No. 07-60897

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

RYAN MICHAEL TEEL,

Appellant

ON APPEAL FROM THE 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 oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 18 U.S.C. 3231. This Court has jurisdiction pursuant to 28 U.S.C. 1291. Judgment was entered against the defendant on November 2, 2007. USCA5 1014-1019.[1] The defendant filed a timely notice of appeal on November 5, 2007. USCA5 1020.

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[1] Citations to "USCA5 __" are to pages in the sequentially paginated district court record lodged with this Court; citations to "Tr. __" are to pages in the sequentially numbered trial transcript; citations to "Gov't Exh. __" are to trial exhibits introduced by the government; citations to "Sent. Tr. __" are to pages in the transcript of Teel's sentencing hearing; citations to "Br. __" are to pages in Teel's brief as appellant; references to "R.E. Tab __" are to the numbered tabs in Teel's Record Excerpts.

STATEMENT OF ISSUES

1. Whether the government's exercise of peremptory strikes discriminated on the basis of race or sex in jury selection.

2. Whether the district court abused its discretion in making certain evidentiary rulings.

3. Whether a citizen's right not to have excessive force used against him by a police officer is an established right.

4. Whether the district court erred in failing to use Teel's proposed self-defense jury instruction.

5. Whether the district court violated Teel's Sixth Amendment right by sentencing Teel based on the underlying offense of second degree murder.

6. Whether the government's use of Teel's prior sworn affidavit in cross-examining him violated Teel's Fifth Amendment right against self-incrimination.

STATEMENT OF THE CASE

On March 21, 2007, a federal grand jury returned a five-count superceding indictment against Officer Ryan Michael Teel and three co-defendants, Officers James Ricky Gaston, Daniel Evans, and Karl W. Stolze, all of whom were employed in the "booking" area of the Harrison County Adult Detention Center (the Jail) in Harrison County, Mississippi. Teel was charged with four counts of violating federal law in connection with his abuse of pretrial detainees (inmates) at the Jail. USCA5 332-342.

Count 1 of the indictment charges Teel with conspiracy to deprive inmates at the Jail of their constitutional right to due process in violation of 18 U.S.C. 241.[2] The indictment identifies a number of overt acts that Teel and his co-conspirators committed in furtherance of the conspiracy, including assaults on several inmates such as Jessie Lee Williams, Jr., Abra Horn, Michelle Abrams, and Kasey Alves. The indictment charges that those assaults caused bodily injury to the inmates in question and resulted in the death of Williams. Count 1 also specifies that Teel and his co-conspirators concealed their assaults on inmates by writing false, vague, and misleading reports about those incidents. More generally, Count 1 specifies that officers employed in the booking area of the Jail unnecessarily used OC spray[3] against inmates, assaulted inmates in the booking area shower, and choked inmates until they passed out. USCA5 333-337.

Count 2 of the indictment charges Teel with use of excessive force in the assault on Jessie Lee Williams, Jr., resulting in bodily injury and death, in violation of 18 U.S.C. 242. USCA5 337. Count 3 charges Teel with knowingly

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[2] Count 1 also charged Gaston, Evans, and Stolze with conspiracy in violation of 18 U.S.C. 241. USCA5 333-337. Officer Gaston was tried with Teel and was acquitted on this count. USCA5 894. Officers Evans and Stolze pleaded guilty to violating 18 U.S.C. 241. See *United States* v. *Evans*, No. 07-CR-90 (S.D. Miss. filed July 30, 2007); *United States* v. *Stolze*, No. 07-CR-92 (S.D. Miss. filed Aug. 1, 2007). The indictment also charged Gaston with two counts of assaulting specific inmates in violation of 18 U.S.C. 242. USCA5 338. Gaston was also acquitted of those charges. USCA5 897-898.

[3] "OC spray" stands for olein capsicum resin spray, which is also known colloquially as pepper spray or mace. Tr. 378.

falsifying and making a false entry in a record or document – concerning the incident with Williams – with the intent to impede, obstruct, and influence the investigation of a matter within the jurisdiction of a department or agency of the United States, in violation of 18 U.S.C. 1519. USCA5 337. Count 4 charges Teel with use of excessive force in the assault on Michelle Abrams,[4] resulting in bodily injury, in violation of 18 U.S.C. 242. USCA5 338.

Teel filed a motion for acquittal and a motion to dismiss pursuant to Federal Rule of Criminal Procedure 29 at the close of the government's case, Tr. 1270, and again at the close of the government's rebuttal case, Tr. 1803. The district court denied those motions. Tr. 1278, 1804.

On August 16, 2007, after a nine-day trial, a jury found Teel guilty on Counts 1-3[5] and acquitted him on Count 4. USCA5 894-897. Using a special verdict form, the jury further found with respect to Counts 1 and 2 that Williams died as a result of Teel's conduct. USCA5 894-895.

On November 1, 2007, the district court held a sentencing hearing and sentenced Teel to life in prison. USCA5 1014-1019.

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[4] Michelle Abrams is identified in the indictment as "M.A." Tr. 1815.

[5] In his opening brief, Teel failed to challenge his conviction for violating 18 U.S.C. 1519 (Count 3), and has waived his right to do so. *In re Texas Mortg. Servs. Corp.*, 761 F.2d 1068, 1073 (5th Cir. 1985).

STATEMENT OF FACTS

As detailed in the following pages, the evidence presented to the jury demonstrated that officers employed in the booking area of the Harrison County Adult Detention Center, including Officer Ryan Michael Teel, engaged in a pattern of abusing inmates and covering up that abuse. The conspiracy included a number of other officers employed at the Jail: William Priest, Timothy Moore, Regina Rhodes, and Morgan Thompson, all of whom pleaded guilty to one or more federal crimes and testified at trial;[6] Karl Stolze, Daniel Evans, and Preston Wills, all of whom pleaded guilty to conspiracy;[7] and Rick Gaston, who was tried along with Teel and acquitted.

1. The Pattern Of Abuse Of Inmates By Booking Officers

The jury heard extensive testimony about the culture of abuse in the booking area of the Jail. Former booking officers who were charged as co-conspirators and/or pleaded guilty to federal crimes in relation to their mistreatment of inmates in the booking area testified that booking operated under its own set of rules, see Tr. 383-384, 556-557, 1009, which permitted and promoted widespread abuse of inmates. The jury heard testimony from those co-

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[6] See *United States* v. *Rhodes*, No. 06-CR-65 (S.D. Miss. filed Aug. 2, 2006); *United States* v. *Thompson*, No. 06-CR-116 (S.D. Miss. filed Nov. 21, 2006); *United States* v. *Priest*, No. 07-CR-04 (S.D. Miss. filed Jan. 18, 2007); *United States* v. *Moore*, No. 07-CR-68 (S.D. Miss. filed July 11, 2007).

[7] See *United States* v. *Evans*, No. 07-CR-90 (S.D. Miss. filed July 30, 2007); *United States* v. *Stolze*, No. 07-CR-92 (S.D. Miss. filed Aug. 1, 2007); *United States* v. *Wills*, No. 06-CR-137 (S.D. Miss. filed Dec. 12, 2006).

conspirators that they routinely taunted and assaulted inmates. Tr. 403, 412, 550, 573, 1195, 1473-1474, 1487. Such assaults included throwing inmates around, dragging them to the floor, and bouncing their heads on hard surfaces. Tr. 403-404. Assaults on inmates were frequently unnecessary and were not responsive to any threatening behavior on the part of inmates. Tr. 404, 411, 1025. Officer Gaston, who was in charge of booking, encouraged officers to teach inmates "a lesson" if the inmates "had gotten on [officers'] nerves." Tr. 408.

The jury also heard testimony from co-conspirators about specific methods they used in the booking department to assault inmates. Although all of the booking officers were trained in the proper use of OC spray, tasers, and methods of physical restraint, see Tr. 602-627, 634-676, they routinely misused those tools. For example, officers sprayed toilet seats and other surfaces inside the cells with OC spray so that inmates were randomly contaminated when they used the facilities. Tr. 420-421, 563-564, 1250-1251. Officers testified that they specifically saw Teel engage in such behavior. Tr. 564, 1258-1259, 1263. Officers were trained to decontaminate an inmate as soon as possible after using OC spray; however, officers in booking, including Teel, sometimes sprayed inmates who were inside holding cells and then closed the doors without decontaminating the inmates simply because the inmates were being a nuisance but were not a threat. Tr. 421, 553, 1017. When the inmates started yelling because of the pain caused by the OC spray, the officers often laughed. Tr. 564,

1251. Officers used OC spray as a means of punishing inmates although they knew that was not permitted. Tr. 1017, 1170, 1250.

Teel's co-conspirators in booking also testified that they used their tasers unnecessarily. *E.g.*, Tr. 451, 566. On at least one occasion, Teel announced to his fellow officers that he was going to tase an inmate who had not even arrived at the Jail yet, and therefore was neither posing a threat to anyone at the Jail nor refusing to comply with Teel's orders. Tr. 565. When the inmate arrived, Tell took him into the shower, had him remove all of his clothes, and then tased him under his scrotum, although the inmate was not a threat at the time of the tasing. Tr. 432-433, 565-567. Teel later bragged about the incident. Tr. 432-433, 567.

The jury also heard testimony from the booking officers with whom Teel conspired about their inappropriate use of restraint tactics on inmates. Those officers, including Teel, often choked inmates – sometimes until the inmate passed out – although that was not an approved method of restraint. Tr. 413-414, 437, 841-842, 1025, 1220-1221. At least some of the people Teel choked were restrained in handcuffs at the time. Tr. 842. Although Jail rules prohibited officers from "hogtying" inmates, officers in booking used that technique. Tr. 709-711, 1103, 1250, 1521; Gov't Exh. 10. Officers also used the "restraint chair" as a means of punishing inmates. Tr. 1182.

Several of Teel's co-conspirators testified about their awareness of the video cameras in the booking area. One officer testified that Officer Gaston referred to the cameras as their "enemy." Tr. 555-556. The officers knew that

there were no cameras in the shower and in the "B hallway." Tr. 407, 550, 555, 1009-1011, 1246. Booking supervisors instructed the officers that if they had to "do something" or "do anything," they should do it off camera in the shower or hallway. Tr. 555, 1009. Officers understood those instructions to mean that they should beat inmates in those areas so that they would not be caught on camera. Tr. 556, 1009. Officers in booking also discussed ways to fool the camera by falsely making it look like an inmate was the aggressor in an altercation[8] before throwing the inmate to the ground and hitting him. Tr. 408, 1012-1013. Officers also frequently yelled "stop resisting" at inmates during physical altercations for the benefit of the cameras, although the inmates were neither resisting nor fighting back. Tr. 434-435, 568-569, 1025-1026.

The jury heard extensive testimony from co-conspirators and other former officers about the "red light - green light" code they adhered to and frequently discussed. Tr. 1011, 1072, 1139, 1186, 1243. According to that code, officers were permitted to hit inmates in areas of the body covered by clothing – "green light" areas – where marks left by blows could not be seen, but were not supposed to strike inmates in "red light" areas such as the face. Tr. 1011, 1072-1073, 1186. Witnesses specifically heard Teel discussing this code. Tr. 1072, 1139, 1158.

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[8] For example, one former booking officer who was not charged as part of the conspiracy testified that officers had a habit of bumping an inmate's arm or elbow under the booking counter – an area that was outside the view of the cameras – so that it looked on camera as if the inmate were initiating an assault with his or her arm. Tr. 1012-1013.

Testimony also revealed that officers encouraged each other to use unnecessary force against inmates in booking. When Officer Rhodes, who was one of the only female officers in booking, took female inmates into the shower area to change into prison clothing, other officers frequently shouted "spray the bitch" at her, encouraging Rhodes to use OC spray on the inmates although the officers could not see into the shower and could not, therefore, determine whether any such force was called for. Tr. 435-436, 567, 840, 1027, 1073, 1133, 1169, 1230. If an officer was hesitant to use force against inmates, other officers in booking called him or her an "inmate lover," which was intended to convey that the officer was not part of the booking team. Tr. 436-437, 567-568, 1027, 1249-1250. Officers also bragged to each other about their assaults on inmates. Tr. 552, 845, 1165.

At one point, the abuse of inmates by officers in booking was so rampant that the Jail leadership – including three officers with a rank of Major – held a meeting with all of the booking officers as well as all of the "shift sergeants" who supervised officers throughout the Jail to discuss misconduct by booking officers. Tr. 380-382, 504-506; Gov't Exh. 11. Specifically, booking officers were instructed to stop cussing at, shouting at, mistreating, and intimidating inmates. Tr. 381; Gov't Exh. 11. The Jail leadership told the booking officers to stop hitting inmates and using force against inmates who were not a threat. Tr. 548-550, 1008. Officers who attended the meeting testified that Officer Gaston rolled his eyes during the meeting and subsequently called a meeting with the booking

officers to remind them not to get caught on camera assaulting inmates. Tr. 1008-1009. Gaston told the booking officers that booking was his "house" and that he would not be told how to run it by his supervisors at the Jail. Tr. 1009. Officers did not notice any changes in the way booking officers treated inmates after that meeting. Tr. 507, 549.

2. Specific Examples Of Abuse Identified In The Indictment

The indictment identified a number of specific instances of abuse against individual inmates.[9]

a. Jessie Lee Williams

On the night of February 4, 2006, an officer from the Gulfport Police Department arrested Jessie Lee Williams and brought him to the Harrison County Adult Detention Center. Tr. 677-681. At the time he was delivered to the Jail, Williams was not physically injured in any way. Tr. 680-681, 691-692, 701-702. Although he was verbally belligerent, he was not physically aggressive or threatening. Tr. 681, 703. The Gulfport officer turned Williams over to the booking officers at the Jail. Tr. 681. In addition to Teel, six officers with the Harrison County Sheriff's Department and one high school student who was present at the Jail as part of a "career discovery program" testified about the altercation they observed between Williams and Teel that night. Tr. 697-746 (student Jeremy Powell), 754-769 (Officer Dulong), 777- 800 (Officer Case), 813-

[9] The following incidents highlight some, but not all, of the incidents charged as substantive civil rights violations or overt acts of the conspiracy.

839 (Officer DeGeorge), 956-972 (Officer Correa), 1090-1111 (Officer Rhodes), 1174-1182 (Officer Thompson). The jury also watched a video recording of the altercation. Gov't Exh. 20B.

Williams arrived with his hands handcuffed behind his back. Tr. 701. He told the officers he wanted to fight them, but he did not initiate any physical contact or behave aggressively. Tr. 701, 703, 777. In response, Teel and other officers began taunting Williams. Tr. 703, 777-779, 958-960, 1091-1092. Teel told Williams that Williams would get his chance to fight Teel, that they would fight as soon as Teel finished his paperwork and removed Williams' handcuffs.[10] Tr. 958-960, 1091. After Williams' handcuffs were removed, Teel told him to place his hands on the counter and Williams refused. Tr. 702-703. Williams and Teel continued to argue back and forth until Teel took out his taser and threatened to use it on Williams. Tr. 1093. Officer Rhodes testified that she did not see any need for Williams to be tased at that time. Tr. 1093. Williams ultimately placed his hands on the counter until he was instructed to untie his shoes, which he started to do. Tr. 960-961, 972.

As Williams bent down to untie his shoes, Teel swung his foot back and kicked Williams in the torso. Tr. 704, 722, 961, 971, 1174. Up to that point, Williams was not physically aggressive towards Teel. Tr. 704, 961, 971-972. In

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[10] The jury heard testimony that Jessie Williams was approximately 5'7" tall and weighted approximately 175 pounds while Ryan Teel is approximately 6'2" tall and weighed 285 pounds at the time. Tr. 1508; Gov't Exh. 32 (Williams' medical records).

response, Williams charged at Teel and they fell to the ground where Williams hit his head on the wall. Tr. 704-705, 723, 961. Once they were on the floor, Teel started punching Williams repeatedly with forceful, closed-fist punches, some of which struck Williams in the head. Tr. 705-708, 725, 962, 1176-1177. Williams was lying face-down and was moving, but was not fighting back. Tr. 706. Although Williams was not resisting or being combative in any way at that point, Teel repeatedly punched Williams in the head. Tr. 724-725. Other officers got Williams under control, face-down on the floor. Tr. 1095. Officers Thompson and Rhodes testified that they did not perceive Williams to be a threat at that point. Tr. 1097, 1099-1100, 1179. Nevertheless, Teel used his taser against Williams at least twice and continued to deliver blows to Williams' head and upper body. Tr. 759, 760-762, 783-784, 800, 1097, 1180.

Even after Williams had his hands cuffed behind his back and remained lying on the floor face-down, Teel continued to punch Williams in the head, Tr. 725-726, 785-786, 962-963, 1099, although Williams was being compliant and noncombative, Tr. 962, 1099-1100, 1141, 1179. During this time, Teel also kicked Williams in the head at least twice. Tr. 759-761, 785-786. Teel then stood up and stepped over Williams, intentionally "stomp[ing]" on Williams' head with his boot. Tr. 709, 726, 1102-1103, 1179. Teel left the immediate area and returned with a spit mask[11] and a strap. Tr. 709-710, 726. Teel placed the spit

[11] A spit mask is an item made of soft mesh material that an officer could (continued...)

mask over Williams' head; Teel had previously filled the spit mask with OC spray. Tr. 710, 726, 788-789, 1100-1102. Teel then used the strap he had retrieved to hogtie Williams, after which he and another officer continued to punch Williams. Tr. 710-711, 726-727, 1104. Some of Teel's punches landed on Williams' head. Tr. 711, 1104. Teel then picked Williams up by the hogtie strap, carried him across the room, and dropped him, head first, onto the floor. Tr. 711-712, 727.

Teel and Rhodes then wrapped Williams in a restraint wrap; while wrapping him, the officers continued to punch Williams. Tr. 712-713, 727. Teel delivered additional forceful blows to the back of Williams' head during this time. Tr. 713, 727-728, 740. Officer DeGeorge testified that he was "shocked" to see Teel drive his knee into the back of Williams head at that point when Williams was restrained by several different means. Tr. 815. Officers Correa and Rhodes testified that Williams was restrained and compliant and was "absolutely not" a threat to himself or to any officers. Tr. 966, 1104.

After Williams was contained in the restraint wrap – and still handcuffed – Teel threw him into a restraint chair and strapped him into it. Tr. 713, 715, 729, 790. Although Williams was not resisiting, Tr. 820, Teel used his full strength and weight to tighten the straps on Williams and continued punching Williams in the head and upper body, Tr. 728-729, 791, 820-823. Teel took a strap and placed it around Williams' neck, choking him. Tr. 823-824, 1106-1107. While

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[11] (...continued)
place over the head of an inmate who was spitting. Tr. 1411-1412, 1461.

tightening the straps, Teel continued to punch Williams and repeatedly told Williams that Teel would kill him. Tr. 716-717, 742, 791, 823, 833, 1107, 1181. Officer Correa testified that he heard Teel scream obscenities and racial epithets at Williams during the assault. Tr. 964. Teel then grabbed Williams around the neck and threw the restraint chair into the wall. Tr. 716-717, 730.

Eventually, Teel removed the OC-filled spit mask from Williams' head and poured water over his face to decontaminate him. Tr. 717, 731. While doing this, Teel told Williams he hoped Williams did not drown from the water. Tr. 717, 731. Williams was bleeding, appeared unconscious, and seemed to be having trouble breathing. Tr. 718, 1108. After a nurse employed by the Jail examined Williams twice,[12] she instructed the officers to have Williams transported to the hospital in an ambulance. Tr. 765, 1111. When the nurse told Teel that Williams' eyes were fixed and dilated and that he needed an ambulance, Teel asked what else one would expect from a "crackhead" like Williams. Tr. 765. On the ride to the hospital, Williams was unconscious and was bleeding out of his ears. Tr. 824-825.

At the hospital, neurosurgeon Dr. James Doty evaluated Williams in the Emergency Room. Tr. 913. When Dr. Doty first saw Williams, Williams had marked swelling about his face and neck, blood coming out of both ears, and swollen eyes. Tr. 915. Williams was completely unresponsive except for lower

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[12] The nurse initially did not indicate that Williams needed to go to the hospital, Tr. 1133-1134,1144-1145, although nobody told the nurse at that point that Williams had been repeatedly punched and kicked in the head, Tr. 1168.

brain stem function such as withdrawal from pain, implying significant malfunction of his higher brain functions. Tr. 915-917. Williams was in a coma, and the blood seeping from his ears indicated a major trauma to his brain. Tr. 918. Dr. Doty ordered treatment to decrease brain swelling and ordered a CT scan to assess the damage to Williams' brain. Tr. 918-921.

The CT scan confirmed that Williams had a massive blood clot on the surface of his brain – also known as a subdural hematoma – that extended from the frontal area all the way around the right side of the brain to behind and beneath his ear. Tr. 922, 932. Dr. Doty testified that it was one of the most severe subdural hematomas he had ever encountered in his practice. Tr. 926. Because the clot was "quite thick," it had resulted in a massive shift of his brain to the left side off the midline. Tr. 922. Such a shifting of the brain compromises the oxygenation of the brain and can result in brain death. Tr. 923, 930. Where, as here, a patient does not have a skull fracture, such a brain injury is typically caused by severe blunt force trauma. Tr. 934-935.

Dr. Doty performed surgery in an attempt to save Williams, although he testified that his chances of saving Williams' life through any means at that point were less than one or two percent based on the severity of the blood clot and brain compression. Tr. 936. When Dr. Doty removed a portion of Williams' skull and opened the tissue layer beneath that, he removed a very large clot from the surface of the brain. Tr. 937. Williams' brain then started swelling and pushing outside the confines of the skull by an inch. Tr. 937. Dr. Doty could tell that the brain's

large drainage veins were completely torn and it was impossible for him to control the bleeding. Tr. 937-938. At that point, Dr. Doty testified, it was obvious that Williams would suffer brain death. Tr. 938. Dr. Doty closed Williams' scalp and moved him to intensive care. Tr. 938-939. After the anesthesia wore off, it was evident that he was brain dead. Tr. 939. Dr. Doty testified that if Williams had arrived in the Emergency Room soon after the blood clot began to form, he might have been able to save his life. Tr. 940.

Jessie Lee Williams died on February 6, 2006. Tr. 939. In the early hours of the morning following Teel's assault on Williams, Teel told Officer Case that Williams had gone to the hospital, was in critical condition, and was probably going to die. Tr. 792. Then Teel said, "Fuck 'em." Tr. 792.

b. Kasey Alves

On January 7, 2006, officers with the Biloxi Police Department arrested a very intoxicated Kasey Alves on a charge of trespassing at a casino. Tr. 846-847. Although Alves was verbally belligerent and attempted to pull away from the arresting officers at one point, he was not physically aggressive or violent. Tr. 847, 874. The Biloxi officers delivered Alves to the Harrison County Jail, at which time he had no visible injuries and was not bleeding. Tr. 848. Alves had his hands cuffed behind his back when he arrived at the Jail. Tr. 848-849, 1082.

The arresting officer placed Alves against a wall and told him to stay there so that the officer could finish his paperwork. Tr. 848. Alves left his spot against the wall and approached the arresting officer. Tr. 848. In response, the arresting

office pushed Alves back and said "stay here." Tr. 848. At that point, Teel confronted Alves and forcefully pushed Alves against a glass window. Tr. 848-849. The arresting officer testified that Alves was not a threat to himself or to others when Teel stepped in. Tr. 857-858. Teel then took Alves to the ground and punched him in the mouth. Tr. 850, 878, 1137. Alves remained handcuffed, with his hands behind his back, and was lying face down on the floor. Tr. 851, 861.

Although Alves was lying still and was not doing anything aggressive towards Teel, Teel doused his face with OC spray and then tied a pillowcase tightly around Alves' head. Tr. 850-851, 860-861, 867, 879, 1081-1083. Officer Rhodes, who was assisting Teel, testified that she saw no legitimate reason to spray Alves with OC spray. Tr. 1081. The arresting officer testified that Teel tied the pillowcase so tightly around Alves' face that they could see his facial features through the case, and that blood was seeping into the case. Tr. 851. Although officers at the Jail were trained to decontaminate someone as soon as possible after applying OC spray, Teel did nothing to decontaminate Alves. Tr. 852, 854. On the contrary, tying the pillowcase around Alves' face had the effect of holding in the OC spray and increasing the amount of pain Alves would feel from contact between the OC spray and his eyes, mucous membranes, and open cuts. Tr. 852-854. Alves testified that he could not breathe. Tr. 879.

Teel and Rhodes then wrapped Alves in a full body restraint, Tr. 853, 1080-1081, and placed him in a restraint chair, Tr. 855, 879, 1083-1084. Rhodes testified that she saw no legitimate reason to place Alves in the chair. Tr. 1081,

1084. Teel tightened the straps on the chair by bracing his feet against the chair. Tr. 856. Alves testified that the straps were so tight around his ankles, thighs, and chest that they cut off his circulation. Tr. 879. Teel told Alves that he could take him in a room and kill him and nobody would know. Tr. 880. Alves was left in the restraint chair for seven to eight hours. Tr. 880. As a result, he suffered acute renal failure, nerve damage, and muscle failure. Tr. 881. The jury viewed a video of this altercation. Gov't Exh. 53.

c. Michelle Abrams

On August 9, 2005, Michelle Abrams was locked in one of the holding cells in the booking department of the Jail when Teel and his supervisor – Officer Gaston – were working. Tr. 384-385. Abrams had been sprayed with OC spray earlier in the day and had been only partially decontaminated. Tr. 386, 496. Abrams was agitated, yelling, and hitting the wall with her food tray. Tr. 386. Gaston was irritated by the noise she was making and entered her cell with Teel. Tr. 386-388. Officer Priest, who was present, testified that she was not a threat to herself or to others while she was locked in her cell. Tr. 386. Teel and Gaston entered the cell and Abrams threw a cup of water in Teel's face. Tr. 397. In response, Teel punched Abrams in the face with a closed fist several times. Tr. 388-389, 398. Priest and Officer Thompson, who was also present, testified that the punches were contrary to the training all officers had received and were not justified by anything they saw. Tr. 400, 1193. As a result of the punches, Abrams bled from her face. Tr. 390, 397, 401. Gaston then tased Abrams two or three

times, once on the top of her head and once on her neck, although officers had been trained not to use a taser on an inmate's head. Tr. 390, 400. Thompson testified that he saw nothing that justified the use of the taser. Tr. 1193. After the incident concluded, Gaston told other officers that he had trained Abrams like a dog with his taser. Tr. 391, 1194; see also Tr. 1070. The jury reviewed a video of this altercation. Gov't Exhs. 37a, 37b.

d. Abra Horn

On February 8, 2005, Abra Horn was locked in a holding cell at the Harrison County Jail. Tr. 1063. As Officers Rhodes and Gaston were placing Horn in a cell, Horn spilled half a glass of water on them. Tr. 1064. In response, both Rhodes and Gaston punched Horn, who was lying on the floor, multiple times. Tr. 1064-1066, 1475. Rhodes testified that Horn was not a threat to her or to Gaston when they started punching her. Tr. 1065. The officers then handcuffed Horn and took her into the hallway to take her to central booking. Tr. 523, 1065-1066. As they were escorting Horn down the hallway, Horn spit at Rhodes and kicked out at her but did not make contact. Tr. 525-526, 1067. In response, Rhodes turned around and repeatedly punched Horn in the head and upper body. Tr. 526, 1068. At that time, Horn was still handcuffed and her arms were being held by two male officers. Tr. 526-527, 1067-1068. Rhodes testified that there was no legitimate reason for her to hit Horn. Tr. 1068. Officer Gaston, who was Rhodes' supervisor and was holding one of Horn's arms, did not try to stop

Rhodes from hitting Horn and did not say anything about the assault. Tr. 527-528, 1068.[13]

3. Pattern Of False Report Writing

The jury also heard extensive testimony that booking officers conspired to write and file false reports concerning their use of force against inmates. Although they knew that the Jail had a policy requiring officers to write and file a use of force report and a longer narrative every time they used force on an inmate, the practice in booking was to write and file such reports only when a use of force resulted in a visible injury to the inmate or when the inmate filed a complaint. Tr. 405, 555, 1014-1015, 1240.

When booking officers did file reports, the reports were often intentionally inaccurate in a number of consistent respects. Tr. 405-406, 1014, 1088, 1090, 1240. First, officers generally collaborated in writing their reports to make sure their stories matched up, were overly favorable to the officers, and placed blame for any altercation on the inmate. Tr. 405-406, 555, 1015, 1160, 1183, 1209, 1240, 1243. Second, officers generally wrote their narrative reports in order to give the false impression that the inmate was the aggressor and that force was needed. Tr. 406, 554, 1086-1087, 1089, 1243. Third, when officers hit, punched, or kicked inmates, they intentionally gave the false impression in their reports that

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[13] Testimony at trial also described a number of other incidents in which officers assaulted inmates including Joe Wilson, Tr. 1049-1056; Timothy Oliver, Tr. 328-367; Only Al-Khidir, Tr. 417-419, 557-562, 843-846, 1184-1189; and David Eustice, Tr. 422-426, 429-431, 483-484.

they had struck the inmates in an acceptable fashion.[14] Tr. 554-555, 587, 1014, 1189. Finally, the officers wrote reports that were intentionally vague, devoid of detail, and full of omissions, thereby obscuring what had really happened. Tr. 579, 1014, 1088, 1241.

The jury heard testimony about specific incidents. In particular, Teel and fellow officers filed false reports about the assault on Jessie Williams.[15] Tr. 968-969. Officer Correa testified that he saw Teel writing his report along with Officers Rhodes and Thompson and heard Teel say that they had to write it up "the right way" – a comment Correa understood to mean that they would not incriminate themselves in their reports. Tr. 968-969, 976. Officer Rhodes testified that she wrote a false, incomplete, and watered down report after consulting with Officer Thompson. Tr. 1109-1110, 1160.

In the narrative report, Teel stated that Williams approached his arresting officer "as to assault her," that Teel kicked Williams only after Williams took a

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[14] Officers testified about "round[ing] to the nearest pressure point" in their report. Tr. 554. Booking officers were trained in "pressure point control tactics," according to which officers who needed to subdue an inmate were permitted to strike the inmate in one of a number of "pressure points" such as the brachial plexus on the side of the neck. Tr. 604-610. When officers in booking struck an inmate in a place that was not an approved pressure point – *e.g.*, the face – the officers wrote in their reports that they had, in fact, struck the inmate in the pressure point closest to the actual strike point. Tr. 554-555, 587, 1014, 1189.

[15] The jury also heard testimony about officers' filing of false reports about the incidents with Michelle Abrams, Tr. 392; David Eustice, Tr. 425-426, 484; Only Al-Khidir, Tr. 557, 559-561, 588, 1189; and Kasey Alves, Tr. 1086-1088, 1166-1167.

step towards him and raised his hands to strike Teel in an aggressive manner, that Williams repeatedly attempted to strike Teel in the face and choked him with both hands after they fell to the floor, that he used his taser on Williams only after Williams pulled away from the officers and grabbed Teel again, and that Williams was continuing to resist and to hit and kick Teel when Teel sprayed him with OC and placed him in the restraint chair. Gov't Exh. 23. All of those claims were contradicted by the consistent testimony of other people who witnessed the events. See Tr. 701, 703-704, 706, 713, 715, 725, 728, 759, 761-762, 777, 783-784, 800, 961, 966, 971-972, 1097, 1100, 1104, 1129, 1179-1180. Teel also failed to mention his use of the hogtie in his report. Gov. Exh. 23; Tr. 1523-1524.

SUMMARY OF ARGUMENT

1. Teel fails on appeal to establish that the government intentionally discriminated on the basis of race or sex in its use of peremptory strikes during jury selection. In response to Teel's challenge below, the government offered nondiscriminatory reasons for striking the five jurors in question. Teel failed to offer any argument – before either the district court or this court – that those reasons were pretextual. The district court correctly determined that the government's proffered reasons were neutral and that the government did not engage in intentional discrimination on the basis of race or sex in selecting jurors.

2. Teel also fails on appeal to establish that the district court abused its discretion in any of its evidentiary rulings. Teel first claims that the district court erred in allowing one of the government's witnesses – Officer Priest – to offer

opinion testimony amounting to the legal conclusion that booking officers used excessive force against inmates. Teel is incorrect as Priest merely testified to his own observations. Teel failed to identify any testimony stating that an officer used excessive force. Even if he had, moreover, that would not warrant reversal, as the evidence against Teel was overwhelming.

At the same time he complains that a government witness was permitted to offer a legal conclusion about the excessive use of force, Teel complains that the district court erred in not allowing him to call an expert witness specifically to testify about whether Teel used excessive force against Jessie Williams. Such testimony is not permitted by the Federal Rules of Evidence, however, and the district court correctly excluded it.

Teel also fails to establish that the district court erred in admitting testimony from the surgeon who treated Williams on the night he died. The government timely disclosed the topics on which Dr. Doty would testify, including the timing of Williams' injuries, and handed over the bases for any opinions he offered – namely, Williams' medical records. Teel's claim that he was prejudiced by his "surprise" that Doty testified that Williams died as a result of injuries he received at the Jail is untenable.

3. Teel's argument that 18 U.S.C. 242 is unconstitutionally vague is misplaced. What he actually argues is that he did not have fair notice that his behavior violated Williams' rights. That claim ignores the decades of established precedent recognizing such a right. Teel had more than fair notice that beating a

restrained and unresponsive inmate to the point of death while acting as a police officer was unconstitutional behavior.

4. The district court also did not err in declining to include the self-defense jury instruction Teel proposed. The district court correctly instructed the jury as to the elements of the offense, and Teel was not entitled to an instruction that merely argued that one of the elements – willfulness – was not proved. Moreover, the district court instructed the jury to consider whether a reasonable officer in Teel's position would have felt threatened.

5. Teel's claim that the district court violated his Sixth Amendment right when it sentenced him based on the underlying offense of second degree murder must also fail. The Sixth Amendment prohibits a judge from finding a fact that would raise a defendant's sentence above the statutorily-prescribed sentence based on facts found by the jury. Here, the maximum sentence for violations of 18 U.S.C. 241 and 242 with death resulting is life imprisonment or death. The jury convictions therefore fully support Teel's sentence. Nor did the district court violate Teel's Sixth Amendment rights by applying the advisory Sentencing Guidelines to choose the most appropriate sentence within the statutory maximum.

6. Finally, Teel is incorrect that the district court violated his Fifth Amendment right not to be compelled to testify against himself when it allowed the government to use Teel's affidavit in its cross-examination of Teel. Teel swore to and filed the affidavit voluntarily and with the assistance of counsel. He was later informed by the district court that the affidavit would be made available

to the government for cross-examination if he chose to take the stand in his own defense. When Teel did choose to do so, the district court properly allowed the government to use Teel's prior voluntary and sworn statement for cross-examination. Because the government did not use the affidavit to question Teel about anything outside the scope of Teel's direct examination testimony, there was no error.

ARGUMENT

I

THE GOVERNMENT DID NOT DISCRIMINATE ON THE BASIS OF RACE OR SEX IN SELECTING THE JURY

Teel argues (Br. 23-28) that the district court erred in failing to find that Teel had made out a prima facie case of race and gender discrimination in the government's use of its peremptory challenges. Teel cannot prevail on this argument.

It is well established that a district court must evaluate such a claim under the three-part test articulated in *Batson* v. *Kentucky*, 476 U.S. 79 (1986):

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. *New York*, 500 U.S. 352, 358-359 (1991) (internal citations omitted); *J.E.B.* v. *Alabama*, 511 U.S. 127, 144-145 (1994) (same analysis for claims of gender discrimination).

During the jury selection, Teel's counsel objected that the government had used five of its six peremptory challenges to strike potential jurors who were white men. Tr. 256-257. The district court assumed without deciding that Teel had established a prima facie case of intentional discrimination, and allowed the government to offer race- and gender-neutral explanations for striking the potential jurors in question. Tr. 257-261. Teel's counsel declined to offer any argument that the government's reasons were pretextual. Tr. 261. The district court found that Teel had failed to carry his burden of establishing race or gender discrimination on the part of the government.[16] Tr. 261-262.

Both this Court and the Supreme Court have held that where, as here, a district court hears and evaluates the government's nondiscriminatory reasons for striking particular jurors, it is irrelevant whether the defendant made out a prima facie case of discrimination. *Hernandez*, 500 U.S. at 359; *United States* v. *Williams*, 264 F.3d 561, 571 (5th Cir. 2001); *United States* v. *Webster*, 162 F.3d

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[16] Teel also argues (Br. 27-28) that the district court erred by failing to rule on his race-based *Batson* challenge. Teel is simply incorrect. It is true that the district court initially couched his ruling in terms of gender discrimination only. Tr. 261-262. However, after co-defendant Gaston's counsel reminded the court that he and Teel had raised a race-based challenge as well, the district court promptly addressed that claim, finding that the defendants failed to demonstrate that the government discriminated on the basis of race or gender in its use of peremptory challenges. Tr. 262.

308, 349 (5th Cir. 1998), cert. denied, 528 U.S. 829 (1999). Thus, this Court reviews the second and third steps of the *Batson* analysis only.

The reasons offered by the government were not based on race or gender. The government challenged Juror No. 9 because he appeared to be confused during questioning and government counsel felt he would not be able to follow the proceedings at the requisite level of detail. He also had surgery scheduled for the following day. Tr. 258. The government challenged Juror No. 16 because he was laughing inappropriately and was giggling to himself during the court's instructions. Government counsel felt that he would not take the proceedings seriously and pay attention to the evidence. Tr. 259. The government challenged Juror No. 26 because he was a former security officer, was friends with several police officers, and had been beaten up at his work place. Tr. 260. The government challenged Juror No. 29 because he was a retired police officer and government counsel felt he would identify very strongly with the defendants. Tr. 260. Finally, the government challenged the final juror because he had previously been a foreperson on a jury that had acquitted a defendant and because of his demeanor towards government counsel. Tr. 260-261. Because the government's reasons were not based on race or gender, therefore, they satisfy the second step of the *Batson* inquiry. Indeed, Teel offered no argument to the contrary in the district court and offers none on appeal.

Once the government offered neutral explanations for its challenges, it was the duty of the district court to determine whether the defendant met his burden of

demonstrating that the government intentionally discriminated on the basis of race or gender in exercising its peremptory challenges. *Hernandez*, 500 U.S. at 363. Teel does not argue that the district court committed clear error in concluding that Teel failed to prove intentional discrimination on the part of the government; nor could he. Teel did not argue below that the government's neutral reasons were a pretext for intentional race and/or gender discrimination. This Court should affirm the district court's rejection of Teel's *Batson* challenge.

II

THE DISTRICT COURT DID NOT ERR WITH RESPECT TO ITS EVIDENTIARY RULINGS

Teel challenges a number of the district court's evidentiary rulings. This Court reviews evidentiary rulings for abuse of discretion where counsel makes a timely objection below. *United States* v. *Williams*, 343 F.3d 423, 434 (5th Cir.), cert. denied, 540 U.S. 693 (2003). A court of appeals "will not reverse a district court's evidentiary rulings unless substantial prejudice results to the complaining party." *United States* v. *Izydore*, 167 F.3d 213, 218 (5th Cir. 1999). The burden of proving substantial prejudice, moreover, "lies with the party asserting error." *Ibid.*

A. The District Court Correctly Prevented Witnesses From Presenting Opinion Testimony Constituting A Legal Opinion

On appeal, Teel argues both that the district court incorrectly allowed one of the government's witnesses to offer lay opinion testimony amounting to a legal conclusion and that the court erred in refusing to allow the defense to present

expert opinion testimony amounting to a legal conclusion. He is wrong on both counts.

Federal Rule of Evidence 704(a) provides that lay "[t]estimony 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." Although Rule 704 does allow testimony regarding ultimate issues of fact, it "does not open the door to all opinions," and this Court has made clear that neither expert nor lay witnesses may offer legal conclusions. *Owen* v. *Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983); see also *Williams*, 343 F.3d at 435-436. In *Williams*, a civil rights case concerning a police officer's shooting of an arrestee, this Court held that the district court erred in allowing police officers to offer opinion testimony about whether the shooting was reasonable. 343 F.3d at 435-436.

1. Officer Priest Did Not Offer Opinion Testimony Constituting A Legal Opinion

Teel identifies four questions (Br. 29-30) posed by counsel for the government that he claims were designed to elicit testimony from Officer William Priest about whether other officers used excessive force:

1. "Were booking officers mistreating people that came into the jail?" Tr. 381.

2. "Was there an understanding among the booking officers that excessive force would be used against people at the jail?" Tr. 383.

3. "What sort of extreme uses of force?" Tr. 404.

4. "Did it include using force when it wasn't justified?" Tr. 411.

However, Teel identifies (Br. 29) only one item of actual testimony that he claims constitutes a legal opinion: the answer to the first question, which was "Yes, sir." Of course, questions posed by attorneys are not testimony. But even if this Court construes Teel's argument to be a challenge to the answers Priest gave in response to all four identified questions, Teel is incorrect that the district court allowed any testimony in violation of the rule articulated in *Williams*, 343 F.3d at 435-436.

This Court may easily dispose of Teel's objections to the second and fourth questions he identifies (*i.e.*, "Was there an understanding among the booking officers that excessive force would be used against people at the jail?" and "Did it include using force when it wasn't justified?") because the district court sustained his objections to those questions. It is not clear on what basis Teel objected to the other two questions (*i.e.*, "Were booking officers mistreating people that came into the jail?" and "What sort of extreme uses of force?"). But even if this Court assumes that Teel objected to the first and third questions on the proper basis, the district court's overruling of those objections was not error because neither question sought or actually elicited a legal opinion. The first question related to a meeting held at the Jail in April 2005 regarding the treatment of inmates in booking, specifically the "[i]ntimidation of inmates, cursing inmates, mistreatment of inmates." Tr. 381. When asked whether officers in booking were, in fact,

mistreating people who came into the Jail, Priest testified that they were. Tr. 381. When Priest was then asked how officers mistreated inmates, he explained that "inmates were widely criticized, taunted[, and] physically abused." Tr. 382. In response to the third question about what sorts of extreme uses of force booking officers used, Priest stated: "I recall incidents of people being picked up and slammed back down on the bench. Having their head bounced off the bench, off the floor." Tr. 404.

In describing the mistreatment and abuse he observed, Priest was not giving a legal opinion that officers used excessive force. In fact, Priest did not offer any type of opinion. Rather, Priest testified about behavior he actually observed and, in some cases, participated in. Testimony about his own observations and actions cannot be excluded merely because it supports the government's contention that Teel and other officers used excessive force.

Even if this Court were to construe Priest's answers as opinion testimony, moreover, they did not amount to impermissible legal conclusions. In testifying that he observed Jail officers abuse and mistreat inmates, Officer Priest was not offering a legal opinion about whether those officers used excessive force. Priest did not use any specialized legal terms in describing what he saw. *United States* v. *Barile*, 286 F.3d 749, 760 (4th Cir. 2002); see also Fed. R. Evid. 704 Advisory Committee Notes (noting that opinions should not be "phrased in terms of inadequately explored legal criteria").

Finally, even if Priest's answers to the first and third questions identified by Teel could be construed as legal opinions, the admission of that testimony does not constitute reversible error because the evidence against Teel was overwhelming. *Williams*, 343 F.3d at 435; *United States* v. *Olano*, 507 U.S. 725, 736 (1993). Seven eye witnesses testified about Teel's assault on Jessie Williams. Many of those witnesses, along with seven additional witnesses, testified about the pattern of inmate abuse and false report writing among booking officers. See *supra*, pp. 10-14, 20-22.

2. The District Court Did Not Err In Preventing Teel's Excessive Force Expert To Offer A Legal Conclusion

Teel argues (Br. 31-32) that the district court violated Teel's rights under the Sixth Amendment by not allowing his "excessive force expert," Wade Schindler, to testify. He is incorrect. To begin with, the district court did not prohibit Teel from calling Schindler as an expert witness. Rather, the court made clear that it was only precluding Schindler from offering an expert opinion "on whether or not the facts and circumstances contained within the videotape [of the assault on Jessie Williams] constitute the use of, quote-unquote, excessive force." Tr. 1544. It was Teel's counsel who decided not to call Schindler in light of the court's ruling. This Court has held that the "admission or exclusion of expert testimony is a matter left to the discretion of the trial judge, and his or her decision will not be disturbed on appeal unless it is manifestly erroneous." *Smogor* v.

Enke, 874 F.2d 295, 297 (5th Cir. 1989) (quoting *Perkins* v. *Volkswagen of Am., Inc.*, 596 F.2d 681, 682 (5th Cir. 1979)).

The district court correctly ruled that Teel could not offer expert opinion about whether he used excessive force against Jessie Williams. On appeal, Teel offers no argument as to why the general rule prohibiting legal opinion testimony should not apply to Schindler, asserting only that he should have been permitted to offer impermissible legal opinion testimony because the government was permitted to do so. For the reasons explained *supra*, however, the government's witness did not offer such testimony, and the district court did not err in ruling it inadmissible.

B. The District Court Did Not Err In Permitting Dr. James Doty To Testify About His Medical Treatment Of Jessie Williams

Teel argues (Br. 32-36) that the district court abused its discretion in admitting testimony from Dr. James Doty because the government failed to disclose, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G), what opinions Doty would offer in his testimony and the bases for those opinions. Teel is incorrect. Rule 16 requires the government to disclose, at the request of the defendant, the identity of any expert witness it intends to call, as well as the qualifications of the witness, any opinions the witness intends to offer, and the bases and reasons for any such opinions. Fed. R. Crim. P. 16(a)(1)(G). The disclosure requirements apply to expert witnesses only. *Ibid.*

As the government noted in its Rule 16 disclosure, Dr. Doty appeared both as a fact witness and an expert witness. Doty was Jessie Williams' treating physician at the hospital on the night that Teel assaulted him. Thus, much of his testimony consisted of observations he made in the course of assessing and treating Williams' injuries. Doty did not offer opinions, but largely recounted his assessment and treatment of Williams. Out of an abundance of caution, the government included Doty in its Rule 16 disclosure in order to give Teel fair warning that some of Doty's testimony might rely on his professional expertise. USCA5 544.[17]

Although Teel has not identified any specific opinion or item of testimony to which he objects, he complains generally that he was not given sufficient notice (1) about the bases for Doty's opinions about the severity and possible cause of Williams' head injury (Br. 33); (2) that Doty would offer opinions about "blood flows related to hematomas" (Br. 34); and (3) that Doty would use Williams' CT scans in his testimony (Br. 33-34). In order to prevail, Teel must demonstrate both that these alleged lapses violated Rule 16 and that he suffered prejudice as a result. *United States* v. *Cuellar*, 478 F.3d 282, 293 (5th Cir. 2007) (en banc), rev'd on other grounds, 128 S. Ct. 1994 (2008). He can do neither.

The government notified Teel in its Rule 16 disclosure that Doty was expected to "testify as to his observations concerning Williams' condition during

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[17] The government also listed Doty's qualifications, as required by Rule 16, and Teel does not now claim otherwise.

his examinations" as well as "concerning the severity of Williams' head injury and the course of treatment he provided to Williams." USCA5 544. The government also notified Teel that Doty might testify about "the type of activity that could cause [the] injury he observed." USCA5 544. That is exactly what he did. Tr. 915-942. The doctor's own observations about the severity of Williams' injuries cannot reasonably be characterized as "opinion" testimony. But even if they could, Teel was in possession of the bases of any opinion Doty may have offered about the severity of Williams' head injury or its possible cause: namely, Williams' medical records. Gov't Exh. 32. Counsel for Teel admitted at the time of Doty's testimony that the government provided those records to Teel. Tr. 907, 927. On appeal, Teel fails to identify any specific opinion of Doty's regarding Williams' injuries or their cause of which he was not apprised prior to trial or which was not based on Williams' medical records and, therefore, fails to establish a violation of Rule 16.

Doty testified that the massive subdural hematoma covering Jessie Williams' brain was caused by the extensive tearing of the blood vessels going to and from his brain. Tr. 933, 937-938; see also Gov't Exh. 32 (medical records). In order to assist the jury in understanding this testimony, Doty explained how the vascular system in the human head works, as well as what happens when those vessels are torn or severed. Tr. 930-933. Teel argues on appeal (Br. 33) that the government did not inform him prior to trial that Doty would offer opinion testimony "about blood flow." But Doty did not offer opinion testimony about

blood flow. Although his testimony on those subjects may have qualified as expert testimony because it was based on scientific or specialized knowledge, Fed. R. Evid. 702, he related facts about how severed blood vessels in the brain can cause a hematoma, not opinion. Because Doty's explanation of how a subdural hematoma forms was encompassed within the government's disclosure that he would testify about the severity of Williams' head injury, Teel has not established a Rule 16 violation.

Teel also complains (Br. 33-34) about Doty's use of the CT scan taken of Williams' head for diagnostic purposes during the course of his treatment. Williams' head CT was part of the medical records that the government turned over to Teel prior to trial. Doty used the CT scan to explain the severity of Williams' injuries and the course of treatment Doty chose to take on the night Williams was assaulted. Because Teel was on notice that Doty would testify about Williams' injuries and his treatment of those injuries, and because the government turned the CT scan over to Teel prior to trial, Teel has not established a Rule 16 violation.[18]

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[18] Moreover, there is no merit to Teel's contention (Br. 35-36) that he suffered prejudice because he did not know that Doty would testify about whether the injuries Williams suffered were likely caused during the time frame in which he was at the Jail. The government's Rule 16 disclosure specifically noted that Doty might testify about "the possible timing of the infliction of the injuries" that Williams suffered. USCA5 544. In addition, the indictment itself alleges that Teel assaulted Williams at the Jail that night and that Williams ultimately died as a result of his injuries. USCA5 336.

III

18 U.S.C. 242 IS NOT UNCONSTITUTIONALLY VAGUE

Teel argues that this Court should vacate his conviction for violating 18 U.S.C. 242 because the term "excessive force" is vague. This Court reviews such a claim *de novo*. *United States* v. *Monroe*, 178 F.3d 304, 308 (5th Cir.), cert. denied, 528 U.S. 1010 (1999).

Teel's vagueness challenge is misplaced. Section 242 prohibits the "deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" under color of law. Teel has not identified any part of that language that he claims is vague; nor could he as the statute is perfectly clear. Indeed, the Supreme Court long ago rejected a vagueness challenge to Section 242. *Screws* v. *United States*, 325 U.S. 91, 103-105 (1945); *United States* v. *Lanier*, 520 U.S. 259, 267 (1997). The Court in *Screws* interpreted the statute to prohibit a person from intentionally depriving a person of a right "which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them" while acting under color of law. *Screws*, 325 U.S. at 104; *Lanier*, 520 U.S. at 267. In response to the defendant's vagueness challenge to the law, the Court stated:

> We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.

Screws, 325 U.S. at 103; see also *Lanier*, 520 U.S. at 267, 271-272. Thus, Teel's vagueness challenge to Section 242 is squarely foreclosed.

What Teel apparently intends to argue is that he did not have fair notice that he would be violating Jessie Williams' clearly established rights when he beat Williams. Teel asserts (Br. 38) that the right "not to be assaulted" is "not a constitutional right * * * by a person acting under color of any law, since it is not publicly known or understood as a constitutional right, it has not been declared as such by the Supreme Court, it is not a right listed in the Constitution, and it is not a well-established right of procedural due process." That argument is plainly contrary to longstanding precedent in this Court. As early as 1975, this Court stated that:

> one's right to be free from unlawful assault by state law enforcement officers when lawfully in their custody has been made a definite and specific part of the body of due process rights protected by the fourteenth amendment of the Constitution, so that a willful deprivation of that right comes within the purview of § 242.

United States v. *Stokes*, 506 F.2d 771, 775 (5th Cir. 1975); *id.* at 776.

IV

THE DISTRICT COURT DID NOT ERR IN DECLINING TO INCLUDE TEEL'S PROPOSED SELF-DEFENSE JURY INSTRUCTION

Teel claims that the district court erred in refusing to give the self-defense jury instruction he requested. This Court reviews a district court's refusal to give a proposed instruction for abuse of discretion. *United States* v. *Branch*, 91 F.3d 699, 711 (5th Cir. 1996), cert. denied, 520 U.S. 1185 (1997). This Court "may

reverse only if the requested instruction is substantially correct; was not substantially covered in the charge as a whole; and if the omission of the requested instruction seriously impaired the defendant's ability to present a given defense." *United States* v. *Williams*, 132 F.3d 1055, 1061 (5th Cir. 1998) (internal quotation marks omitted). Because none of those criteria was met, this Court may not reverse Teel's conviction.

The district court's jury instructions substantially covered the issue Teel wished to pose to the jury – whether Teel assaulted Williams out of fear for his life. The district court correctly instructed the jury that it had to find that, when Teel assaulted Williams, he was acting "willfully, that is, * * * with a bad purpose or evil motive, intending to deprive" Williams of his right to be free from excessive force. Tr. 1844. Teel's proposed self-defense instruction "amount[ed] to little more than suggesting the nonexistence of one of the essential elements of the offense" – namely, willfulness. *United States* v. *Stone*, 960 F.2d 426, 432 (5th Cir. 1992). Indeed, in overruling Teel's request for the self-defense instruction, the district court told Teel's counsel that he could "argue self-defense to negate the willful element of the charge." Tr. 1821. In the end, he did not even do that, opting instead to impugn the credibility of the government's witnesses and argue that Teel was attempting to "maintain the discipline and control at the jail." Tr. 1878-1883. But, because the instructions actually delivered accurately covered all of the elements of the charged crimes, Teel was not entitled to an instruction that

merely recounted his theory that one of the elements had not been proved. *Stone*, 960 F.2d at 433.

In addition, the district court instructed the jury that, in assessing whether the force Teel used on Williams was excessive, it should consider such factors as "the need for application of the force," "the relationship between the need and the amount of force used," and "the threat reasonably perceived by the responsible officials." Tr. 1843. Those instructions – which correctly state the law, *Valencia* v. *Wiggins*, 981 F.2d 1440, 1446-1447 (5th Cir.), cert. denied, 509 U.S. 905 (1993) – more than adequately cover any defense theory that the force Teel administered was in response to a "threat reasonably perceived" by Teel and was needed as a response to Williams' actions. Thus, the exclusion of Teel's proposed self-defense instruction did not prevent him from presenting that defense theory to the jury.

V

THE DISTRICT COURT DID NOT ERR IN SENTENCING TEEL BASED ON THE GUIDELINE FOR SECOND DEGREE MURDER

The sentencing guideline associated with violations of Sections 241 and 242 instructs the district court to use an offense level of either 12 or "the offense level from the offense guideline applicable to any underlying offense," whichever is greater. U.S.S.G. 2H1.1. In choosing the appropriate underlying offense to consider, the Guidelines instruct the court to apply "the offense guideline applicable to any conduct established by the offense of conviction." U.S.S.G.

2H1.1, comment (n.1). The district court concluded that the underlying conduct established by Teel's convictions was second degree murder. Teel challenges this decision, arguing that the district court violated the Sixth Amendment by not allowing the jury to make that determination.[19] This Court reviews a district court's application of the Guidelines *de novo* and its findings of fact for clear error. *United States* v. *Rodarte-Vasquez*, 488 F.3d 316, 322 (5th Cir. 2007). The district court did not err in sentencing Teel based on an underlying offense of second degree murder.

In support of his argument, Teel relies on the Supreme Court's decisions in *United States* v. *Booker*, 543 U.S. 220 (2005); *Ring* v. *Arizona*, 536 U.S. 584 (2002); and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). However, Teel misconstrues the holding of each case. Properly understood, *Booker*, *Ring*, and *Apprendi* dictate that the district court did not violate the Sixth Amendment in sentencing Teel.

The Supreme Court held in *Apprendi*, and reaffirmed in *Ring*, that "any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*,

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[19] In his brief, Teel purports to mount two distinct challenges to the district court's use of second degree murder as the underlying offense for sentencing purposes. See Br. 43-46. But the two challenges actually assert the same argument – that the district court should have permitted the jury to determine the underlying offense as Teel requested.

530 U.S. at 490 (emphasis added); see also *Ring*, 536 U.S. at 602. That is exactly what happened with Teel.

A defendant who has been convicted of violating 18 U.S.C. 241 or 18 U.S.C. 242, with death resulting, is subject to a maximum sentence of life imprisonment or death. The jury found all of the elements of those offenses. Thus, it was the jury's factual findings, rather than the judge's, that subjected Teel to a maximum sentence of life imprisonment.

Nor did the court's sentencing decision violate the rule set out in *Booker*. As mandated by *Booker*, the district court noted that the Guidelines are advisory only. Sent. Tr. 3. The district court's use of an advisory guideline to arrive at Teel's sentence did not violate the Sixth Amendment.[20]

Although Teel claims in one of his argument headings (Br. 44) that the district court should have based his sentence on the underlying offense of voluntary manslaughter, he does not offer any argument in support of that claim. In fact, the district court correctly based Teel's sentence on the underlying offense of second degree murder. Second degree murder is any killing committed with malice aforethought that is not within the statutory circumstances constituting first degree murder. 18 U.S.C. 1111(a). This Court has held that:

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[20] The district court also did not err in refusing to use the special interrogatories requested by Teel, which asked the jury to determine whether Teel's actions constituted first degree murder, second degree murder, voluntary manslaughter, or involuntary manslaughter. R.E. Tab 6. Because the jury did not need to decide that issue, the interrogatories were unnecessary.

> Malice aforethought encompasses three distinct mental states: (1) intent to kill; (2) intent to do serious bodily injury; and (3) extreme recklessness and wanton disregard for human life.

United States v. *Hicks*, 389 F.3d 514, 530 (5th Cir. 2004) (internal quotation marks omitted), cert. denied, 546 U.S. 1089 (2006); *Lara* v. *United States Parole Comm'n*, 990 F.2d 839, 841 (5th Cir. 1993).

The district court correctly based Teel's sentence on the underlying offense of second degree murder because there was overwhelming evidence that he killed Williams with malice aforethought. The court found that Teel "continued to abuse, continued to beat, and * * * continued to inflict pain and suffering upon [Williams] while he was restrained, while he was subdued." Sent. Tr. 102-103. The district court concluded that "the conduct of [Teel], particularly after the victim had been subdued and had been restrained, indicates malice aforethought." Sent. Tr. 103. Teel's actions, the court correctly concluded, indicated that Teel "engaged in conduct [that] was callous and with wanton disregard of human life, which ultimately resulted in the death of" Jessie Williams. Sent. Tr. 103.

VI

THE DISTRICT COURT DID NOT VIOLATE TEEL'S FIFTH AMENDMENT RIGHT AGAINST COMPELLED SELF-INCRIMINATION BY ALLOWING THE GOVERNMENT TO USE TEEL'S AFFIDAVIT FOR PURPOSES OF CROSS-EXAMINATION

Before his trial began, Teel filed a motion to sever his trial from that of his co-defendant Gaston. USCA5 740. Attached to his motion, Teel filed under seal an affidavit laying out incriminating information he claimed to know about

Gaston. USCA5 742-744. Teel later filed a motion to withdraw the severance motion and the accompanying affidavit. USCA5 811. Although the district court allowed the withdrawal of Teel's severance motion, it refused to allow Teel to withdraw his affidavit. See USCA5 39, unnumbered docket entry for July 13, 2007. The district court advised the parties that the affidavit would remain sealed unless and until Teel opted to testify at trial. Tr. 1419. When Teel did, in fact, choose to testify in his own defense, the government and Teel's co-defendant asked the district court to unseal the affidavit so that they could use it during their cross-examination of Teel. Tr. 1419. The district court granted that request over Teel's objection.[21] Tr. 1421-1422.

On appeal, Teel claims (Br. 46-49) that the unsealing of the affidavit violated his Fifth Amendment right against compelled self-incrimination. He also claims (Br. 49-52) that the government improperly used the affidavit to question Teel about matters that were outside the scope of his direct examination. Teel is incorrect in both respects. This Court reviews a claim of a Fifth Amendment violation *de novo*. *United States* v. *Pando Franco*, 503 F.3d 389, 393 (5th Cir. 2007), cert. denied, 128 S. Ct. 1874 (2008).

1. The Fifth Amendment to the Constitution protects an individual from being "compelled in any criminal case to be a witness against himself." U.S.

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[21] Teel seems to suggest (Br. 48) that the district court also gave a copy of the affidavit to the jury. But that is not correct. The district court did not enter the affidavit into evidence, but unsealed the affidavit so that the government and Teel's co-defendant could examine its contents and use it in cross-examination.

Const. Amend. V. As an initial matter, Teel was not compelled to swear to and file the affidavit. He appears to claim, instead, that he was essentially compelled to testify against himself at his own trial when the district court permitted the government to use the affidavit for the purpose of cross-examining him. Far from being compelled to testify against himself at his criminal trial, Teel voluntarily chose to take the stand in his own defense. In so doing, Teel waived "his constitutional privilege of silence," thereby granting to the prosecution the right to cross-examine him on his statements to the same extent it may cross-examine other types of witnesses on their direct testimony. *Fitzpatrick* v. *United States*, 178 U.S. 304, 315 (1900); see also *United States* v. *Beechum*, 582 F.2d 898, 907 (5th Cir. 1978) ("It is an inveterate principle that a defendant who takes the stand waives his fifth amendment privilege against self-incrimination at least to the extent of cross-examination relevant to issues raised by his testimony."), cert. denied, 440 U.S. 920 (1979).

The Supreme Court has held, moreover, that prior statements made by defendants may be used by the government during cross-examination even where they could not be used for the government's case in chief. *Oregon* v. *Elstad*, 470 U.S. 298, 307 (1985); *Anderson* v. *Charles*, 447 U.S. 404, 408 (1980); *Harris* v. *New York*, 401 U.S. 222, 224-226 (1971). In particular, the right against self-incrimination does not prevent counsel for the government from using a prior inconsistent statement to impeach the defendant at trial. *Anderson*, 447 U.S. at 408.

2. Teel also claims that the district court erred in permitting use of the affidavit for questioning by the government that exceeded the scope of his direct testimony. The lack of merit in Teel's argument is evidenced by the fact that he fails to cite a single question posed by the government that allegedly exceeded the scope of his direct testimony. Nor could he.

Counsel for the government used Teel's affidavit in its cross-examination on only three occasions, and all three were well within the confines of permissible cross-examination under Rule 611(b). On direct examination, Teel testified extensively about the use of force practiced by officers in the booking department, both in general terms and in reference to specific instances. Tr. 1377-1418, 1423-1444. The government was, therefore, entitled to question Teel about statements he made in his affidavit concerning general and specific uses of force by booking officers. And that is exactly what the government did. Government counsel first questioned Teel about his sworn statements concerning Officer Gaston's general practices regarding uses of force on inmates. Tr. 1473-1478. The government next questioned Teel about his claim that Gaston complained about other officers' violence towards inmates. Tr. 1495-1496. Finally, in response to Teel's testimony on direct about his and Gaston's altercation with Michelle Abrams, Tr. 1398-1405, government counsel cross-examined him about his sworn affidavit statements concerning the same matter, Tr. 1485-1486. Because the government's use of Teel's sworn affidavit fell well within the bounds of cross-examination, his claim must fail.

CONCLUSION

This Court should affirm the defendant's convictions and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 9, 2008, two copies and one compact disc containing an electronic copy of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, were served by Federal Express, postage prepaid, on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 12.0 and contains 12,181 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

Date: July 9, 2008

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