No. 00-40243

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

WILTON DAVID WALLACE,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe this appeal raises novel legal issues that require oral argument.

ABLE OF CONTENTS

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

RULES:

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STATEMENT OF JURISDICTION

The district court's jurisdiction is based upon 18 U.S.C. 3231. After sentencing Wilton David Wallace on February 22, 2000, the court entered the judgment on February 25, 2000 (R1-342-349).[1] Wallace timely filed a notice of

[1] References to "R__-__-__" are to the volume number and page number or page range of the record on appeal, while references to "SR__-__-__" are to the supplemental record on appeal.

appeal on February 22, 2000 (R1-350). This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742(a).

STATEMENT OF ISSUES

1. Whether the district court's refusal to give Wallace's proposed jury instruction concerning a good faith use of force defense is reversible error.

2. Whether Wallace acted under color of Texas law when he physically abused an inmate.

3. Whether admission of evidence of Wallace's two prior convictions for violation of 18 U.S.C. 242 is reversible error.

4. Whether the district court abused its discretion by denying Wallace's motion for recusal.

5. Whether Wallace was denied effective assistance of counsel.

STATEMENT OF THE CASE

This case arises from a November 7, 1996, incident at the Brazoria County Detention Center, involving appellant Wilton David Wallace and inmate Clarence Fisher (R2-2; SR3-12). On June 3, 1998, Wilton David Wallace, who worked as a jailer at the detention center, was indicted for violating 18 U.S.C. 2 and 242 (R2-2-3). Specifically, the indictment charged that, while acting under color of Texas

law, Wallace willfully assaulted Fisher "by slamming his face into a wall" and, thereby, willfully deprived Fisher of his Eighth Amendment right not to be subjected to cruel and unusual punishment, resulting in bodily injury (R2-2-3).

The first trial of the defendant, in July 1999, ended with a hung jury (R2-200). The court then set a new trial for October 26, 1999 (R2-200). Before the beginning of the second trial, however, Wallace's attorneys from the Federal Public Defender Office filed several motions to request that the judge recuse himself, to withdraw as counsel, and to continue the trial date pending resolution of the recusal and withdrawal of counsel issues (R2-Doc. 80, 82). As grounds for the substantive motions, counsel pointed to statements made by the court at the end of an unrelated trial against Wallace for violation of 18 U.S.C. 242 (hereinafter, Trial One) concerning a possible conspiracy between Wallace, his attorney from the Federal Public Defender Office, and his expert witness to suborn perjury.[2] The district court denied each of Wallace's motions (R2-236; R2-Doc. 97).

The government, at trial, relied primarily on the testimony of four other correctional officers who witnessed the assault by Wallace to establish that he applied excessive force against Fisher when he pushed Fisher's face into a wall

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[2] Wallace's misdemeanor conviction in that case is now on appeal in this Court (Case No. 00-40242).

(see, *e.g.*, SR3-23-24, 46-47, 59, 84-85, 89, 189). In Wallace's defense, a single guard and an expert witness testified that Wallace applied the appropriate level of force under the circumstances (SR4-17-18, 34-36). Wallace moved for judgment of acquittal at the conclusion of both the government's case and his defense (SR3-272-273; SR4-58), emphasizing that he was not acting under color of state law during the November 7, 1996, incident, but the court denied the motions (SR3-273; SR4-58).

On October 29, 1999, the jury found Wallace guilty of a felony violation of 18 U.S.C. 242 (R2-308). After dismissing the jury, the court noted that Wallace had requested that new counsel be appointed in both Trial One and this case and stated that, for sentencing and appeal purposes, it would be advisable to appoint new counsel from outside of the Federal Public Defender Office for Wallace in this case, as he had already done in Trial One after that trial ended (SR5-21-24). The court further stated that it "was comfortable with the public defender continuing through this trial because the factual basis is totally separated and different" from Trial One (SR5-22). The court, however, believed that Wallace's participation in a possible conspiracy to suborn perjury in Trial One could be an issue in the Probation Office's determination of an appropriate sentence term here and,

therefore, invited Wallace's attorneys from the Federal Public Defender Office to move to withdraw, if they so desired (SR5-21-22, 24).

Thereafter, on November 1, 1999, Wallace's attorneys filed motions to withdraw (R2-310-311) and to extend the time for new counsel to move for a new trial (R2-312-314). The court granted both motions (R2-315-316) and appointed new counsel for Wallace (R2-317). Wallace subsequently filed a Motion for New Trial, arguing that (1) the conflict of interest between Wallace and the Federal Public Defender Office that arose in Trial One and continued throughout the trial in this case until new counsel was appointed in November 1999 deprived him of his constitutional right to have an attorney who was not "encumbered by conflicting interests that might hinder his representation" (R2-321); and (2) the district court's refusal to give Wallace's request for a good faith jury instruction was reversible error because it "impaired his ability to present a defense" and denied him a fair trial (R2-320-321). The court denied this motion on January 27, 2000 (R2-333), and then sentenced Wallace to a 46 month prison term to run concurrently with his 12 month sentence imposed in Trial One (R1-342-349). Wallace timely filed a notice of appeal on February 22, 2000 (R1-350).

STATEMENT OF THE FACTS

In 1996, the State of Missouri contracted with Brazoria County, Texas, to

lease bed space at the Brazoria County Detention Center to house inmates convicted in Missouri (R2-48-59). Brazoria County then arranged for Capital Correctional Resources, Inc. (CCRI), a private company, to operate the portion of the detention center housing the Missouri inmates (R2-60-77). Although the guards in this section of the facility worked for CCRI, they were obligated to follow Texas state law and the rules and policies of the Texas Jail Standard Commission (Commission) (R2-70-71). The Sheriff of Brazoria County assisted in training the CCRI guards to perform in accordance with Texas law and the rules of the Commission (R2-70). The Sheriff was also required to certify each CCRI guard as a jailer, again pursuant to the laws of Texas and the rules of the Commission (R2-70; SR3-6-7), and appellant Wilton David Wallace, who worked for CCRI as a lieutenant, was certified on October 22, 1996 (R2-300 (Wallace Certification) (attached at Addendum)). The Sheriff's Department, moreover, regularly inspected the CCRI portion of the detention center (R2-68).

Clarence Fisher was an inmate housed in the CCRI portion of the detention facility (R3-114). On November 7, 1999, Fisher started a fight with another inmate in his cellblock because the other inmate ate Fisher's lunch that he had specially requested due to a food allergy (SR3-115-117, 136). After the fight broke out, several jailers — either working for the Brazoria County Sheriff's Department or

CCRI — ran to Fisher's cellblock located in the "C pod." Daniel Mathes and Larry Higgins, jailers for the Brazoria County Sheriff's Department and stationed in the cellblock next to C pod, noticed guards running toward C pod and followed them to provide assistance (SR3-6, 13, 49, 51). At the same time, after hearing about the fight on the guards' radio frequency, CCRI guards William Moffett and Jeff Bevers also went over to C pod to offer assistance (SR3-171, 173-174, 237, 240). Another Sheriff's Department deputy, James Achten, who was working for CCRI on his day off from the Sheriff's Department also heard the announcement and went to C pod (SR3-76, 78-79, 101).

When Mathes and Higgins arrived at C pod, the fight had already ended; one inmate was standing against the wall in the hallway outside of the cell area with several officers surrounding him, while Fisher was pacing along the wall in the hallway (SR3-13, 51, 79). Mathes went over to Fisher and ordered him to stand against the wall (SR3-15-16, 53, 79, 118), which is one method jailers use to control inmates (SR3-43, 249). Although Mathes told Fisher three to four times to stand against the wall, Fisher did not comply (SR3-15-16, 44-45, 53). Mathes then put his left hand on Fisher's chest and told him again to stand against the wall (SR3-16, 54). Instead of complying, Fisher "knocked" Mathes's hand off his chest and then lunged at Mathes (SR3-17, 34-35, 69, 78-81, 118-119). Mathes instantly

grabbed Fisher's neck with his right hand and called out for help (SR3-17, 54, 80). Almost immediately, approximately eight to nine guards, including Moffett, pushed Fisher to the ground and handcuffed him with his hands behind him (SR3-19, 36, 55, 80-81, 98, 240); Mathes bumped his head against the wall as he pushed Fisher down, but testified that Fisher did not cause him to hit his head (SR3-19). At some point, Fisher's legs were also shackled (SR3-20-21, 122, 157; SR4-92 (Wallace's Incident Report, dated November 8, 1996 (attached at Addendum)); cf. SR3-58, 104-105).

Although Fisher did not fully comply with the guards' orders (SR3-15-16, 56-57, 69, 98, 102), it was undisputed that he did not hit (other than knocking away Mathes's hand), kick, bite, or head-butt any of the guards at any time (SR3-15-16, 19, 55-56, 58, 80-81, 107-108, 120-121, 156, 182, 240-241). And once Fisher was handcuffed, the guards thought he was under control and no longer posed any afety threat (SR3-21, 58, 110, 184, 208, 222, 223). Thereafter, the guards pulled Fisher up to his feet and started walking him down the hallway. At that time, Higgins left C pod (SR3-58, 81, 186).

At some point, Wallace appeared and the guards put Fisher against the wall; Wallace yelled at Fisher in his face even though Fisher was handcuffed and did not lunge or make any assaultive movement toward Wallace (SR3-22-25, 38-39

(Mathes), 82-84, 99-100, 102-104, 107 (Achten), 123-125 (Fisher), 187-188, 215-216, 220-222 (Bevers), 242-243 (Moffett)). Wallace then slammed Fisher's face into the wall, knocking out one of Fisher's teeth and causing a large cut in his lip (SR3-24-25, 39, 42, 46-47 (Mathes), 82-84, 99-100 (Achten), 125-127, 162 (Fisher), 187-191, 210-211 (Bevers), 242-243 (Moffett)). These injuries were caused solely by Wallace's action because Fisher was not injured at all until that time (SR3-14, 17, 21-22, 59, 73-74, 81-82, 122, 169). Afterwards, Fisher was escorted to the infirmary (SR3-242), and Wallace told the nurse, who examined Fisher, that Fisher's injuries were caused by another inmate who slammed his face into the bed (SR3-229-233). Higgins later took Fisher to the emergency room at a nearby hospital to get stitches for his lip (SR3-62).

The guards who witnessed Wallace slamming Fisher's face into the wall all testified that, based on their training in the use of force, Wallace's use of force was not warranted under the circumstances (because Fisher was restrained and under control) and constituted excessive force (SR3-23-24, 46 (Mathes), 84-85, 89, 102-106, 109-110 (Achten), 191, 197, 224 (Bevers), 242, 246, 248, 250-251 (Moffett)). Achten, in fact, thought that Wallace's action was so unjustified that he stepped in between Wallace and Fisher and told Wallace "that that was enough" (SR3-84). In contrast to the testimony of Mathes, Achten, Bevers, and Moffett, Wallace's

witnesses testified that his use of force was not excessive (SR4-17-18, 34). Neither of them, however, was present when Wallace assaulted Fisher (SR4-19, 32).

Following the incident, Mathes, Achten, Bevers, and Wallace wrote formal reports about the November 7, 1996, incident. None of these reports fully described what happened to Fisher. For example, Mathes and Achten did not write about Wallace's action (or even Wallace's presence) in their incident reports because they did not want to be associated with Wallace's excessive use of force or they believed that Wallace would alter the report in any event (SR3-26-29, 88-89, 93, 106, 110). Wallace tried to ask Moffett to also write a report on the November 7, 1996, incident, but when Moffett responded that he would include everything in his report, Wallace did not ask Moffett to draft the report (SR3-244). Instead, he told Bevers, a rookie working under Wallace at that time (SR3-173, 202), to write the incident report and state that Fisher slipped and hit his face against the wall (SR3-192-197, 213, 219-220). Bevers complied with Wallace's instruction, even though the statement was false, because he feared retaliation by Wallace and being branded a "snitch[]" (SR3-192-196). Wallace then attached the other guards' reports to his own incident report, in which he stated that Fisher cut his lip when he fell to the floor during his scuffle with Mathes and other guards (R2-300 (Wallace Incident Report, dated November 8, 1996) (attached at Addendum); see also SR3-89; SR4-

115).

SUMMARY OF ARGUMENT

Although this response has consolidated Wallace's eight issues on appeal into five issues, each of Wallace's asserted grounds for reversal lacks merit.

First, Wallace contends that the district court abused its discretion by refusing to give his proposed good faith jury instruction. This claim fails because the instructions given by the court substantially covered his good faith defense and, in any event, Wallace had wide latitude to testify and argue his defense to the jury.

Second, Wallace argues that he is entitled to a judgement of acquittal because 18 U.S.C. 242's "under color of any law" requirement is not met. He asserts, in particular, that he was not a state actor and, even if he were a state actor, he acted under Missouri law rather than Texas law, as charged in the indictment. According to Wallace, this variance between the indictment and proof at trial mandates reversal of his conviction. This claim also fails. Although Wallace worked for a private company, the state gave him authority to control inmates and, thus, he was a state actor. Moreover, there was no variance between the indictment and proof at trial because his authority as a jailer was controlled by Texas law.

Wallace next claims that the district court erred by admitting evidence of his

prior convictions under the same statute for similar use of unnecessary force against an inmate. These convictions, however, were properly admitted under Federal Rule of Evidence 404(b) to show Wallace's specific intent and the absence of mistake in this case. In any event, admission of the prior convictions does not require reversal in light of the limiting instruction, which Wallace requested and the court gave, that instructed the jury to consider the prior convictions evidence only for determining intent and absence of mistake.

Wallace's final claims on appeal contend that he is entitled to a new trial due to certain comments made by the district court after the jury began its deliberations in a prior unrelated lawsuit as well as certain language in the court's October 25, 1999, order, denying Wallace's motion for recusal in this case. The statements at the prior trial and in the order that are at issue stemmed from the court's concern about a possibility that Wallace, his attorney, and expert witness had conspired to commit and suborn perjury in the earlier case. Wallace asserts that these statements are grounds for the judge to recuse himself and for appointment of new counsel in this case.

The judge's comments in the prior trial, however, merely reflected his opinion of the evidence at the end of the trial and informed counsel of the possibility of perjury committed in the trial. Similarly, the court's October 25,

1999, order contained only the judge's opinion of the evidence presented in the earlier lawsuit. As for his attorney's supposed conflict of interest, Wallace explicitly waived any potential conflict and stated on the record that he wanted the Federal Public Defender Office to continue to represent him for the remainder of the prior trial. In the end, despite Wallace's abundant allegations of problems with the judge and a conflict of interest with his attorney in the earlier trial, his claims fail because he cannot cite in this case a single statement made by the court that a reasonable person would find had created an appearance of bias; nor can he show any adverse actions by his counsel in this case related to the alleged conflict of interest.

Accordingly, no basis exists for reversal and Wallace's conviction and sentence should be upheld.

ARGUMENT

I

THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE ELEMENTS AND MENTAL STATE REQUIRED FOR PROVING WALLACE'S CHARGED OFFENSE

Section 242 prohibits the willful deprivation of "any rights, privileges, or immunities secured or protected by the Constitution" while acting under the "color of any law." 18 U.S.C. 242. In this appeal, Wallace contends that good faith is a

defense to this specific intent crime and that the district court erred in failing to give his requested instruction on his good faith defense (Br. 11-17), which stated that "[f]orce is not cruel and unusual in violation of the Eighth Amendment if it was applied in a good-faith effort to maintain or restore discipline" (R2-183).

This Court reviews a district court's refusal to include a requested instruction in the jury charge for abuse of discretion, *United States* v. *Dixon*, 185 F.3d 393, 402 (5th Cir. 1999), recognizing that the district court is "afforded substantial latitude in formulating its instructions." *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995). Assuming that good faith is a defense to a Section 242 charge based on an Eighth Amendment violation, see *Hudson* v. *McMillian*, 503 U.S. 1, 6-7 (1992) (whether prison officials inflicted cruel and unusual punishment in violation of the Eighth Amendment and 42 U.S.C. 1983 turns on whether officials applied force in good faith to maintain order), the district court's refusal to give Wallace's requested instruction is not reversible error because Wallace cannot show that (1) his requested instruction was not substantially covered in the charge given to the jury and (2) the omission of the instruction seriously impaired his ability to present his defense. See *United States* v. *Upton*, 91 F.3d 677, 683 (5th Cir. 1996), cert. denied, 520 U.S. 1228 (1997).

Contrary to Wallace's contention, the district court sufficiently instructed the

jury that it must acquit if it finds that Wallace acted in good faith. Specifically, the court instructed the jury that if it found that the defendant "used force on Clarence Fisher, then [the jury] should determine whether that force was excessive and objectively unreasonable, in that the force was an unnecessary and wanton infliction of pain" (R1-363). And, pursuant to the jury charge, the jury should consider, among other factors, "the threat reasonably perceived by the officers" in making this determination (R1-363). The court further instructed the jury that, in order to find a violation of 18 U.S.C. 242, the jury must find that Wallace acted "willfully" and with the specific intent "to act in a way which amounts to the unnecessary and wanton infliction of pain" (R1-362).

Although the jury charge did not use the words "good faith," the district court did not abuse its discretion in refusing to give Wallace's requested instruction because the court's jury charge substantially covered the good faith defense by instructing the jury as to the elements of a Section 242 violation, including the requisite specific intent for the offense. See, *e.g.*, *United States* v. *Daniel*, 957 F.2d 162, 170 (5th Cir. 1992) (no abuse of discretion for failing to instruct as to good faith defense where jury was properly instructed on the elements of conspiracy and the requisite mental state); *United States* v. *Gunter*, 876 F.2d 1113, 1119-1120 (5th Cir.) (good faith instruction not required where offense could not be agreed to by

mistake and where jury was properly instructed on the requisite mental state), cert. denied, 493 U.S. 871 (1989); *United States* v. *Luffred*, 911 F.2d 1011, 1016 (5th Cir. 1990) ("When the court instructs the jury as to the government's burden of proving that the defendant's conduct was willful and then properly defines that term, it adequately conveys the concept of the good faith defense.").

Indeed, the district court's definition of willfulness and specific intent in the jury charge is virtually identical to the definitions approved in this Circuit as sufficient to obviate a need for an express good faith instruction. See, *e.g.*, *United States* v. *Rochester*, 898 F.2d 971, 978-979 (5th Cir. 1990) (no abuse of discretion for not giving a good faith instruction where court defined willfulness as "voluntarily and purposely, with specific intent to disobey or disregard the law"); *Upton*, 91 F.3d at 683 (same); *United States* v. *Giraldi*, 86 F.3d 1368, 1376 (5th Cir. 1996) (same); *United States* v. *St. Gelais*, 952 F.2d 90, 93-94 (5th Cir.) (same), cert. denied, 506 U.S. 965 (1992); *Gunter*, 876 F.2d at 1119 (same). A good faith instruction would have been redundant in light of the specific intent instruction given by the court. See *United States* v. *Chenault*, 844 F.2d 1124, 1130 (5th Cir. 1988).

Wallace's citation to *United States* v. *Burroughs*, 876 F.2d 366 (5th Cir. 1989), is inapposite. The district court's failure to give a good faith instruction in

Burroughs was an abuse of discretion because the court erroneously treated the drug offense at issue as a general intent crime and failed to properly instruct the jury as to the requisite specific intent for the charged offense. *Id.* at 368-369. In contrast, where a specific intent instruction is given as in this case, a "finding of specific intent * * * categorically excludes a finding of good faith" and obviates the need for expressly instructing as to good faith. *Rochester*, 898 F.2d at 979.[3]

Not only did the jury charge substantially cover Wallace's good faith defense, but Wallace also had the opportunity to fully present his defense to the jury. For instance, both of Wallace's witnesses testified that his use of force was appropriate for the situation and not excessive (SR4-17-18, 34). His attorney's opening and closing arguments also made this point to show that Wallace acted in

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[3] Wallace appears to argue (Br. 16-17), without any elaboration, that the jury charge did not substantially cover his good faith defense because it also did not instruct the jury as to "[w]hether the District Court erred in denying Wallace's rule 29 motion in that at the time of the alleged assault no State employees were presented [sic] so that he could not have been acting under 'color of state law.'" It is unclear how such an instruction relates to Wallace's good faith defense. Moreover, this charge is not supported by the evidence presented at trial; the record shows that Brazoria County Sheriff's Department guards Mathes, Higgins, and Achten participated in all or part of the November 7, 1996, incident. Thus, it would have been improper to give this instruction. See *United States* v. *Sharpe*, 193 F.3d 852, 871 (5th Cir. 1999) ("The district court 'may not instruct the jury on a charge that is not supported by the evidence.'"), cert. denied, 120 S. Ct. 1202 (2000). In any event, Wallace did not challenge the court's specific instruction on "color of law" (R1-360) and Section 242's color of law element (R1-364; SR4-62-66). Nor did Wallace propose another instruction on "color of law."

good faith toward Fisher (SR2-185; SR4-103).

Hence, viewing "the record as a whole," the district court's refusal to give Wallace's requested good faith instructions clearly did not "thwart" Wallace's presentation of his defense to the jury and, consequently, does not constitute an abuse of discretion. See *Rochester*, 898 F.2d at 979 (failure to give good faith instruction was not reversible error where the court instructed the jury as to the elements and requisite mental state of the charged offense and the defendant was able to testify and argue his defense to the jury); accord *Upton*, 91 F.3d at 683; *Storm*, 36 F.3d at 1295; *Daniel*, 957 F.2d at 170; *St. Gelais*, 952 F.2d at 94; *Gunter*, 876 F.2d at 1119; *United States* v. *Lavergne*, 805 F.2d 517, 523 (5th Cir. 1986).

II

WALLACE ACTED UNDER COLOR OF TEXAS LAW

Wallace's motion for judgment of acquittal asserted, among other things, that Wallace was entitled to an acquittal because he did not act under color of Texas law when he physically abused Fisher (SR3-272; SR4-58; cf. R2-320-322). His argument is two-fold. He asserts (Br. 17-23) that he did not qualify as a state actor and, therefore, 18 U.S.C. 242's "under color of law" requirement is not met. Furthermore, even if he were a state actor, Wallace contends (Br. 23-25, 31-35)

that there was a fatal variance between the indictment's reference to Texas law and the proof at trial, which also requires overturning his conviction. Both arguments lack merit.

This Court reviews a denial of a motion for acquittal *de novo*. See *United States* v. *De Leon*, 170 F.3d 494, 496 (5th Cir.), cert. denied, 120 S. Ct. 156 (1999).

A. *State Actor*

To determine whether a private individual acted "under color of state law," courts apply a two-part test. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Ibid*. Although *Lugar* involved a claim under 42 U.S.C. 1983, the under color of state law requirements of Sections 242 and 1983 are co-extensive. See *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966); *Monroe* v. *Pape*, 365 U.S. 167, 185 (1961), overruled in part on other grounds, *Monell* v. *Dep't of Social Servs.*, 436 U.S. 658 (1978).

As Wallace concedes (Br. 19), the first part of the state action test is satisfied. In *West* v. *Atkins*, 487 U.S. 42, 55 (1988), a private physician, who

contracted with the State to assume the state's Eighth Amendment duty to provide adequate medical services to inmates, was "clothed with the authority of state law" and thus was a state actor. Similarly, deprivation of Fisher's Eighth Amendment right to be free from cruel and unusual punishment resulted from the exercise of a right or privilege created by Texas. As in *Atkins*, Wallace's authority over Fisher and other Missouri inmates in the Brazoria County Detention Center arose from a contract between Brazoria County, Texas, and Missouri for Brazoria County to house inmates convicted in Missouri (R2-48-59 (Contract)). The Contract specifically cited a Texas statute that empowered political subdivisions in Texas to house inmates convicted in other States (R2-59). Wallace's authority over the Missouri inmates also arose from a second contract between Brazoria County and his employer, Capital Correctional Resources, Inc. (CCRI), whereby CCRI agreed to operate the portion of the detention facility housing Missouri inmates "in compliance with Texas state law, other applicable law, and rules and procedures promulgated by the [Texas Commission on Jail Standards]" (R2-62-77 (Lease Agreement ¶ 6.01)).

The second part of the *Lugar* test is met as well. Wallace may be treated as a state actor under the public function, joint action, symbiotic relationship, and nexus tests. See *Lugar*, 457 U.S. at 939. This analysis is necessarily fact-bound and "[o]nly by sifting facts and weighing circumstances can the nonobvious

involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

Under the public function test, the focus is on whether the private party exercised powers that are traditionally the prerogative of the State. See *Marsh* v. *Alabama*, 326 U.S. 501, 507 (1946). Wallace argues (Br. 22-23) that a private party becomes a state actor only by participating in an activity "traditionally exclusively reserved to the State," see *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 352 (1974), and that because operating a prison is not historically a function performed only by a State, see *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997), the public function exception does not apply to Wallace's role as a correctional facility supervisor.

Although privately-operated prisons exist, only a sovereign has the authority to incarcerate persons who violate state law. *Richardson* is not to the contrary. In *Richardson*, 521 U.S. at 412-413, the Supreme Court addressed solely whether the history and purpose of qualified immunity warrant extending such immunity to private prison guards and explicitly stated that it was not determining whether the defendants were state actors under Section 1983. Thus, *Richardson* does not support Wallace's argument.

In contrast, numerous cases before and after *Richardson* underscore the point that the ability to incarcerate individuals who violate the law is a public function. Indeed, the Supreme Court implicitly recognized this in *West* v. *Atkins*, 487 U.S. at 55, holding that a private party who contracts with a State to render services that the State needed to provide to inmates is a state actor. The basis for the decision in *Atkins* is not, as Wallace would argue, that historically only a sovereign (and not private parties) had provided medical services to inmates, but that adequate medical services is an obligation owed by the State under the Eighth Amendment to inmates incarcerated by the State. See *Atkins*, 487 U.S. at 46 n.6, 54-55.

Relying on *Atkins*, courts have ruled that a private entity that contracts with a State to perform a traditional state function in a prison is a state actor. In particular, the Sixth Circuit has directly addressed the issue presented in this case and found that a private company that contracts with the State to operate a prison is a state actor under Section 1983. See *Street* v. *Corr. Corp. of Am.*, 102 F.3d 810, 814 (1996); see also *Giron* v. *Corr. Corp. of Am.*, 14 F. Supp. 2d 1245, 1247-1251 (D.N.M. 1998) (corrections officer, who worked for a private company that operated a prison and who raped an inmate, was a state actor under Section 1983).[4]

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[4] District courts that have applied the public function test to private

(continued...)

Furthermore, in another post-*Richardson* case, *Lemoine* v. *New Horizons Ranch & Center, Inc.*, 990 F. Supp. 498, 502 (N.D. Tex. 1998), the court relied on *Atkins* when it applied *Lugar*'s public function test to hold that New Horizons, a private juvenile residential treatment center that contracted with the State of Texas to provide 24-hour care, was a state actor under Section 1983. The court wrote:

> Courts have held that if a state contracts with a private corporation to run its prisons, it would no doubt subject the private prison employees to section 1983 suits under the "public function" doctrine. *Skelton* v. *Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir.), cert. denied, 503 U.S. 989, 112 S. Ct. 1682 * * * (1992); *Blumel* v. *Mylander*, 919 F. Supp. 423, 427 (M.D. Fla. 1996) (citing *Plain* v. *Flicker*, 645 F. Supp. 898, 907 (D.N.J. 1986)). Based upon the extensive contractual relationship between the state and New Horizons, wherein New Horizons assumed the state's total responsibility for the care of troubled juveniles, the

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[4](...continued)
contractors who run prisons have found that the private party had acted under color of state law for purposes of Section 1983. See, *e.g.*, *Mauldin* v. *Burnette*, 89 F. Supp. 2d 1371, 1377 (M.D. Ga. 2000) (private citizen, who was authorized by county to sign inmate out of jail, supervise him throughout the week, maintain discretion and authority over his behavior, and return him to county jail, could be liable as a state actor); *Kesler* v. *King*, 29 F. Supp. 2d 356, 371 (S.D. Tex. 1998) (private company performing function of incarcerating inmates was acting under color of state law); *Blumel* v. *Mylander*, 919 F. Supp. 423, 426-427 (M.D. Fla. 1996) (private company that contracted with the Florida county to operate jail was a state actor); *Payne* v. *Monroe County*, 779 F. Supp. 1330, 1335 (S.D. Fla. 1991) (private guard service that was authorized to exercise supervision and control over the functions of a county jail could be sued under Section 1983); *Plain* v. *Flicker*, 645 F. Supp. 898, 907 (D.N.J. 1986) (stating that "if a state contracted with a private corporation to run its prisons it would no doubt subject the private prison employees to § 1983 suits under the public function doctrine").

> Court finds that under the public function doctrine analysis, New Horizons is a state actor for purposes of 42 U.S.C. § 1983. *West* v. *Atkins*, 487 U.S. 42, 50-51, 108 S. Ct. 2250, 2256 * * * (1988)[.]

Ibid. Thus, under the public function test, Wallace, a jailer certified by the Sheriff of Brazoria County, pursuant to the rules of the Texas Commission on Jail Standards, to work in the county detention facility, is a state actor for purposes of Section 242.[5]

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[5] The joint action, symbiotic relationship, and nexus tests also support finding that Wallace was a state actor. Joint action was established by the testimony of Carl Mathes, Larry Higgins, and James Achten, all of whom worked for the Sheriff's Department. See *Lugar*, 457 U.S. at 941. They were present at the November 7, 1996, incident and, in fact, Mathes and Achten played an integral role in the events leading up to Wallace's assault on Fisher by actively participating in restraining Fisher and getting him under control as Wallace approached Fisher. See pp. 7-8, *supra*. Mathes and Achten's formal reports about the incident, which were written on a form titled, "Brazoria County Sheriff's Department Offense/Incident Report Form" further support finding joint action (R2-300 (Mathes Incident Report and Achten Incident Report) (attached at Addendum)).

In addition, the joint cooperation between Brazoria County and CCRI in law enforcement and security matters (R2-70 (Lease Agreement ¶ 7.04)) supports finding that the county and CCRI shared a symbiotic relationship. See *Burton*, 365 U.S. at 725. The Lease Agreement, moreover, provided Brazoria County extensive control over the operations of CCRI employees. For instance, the Brazoria County Sheriff reviewed and approved the hiring and training of CCRI personnel (R2-72 (Lease Agreement ¶ 4.08)) and all CCRI jailers, including Wallace, "must be certified by the Sheriff prior to undertaking their duties" (R2-72 (Lease Agreement ¶ 7.07)). Brazoria County was also paid a daily rate for each Missouri inmate that it housed (R2-53 (Contract ¶ 3.1)). Furthermore, because Wallace's authority over the inmates arose from Texas law (see R2-59 (Contract at 1)) and he was required to comply with Texas law in performing his duties as a correctional officer (R2-71 (Lease Agreement ¶ 6.01)), there is a sufficient nexus between Wallace's conduct

(continued...)

B. *No Fatal Variance*

Wallace argues (Br. 23-25, 31-35) that even if the Court finds that he acted under color of state law, he is entitled to an acquittal because he acted under color of Missouri law rather than Texas law, as charged in the indictment. Thus, according to Wallace (Br. 25, 35), there was a fatal variance between the indictment and the proof at trial.

"A variance results when the charging terms of the indictment remain unaltered, but the evidence at trial proves facts other than those alleged in the indictment." *Sharpe*, 193 F.3d at 866. That is not the case here.

As charged in the indictment, Wallace acted under Texas law (R2-2): he was certified by the Brazoria County Sheriff, pursuant to the rules of the Texas Commission on Jail Standards (R2-70 (Lease Agreement ¶ 7.07); R2-300 (Wallace Certification) (attached at Addendum)), and he was obligated to follow the operating procedures for correctional facilities under "Texas state law, other applicable law, and rules and procedures [of the] Commission" (R2-71 (Lease Agreement ¶ 6.01); accord R2-70 (Lease Agreement ¶ 6.02)). Furthermore, the

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[5](...continued)
and state law to make him a state actor. Cf. *Blum* v. *Yaretsky*, 457 U.S. 991, 1008 (1982).

authority for Brazoria County and, in turn, CCRI to house inmates convicted in Missouri arises from Section 42.19 of the Texas Criminal Procedure Code and various local government code provisions, as specified in the contract between Brazoria County and Missouri (R2-59 (Contract at 1)). It is clear from the basis for Wallace's authority — the Contract and Leasing Agreement — that Texas law controls. And Wallace's citation (Br. 24, 34) to the Texas statute defining "custody" is irrelevant. What matters is not which State convicted Fisher, but which State's laws and procedures authorized Wallace to be a jailer at the Brazoria County Detention Center.

Even assuming that Wallace's authority arose from Missouri law, acquittal is not warranted. For purposes of proving a violation of Section 242, it is immaterial whether Wallace was acting under Texas or Missouri law; the statute requires only that the defendant act "under color of any law." 18 U.S.C. 242. Specifying Texas law, therefore, was unnecessary for charging Wallace. See *United States* v. *Miller*, 471 U.S. 130, 136 (1985) ("A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored.'").

III

ADMISSION OF THE EVIDENCE OF WALLACE'S PRIOR CONVICTIONS IS NOT REVERSIBLE ERROR

Whether the district court erred in admitting evidence of Wallace's 1987 and 1999 convictions for using excessive physical force in violation of 18 U.S.C. 242 as additional evidence of Wallace's specific intent and lack of mistake (SR3-264-269) is reviewed for abuse of discretion. See *United States* v. *Hernandez-Guevara*, 162 F.3d 863, 869 (5th Cir. 1998), cert. denied, 526 U.S. 1059 (1999). Under this Circuit's seminal case on the admissibility of evidence of extrinsic offenses, *United States* v. *Beechum*, 582 F.2d 898, 911 (1978), cert. denied, 440 U.S. 920 (1979), evidence of a prior conviction is admissible under Rule 404(b) to prove, *inter alia*, intent and the absence of mistake, if the evidence is relevant to an issue apart from the defendant's character and its probative value is not substantially outweighed by the danger of unfair prejudice, confusion, or the other proscriptions in Federal Rule of Evidence 403.

Wallace does not dispute that evidence of the prior convictions for identical specific intent offenses is admissible under Rule 404(b) to show specific intent in a subsequent case. He argues instead (Br. 28-29) that, unlike crimes involving a premeditated intent, the specific intent for assault is a "spontaneously formed

intent" and, consequently, evidence of his prior assault convictions was not probative of intent to commit an assault in the future and was admitted only to show bad character. Contrary to Wallace's assertion, however, *United States* v. *San Martin*, 505 F.2d 918, 923 (5th Cir. 1974), does not hold that evidence of prior convictions for assault is never admissible. *San Martin* indeed states that "evidence of prior crimes involving intent of the moment are hardly ever probative of later acts involving similarly split-second intent," but it does not stand for the proposition that all assaults are such crimes. *Ibid*. Here, Wallace's assault did not involve spontaneously formed intent. Trial evidence shows that Fisher was under control and was not a safety threat once he was handcuffed and by the time Wallace appeared (SR3-21, 58, 184, 208, 222-223). Thus, Wallace's intent to push Fisher was not the kind of "split-second intent" that was discussed in *San Martin*.

In addition, Wallace's reliance on *San Martin* is misplaced because that decision predates Rule 404(b), which took effect on July 1, 1975, and this Court's decision in *Beechum*. Tellingly, no subsequent case in this Circuit has distinguished between "premeditated" and "spontaneous" intent for purposes of Rule 404(b).[6] Moreover, the cases cited in *San Martin* and in Wallace's brief (Br. 28-29)

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[6] Although *United States* v. *Bettencourt*, 614 F.2d 214, 217-218 (9th Cir.

(continued...)

for this proposition (*e.g.*, *Hurst* v. *United States*, 337 F.2d 678, 681 (5th Cir. 1964), and *Railton* v. *United States*, 127 F.2d 691, 693 (5th Cir. 1942)) are irrelevant because intent was not at issue in those cases.

Even if the distinction made in *San Martin* applies to the Rule 404(b) context, Wallace cannot prevail. In that case, the government sought to admit the defendant's prior two convictions for resisting arrest and one conviction for assault and battery on a uniformed military personnel to show that the defendant intended to assault an FBI agent when he turned to escape the officer's hold from behind and struck the officer in the shoulder with his arm or elbow. 505 F.2d at 920-923. The court held that the evidence was inadmissible because it was not clear that the prior offenses included specific intent as a material element, the two prior crimes for resisting arrest were committed while the defendant was a minor and thus too remote in time, and the third conviction was too remote in that it was not "similar

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[6](...continued)

1980), addressed evidence of a prior assault under Rule 404(b), that case does not support Wallace's position. Significantly, in determining that the evidence of a prior arrest for assault was not admissible, the court stated that that evidence was not probative of the defendant's specific intent with respect to the charged offense because, *inter alia*, the defendant was never prosecuted or convicted following his arrest and, therefore, his state of mind in the prior incident was never proven. *Ibid*. The court nonetheless held that the admission of this evidence was harmless error. *Id*. at 219.

in nature and in its material elements to have clearly probative value with respect to the intent of the accused at the time of the offense charged." *Id.* at 922-923.

Wallace's 1987 and 1999 convictions do not suffer from the same remoteness problems as in *San Martin*. Here, Wallace's prior convictions are virtually identical in nature to the offense charged (all three incidents involve physically abusing an inmate in violation of his right to be free from cruel and unusual punishment) and required proof of the same material elements. Because Wallace had twice before confronted the very same situation of physically abusing an inmate, evidence of the prior convictions was probative of Wallace's specific intent to use unjustifiable force when he assaulted Fisher and showed that Wallace's conduct was not a mistake or accident.

Wallace asserts (Br. 31), however, that the October 1999 conviction is not probative of intent because that conviction occurred after the November 7, 1996, incident at issue. Contrary to Wallace's argument, the probative value of Wallace's October 1999 conviction for inflicting cruel and unusual punishment on an inmate on September 18, 1996, lies in the fact that on November 7, 1996, he knew — based on the same specific intent he had while committing the offenses underlying both the 1987 and 1999 convictions — that slamming Fisher's face into the wall was unlawful. See *United States* v. *Espinoza*, 578 F.2d 224, 227-228 (9th

Cir.) (admission of prior transportation of illegal aliens eleven days before commission of the same act on trial to show "knowledge and intent on the part of the defendant" under Rule 404(b) was not an abuse of discretion), cert. denied, 439 U.S. 849 (1978).

Nor could Wallace assert that the 1987 conviction is too remote in time. As stated in *United States* v. *Hernandez-Guevara*, 162 F.3d 863, 872 (5th Cir. 1998), cert. denied, 526 U.S. 1059 (1999), "[t]he age of a prior conviction has never been held to be a per se bar to its use under Rule 404." In fact, this Court has upheld admission of evidence of similar crimes even older than Wallace's 1987 conviction proper to show intent. See *id*. at 873 (admission of eighteen-year-old crime was not an abuse of discretion); *United States* v. *Chavez*, 119 F.3d 342, 346-347 (5th Cir.) (admission of fifteen-year-old conviction was proper under Rule 404(b)), cert. denied, 522 U.S. 1021 (1997).

Aside from the above differences, the district court in this case, unlike in *San Martin*, gave a limiting instruction to cure any risk of prejudice to Wallace. The court even adopted Wallace's proposed limiting language (R1-369) to make clear to the jury that it could consider the evidence of the prior conviction, if indeed it was considered at all, for the limited purpose of showing "whether the defendant had the state of mind or intent necessary to commit the crime charged in the

indictment" and "whether the defendant committed the act for which he is on trial by accident or mistake" (R2-369; SR1-74). By giving a proper limiting instruction, the district court cured any danger that the prior convictions would be considered for any improper purpose. See *United States* v. *Gordon*, 780 F.2d 1165, 1174 (5th Cir. 1986) (improper admission of extrinsic act evidence may be cured by limiting instruction).

Furthermore, in light of the record as a whole, admission of the prior conviction evidence had no substantial influence on the jury's decision to convict. The government did not provide any detailed testimony regarding the prior convictions (SR3-264-268). In contrast, the guards who witnessed Wallace's assault on Fisher all testified that his use of force against Fisher was not justified (SR3-22-23, 46, 84-85, 89, 102-106, 109-110, 119, 197, 224, 242, 246, 248, 250-251). Thus, as in *United States* v. *Gadison*, 8 F.3d 186, 192 (5th Cir. 1993), where the government presented strong circumstantial evidence establishing the defendant's membership in the charged conspiracy to distribute drugs in addition to the evidence of the defendant's prior drug offense conviction, the admission of the prior convictions evidence here "added little to the government's case" and any potential undue prejudice was minimal due to the court's limiting instruction.

Accordingly, even if the district court erred in admitting the prior conviction evidence (which we do not believe that it did), Wallace cannot show that admission of the evidence compromised his substantial rights — let alone that it affected the fairness, integrity, or reputation of his trial. Absent such a showing, no remedy is available. See *United States* v. *Clayton*, 172 F.3d 347, 352 (5th Cir. 1999) (even assuming that the district court committed plain error in charging the jury, the appellate court need not exercise its discretion to correct the error because defendant failed to show how the error affected the integrity of his trial); *United States* v. *Sneed*, 63 F.3d 381, 390 (5th Cir. 1995) (although district court erred in not making explicit findings regarding losses attributable to defendants in calculating their sentence terms, error was not plain because defendants failed to show how the error affected their sentences), cert. denied, 516 U.S. 1048 (1996).

IV

NO BASIS EXISTS FOR RECUSAL OF THE DISTRICT COURT JUDGE

Wallace contends (Br. 35-43) that the district court judge erred in denying his motion for recusal, filed before trial commenced, pursuant to 28 U.S.C. 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." According to Wallace (Br. 40-41), recusal is warranted because of the district court's comments at the end of

Wallace's separate, unrelated October 1999 trial (Trial One). In Trial One, the court had conducted two hearings to inform government counsel and an attorney from the Federal Public Defender Office, which represented Wallace at the trial, of his concerns that Wallace, his trial counsel, and expert witness may have conspired to commit and suborn perjury. Wallace further argues (Br. 41-42) that the court's October 25, 1999, Memorandum Order, denying Wallace's motion for recusal, also created an appearance of bias due to its "harsh and hostile" language and lack of "explication or analysis." Alternatively, Wallace asserts that the court applied the wrong standard for determining whether recusal was required. These issues are discussed in turn.

A. *Court's Statements At The End Of Trial One*

The court's comments at issue arose as a result of testimony toward the end of Trial One. On October 6, 1999, Wallace testified that he did not kick inmate Toby Hawthorne, but tripped and stepped on Hawthorne (Tr. 18-45-55).[7] His testimony was followed by that of his use-of-force expert witness, Terry Pelz, who testified that, based on his review of the videotape of the September 18, 1996,

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[7] References to "Tr. __-__-__" are to the volume number and page number or page range of the record on appeal in the October 1999 trial in *United States* v. *Wallace*, No. 00-40242 (5th Cir.). These transcript pages are attached in the Addendum.

incident at issue in that trial, it did not appear to him that Wallace kicked Hawthorne in the head (Tr. 19-19). Wallace's attorney, Assistant Federal Public Defender Richard Ely, specifically asked Pelz whether on the videotape "it appears that Mr. Wallace is knocked off balance when inmate Hawthorne crawls around the door frame," to which Pelz responded, "I believe when I viewed the videotape, I brought that to your attention" (Tr. 19-19).

Following this exchange, the government pursued this point in its cross-examination of Pelz. When asked if Pelz "suggested to Ely that maybe it appeared that Wallace was off balance," Pelz answered, "After my many reviews of it, yes" (Pelz Tr. at 3 (attached at Addendum)). Pelz further testified that he told Ely about this possible defense and confirmed that he did not base this defense theory on any discussions with Wallace (Pelz Tr. at 3).

Wallace's counsel argued in closing that the jury should not believe the "government's insinuation" that the defense "paid an expert to perjure himself" (Tr. 23-3), while the government argued in rebuttal that Pelz himself testified that "he is the one that told [defense counsel] about" his observation that Wallace tripped (Tr. 13-1420). The judge, however, did not comment on this issue in front of the jury except to overrule Ely's objection to the government's rebuttal statement regarding Pelz's testimony (Tr. 13-1420).

Only after the jury started deliberating on October 7, 1999, did the judge conduct a bench conference with Ely and government counsel, where he stated for the first time that he did "not want to accuse [Ely] or anyone else of anything improper," but if Pelz "testified truthfully, what he suggests is that there has been a conspiracy between [Ely, Wallace,] and him to suborn perjury" (Tr. 22-3). The judge further stated that he "could be all wrong about all of this"; he just wanted to inform counsel about his concerns and asked Ely to review the transcript of Pelz's testimony, consider the implications if such a conspiracy exists, and advise the court how he wanted to proceed (Tr. 22-4). Lastly, the court cautioned Ely that he should consider the implications for Wallace before speaking to Wallace about the suborning perjury issue (Tr. 22-4).

On the following day, October 8, 1999, while the jury was deliberating, the court held an in-chambers conference with government counsel and Assistant Federal Public Defender H. Michael Sokolow (Tr. 24-2). Sokolow had requested the conference to discuss how the Federal Public Defender Office should address their conflict of interest resulting from the suborning perjury allegation; Sokolow was under the mistaken impression that the court had ordered Ely not to tell Wallace about this issue (Tr. 24-2, 5). In response, the judge explained that he did not prohibit Ely from discussing the matter with Wallace, but that he merely

advised Ely to think about how best to proceed before involving Wallace (Tr. 24-9, 18, 31).

This Court reviews a denial of a motion to recuse for an abuse of discretion. See *United States* v. *Bremers*, 195 F.3d 221, 226 (1999). Recusal may be required under Section 455(a) if "a reasonable person, knowing the relevant facts, would expect that [the judge] knew of circumstances creating an appearance of partiality" even if no actual partiality exists. *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1988); *Bremers*, 195 F.3d at 226. But recusal may not be based on "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings * * * unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 510, 555 (1994). "Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Ibid.*

No basis exists for finding that the court's statements or rulings concerning an issue unrelated to this case created an appearance of bias in the instant case. See *United States* v. *Wilson*, 77 F.3d 105, 111 (5th Cir. 1996) ("Opinions formed during the prior proceedings do not constitute a basis for statutory recusal unless the opinion displays a deep-seated favoritism or antagonism that would make fair

judgment impossible."); *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 964 (5th Cir.) (the mere fact of having presided over a previous criminal trial involving the same defendant does not mandate recusal from all future litigation involving that defendant), cert. denied, 449 U.S. 888 (1980); see also *Liteky*, 510 U.S. at 551 ("It has long been regarded as normal and proper for a judge to sit in * * * successive trials involving the same defendant.").

Because the district court's comments at issue were based on Wallace's expert witness's testimony during Trial One, recusal is proper only if the statements can be characterized as deep-seated favoritism or antagonism that made the trial in this case unfair. The record, however, clearly reveals that neither characterization is appropriate. See *United States* v. *Jordan*, 49 F.3d 152, 157 (5th Cir. 1995) (courts must analyze the "unique facts and circumstances" of the particular Section 455(a) claim at issue, rather than compare the case at hand to similar "situations considered in prior jurisprudence").

After presiding over a trial, it is entirely proper for the court to have formed an opinion about the evidence at trial and even about the defendant. See *Liteky*, 510 U.S. at 550-551; *Garcia* v. *Woman's Hosp.*, 143 F.3d 227, 230 (5th Cir. 1998) (on remand, judge's comments regarding plaintiff's "ability to prove her case were perhaps unflattering, but reflected only the district judge's considered opinion upon

having viewed the evidence and law in this case" and were not grounds for recusal).

It is the court's informed opinion of the evidence presented at Trial One that Wallace challenges here. At bottom, nothing stated by the judge could be interpreted by a reasonable person as showing that the court was convinced that Wallace had conspired to suborn perjury (though it would not be grounds for recusal even if the court held that opinion based on the trial evidence) or that the court would disregard any credible evidence by Wallace. See *Liteky*, 510 U.S. at 551 ("Impartiality is not gullibility. Disinterestedness does not mean child-like innocence."); *Garcia*, 143 F.3d at 230 (no basis for recusal where "judge's comments did not indicate that he would ignore the probative value" of plaintiff's evidence). To the contrary, the judge characterized the matter as "*potentially* a conspiracy to submit and to suborn perjury," which indicates that he did not have his mind made up about Wallace (Tr. 24-8 (emphasis added)). The judge's impartiality was also evident in the way that he qualified his statements by saying "if we are to believe what the expert witness had to say" (Tr. 24-9) and generally referred back to the actual testimony by Pelz when giving his opinion of the evidence (Tr. 24-10, 14, 26-27). And far from being biased against Wallace, the judge tried to avoid any undue prejudice to Wallace by purposely not mentioning

his concerns in front of the jury (Tr. 24-6, 27) and was fully aware that even the appearance of bias would affect the integrity of the trial (Tr. 24-13). He even stated so (Tr. 24-13).

Wallace appears to argue (Br. 41) that the very fact that the judge "accused" him of conspiring to suborn perjury creates an impression of bias mandating recusal. The record shows, however, that the judge was merely "bring[ing] it to [counsel's] attention" (Tr. 24-16). By doing so, the court was only performing its obligation to investigate a potential problem that was relevant to the credibility of Wallace and his expert witness. See *Securacomm Consulting, Inc.* v. *Securacom Inc.*, Nos. 95-5393, 96-3247, 99-5326, 2000 WL 1177428, at *5 (3d Cir. Aug. 21, 2000) (court's questioning at trial was relevant to the witness's credibility and did not create appearance of bias to support recusal); see also *United States* v. *Howard*, 218 F.3d 556, 566 (6th Cir. 2000) (no basis for recusal where defendant failed to show "that the district judge manifested a clear inability to render fair judgment" by stating, outside the presence of the jury, that the testimony against defendant was "highly credible"). Indeed, the court stated that its purpose in raising this issue was to resolve what it perceived to be a potential problem that could have jeopardized the efficacy of Trial One (Tr. 24-10-11). Decisions related to trial administration like this one can hardly be grounds for recusal. See *Liteky*, 510 U.S.

at 556 (stating that "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses" do not support recusal).

Consequently, because the court's statements at the end of Trial One did not create an appearance of bias in that trial, it cannot be the basis for finding an appearance of bias in the present case.

B. *October 25, 1999, Memorandum Opinion*

Wallace argues (Br. 42) that the October 25, 1999, Memorandum Opinion's "harsh and hostile" language also created an appearance of partiality. The Supreme Court, however, has held that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555. At most, the Memorandum Opinion was critical of Wallace's asserted bases for recusal and, in denying Wallace's motion, stated that the court would "correct false or misleading allegations" made in Wallace's motion (R2-Doc. 97 (Opinion at 8)). Wallace considers these and similar statements about the "misleading allegations" in the motion as contributing to an appearance of bias. Yet, the law is clear that a court's opinion, based on the evidence, that a party's argument lacks merit or does not accurately reflect the record does not require

recusal. *Liteky*, 510 U.S. at 555 ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.").

Wallace further argues (Br. 42) that the court's denial of his motion without explication somehow created an appearance of bias. Contrary to his argument, the court's opinion analyzed each of Wallace's asserted grounds for recusal in detail and explained why the court's conduct did not require recusal when considered in the context of the evidence and events at trial (R2-Doc. 97 (Opinion at 8-13)). Indeed, the order reflected the court's opinion formed on "the basis of facts introduced or events occurring in the course of the current proceedings." *Liteky*, 510 U.S. at 555. The tone of the opinion may have been critical of Wallace's arguments, but it did not represent "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id*. at 555-556 (stating that "expressions of impatience, dissatisfaction, annoyance, and even anger" do not establish an appearance of bias).

C. *Standard For Recusal Motion*

In the alternative, because Wallace is unable to show that there was an appearance of bias, he argues (Br. 42) that the district court erred in denying his motion for recusal by failing to apply the proper standard for recusal (that is, where there is an appearance of bias), regardless of whether an actual bias existed. As discussed above, however, not even an appearance of partiality existed. Thus, if

the district court had applied an incorrect recusal standard, the error was harmless. See *Doddy* v. *Oxy USA, Inc.*, 101 F.3d 448, 458 (5th Cir. 1996) (harmless error standard applies to Section 455).

V

THE DISTRICT COURT DID NOT ERR IN DENYING WALLACE'S REQUEST FOR NEW COUNSEL

A criminal defendant has the right to effective assistance of counsel, which "includes the right to representation free from a conflict of interest." *United States* v. *Greig*, 967 F.2d 1018, 1021 (5th Cir. 1992). Ordinarily, to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense to the extent that the result would have been different. See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Where, as here, the defendant alleges that a conflict of interest existed between him and his counsel, however, the Supreme Court applies a separate two-part test to the claim. *Id*. at 692. This test provides that prejudice is presumed "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid*. (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 350

(1980)). Under this standard, the Court reviews legal questions *de novo* and questions of fact for clear error. See *United States* v. *Hoskins*, 910 F.2d 309, 310 (5th Cir. 1990).

Wallace contends (Br. 8-11) that his claim qualifies for a presumption of prejudice because both his attorneys at Trial One, Assistant Federal Public Defenders Richard Ely and H. Michael Sokolow, were burdened by an actual conflict of interest. According to Wallace (Br. 9-10), a conflict arose between him and Ely in Trial One once the court disclosed its concerns that Wallace, Ely, and Terry Pelz may have conspired to commit and suborn perjury. Because this conflict implicated the entire Federal Public Defender Office, Wallace argues the substitution of Ely with Sokolow did not cure the conflict and that conflict continued into this trial.

Even assuming that a conflict arose between Wallace and Ely once the court communicated its concerns toward the end of Trial One (and Wallace's waiver of a conflict between himself and the Federal Public Defender Office was, for whatever reason, invalid) and the conflict existed in this case as well, Wallace's claim still fails because he has not carried his burden of showing that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 350; see also *United States* v. *Abner*, 825 F.2d 835, 843-844 (5th Cir. 1987) (to establish

"adverse effects," defendant must identify specific instances where attorney's performance was allegedly compromised). His appeal fails to address this point altogether.

Wallace suggests (Br. 11) that, among other "strategic decisions that were burdened by the pending investigation of the alleged conspiracy to suborn perjury," his attorney from the Federal Public Defender Office had to decide whether to call him to the stand and risk subjecting him to cross-examination about his part in the alleged conspiracy in Trial One. This assertion ignores the fact that the potential conspiracy was entirely unrelated to this case. Moreover, neither Wallace's attorney, Ely, nor expert witness from Trial One participated in the present case and Wallace did not argue in his defense that his assault on Fisher was an accident. The conspiracy issue from Trial One simply was not relevant here so the risk of any mention of that issue by the government was nonexistent. In fact, the government stated on the record before trial commenced that, aside from presenting evidence that Wallace was convicted of 18 U.S.C. 242 in Trial One, it did not intend to mention anything — let alone the conspiracy issue — from that case (SR2-8, 19). Thus, the conspiracy issue was irrelevant to this case and could not possibly have adversely affected Wallace's attorney's trial decisions.

Wallace also appears to imply (Br. 9 n.2) that the district court's subsequent appointment of new counsel for Wallace for purposes of sentencing and appeal, one month after the conclusion of the trial in this case (R2-317), proves that he was entitled to new counsel at the trial. This is wrong. Appointment of counsel for proceedings *after trial* does not demonstrate that there was cause to replace counsel *at trial*.

Without more, prejudice cannot be presumed, see *Greig*, 967 F.2d at 1024 (stating that "existence of an actual conflict does not warrant setting aside the conviction in a criminal proceeding if the error had no 'adverse effect'" on counsel's performance), and the district court did not err in denying Wallace's request for new counsel.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment against Wallace.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2000, two copies of the foregoing Brief For The United States As Appellee and a diskette containing the body of the brief were served by first-class mail, postage prepaid, on:

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe this appeal raises novel legal issues that require oral argument.