No. 09-11229

IN THE SUPREME COURT OF THE UNITED STATES

JAMES FORD SEALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the 2007 indictment in this case was barred by the five-year statute of limitations applicable to non-capital crimes, 18 U.S.C. 3282, where the indictment charged petitioner with two counts of kidnaping in 1964, in violation of 18 U.S.C. 1201, which at the time provided for capital punishment and therefore was subject to no limitation on prosecution, see 18 U.S.C. 3281.

2. Whether the court of appeals correctly rejected petitioner's argument that his 1964 statement to the FBI should have been suppressed under Miranda v. Arizona, 384 U.S. 436 (1966), where petitioner argued to the district court and again in his initial appellate brief that his statement should be suppressed not under Miranda, but under pre-Miranda standards of voluntariness.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6:1-60)[1] is reported at 600 F.3d 473. Earlier opinions of the court of appeals (Pet. App. 2:1-20, 3:1-2, 4:1-11) are reported at 542 F.3d 1033, 570 F.3d 650, and 577 F.3d 566.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2010. The petition for a writ of certiorari was filed on June 4,

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated but comprises separate sections marked with numbered tabs. "Pet. App. 6:1-60" refers to pages 1 through 60 of tab 6.

2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of two counts of interstate kidnaping, in violation of 18 U.S.C. 1201(a), and one count of conspiracy to commit interstate kidnaping, in violation of 18 U.S.C. 1201(c). He was sentenced to life imprisonment. The court of appeals affirmed. Pet. App. 6:1-60.

1. Petitioner was a member of the White Knights of the Ku Klux Klan of Mississippi. On May 2, 1964, he and several fellow Klan members abducted Henry Dee and Charles Moore, two African-American teenagers, in Franklin County, Mississippi. They drove Dee and Moore to the Homochitto National Forest and beat them repeatedly. They then drove to Parker's Island, Mississippi -- passing through Louisiana on the way -- where they tied heavy objects to Dee and Moore and drowned them in the Mississippi River. The victims' bodies were found about two months later. Pet. App. 6:1-3.

On November 6, 1964, petitioner was arrested at his home by two Mississippi state police officers accompanied by two FBI agents. While the officers were driving petitioner to Jackson, Mississippi, one of the FBI agents accused petitioner of killing

Dee and Moore, saying, "We know you did it, you know you did it, the Lord above knows you did it." Petitioner responded, "Yes, but I'm not going to admit it, you are going to have to prove it." Pet. App. 6:8.

Petitioner was charged with murder in Mississippi state court, but the charges were dismissed without prejudice in 1965. Pet. App. 6:5.

2. On January 24, 2007, a grand jury charged petitioner with two counts of interstate kidnaping, in violation of 18 U.S.C. 1201(a), and one count of conspiracy to commit interstate kidnaping, in violation of 18 U.S.C. 1201(c). Pet. App. 6:3.

Petitioner moved to dismiss the indictment on the ground that it was barred by the statute of limitations. Although an "offense punishable by death" is not subject to any statute of limitations, 18 U.S.C. 3281, non-capital offenses are subject to a five-year limitations period, see 18 U.S.C. 3282(a). In 1964, a violation of Section 1201 was 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) (1958). In 1968, however, this Court stuck down Section 1201's death-penalty provision, see United States v. Jackson, 390 U.S. 570, and in 1972, Congress repealed it, making life imprisonment the maximum penalty for kidnaping, see Act for the Protection of Foreign Officials and

Official Guests of the United States, Pub. L. No. 92-539, § 201, 86 Stat. 1072 (1972 Act).[2]

The district court denied the motion to dismiss. The court agreed with "the vast majority of courts" that judicial invalidation of a death-penalty provision in a federal criminal statute does not change the limitations period applicable to that crime, and it held that the 1972 amendment to the kidnaping statute "was not made retroactive." Pet. App. 4:2-5 & n.2.

Before trial, petitioner also moved to suppress his 1964 statement to the FBI. Pet. App. 6:3. Petitioner argued that, because his statement was made before this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), pre-Miranda standards of voluntariness applied. In his motion and again at the suppression hearing, petitioner asked the district court to find that his statement was involuntary under pre-Miranda case law. The government agreed with petitioner that pre-Miranda standards applied but argued that the statement was voluntary. Applying the pre-Miranda totality-of-the-circumstances test urged by both parties, the court found that the statement was voluntary, and it denied the motion. Pet. App. 6:8-9.

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[2] In the Federal Death Penalty Act of 1994, Pub. L. No. 103-322, § 60003, 108 Stat. 1969, Congress amended Section 1201 to provide for capital punishment "if the death of any person results" from a kidnaping.

Petitioner was tried before a jury and found guilty on all counts. He was sentenced to life imprisonment. Pet. App. 6:4.

3. A panel of the court of appeals vacated petitioner's conviction and rendered a judgment of acquittal. Pet. App. 2:1-20. Petitioner argued in his initial appellate brief that the court should rely on pre-Miranda voluntariness standards in reviewing the denial of his suppression motion. Id. at 6:9. In response, the government noted that in Johnson v. New Jersey, 384 U.S. 719 (1966), this Court held that Miranda applies "to cases in which the trial began after the date of our decision." Id. at 721 (emphasis added); Pet. App. 6:9. The government explained that it had been mistaken in agreeing with petitioner that Miranda was inapplicable, but it argued that petitioner had waived any argument based on Miranda. Gov't C.A. Br. 46 n.9. In his reply brief, petitioner argued for the first time that his statement should have been suppressed under Miranda. Pet. App. 6:9-10. The court of appeals did not address the suppression issue, however, because it concluded that the 1972 amendment repealing the death-penalty provision of the kidnaping statute applied retroactively for statute-of-limitations purposes and therefore barred petitioner's 2007 indictment. Id. at 2:1-20.

4. The court of appeals granted rehearing en banc and vacated the panel's decision. Pet. App. 6:4. By an equally divided vote, the court affirmed the district court's denial of petitioner's

motion to dismiss the indictment on the basis of the statute of limitations. Id. at 3:1. The court ordered that the appeal be returned to the panel for consideration of the remaining issues in the case. Ibid.

Before the appeal was returned to the panel, petitioner asked the en banc court to certify the statute-of-limitations question to this Court under 28 U.S.C. 1254(2) and Supreme Court Rule 19. The court of appeals did so, Pet. App. 4:1, but this Court dismissed the certified question, 130 S. Ct. 12 (2009); Pet. App. 5:1. Justice Stevens, joined by Justice Scalia, issued a separate statement expressing the view that the case should be set for briefing and argument. Ibid.

5. In a 2-1 decision, the original panel of the court of appeals affirmed petitioner's conviction. Pet. App. 6:1-60.

a. Because the statute-of-limitations issue had been resolved by the en banc court, the panel did not address it. Pet. App. 6:4-5. With respect to the suppression issue, the court observed that petitioner had presented an "erroneous and misleading argument * * * both to the district court and to this court," id. at 6:10, by framing his argument in terms of pre-Miranda voluntariness standards, and that he "never put the district court on notice that the admissibility of his statement should be analyzed under Miranda," id. at 6:16. The court rejected petitioner's contention that he adequately brought the Miranda issue to the district

court's attention by arguing, as part of his voluntariness argument under Haynes v. Washington, 373 U.S. 503 (1963), that he had not been warned of his right to remain silent. Pet. App. 6:10-21. The court explained that the pre-Miranda test for voluntariness, which considered the totality of the circumstances, is in conflict with Miranda's bright-line rule that no statement shall be admitted unless the suspect is given four specific warnings. Pet. App. 6:11-14 (citing Dickerson v. United States, 530 U.S. 428 (2000)). The court thus concluded that petitioner had forfeited his argument that the district court should have suppressed his statement under Miranda. Id. at 6:21.

Applying the plain-error standard of United States v. Olano, 507 U.S. 725 (1993), the court of appeals concluded that the district court committed obvious error by failing to analyze the suppression issue under Miranda. Pet. App. 6:22. The court went on to hold, however, that reversal was unwarranted because petitioner had failed to satisfy Olano's requirement of showing that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." 507 U.S. at 736 (internal quotation marks omitted); Pet App. 6:24. In reaching that conclusion, the court emphasized that "the Government presented a strong case of guilt" at trial, and "[w]hile the defendant's statement may have been helpful to the Government, it was certainly not the centerpiece of its case." Id. at 6:24; see

id. at 6:23 (observing that the testimony of petitioner's co-conspirator provided the jury with "all of the gory details of the horrible crime," and the testimony "was corroborated by physical evidence" and the testimony of other witnesses). The court also noted "the defendant's responsibility for the court's error." Id. at 6:24.

b. Judge DeMoss dissented in relevant part. Pet. App. 6:37-60. In his view, petitioner had adequately preserved the argument that his statement should have been excluded under Miranda. Id. at 6:48. Judge DeMoss also argued that reversal was appropriate even on plain-error review because "the erroneous admission of the confession was highly prejudicial." Id. at 6:54.

ARGUMENT

Petitioner asserts (Pet. 6-13) that the indictment in his case should have been dismissed on the basis of the statute of limitations and (Pet. 13-18) that the district court committed reversible plain error in failing to suppress his statement to the FBI. The court of appeals correctly rejected both claims, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, petitioner's first claim is relevant only to decades-old offenses and therefore is of limited ongoing importance, and petitioner's second claim is entirely factbound. Further review is not warranted.

1. The indictment in this case alleged that, in 1964, petitioner kidnaped and killed two individuals, in violation of 18 U.S.C. 1201. At the time of the offense, such violations of 18 U.S.C. 1201 were "punishable by death," and thus, under 18 U.S.C. 3281, were subject to no limitation on prosecution. The court of appeals therefore correctly affirmed the district court's denial of petitioner's motion to dismiss, and its unpublished per curiam judgment does not warrant further review.

a. Petitioner argues (Pet. 8-10) that the decision below conflicts with United States v. Jackson, 390 U.S. 570 (1968), which invalidated the death-penalty provision of 18 U.S.C. 1201. According to petitioner (Pet. 9), Jackson means that his Section 1201 offense was a "non-capital crime" subject to the five-year statute of limitations set out in 18 U.S.C. 3282. That argument lacks merit. Jackson held that the death-penalty provision of 18 U.S.C. 1201, which authorized only juries to recommend punishment by death, was unconstitutional because it discouraged assertion of the Fifth and Sixth Amendment rights to a jury trial. 390 U.S. at 583-585. The Court made clear, however, that "elimination [of the death penalty] in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." Id. at 586. As the Court explained, "[b]y holding the death penalty clause of the Federal Kidnaping Act unenforceable, we leave the

statute an operative whole, free of any constitutional objection." Id. at 591.

Although Jackson made the death-penalty provision of 18 U.S.C. 1201 unenforceable, it did not affect the statute of limitations applicable to violations of that statute that had been "punishable by death." As the Eighth Circuit explained in rejecting an argument similar to petitioner's:

> [T]he scope of the Jackson decision is limited to the constitutional infirmities attending imposition of the death penalty. * * * Generally speaking, limitation of the time for commencing the prosecution of a criminal charge is purely a matter of statute. Thus in deciding which limitation is applicable, we must look directly to the statute. And in interpreting the statute of limitations, the statute must be considered in light of the situation as it existed and presumably was known to Congress at the time of the passage of the statute.

United States v. Coon, 411 F.2d 422, 425 (1969) (internal quotation marks and citations omitted). The court thus concluded that 18 U.S.C. 3281, not 18 U.S.C. 3282, was the controlling statute of limitations for offenses for which Congress had authorized the death penalty, even though that penalty was unenforceable under Jackson. Coon, 411 F.2d at 425.

Every court of appeals to consider the question has held, in accord with the Eighth Circuit and the court below, that judicial invalidation of a death-penalty provision does not affect the applicable statute of limitations. See United States v. Ealy, 363 F.3d 292, 296-297 (4th Cir.), cert. denied, 543 U.S. 862 (2004); United States v. Edwards, 159 F.3d 1117, 1128 (8th Cir. 1998),

cert. denied, 528 U.S. 825 (1999); United States v. Manning, 56 F.3d 1188, 1196 (9th Cir. 1995); Willenbring v. Neurauter, 48 M.J. 152, 179-180 (C.A.A.F. 1998). That is because statutes of limitations "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." Manning, 56 F.3d at 1196.[3] Accordingly, even after Jackson, petitioner's offense was one "punishable by death" for statute-of-limitations purposes.

b. Petitioner also contends (Pet. 10-11) that the 1972 Act, which amended the kidnaping statute by, among other things, repealing the death penalty, effected a procedural change that

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[3] By contrast, when a statute provides additional procedural protections for a defendant facing the death penalty, courts generally do not treat the case as a capital case if the death penalty is unavailable. See, e.g., United States v. Steel, 759 F.2d 706, 709-710 (9th Cir. 1985) (concluding that judicial invalidation of the death penalty eliminates the right to a witness list that 18 U.S.C. 3432 provides in capital cases); United States v. McNally, 485 F.2d 398, 406-407 (8th Cir. 1973) (treating death-authorized offense as non-capital for purposes of Federal Rule of Criminal Rule 24(b)(1), which provides capital defendants with 20 peremptory challenges, because the death penalty could not be constitutionally enforced), cert. denied, 415 U.S. 978 (1974). Petitioner's reliance (Pet. 9) on United States v. Hoyt, 451 F.2d 570 (5th Cir. 1971), cert. denied, 405 U.S. 995 (1972), and United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977), is therefore misplaced, because those cases simply held that a defendant is not entitled to 20 peremptory strikes under Rule 24(b)(1), or to the prosecution's witness list under 18 U.S.C. 3432, where the government is barred from seeking the death penalty. See Hoyt, 451 F.2d at 571; Kaiser, 545 F.2d at 475. In any event, any intra-circuit conflict with those cases would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

should apply retroactively for statute-of-limitations purposes. Petitioner is incorrect.

The 1972 Act made several substantive changes to the federal kidnaping statute, including creating new crimes. For example, the Act extended the geographic reach of 18 U.S.C. 1201 to include kidnapings committed within the special maritime, territorial, and aircraft jurisdiction of the United States. See 1972 Act § 201, 86 Stat. 1072. It also expanded the scope of the statute to include acts committed against foreign officials and official guests, regardless of where those acts were committed. See ibid. In addition, the Act eliminated the death penalty and made life imprisonment the maximum punishment. See ibid. Under the saving clause provided in 1 U.S.C. 109, the amendment of Section 1201 to eliminate the death penalty does not apply to offenses committed before the date of the amendment. See 1 U.S.C. 109 ("The repeal of any statute shall not have the effect to release or extinguish any penalty * * * incurred under any such statute."). And even without the saving clause, a substantive change in the criminal law would normally be construed to apply only to future conduct. See Carr v. United States, 130 S. Ct. 2229, 2237 n.6 (2010); Johnson v. United States, 529 U.S. 694, 701 (2000). That is especially true of the 1972 Act, because its expansion of the scope of substantive liability under Section 1201 could not constitutionally be applied retroactively. See U.S. Const. Art. I, § 9, Cl. 3.

Petitioner notes (Pet. 10) that statutes of limitations are procedural laws that apply retroactively. That is true, but it is irrelevant here because the Act did not amend any limitations statute. Rather, it changed the maximum penalty for kidnaping, which had an indirect effect on which existing statute of limitations applied to future violations of 18 U.S.C. 1201.

Indeed, there is no evidence either in the text of the 1972 Act or in its legislative history to indicate that Congress was concerned with changing the limitations period for prosecuting aggravated kidnapings. In amending Section 1201, Congress was concerned not with limitations on prosecution, but rather -- as the Act's title suggests -- with expanding protection of certain foreign nationals in the United States. Consistent with that purpose, Congress initially set out to "restore[] the death penalty for kidnaping by correcting the defect in the present provision disclosed in [Jackson]." S. Rep. No. 1105, 92d Cong., 2d Sess. 14 (1972). Before Congress voted on final passage of the bill, however, this Court decided Furman v. Georgia, 408 U.S. 238 (1972), which effectively invalidated the federal death penalty as it existed at that time. In response, Congress removed the death-penalty language from the final version "to avoid facial invalidity." 118 Cong. Rec. 27,116 (1972) (statement of Rep. Poff). That history undermines any argument that Congress wanted to make it easier for offenders to escape prosecution.

Petitioner asserts (Pet. 11-12) that the decision below conflicts with United States v. Massingale, 500 F.2d 1224 (4th Cir. 1974), but that is incorrect because Massingale did not address the statute-of-limitations issue presented here. Instead, the issue in that case was whether the defendants, who were charged under 18 U.S.C. 1201, were entitled to 20 peremptory challenges under Federal Rule of Criminal Procedure 24(b)(1), and to a list of prosecution witnesses under 18 U.S.C. 3432. 500 F.2d at 1224. The court concluded that, because Congress had amended the kidnaping statute to eliminate the death penalty, the defendants were not entitled to those benefits. Ibid. Massingale is consistent with cases holding that an otherwise-capital offense for which the death penalty is unavailable is treated as capital for statute-of-limitations purposes but not for purposes of providing the procedural protections associated with capital cases. See note 3, supra. It has no bearing on the question presented here.[4]

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[4] In United States v. Coleman, No. 4:08-CR-701 CAS, 2010 WL 750101 (E.D. Mo. Mar. 2, 2010), the district court held that a prosecution for murder for hire, in violation of 18 U.S.C. 1958, was not time-barred where the murder took place in 1992 and the indictment was returned in 2008. Until 1994, a violation of Section 1958 was not punishable by death, but in 1994, the statute was amended to provide for the death penalty. The court in Coleman accepted the government's argument that "the 1994 amendment extending the statute of limitations for murder-for-hire offenses in § 1958 applies to all cases for which the limitations period had not yet expired." 2010 WL 750101, at *5. As this brief indicates, that conclusion is inconsistent with the view of the United States. The court in Coleman has not yet entered a final judgment; the government will notify that court and defense counsel, by providing them with a copy of this brief, that it is not the position of the

c. Because the statute-of-limitations issue presented here can arise only in cases in which the offense was committed before 1968 (when Jackson was decided) or 1972 (when Section 1201 was amended), it is of minimal ongoing importance. Petitioner argues (Pet. 7-8) that "[t]he pendency of civil rights cold cases potentially involving the exact same statute of limitations issue as this case provides a compelling reason [for this Court] to decide this important legal issue." He relies on a letter the government submitted at the request of the court of appeals (Pet. App. 7:1-2), and on the Attorney General's First Annual Report to Congress Pursuant To The Emmett Till Unsolved Civil Rights Crime Act of 2007 (Apr. 7, 2009) (Pet. App. 8:1-8). Those documents do not support petitioner's contention.

In its letter to the court of appeals, the government made clear that "the Civil Rights Division currently has no pending prosecutions within [the court of appeals'] jurisdiction under the federal kidnaping statute, 18 U.S.C. 1201, for conduct that occurred prior to 1972." Pet. App. 7:1. Although the letter stated that the FBI was reviewing 22 matters that could not "be excluded as potential federal kidnaping cases," it also stated that only seven were "particularly promising because the underlying murders occurred in very close proximity to state borders." Ibid.

United States that the 1994 amendment to the murder-for-hire statute extended the statute of limitations applicable to offenses committed before that date.

Similarly, the Attorney General's 2009 report identified only one pending civil-rights cold case -- this case. Id. at 8:4-5. Although the report identified 93 open investigations, id. at 8:8, it explained that "federal jurisdiction over these historic cases is limited" and that there are many "difficulties inherent in these cold cases," id. 8:1-2.

In any event, the numbers provided in the letter and in the 2009 report are now outdated. The federal government currently has no pending civil-rights-era prosecutions under any statute. See Attorney General's Second Annual Report to Congress Pursuant to the Emmett Till Unsolved Civil Rights Crime Act of 2007 13 (May 13, 2010) (App., infra, 1-16). There are now only 52 open investigations;[5] the Civil Rights Division has determined that all but three can be excluded as potential kidnaping cases; and insufficient evidence currently exists to characterize any of those three as promising. Accordingly, the possibility of any future prosecutions under 18 U.S.C. 1201 for offenses committed before 1972 is purely speculative. In any event, even if a few more cases were to materialize, that would hardly make the statute-of-limitations issue one of "national importance" (Pet. 7) warranting review by this Court.

[5] One additional investigation has been closed since the 2010 report to Congress was drafted.

2. Petitioner renews his contention (Pet. 13-18) that his 1964 statement to the FBI should have been suppressed under Miranda v. Arizona, 384 U.S. 436 (1966). The court of appeals correctly rejected that claim, holding that petitioner had failed to preserve the argument in the district court and that he was not entitled to relief on plain-error review. That factbound conclusion does not conflict with any decision of this Court or any other court of appeals.

a. Petitioner asserts that his suppression motion was adequate to preserve his claim that the admission of his statement violated Miranda. That is incorrect. Petitioner concedes (Pet. 14) that his suppression motion "did not specifically cite Miranda." Indeed, as the court of appeals observed, petitioner not only did not invoke Miranda; he affirmatively disclaimed reliance on it, indicating that Miranda was inapplicable and that his statement should be evaluated under the pre-Miranda voluntariness standard of Haynes v. Washington, 373 U.S. 503 (1963). Pet. App. 6:9 & n.9; see Pet. Mem. in Supp. of Mot. to Suppress 1-2 ("At the time the statement was made, the United States Supreme Court had not yet issued their famous opinion in the case of [Miranda]. * * * In order to determine whether a confession or admission is voluntary, the Court must look at the 'totality of the circumstances.'"). The court of appeals concluded that petitioner's "affirmative misrepresentation of the correct standard

did more than fail to alert the court to the proper standard, it affirmatively led the court into error." Pet. App. 6:20. Here, as in the court of appeals, petitioner "points to no case holding that a party who affirmatively asked the trial court to apply an incorrect legal standard nevertheless preserved his argument for appeal that the lower court erred in failing to apply the correct standard." Id. at 6:21. The court correctly held that petitioner had failed to preserve his claim.[6]

Petitioner contends (Pet. 15-16) that the decision below conflicts with Osborne v. Ohio, 495 U.S. 103 (1990), in which this Court stated that "an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is * * * sufficient to preserve the claim for review." Id. at 125 (quoting Douglas v. Alabama, 380 U.S. 415, 422 (1965)). The decision below is entirely consistent with that proposition, however. The court of appeals cited Osborne, Pet. App. 6:20, conducted a detailed examination of the arguments petitioner presented to the district court, id. at 6:8-21, and concluded that his motion was not

[6] Petitioner did not raise his Miranda argument in his initial appellate brief, presenting it only in his reply brief. Like other courts of appeals, the court below "[o]rdinarily * * * [does] not consider any argument made for the first time in a reply brief." Pet. App. 6:21. Thus, the court of appeals would have been within its discretion not to consider petitioner's claim at all, providing an additional reason why it did not err in reviewing the claim only for plain error.

adequate "to bring the alleged federal error to the attention of the trial court," Osborne, 495 U.S. at 125.

b. Petitioner further errs in arguing (Pet. 16-18) that the court of appeals' application of plain-error review conflicts with this Court's decision in United States v. Olano, 507 U.S. 725 (1993). In Olano, this Court interpreted Federal Rule of Criminal Procedure 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Under Rule 52(b), a defendant who fails to make a timely objection may obtain relief on appeal only by showing that (1) the district court committed an error, (2) the error was "clear" or "obvious," (3) the error affected "substantial rights," and (4) the error seriously affected "the fairness, integrity, or public reputation of judicial proceedings." Olano, 507 U.S. at 732-737 (internal quotation marks omitted).

Petitioner contends (Pet. 17) that the court "erred by exercising its discretion" under the fourth part of the Olano test "to leave untouched the district court's suppression ruling." The misapplication of a properly stated rule of law would not be a basis for this Court's review, see Sup. Ct. R. 10, and in any event, the court of appeals correctly declined to exercise its discretion under the fourth part of the Olano test because the court was "satisfied that the Government presented a strong case of guilt" even without petitioner's statement. Pet. App. 6:24.

In so doing, the court of appeals followed the approach this Court took in Johnson v. United States, 520 U.S. 461 (1997), and United States v. Cotton, 535 U.S. 625 (2002). In both of those cases, the Court assumed without deciding that a constitutional error affected substantial rights, but it declined to reverse the defendants' convictions because it was unlikely that the errors affected the jury's verdicts. See Johnson, 520 U.S. at 470; Cotton, 535 U.S. at 633; see also United States v. Marcus, 130 S. Ct. 2159, 2166 (2010) (reaffirming that "in most circumstances, an error that does not affect the jury's verdict does not significantly impugn the 'fairness,' 'integrity,' or 'public reputation' of the judicial process"). Here, petitioner's statement to the FBI would not have affected the jury's verdict because, although it was "helpful to the Government, it was certainly not the centerpiece of its case." Pet. App. 6:24. Rather, the government's primary evidence at trial was the compelling testimony of petitioner's co-conspirator, which, as the court of appeals emphasized, was corroborated in many key respects by physical evidence and the testimony of other witnesses. Pet. App. 6:23. Petitioner had the burden on appeal of demonstrating that admission of his statement affected the jury's verdict, see Marcus, 130 S. Ct. at 2164, but he failed to make any effort to do so, even after the government brought the error to his attention.

The court of appeals also correctly "decline[d] to exercise [its] discretion to give relief" for the independent reason that petitioner bore substantial "responsibility for the court's error." Pet. App. 6:24. The court explained that "[a]lthough in this case both the defendant and the Government were in error in arguing the incorrect standard for the admissibility of [petitioner's] statement, [petitioner's] counsel had the primary responsibility of marshaling the facts and law to persuade the court to exclude [the] statement." Ibid. One purpose of the requirement that a party object in order to preserve a claim of error is to "prevent[] a litigant from 'sandbagging' the court -- remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." Puckett v. United States, 129 S. Ct. 1423, 1428 (2009). That purpose would be frustrated if a defendant could obtain reversal based on an error that he invited the district court to commit. Reversal for such an error would undermine, rather than promote, the "public reputation of judicial proceedings." Olano, 507 U.S. at 736; see United States v. Young, 470 U.S. 1, 17-19 (1985) (declining to grant relief on plain-error review based on improper remarks by a prosecutor in closing argument, in part because the remarks were invited by defense counsel's comments); United States v. Lopez-Escobar, 920 F.2d 1241,

1246 (5th Cir. 1991) ("A party cannot complain on appeal of errors which he himself induced the district court to commit.").[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2010

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[7] Even if petitioner's challenge to the court of appeals' plain-error analysis otherwise warranted review, this case would be a poor vehicle for considering it. Petitioner's underlying claim is that the district court should have suppressed evidence at his trial, but under Federal Rule of Criminal Procedure 12(e), such a claim is "waive[d]" -- not merely forfeited -- if it is not timely raised. See Olano, 507 U.S. at 733 (distinguishing waiver from forfeiture). Accordingly, several courts of appeals, including the court below, have concluded that arguments not raised in a Rule 12 motion may not be considered on appeal, even under the plain-error standard. See United States v. Chavez-Valencia, 116 F.3d 127, 130 (5th Cir.), cert. denied, 522 U.S. 926 (1997); see also United States v. Hamilton, 587 F.3d 1199, 1216 n.9 (10th Cir. 2009), cert. denied, 130 S. Ct. 3443 (2010); United States v. Rose, 538 F.3d 175, 182-183 (3d Cir. 2008); United States v. Santos Batista, 239 F.3d 16, 19-20 (1st Cir.), cert. denied, 534 U.S. 850 (2001); but see United States v. Johnson, 415 F.3d 728, 730 (7th Cir. 2005). The court of appeals did not address the government's argument that petitioner waived any claim under Miranda, but that argument would provide an alternative ground for affirming the judgment.

THE ATTORNEY GENERAL'S
SECOND ANNUAL REPORT TO CONGRESS
PURSUANT TO THE EMMETT TILL
UNSOLVED CIVIL RIGHTS CRIME ACT OF 2007

MAY 13, 2010

INTRODUCTION

This report is submitted pursuant to the Emmett Till Unsolved Civil Rights Crime Act of 2007 ("The Emmett Till Act").[1] This second Department of Justice ("DOJ" or "Department") Report describes the Department's activities in the year since the first report[2] and summarizes prior Department activities.

Section I of the Report gives a history of the Department's civil rights cold case work and provides an overview of the factual and legal challenges we face in our ongoing efforts to prosecute unsolved civil rights era homicides. Over the past year, Department attorneys and FBI agents interviewed potential witnesses, reviewed thousands of pages of documents, files, and evidence and we have now concluded our investigation into 56 of 109 cold cases involving 122 victims. Though very few prosecutions have resulted, the Department's efforts have helped bring closure to many families. This Section describes the Department's efforts locating the victims' next of kin, personally notifying them of the closure, and providing them with a detailed letter explaining the facts of their relative's case and our decision.

Section II of the Report sets forth the steps we have taken since we began the Cold Case Initiative in 2006 and describes how our efforts to bring justice and/or closure to the families has evolved as it has become apparent that most of these cases will not result in prosecutions. This Section describes our ongoing efforts to generate leads, uncover relevant information and heighten public awareness through extensive outreach efforts. This year, the Department conducted significant outreach to interested community groups, law enforcement organizations, academic communities, and the media. Section II chronicles our cold case presentations at national conferences, in classes, and as part of town hall meetings. And, this Section updates the Department's efforts regarding our successful prosecution of James Ford Seale for the 1964

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[1] Pub. L. 110 – 344 (2008). The Act requires the Attorney General to annually conduct a study and report to Congress not later than 6 months after the date of enactment of this Act, and each year thereafter. Among other issues, the study and report is required to discuss the number of open investigations within the Department for violations of criminal civil rights statutes that occurred not later than December 31, 1969, and resulted in a death. The Act also requires the report to discuss any applications submitted for grants under section 5, the award of any grants, and the purposes for which any grant amount was expended. Additionally, the Act requires the Attorney General to designate a Deputy Chief in the Criminal Section of the Civil Rights Division to coordinate the investigation and prosecution of these criminal cases, and authorizes the Deputy Chief to coordinate investigative activities with State and local law enforcement officials.

[2] The Attorney General's First Report to Congress Pursuant to the Emmett Till Unsolved Civil Rights Crime Act of 2007 was submitted on May 13, 2009.

murders of Charles Moore and Henry Dee. Over the course of this year the Department participated in extensive appellate litigation to uphold this conviction in a process that culminated on March 12, 2010 when the Fifth Circuit affirmed the conviction.

Section III of the Report sets forth where things currently stand with respect to the 109 matters opened for review during this process. Section III identifies by name all 122 victims and the approximate date and location of death. It also identifies the two cases which were successfully prosecuted and the 54 matters for which, after significant investigation and review, we have made a decision to close the matter without prosecution. In the vast majority of the matters that we have closed without prosecution, all identified subjects are deceased. In others, there is insufficient evidence to establish that a racially motivated homicide occurred, as opposed to some other manner of death outside the scope of the Emmett Till Act.

We believe that we have made great progress this year, and look forward to continued progress in the upcoming year.

I. THE DEPARTMENT OF JUSTICE'S EFFORTS TO INVESTIGATE AND PROSECUTE UNSOLVED CIVIL RIGHTS ERA HOMICIDES

A. Overview and Background

The Department of Justice continues to fully support the goals of the Emmett Till Act. For more than 50 years, the Department of Justice has been instrumental in bringing justice to some of the nation's most horrific civil rights era crimes, including the Department's groundbreaking federal prosecution of 19 subjects for the 1964 murders of three civil rights workers in Philadelphia, Mississippi, a case commonly referred to as the "Mississippi Burning" case. These crimes occurred during a terrible time in our nation's history when all too often crimes were not fully investigated or prosecuted or evidence was ignored by juries because of the color of the victims' skin. The Department of Justice believes that racially motivated murders from the civil rights era constitute some of the greatest blemishes upon our history. As such, the Department stands ready to lend our assistance, expertise, and resources to assist in the investigation and possible prosecution of these matters.

Unfortunately, federal jurisdiction over these historic cases is quite limited. The Ex Post Facto Clause of the Constitution and federal statutory law have limited the Department's ability to prosecute most civil rights era cases at the federal level. For example, two of the most important federal statutes that can be used to prosecute racially motivated homicides, 18 U.S.C. § 245 (interference with federally protected activities) and 42 U.S.C. § 3631 (interference with housing rights), were not enacted until 1968. Under the Ex Post Facto Clause, these statutes cannot be applied retroactively to conduct that was not a crime at the time of the offense.

The five-year statute of limitations on federal criminal civil rights charges presents another limitation on such prosecutions. In 1994, death-resulting violations of 18 U.S.C. § 242 (civil rights violations committed under color of law) and 18 U.S.C. § 245 (interference with federally protected activities) became capital offenses; as capital offenses, these statutes are no longer subject to a statute of limitations. However, even death-resulting civil rights violations which occurred prior to 1994 are governed by the then-existing five-year statute of limitations.

In addition, there are certain difficulties inherent in these cold cases: subjects die; witnesses die or can no longer be located; memories become clouded; evidence is destroyed. Even with our best efforts, investigations into historic cases are exceptionally difficult, and justice in few, if any, of these cases will ever be reached inside of a courtroom. Notwithstanding these legal and factual limitations, the Department believes that the federal government can still play an important role in these cases.

The Department has always been willing to reassess and review cold cases when new evidence came to light, and, as set forth below, played a major role in successfully prosecuting three such cold cases prior to the Cold Case Initiative. In order to further the Department's mission, in 2006, the FBI began its Cold Case Initiative to identify and investigate the murders committed during our nation's civil rights era.

In October 2008, the Emmett Till Act was signed into law, directing the Department to designate a Deputy Chief in the Civil Rights Division to coordinate the investigation and prosecution of civil rights era homicides, and a Supervisory Special Agent in the FBI's Civil Rights Unit to investigate those cases. The Civil Rights Division and the FBI were also given the authority to coordinate their activities with State and local law enforcement officials. For fiscal years 2009 through 2018, the Act authorized $10,000,000 per year to the Attorney General, to be allocated as appropriate by the Department's Civil Rights Division and the FBI; $2,000,000 per year for grants to State or local law enforcement agencies for expenses associated with the investigation and prosecution by them of civil rights era homicides; and $1,500,000 per year to the Department's Community Relations Service ("CRS") to bring together law enforcement agencies and communities in the investigation of these cases. For fiscal year 2009, no funds authorized by this Act were appropriated; thus, the Department had to meet its obligations under this project by shifting resources from other important civil rights programs, projects, and prosecutions. For fiscal year 2010, Congress approved the President's budget request, which included, among other things, a request for $1,600,000 for the Civil Rights Division's Cold Case Unit.

B. Pre-Cold Case Initiative Efforts

For many years now, the Department has played an important role in the investigation and prosecution of civil rights era homicides, notwithstanding the constitutional and

jurisdictional limitations noted above. Even prior to launching the Cold Case Initiative in 2006, the Department was able to play an important – indeed, essential – role in three successful cold case prosecutions.

For example, in 1997, the FBI reopened the investigation into the 1963 bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama which resulted in the deaths of an eleven year old and three fourteen year old girls. Civil Rights Division attorneys worked with the United States Attorney for the Northern District of Alabama in conducting a federal grand jury investigation. We were able to assume federal jurisdiction because a predecessor statute to the current arson and explosives statute, 18 U.S.C. § 844, provided that in situations where death resulted from an explosive transported in interstate commerce, the penalty was death, and under 18 U.S.C. § 3281, crimes punishable by death have no statute of limitations. Ultimately, we could not prove that the explosive traveled in interstate commerce, so we released the grand jury investigation to the State of Alabama. State charges were filed against defendants Thomas Blanton and Bobby Cherry in Birmingham, Alabama, in May 2000. Defendant Blanton was convicted in April 2001, and sentenced to four life terms; Cherry was convicted in May 2002, and sentenced to four life terms. The United States Attorney for the Northern District of Alabama was cross-designated to serve as the lead prosecutor in the state trials. Thus, this case – which was investigated by federal agents and a federal grand jury, and ultimately successfully prosecuted by a federal prosecutor in state court – provides a perfect example of the Department's efforts to find creative ways to pursue civil rights era cases.

In 1999, the Civil Rights Division and the United States Attorney's Office for the Southern District of Mississippi reopened the investigation into the 1966 murder of Ben Chester White, an elderly African-American farm worker, by Ernest Henry Avants, a Mississippi Klansman. Avants, along with two other men, lured White to Pretty Creek Bridge in the Homochitto National Forest outside of Natchez, Mississippi. Once there, White was shot multiple times with an automatic weapon, and also was shot in the head with a single barrel shotgun. Following the killing, which was intended to lure Dr. Martin Luther King to the area, White's body was thrown off the bridge. His bullet ridden body was discovered several days later. A 1967 state prosecution for murder resulted in an acquittal for Avants and a mistrial for another defendant who is now deceased. A third defendant, also now deceased, was never prosecuted by state officials. The Justice Department opened an investigation into the death of White in 1999, using a federal statute that prohibits murder on federal property, 18 U.S.C. § 1111. Avants was indicted in June 2000, convicted in February 2003 and sentenced to life in prison in June 2003.

Another matter in which federal resources contributed to the conviction of a civil rights era murderer involved the reopened investigation into the 1964 the murder of three civil rights workers in Philadelphia, Mississippi - an incident commonly known today as the "Mississippi Burning" case. At the time of the murders, the Assistant Attorney General of the Civil Rights

Division, John Doar, personally led the investigation and prosecution of these murders. Despite facing extraordinary hurdles, he was able to secure the convictions of 7 of the 18 defendants charged with these murders; however, they received sentences ranging from just 4 to 10 years of imprisonment. One of the ringleaders, Ku Klux Klan member Edgar Ray Killen, received a mistrial because one of the jury members refused to convict a "preacher." The Department, however, remained committed to ensuring that Justice eventually prevailed in that case. The FBI worked with local law enforcement and provided invaluable assistance on the reopened investigation, which resulted in the indictment of Killen on three counts of state murder charges on January 6, 2005. Killen was finally convicted on June 21, 2005 for three counts of manslaughter for his involvement in the case. The then-80-year-old Killen was sentenced to twenty years for each count, to be served consecutively.

In addition to the three successful cold case prosecutions, the Department also made significant contributions in the recent re-investigation of the murder of Emmett Till, the then-14-year-old victim of a brutal murder in Money, Mississippi in 1955, and the individual for whom the Congressional Act authorizing renewed federal investigations of these cold cases is named. Photographs of Mr. Till's mutilated body caused a national outcry and galvanized the civil rights movement. Two men, now deceased, were acquitted by a jury of 12 white men of murdering Emmett Till in a 1955 state prosecution. Shortly after the trial, the two men admitted to a magazine reporter that they had killed the teenager. Since then, allegations persisted that there were others – most of whom are also deceased – involved in the murder. At the request of the District Attorney for the 4th Judicial District of Mississippi and the Department's Civil Rights Division, the FBI commenced a new investigation of the murder in May 2004, and in March 2006 turned over a more than 8,000 page report to the District Attorney.[3] The District Attorney presented the matter to a grand jury in February 2007 and the grand jury declined to issue any new indictments in the matter. Although the grand jury did not issue an official report on the matter, several members of the biracial grand jury spoke with members of the press, and they reported that the grand jury unanimously agreed that there was insufficient evidence to establish probable cause that any surviving individual participated in the kidnapping or murder of Emmett Till. In March 2007, the FBI and the District Attorney met with family members of Emmett Till and discussed the investigative findings with them. Additionally, the FBI produced a detailed report on the investigation, a redacted version of which is available on the FBI's website, www.fbi.gov. Although this particular case did not result in a successful prosecution, we believe that the exhaustive investigation conducted by the FBI gave some sense of closure to the victim's family members and the community. Additionally, the investigation served to benefit history by unearthing the long-lost transcript of the 1955 trial.

[3] The five-year statute of limitations on any potential federal criminal civil rights violation has expired, and there were no other applicable federal statutes; thus, there was no possibility of a federal prosecution.

These four cold cases represent the four different models in which the Department of Justice has participated in the investigation and prosecution of civil-rights era crimes: 1) non-civil rights federal statutes, such as the federal murder statute, have been used to successfully prosecute the perpetrators in federal court; 2) when the federal investigation failed to establish federal jurisdiction, a federal prosecutor was cross-designated to serve as a state prosecutor and was able to use the federal investigation in a successful State trial; 3) federal and local investigators have jointly investigated and provided assistance to a State prosecutor in an effort to bring a State prosecution; and 4) a thorough investigation has been completed and even though no prosecution has resulted, some closure has been provided.

II. THE COLD CASE INITIATIVE

A. Overview

In order to further the Department's commitment to investigating and prosecuting civil rights era homicides, the FBI in 2006 began its Cold Case Initiative (the Initiative) to identify and investigate the murders committed during the civil rights era. The Department and the FBI have jointly participated in a multi-faceted strategy to address these investigations.

The first step was to identify cases for inclusion under the Initiative. Each of the 56 field offices was directed to identify cases within its jurisdiction that might warrant inclusion on a list of cold cases meriting additional investigation. In 2007, we began the next phase of this initiative, which includes a partnership with the National Association for the Advancement of Colored People (NAACP), the Southern Poverty Law Center (SPLC), and the National Urban League to identify possible additional cases for investigation and to solicit their assistance with already identified matters.

As the investigations progressed, we fully realized the challenges associated with locating surviving subjects, witnesses and family members of the victims. In an effort to generate leads and other information, we began an extensive outreach campaign, soliciting assistance from community groups and other NGOs, engaging the academic community, reaching out to the media, and working with state and local law enforcement organizations. We have received valuable information as a result of these efforts, and our outreach campaign will continue. And at a minimum, we believe that our demonstrated commitment already has provided the communities with the assurance that they are being heard and that the Department is doing everything possible to investigate these important cases.

B. Ongoing Outreach Efforts

As part of the Department's efforts to uncover relevant information regarding our unsolved civil rights era homicides, we continue to engage in a comprehensive outreach program, meeting with a broad array of interested individuals and organizations.

i. Meetings with NGOs and Community Activists

In July 2009, the Attorney General met with the Chairman of the Emmett Till Justice Campaign, a cousin of Emmett Till, and other interested advocates, academics, journalists and members of the media to discuss issues related to the Emmett Till Act. This meeting followed up on an earlier meeting in which Department officials met with a number of key supporters of the Cold Case Initiative, including the Chairman of the Emmett Till Justice Campaign, and the brother of slain civil rights worker James Chaney to update them on the status of the Department's cold case work. During these meetings, we also discussed how these groups and individuals could: (1) help law enforcement locate witnesses and family members of the victims; (2) assist in providing psychological comfort and closure to victims; and (3) fulfill a historical role by documenting the stories underlying these cases through investigative journalism, research, and documentary films. We expect these productive dialogues with these groups to continue throughout the Initiative.

Senior officials with the Department and the FBI have also met with and will continue to meet with representatives from the NAACP, SPLC, and the National Urban League. The purpose of these meetings is threefold: 1) to encourage those organizations to reach out to their field offices and to try to obtain information on cold cases; 2) to provide the organizations with updates on our progress; and 3) to educate these organizations on the scope of the Emmett Till Act and the impediments that we face in pursuing these matters.

ii. Law Enforcement Outreach

We have also reached out to federal and local law enforcement officials and organizations to educate them about the Emmett Till Act and to solicit assistance and information. As noted earlier, the FBI reached out to all of its field offices and instructed them to identify all potential cold cases in their districts. The Department has proactively reached out to all of the United States Attorneys' Offices in districts in which there are open cold cases, notifying them of the cases in their districts and seeking their assistance.

A Department official presented on the Emmett Till Act at the 2009 Criminal Civil Rights Conference at the National Advocacy Center in Columbia, South Carolina. The conference was attended by Assistant United States Attorneys and FBI agents from across the country. A Department official also gave a presentation on the Emmett Till Act at the FBI's Civil Rights training program in 2009, attended by agents from across the country.

In an effort to broaden the outreach to prosecutors at a state and local level, Department officials participated in the annual conference of the National Black Prosecutors Association in July 2009, and presented on the James Ford Seale case. The FBI and Department officials have also met with representatives from the Mississippi Highway Safety Patrol, the Alabama Bureau of Investigation, and numerous other state and local law enforcement agencies.

iii. Collaboration with Academic Communities

In January 2008, November 2008, July 2009, and October 2009, Department officials met with professors from the Syracuse University College of Law. The Syracuse law school founded a Cold Case Justice Initiative (CCJI) project in response to the unsolved 1964 murder in Ferriday, Louisiana of shoe shop owner Frank Morris, who suffered fatal burns when his store was set on fire, presumably by members of the Ku Klux Klan.[4] Under the supervision of the professors, Syracuse University College of Law students have researched thousands of documents related to the Morris matter and other cold cases in that geographic area. In addition, in October 2009, the Department and FBI met with a Syracuse undergraduate class in which students have done significant research on civil rights homicides. Syracuse has generously shared the results of the research conducted by its students.

We have also been in contact with a professor from Northeastern University School of Law, who is directing Northeastern University's Civil Rights and Restorative Justice Project, which engages students in matters relating to the civil rights movement. These students have also done extensive research on a number of our cold cases, and have shared their findings with us.

iv. Conferences and Town Hall Meetings

In addition to our efforts with scholars, the Department continues to reach out to local civil rights organizations and participate in conferences in an effort to encourage the active assistance of these groups. For example, an official from the FBI participated in the Mississippi Civil Rights Veterans Conference in Jackson, Mississippi in March 2009 and March 2010. In both instances, the official met with journalists, veterans of the civil rights movement, and others to discuss issues related to cold cases, explain our achievements with the Initiative, answer questions regarding specific cases, and request assistance with our efforts. In connection with the 2010 conference, the Attorney General issued a statement in support of the Emmett Till Act in which he encouraged citizens to come forward with any information they might have concerning civil rights era racially motivated homicides.

Similarly, in March 2009, officials from the FBI and the Civil Rights Division jointly participated in a two-day conference in Monroe, Georgia, sponsored by the Moore's Ford Memorial Committee. During that conference, officials participated in a panel discussion and met with community members, civil rights veterans, local law enforcement, jury consultants, and others in an attempt to re-invigorate the Moore's Ford investigation, which focuses on the

[4] It should be noted that the Department is continuing to vigorously pursue the Morris murder case and the FBI has offered a $10,000 reward for information leading to an indictment in the Morris matter.

lynching of two African-American couples on the Moore's Ford bridge in 1946. The FBI has offered reward money for information leading to an indictment in this matter.

During the October 2009 visit to Syracuse, New York, officials participated in a town hall meeting, which began with the screening of a documentary film about one of the cases under review as part of the Initiative. The officials granted an interview to a local public television program and met with community members, professors, journalists, and other interested persons in an attempt to identify leads and other information for the Cold Case Initiative in the northeast, where many African Americans relocated during the turbulent civil rights era.

The FBI also participated in a town hall meeting in Baton Rouge, Louisiana in November 2009, again partnering with a documentary filmmaker to screen one of his Cold Case documentaries in a community where some of these crimes occurred and where witnesses might reside.

In July 2010, a Department official is scheduled to deliver a presentation on the Cold Case Initiative at the NAACP's annual conference in Kansas City, Missouri.

v. Media Outreach

The Department and the FBI have embarked on an aggressive media outreach campaign, granting interviews to the Washington Post, National Public Radio, the British Broadcasting Company, 60 Minutes, Dateline, and other local media outlets to continue to elicit the public's assistance with locating witnesses to these crimes, as well as family members of the victims.

As noted in the first Report, in January 2009, the Department sponsored a joint press conference held by representatives from the FBI, the Civil Rights Division, the United States Attorneys and other prosecutors from the Northern and Southern Districts of Mississippi, senior officials from the United States Marshals Service, and the Mississippi Attorney General. During this press conference, the Department released the names of the victims whose murder cases are currently under review in the state of Mississippi, provided a phone number for a cold case hotline, and asked for citizen assistance in solving these crimes.

The Department continues to meet with journalists to seek input, ideas, and possible leads. For instance, we are regularly in contact with members of the Civil Rights Cold Case Project, a multi-partner, multi-platform effort focused on the unresolved history of the South during the civil rights era, seeking any information that it may have relevant to cold cases. Among the participants in that project are investigative reporters from Alabama, Mississippi, and Louisiana, who are vigorously investigating the matters in their respective regions. Investigative reporters from Michigan and Massachusetts are also contributing to the project. Another participant in that project is a documentary film maker from the Canadian Broadcasting

Corporation, who provided the Department with invaluable information during the investigation and successful prosecution of the James Ford Seale case.[5]

C. Prosecutions

The Cold Case Initiative resulted in one successful federal prosecution which was upheld on appeal this past year. This case involved the 1964 murders of 19-year-old Charles Moore and Henry Dee, in Franklin County, Mississippi. On May 2, 1964, James Ford Seale and other members of the Ku Klux Klan forced Moore and Dee into a car and drove the teenagers into the Homochitto National Forest. Mistakenly believing that Dee was a member of the Black Panthers and that he was bringing guns into the county, the Klansmen beat the boys while interrogating them about the location of the weapons. In order to stop the beating, the boys falsely confessed, telling the Klansmen that guns were stored in a nearby church. The Klansmen then split into two groups. One group went to search the church for the guns. The other group, including Seale, transported the victims across state lines, into Louisiana, and then back into Mississippi to a remote location on the Mississippi River. Moore and Dee, bound and gagged, were chained to a Jeep engine block and railroad ties, and were taken by Seale out onto the water in a boat, and were pushed overboard to their deaths. Their severely decomposed bodies were found months later.

Seale and another Klansmen, Charles Edwards, were arrested on state murder charges in late 1964, but the charges were later dropped. The Civil Rights Division and the United States Attorney's Office for the Southern District of Mississippi reopened an investigation into the murders in 2006. The new investigation revealed evidence that supported a federal prosecution under the federal kidnapping statute, 18 U.S.C. § 1201. Edwards, who was in the group of Klansmen who searched the church, but who did not participate in the actual murders, was granted immunity and testified against Seale, the only other surviving participant. Seale was indicted in January 2007, and convicted in June 2007, of two counts of kidnapping and one count of conspiracy. He was sentenced to three life terms. On appeal, when Seale's conviction was reversed by a three judge panel on a legal technicality involving the statute of limitations, the Department successfully sought en banc review. The en banc panel reinstated Seale's conviction and returned the case to the original panel for consideration of the remaining issues. On March 12, 2010 Seale's conviction was affirmed by the original Fifth Circuit panel.

D. Notifying Victim Family Members

[5] An FBI official was also interviewed by another film maker for a documentary on another particularly egregious cold case – the murder of Johnnie Mae Chappell, and African-American mother of ten who was gunned down by a car full of white men as she walked along the side of the road searching for her wallet. At the end of the documentary, which aired on the History Channel in February 2009, the film maker provided an FBI phone number for viewers to call with information related to any cold cases.

During the past year, the FBI has completed its work on many of the investigations and has submitted them to the Department for review. The Department is in the process of reviewing these investigations and the thousands of documents provided by the FBI. Unfortunately, during this process, it has become apparent that due to the many impediments discussed earlier in this report, few, if any, of these cases will be prosecuted.

In an effort to nonetheless bring some sense of closure to the family members of these victims, the Department is writing letters to the next of kin when found. Pursuant to 68 Fed.Reg. 47610-01, excepting certain categories of disclosure from the Privacy Act, the Civil Rights Division has the authority to disclose information about the results of an investigation or case to family members of the victims. Thus, we have made the decision that our notification letters will detail our investigative efforts and our findings. We have also made the decision to have FBI agents hand deliver these letters to the family members.

The FBI has devoted considerable resources to locating the next of kin for the victims, successfully locating family members for 93 of the 122 victims. This past year, the FBI enlisted the public's assistance in locating next of kin at a town hall forum on November 18, 2009, at Southern University in Baton Rouge, Louisiana by presenting a list of the victims for whom the FBI was searching for next of kin. A press advisory alerted media to the announcement beforehand, and press packets were available at the event. Following the announcement, the FBI posted the Next of Kin list on the Seeking Information page of its website, and simultaneously issued a press release with updates and a link to the Seeking Information poster. Additionally, the information was publicized with a front page story on www.fbi.gov, email alerts to www.fbi.gov subscribers, a video on the FBI's YouTube channel, announcements on the FBI's Twitter feed and Facebook page, and through the "Wanted by the FBI" Podcast. A large number of media outlets picked up the story, including the Associated Press. This effort helped the FBI locate 12 of the 93 next of kin.

III. COLD CASE STUDY AND REPORT

As set forth above, the Department's efforts to investigate and prosecute unsolved civil rights era homicide cases predate the Emmett Till Act. During the course of the Department's focus on these matters, we have opened 109 matters, including 122 victims, for review. Two of those matters have been opened since the First Report to Congress was submitted in May 2009.

Thus far, the Department's efforts have resulted in two successful federal prosecutions, and two successful state prosecutions. The first federal case was *United States v. Avants*, 367 F.3d 433 (5th Cir. 2004), which was indicted in the Southern District of Mississippi in June 2000. Avants was convicted in February, 2003, and sentenced to life in prison. The second federal case was *United States v. James Ford Seale*, --- F.3d ---, 2010 WL 909199 (5th Cir. March 12, 2010), described in Section II.C. above, which was indicted in the Southern District of

Mississippi in January 2007. Seale was convicted in June 2007, and sentenced to three life terms.

The first successful federally-assisted state prosecution was the Sixteenth Street Church bombing case described above. The second successful federally-assisted state prosecution was the *State of Mississippi v. Edgar Ray Killen*. Charges were filed against Killen in Philadelphia, Mississippi, in January 2005; he was convicted of three counts of manslaughter in June 2005, and was sentenced to 60 years in prison.

Six of the 109 matters have been referred to state authorities. One of those matters is *In re: Emmett Till*. As discussed above, the District Attorney for the 4th Judicial District of Mississippi presented the matter to a grand jury in February 2007, and the grand jury declined to issue any new indictments. In another matter, State charges have been filed against then-Alabama State Trooper James Bonard Fowler for the 1965 murder of Jimmie Lee Jackson in Marion, Alabama. The murder of Jackson, an unarmed civil rights protester, was one of the events which led to the Selma to Montgomery marches. In May 2007, Fowler was charged with murder in Marion, Alabama. His October 2008 trial date was vacated, and the court has not yet set a new trial date.

Thus far, our review has revealed no viable federal statutory authority for any of the matters other than the federal murder statute used in *United States v. Avants* and the federal kidnapping statute used in *United States v. Seale*. In 39 of the cases closed without prosecution, all identified subjects are deceased. In 14 of the closed cases, there was insufficient evidence of a racially motivated homicide, as opposed to an accidental death, a suicide, a heart attack, a homicide committed by a black subject for non-racial reasons, or some other manner of death outside the scope of the Emmett Till Act.

Since January 2007, at least 57 federal prosecutors have worked on cases under review as part of the Department's Cold Case Initiative and the Emmett Till Act. Although no matters are currently under federal indictment, several cases have been identified as potentially viable prosecutions at the state level. The resources involved in a viable prosecution are enormous. More than 40 federal employees participated in the Seale prosecution alone. That number does not include the numerous retired federal employees, local law enforcement officials, or contract employees who provided additional assistance.

The Department has received no applications for grants from State or local law enforcement agencies under the Emmett Till Act.

Below is a chart listing the 122 victims whose deaths the Department has reviewed and is reviewing in accordance with the Emmett Till Act:

NAME OF VICTIM	INCIDENT LOCATION	INCIDENT DATE	CLOSING DATE
1. Louis Allen	Amite County, Mississippi	January 31, 1964	
2. Andrew Lee Anderson	Crittendon County, Arkansas	July 17, 1963	April 9, 2010
3. Frank Andrews	Lisman, Alabama	November 28, 1964	
4. Isadore Banks	Marion, Arkansas	June 8, 1964	
5. John Larry Bolden	Chattanooga, Tennessee	May 3, 1958	April 15, 2010
6. Preston Bolden	San Antonio, Texas	May 8, 1953	
7. James Brazier	Dawson, Georgia	April 20, 1958	April 6, 2009
8. Thomas Brewer	Columbus, Georgia	February 18, 1956	April 6, 2009
9. Hilliard Brooks	Montgomery, Alabama	August 13, 1952	April 9, 2010
10. Benjamin Brown	Jackson, Mississippi	May 11, 1967	
11. Charles Brown	Yazoo City, Mississippi	June 18, 1957	April 16, 2010
12. Gene Brown/a.k.a Pheld Evans	Canton, Mississippi	1964	April 21, 2010
13. Jessie Brown	Winona, Mississippi	January 13, 1965	April 19, 2010
14. Carrie Brumfield	Franklinton, Louisiana	September 12, 1967	
15. Eli Brumfield	McComb, Mississippi	October 13, 1961	April 16, 2010
16. Johnnie Mae Chappell	Jacksonville, Florida	March 23, 1964	
17. Jesse Cano	Brookville, Florida	January 1, 1965	
18. Silas Caston	Hinds County, Mississippi	March 1, 1964	May 2, 2010
19. James Chaney	Philadelphia, Mississippi	June 21, 1964	
20. Thad Christian	Anniston, Alabama	August 28, 1965	
21. Clarence Cloniger	Gaston, North Carolina	October 10, 1960	April 3, 2009
22. Willie Countryman	Dawson, Georgia	May 25, 1958	April 6, 2009
23. Vincent Dahmon	N/A	N/A	April 12, 2010
24. Jonathan Daniels	Lowndes County, Alabama	August 20, 1965	
25. Woodrow Wilson Daniels	Yalobusha County, Alabama	June 25, 1958	April 12, 2010
26. Henry Hezekiah Dee	Parker's Landing, Mississippi	May 2, 1964	March 15, 2010
27. George Dorsey	Monroe, Georgia	July 25, 1946	
28. Mae Dorsey	Monroe, Georgia	July 25, 1946	
29. Roman Ducksworth	Taylorsville, Mississippi	April 9, 1962	April 12, 2010
30. Joseph Dumas	Perry, Florida	May 5, 1962	April 9, 2010
31. Joseph Edwards	Vidalia, Mississippi	July 12, 1964	
32. Willie Edwards	Montgomery, Alabama	January 23, 1957	
33. James Evansington	Tallahatchie, Mississippi	December 24, 1955	April 12, 2010
34. Andrew Goodman	Philadelphia, Mississippi	June 21, 1964	
35. Mattie Greene	Ringgold, Georgia	May 20, 1965	
36. Jasper Greenwood	Vicksburg, Mississippi	July 10, 1964	
37. Jimmie Lee Griffin	Sturgis, Mississippi	September 24, 1965	
38. Paul Guihard	Oxford, Mississippi	September 30, 1962	
39. A.C. Hall	Macon, Georgia	October 11, 1962	
40. Rogers Hamilton	Lowndes County, Alabama	October 22, 1957	

41. Adlena Hamlett	Sidon, Mississippi	January 11, 1966	
42. Samuel Hammond	Orangeburg, South Carolina	February 8, 1968	
43. Collie Hampton	Winchester, Kentucky	August 14, 1966	
44. Alphonso Harris	Albany, Georgia	December 1, 1966	April 12, 2010
45. Isaiah Henry	Greensburg, Louisiana	July 28, 1954	
46. Arthur James Hill	Villa Rica, Louisiana	August 20, 1965	
47. Ernest Hunter	Savannah, Georgia	September 13, 1958	April 6, 2009
48. Jimmie Lee Jackson	Marion, Alabama	February 18, 1965	
49. Luther Jackson	Philadelphia, Mississippi	October 25, 1959	April 16, 2010
50. Wharlest Jackson	Natchez, Mississippi	February 27, 1967	
51. Ernest Jells	Clarksdale, Mississippi	October 20, 1963	April 16, 2010
52. Joseph Jeter	Atlanta, Georgia	September 13, 1958	May 2, 2010
53. Nathan Johnson	Alabaster, Alabama	May 8, 1966	
54. Marshall Johns	Ouachita Parish, Louisiana	July 13, 1960	April 22, 1010
55. Birdie Keglar	Sidon, Mississippi	January 11, 1966	
56. Bruce Klunder	Cleveland, Ohio	March 7, 1964	April 16, 2010
57. William Henry "John" Lee	Rankin County, Mississippi	February 25, 1965	
58. George Lee	Belzoni, Mississippi	May 7, 1955	
59. Herbert Lee	Amite County, Mississippi	September 25, 1961	April 16, 2010
60. Richard Lillard	Nashville, Tennessee	July 20, 1958	April 15, 2010
61. George Love	Ruleville, Mississippi	January 8, 1958	
62. Maybelle Mahone	Zebullon, Georgia	December 5, 1967	April 6, 2009
63. Dorothy Malcolm	Monroe, Louisiana	July 25, 1946	
64. Roger Malcolm	Monroe, Louisiana	July 25, 1946	
65. Sylvester Maxwell	Canton, Mississippi	January 17, 1963	May 2, 2010
66. Bessie McDowell	Andalusia, Alabama	June 14, 1956	April 9, 2010
67. Ernest McPharland	Ouachita Parish, Louisiana	July 13, 1960	April 22, 2010
68. Robert McNair	Pelahatchie, Mississippi	November 6, 1965	
69. Clinton Melton	Sumner, Mississippi	December 3, 1955	April 12, 2010
70. Delano Middleton	Orangeburg, South Carolina	February 8, 1968	
71. James Andrew Miller	Jackson, Georgia	August 30, 1964	April 12, 2010
72. Booker T. Mixon	Clarksdale, Mississippi	September 12, 1959	
73. Neimiah Montgomery	Cleveland, Mississippi	August 10, 1964	April 12, 2010
74. Charles Edward Moore	Parker's Landing, Mississippi	May 2, 1964	March 15, 2010
75. Harriette Moore	Mims, Florida	December 25, 1951	
76. Harry Moore	Mims, Florida	December 25, 1951	
77. Oneal Moore	Varnado, Louisiana	June 2, 1965	
78. William Moore	Attalia, Alabama	April 23, 1963	
79. Frank Morris	Ferriday, Louisiana	December 10, 1964	
80. James Motley	Elmore County, Alabama	November 20, 1966	April 12, 2010
81. Samuel O'Quinn	Centreville, Mississippi	August 14, 1959	
82. Herbert Orsby	Canton, Mississippi	September 7, 1964	April 12, 2010
83. Will Owens	New Bern, North Carolina	March 5, 1956	April 3, 2009

84. Mack Charles Parker	Pearl River County, Mississippi	May 4, 1959	
85. Larry Payne	Memphis, Tennessee	March 28, 1968	
86. Charles Horatious Pickett	Columbus, Georgia	December 21, 1958	April 12, 2010
87. Albert Pitts	Ouachita Parish, Louisiana	July 13, 1960	April 22, 2010
88. David Pitts	Ouachita Parish, Louisiana	July 13, 1960	April 22, 2010
89. Jimmy Powell	New York City, New York	July 16, 1964	
90. William Roy Prather	Corinth, Mississippi	October 31, 1959	
91. Johnny Queen	Fayette, Mississippi	August 8, 1965	
92. Donald Raspberry	Okolona, Mississippi	February 27, 1965	May 17, 2010
93. James Reeb	Selma, Alabama	March 8, 1965	
94. James Earl Reese	Gregg County, Texas	October 22, 1955	April 15, 2010
95. Fred Robinson	Edista Island, South Carolina	August 5, 1960	
96. Johnnie Robinson	Birmingham, Alabama	September 15, 1963	April 9, 2010
97. Willie Joe Sanford	Hawkinsville, Georgia	March 1, 1957	
98. Michael Schwerner	Philadelphia, Mississippi	June 21, 1964	
99. Marshall Scott	Orleans Parish, Louisiana	January, 1965	
100. Jessie James Shelby	Yazoo City, Mississippi	January 21, 1956	May 24, 2010
101. Ollie Shelby	Hinds County, Mississippi	January 22, 1965	April 16, 2010
102. George Singleton	Shelby, North Carolina	April 30, 1957	April 16, 2010
103. Ed Smith	Stateline, Mississippi	April 27, 1958	November 5, 2009
104. Henry Smith	Orangeburg, South Carolina	February 8, 1968	
105. Lamar Smith	Brookhaven, Mississippi	August 13, 1955	April 12, 2010
106. Maceo Snipes	Butler, Georgia	July 18, 1946	April 12, 2010
107. Eddie Stewart	Jackson, Mississippi	July 9, 1966	
108. Isaiah Taylor	Ruleville, Mississippi	June 26, 1964	April 12, 2010
109. Emmett Till	Money, Mississippi	August 28, 1955	December 28, 2007
110. Ann Thomas	San Antonio, Texas	April 8, 1969	April 15, 2010
111. Freddie Lee Thomas	Sidon, Mississippi	August 19, 1965	
112. Selma Trigg	Hattiesburg, Mississippi	January 21, 1965	May 2, 2010
113. Ladislado Ureste	San Antonio, Texas	April 23, 1953	April 20, 2010
114. Hubert Varner	Atlanta, Georgia	September 10, 1966	April 6, 2009
115. Clifton Walker	Woodville, Mississippi	February 29, 1964	
116. Virgil Ware	Birmingham, Alabama	September 23, 1963	
117. James Waymers	Allendale, South Carolina	July 10, 1965	April 15, 2010
118. Ben Chester White	Natchez, Mississippi	June 10, 1966	October 16, 2003
119. Robert Wilder	Ruston, Louisiana	July 17, 1965	
120. Rodell Williamson	Camden, Alabama	May 20, 1967	May 2, 2010
121. Archie Wooden	Camden, Alabama	December 25, 1967	April 20, 2010
122. Samuel Younge	Tuskagee, Alabama	January 3, 1966	