffirmed district courts' "broad discretion" to resolve such evidentiary issues. See *Sprint/United Mgmt. Co.* v. *Mendelsohn*, No. 06-1221, 2008 WL 495370 (February 26, 2008) ("Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case and thus are generally not amenable to broad *per se* rules."). Finally, "[i]n reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction." *Beechum*, 582 F.2d at 917 n.23.

1. Evidence Of The Defendant's Racial Animus And Of His Membership In The Klan Was Admissible To Show Motive, Identity, And Intent

The defendant first challenges his letter to the editor of the *Franklin Advocate* newspaper, which was published on July 23, 1964, a couple of months after the victims disappeared. In the letter, the defendant urged readers to fight against "[t]he so called Civil Rights Bill," referring to the Civil Rights Act of 1964, which had been enacted three weeks earlier (Exh. G-88). The defendant argued that citizens should not comply with the Act "when the President of the U.S. can

go against the constitution and laws of the U.S. * * * by sending troops to Arkansas and Miss., armed with bayonetts [sic] to force two coons into our schools" (Exh. G-88). The defendant wrote that the Act "is supposed to help the nigger both North and South. It is supposed to help the nigger get equal schools," but he contended that in fact "they want to eat in the white cafe, sleep in the white hotel or motel, swim in the white pool, go to the white church, go to the white school. In short, they want to marry your white daughter, or live with her, the only thing they know. They don't want equal rights, they want 100% integration" (Exh. G-88).

The defendant urged readers to "pick up your Bible and see what God has to say about integration," and argued that "[t]he time has come for the [C]hristian people of this nation to stand up and fight for what is right in the eyes of God and man and not what a few men in congress or the senate decided on under pressure from the niggers and communists" (Exh. G-88). The defendant concluded that "[t]he time is here and passing fast for the people of this great nation to fight and die for what is right, if you choose to live and die under communism dictatorship, may God have mercy on your souls" (Exh. G-88).

The defendant also challenges the testimony of Reverend Robert Middleton, who testified as follows: In 1963, he was the pastor of the Bunkley Baptist

Church, which was attended by the defendant and Archie Prather, and that Prather provided him with free housing on his property so that Middleton could be close to work (19 R. 1573-1574). During that time, the federal government announced that it was going to integrate the schools and that "really struck a nerve in that little community" (19 R. 1579). One day, Prather, a Sunday School teacher, told a group of women at the church who were afraid of African Americans following them in their cars that, "If any of y'all ladies are worried about something like that, * * * I will shoot them niggers that's following you" (19 R. 1579-1580).

Middelton disapproved of Prather's statement and told him that the church was "no place to talk about killing people" (19 R. 1580). Middelton later took the pulpit and told the entire congregation that if people wanted to fight the federal government on integration, they should organize in their homes rather than at church (19 R. 1581). Prather quit coming to church thereafter (19 R. 1581). Later, the defendant came to Middleton's house to borrow some tools to saw off a shotgun (19 R. 1582). When Middleton asked him what he was doing, the defendant said, "What do you think would happen if I walked in a nigger juke joint and just started shooting all the way around the room" (19 R. 1583). Middleton testified that he let the defendant know that he disapproved (19 R. 1983).

After those incidents, the defendant returned to Middleton's house to deliver

a letter from Prather, which the defendant helped write (19 R. 1584-1585). The letter stated that Middleton could no longer live rent-free on Prather's property and instructed Middleton to mind his own business (19 R. 1584-1585). The defendant later delivered another message ordering Middleton to move and to stay away from the Bunkley community (19 R. 1585). After Middleton moved to Roxie, the defendant and his two brothers, Jack and Don Seale, went to see him (19 R. 1586-1587). The encounter caused Middleton to be concerned about his personal safety (19 R. 1587). As a result, he sought a restraining order against the defendant (19 R. 1587).

Finally, the defendant challenges the testimony of Linda Ann Luallen, his former daughter-in-law of 25 years, and Don Irby, a friend of his son. Luallen testified that while she was engaged to and married to the defendant's son, she: (1) saw the defendant's Klan robe; (2) heard the defendant use racially derogatory language to describe African Americans; (3) heard the defendant express strong, negative opinions about African Americans; (4) sensed that the defendant was proud of his membership in the Klan; and (5) saw the defendant show home movies of Klan rallies at family gatherings (19 R. 1615-1622). Luallen also testified about the relationship between the defendant and several of his co-conspirators, including Parker and Prather (19 R. 1623). Similarly, Irby testified

that the defendant often talked about being in the Klan (19 R. 1648-1649); that the defendant claimed to be a constable in Franklin County (19 R. 1655); and that because of that position, the defendant believed he "had a license to kill" (19 R. 1655).

The district court did not abuse its discretion by admitting any of this evidence (16 R. 876, 896; 19 R. 1611-1612; 20 R. 1778). Before admitting each piece of evidence, the court held a hearing and carefully weighed the probative value of the evidence against its prejudicial effect. The court found that the *Franklin Advocate* letter was relevant to the charged offenses because it showed unequivocally that (1) "the defendant manifested a militant opposition to integration;" (2) "he expressed a seeming hatred of African Americans;" (3) "he proclaimed a contempt for laws adverse to his beliefs;" and (4) "he exhorted white citizens to disobey man's law and to follow God's law as privately interpreted by him" (20 R. 1777-1778). "In sum, the article advocates anarchy. It voices disdain for those who would obey * * * integration laws; and it manifests that God expects God-fearing whites to resist matters of integration by whatever means and to be ready to die if necessary" (20 R. 1778). The court explained that the letter was

probative of a "race-based animus" motivating the defendant (20 R. 1778).[11] The testimonies of Middleton, Luallen, and Irby were also probative of the defendant's racial animus. In addition, their testimonies established the defendant's membership in the Klan, as well as his relationship with other members of the conspiracy and their shared purpose.

Although damaging to defendant's case, the evidence was not *unfairly* prejudicial. At the defendant's request (20 R. 1779-1781; 23 R. 2436), the court cautioned the jury that "[t]he defendant is not on trial for any act, conduct or offense not alleged in the indictment" (23 R. 2452-2453).[12] The court's instruction was sufficient to minimize the danger of unfair prejudice. See, *e.g.*, *Sanders*, 343 F.3d at 518 ("Under the Rule 403 standard, when the court issues a limiting instruction, it minimizes the danger of undue prejudice.").

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[11] The defendant's claim that the letter is irrelevant because it was published after the alleged offenses is without merit. See, *e.g.*, *United States* v. *Osum*, 943 F.2d 1394, 1404 n.7 (5th Cir. 1991) (rejecting defendant's contention that the extrinsic offenses were not admissible because they were subsequent to, rather than prior to, the charged offense).

[12] The defense, however, made a tactical decision to reject the United States' proposed limiting instruction, which would have further cautioned the jury not to consider the defendant's "writings" as proof of the acts alleged in the indictment (23 R. 2434-2437). The defendant thus has no basis now for claiming that he was prejudiced by admission of the *Franklin Advocate* letter.

2. Other Incidents Described In Preacher Briggs' Journal And By Chastity Briggs-Middleton Were Admissible To Corroborate The Credibility And Authenticity Of The Journal

The defendant also challenges the admission of "other incidents" described in Preacher Briggs' journal and by Briggs' daughter, Chastity Briggs-Middleton. The journal was offered to corroborate witness testimony about the search for weapons at the First Baptist Church in Roxie on the day of the offense. Three pages of the journal were admitted into evidence (18 R. 1404; Exh. G-32A). In those three pages, Briggs recounted the search on May 2, 1964, and also documented three other incidents of racial violence in Franklin County, including: (1) an incident on June 21, 1964, in which members of the Klan beat an African-American man released from prison; (2) an incident on May 24, 1964, in which a carload of white men followed Briggs home and threatened him after church services; and (3) an incident on August 10, 1964, in which a carload of white men shot at a light in Briggs' yard (Exh. G-32A). The journal did not implicate the defendant or any of his co-conspirators in any of those incidents (Exh. G-32A).

The defendant objected to the admission of the other incidents and argued that the journal should have been redacted to exclude them (18 R. 1397-1401). The United States countered that it was necessary to admit the three pages of the journal in their entirety so that the jury could evaluate the journal's authenticity

and credibility by comparing the handwriting, writing style, and content of those other entries to the ones being offered in connection with this case (18 R. 1398-1404; 1407-1408). The United States made clear that the other incidents were being offered strictly for authenticity and credibility purposes, and suggested that the court instruct the jury not to consider those other incidents as probative of the defendant's guilt (18 R. 1401-1402). The court proposed a limiting instruction, to which the defendant agreed (18 R. 1404, 1409-1410).

The court explained to the jury that "[i]ncluded within [the journal's] pages are incidents and events totally unrelated to the matters pertaining to those of this trial" and that "the government does not allege that the defendant here had anything whatsoever to do with those matters and the government will offer no proof in any attempt to connect this defendant to those incidents" (18 R. 1432-1433). The court instructed the jury that it "admitted the journal and all of its contents so that [the jury] may assess the journal's credibility and authorship" (18 R. 1433).

To further corroborate the authenticity and credibility of the journal, Briggs-Middleton testified about her own independent recollection of the dates and events described in the journal (18 R. 1464-1466; 19 R. 1523-1529). Following her testimony, the court again instructed the jury:

> The witness has testified as to some incidents concerning a shooting at the house * * * and also another incident involving some men following him home. The government does not contend that this defendant had anything to do with that, and the government would not seek to elicit or provide any evidence to seek to prove any such connection.
>
> Now, I have allowed this testimony in those areas only to assist you in determining the credibility of the journal, the accuracy of the journal, and the authorship of the journal. So I have allowed this testimony for a limited purpose only (19 R. 1536-1537).

The court emphasized, "I have admitted this evidence on the other incidents in the journal only to help you determine the correctness, the accuracy, the authenticity, the authorship of the journal" (19 R. 1537). At the close of all the evidence, the court again instructed the jury that the other incidents of violence described in the journal and by Briggs-Middleton were admitted only for the jury to "assess the weight and credibility of the journal on this matter concerning the alleged search of the church," and repeated that the jury must not "make any adverse inference whatsoever against the defendant relative to those matters" (23 R. 2464-2465).

The district court did not abuse its discretion by admitting the evidence of other incidents of racial violence described in the journal and by Briggs-Middleton. Such evidence was admitted for the narrow purpose of corroborating the journal's credibility on matters related to this case. Neither the journal nor the witness implicated the defendant in any of those other incidents, and the court repeatedly

told the jury that it must not infer any connection between those incidents and the defendant. Accordingly, the defendant was not unfairly prejudiced by admission of the other incidents.

VII

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT

The defendant argues (Br. 63-68) that the evidence was insufficient because (1) Edwards's testimony was not credible; and (2) Edwards's uncorroborated testimony provided the only proof of interstate commerce. The defendant's argument fails on both grounds.

A. Standard Of Review

This Court reviews a district court's denial of a motion for judgment of acquittal *de novo*. See *United States* v. *Restrepo*, 994 F.2d 173, 182 (5th Cir. 1993). "The well established standard in this circuit for reviewing a conviction allegedly based on insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt. The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *Ibid.* (internal quotation marks and citations omitted). "Direct and circumstantial evidence

adduced at trial, as well as all inferences reasonably drawn from it, is viewed in the light most favorable to the verdict." *Ibid*. (citations omitted).

B. Edwards's Testimony Was Credible

The defendant's argument that Edwards's testimony was not credible is without merit. It is well-settled that "[t]he jury is the final arbiter of the weight of the evidence, and of the credibility of witnesses." *Restrepo*, 994 F.2d at 182 (citing *United States* v. *Sanchez*, 961 F.2d 1169, 1173 (5th Cir.), cert. denied, 506 U.S. 918 (1992)). The defendant had ample opportunity to attack Edwards's credibility at trial but failed to elicit inconsistent testimony from Edwards about the facts of this case. The testimony cited in the defendant's brief shows only that for more than 40 years, Edwards denied knowing anything about the victims' disappearances, a fact that Edwards admitted on both direct and cross examination (17 R. 1148-1150, 1220; 21 R. 2066). Since July 2006, however, when Edwards was given immunity and ordered to testify in this case, Edwards has never changed his story (21 R. 2061-2062). The defendant provides no reason why a reasonable jury could not have believed Edwards.

Moreover, "[t]estimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature." *United States* v. *Bermea*, 30 F.3d

1539, 1552 (5th Cir. 1994). Edwards testified that on May 2, 1964, he personally observed and assisted the defendant in abducting and beating the victims (17 R. 1180-1191); that he was present during the search of the Roxie church (17 R. 1188-1191); that before he went home, Clyde Seale told him that the victims "would be took care of," meaning that they would be killed (17 R. 1191-1192); and that, several weeks later, he attended a Klan meeting where the defendant described in detail how he, Clyde Seale, Jack Seale, and Ernest Parker took the victims in their car through Louisiana to Parker's land on Palmyra Island and then threw the victims into the river while they were still alive (17 R. 1193-1199). Because Edwards testified only to events that he personally observed and heard, his testimony was not incredible as a matter of law.

C. The Evidence Was Sufficient To Support The Jury's Finding Of Interstate Commerce

In order to prove a violation of 18 U.S.C. 1201, the United States had to prove that the defendant transported the victims in interstate commerce while they were still alive (23 R. 2460). The defendant claims that Edwards's testimony regarding this element was insufficient. The defendant is incorrect. Edwards testified that the defendant and others placed the victims in the trunk of Parker's car while they were still alive and drove from Natchez, Mississippi, across the river

to Louisiana, and up Interstates 84 and 65 to Parker's land on Palmyra Island (17 R. 1197). This Court has repeatedly recognized that "the uncorroborated testimony of an accomplice or co-conspirator can be sufficient to support the verdict." *Restrepo*, 994 F.2d at 182 (citations omitted).

Edwards's testimony, however, was corroborated by overwhelming evidence that the *only* way (today and in 1964) to arrive at Palmyra Island in Warren County, Mississippi, from all other parts of Mississippi, is to drive through Louisiana. Such evidence included the testimony of: (1) Renford Talbert Williams, who was Warden of the Louisiana Department of Wildlife and Fisheries in 1964 (16 R. 1011, 1023-1026); (2) Don Irby, who traveled twice with Ernest Parker from Natchez, Mississippi, to his land on Palmyra Island (19 R. 1656-1659); (3) Everett Wayne Finley, a close friend of the Parkers who spent his summers with them on Palmyra Island in the 1950s and 1960s (19 R. 1713-1714); (4) James Ingram, a former FBI agent who investigated this case in the 1960s and again in 2005 (22 R. 2167); and (5) Edward Putz, the former FBI agent who assisted in the investigation and in the arrest of the defendant in 1964 (22 R. 2212-2213). In addition, the United States introduced into evidence two maps of the region showing the location of, and routes to and from, Palmyra Island (Exh. G-74A, 75B). All of this evidence taken together was more than sufficient to support

a jury finding that the defendant transported the victims in interstate commerce. Accordingly, the district court properly denied the defendant's motions for judgment of acquittal (22 R. 2240, 2400).

CONCLUSION

For the foregoing reasons, this Court should affirm the defendant's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2008, two copies and one diskette containing an electronic copy of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by overnight carrier on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with this Court's order dated March 7, 2008, granting the United States' unopposed motion to file a brief in excess of the word count limitation but not to exceed 19,500 words, because it contains 19,177 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect 12, in 14-point Times New Roman font.

_____

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Date: March 14, 2008