APPENDIX

971 F.3d 524
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff—Appellee,
v.
Len DAVIS, Defendant—Appellant.

No. 19-70010
|
FILED August 21, 2020

Synopsis

Background: Capital murder defendant moved for postconviction relief. The United States District Court for the Eastern District of Louisiana, Ivan L. R. Lemelle, Senior District Judge, 2018 WL 1419351, denied his claims and denied him a certificate of appealability (COA). Defendant appealed.

Holdings: The Court of Appeals, Oldham, Circuit Judge, held that:

[1] evidence was sufficient to support a finding that defendant, a former police officer, deprived victim of her civil rights under color of law when he organized the murder of victim;

[2] defense counsel's failure to investigate, litigate, or argue the weakness of the "under color of law" element did not prejudice defendant, as required to justify the issuance of a COA on the basis of ineffective assistance of counsel;

[3] insufficient evidence existed to issue a COA based on capital murder defendant's claim that his Sixth Amendment right to a jury trial was compromised by the adverse impact of external influences and misconduct during the guilt-phase of his trial;

[4] insufficient evidence existed to issue a COA based on capital murder defendant's claim that the Government withheld key evidence in violation of *Brady*; and

[5] defendant's statutory claim that he was denied an evidentiary hearing with regard to his postconviction relief motion did not implicate a constitutional right, as required for the issuance of a COA.

Request for Certificate of Appealability denied.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (15)

[1] **Civil Rights** ⚿ Offenses

Evidence was sufficient to support a finding that defendant, a former police officer, deprived victim of her civil rights under color of law when he organized the murder of victim after she filed police-brutality complaint against defendant's partner; witness testimony established that defendant misused or abused his official power to access police station, his police car, and police radio, to plan, execute, and cover up the victim's murder. 18 U.S.C.A. §§ 241, 242.

[2] **Criminal Law** ⚿ Certificate of probable cause or reasonable doubt

Before a federal prisoner can seek appellate review of a district court's denial of his motion to vacate, he must first obtain a certificate of appealability (COA) from a circuit justice or judge. 28 U.S.C.A. §§ 2253(c)(1)(B), 2255.

[3] **Criminal Law** ⚿ Certificate of probable cause or reasonable doubt

A Certificate of Appealability (COA) from denial of motion to vacate is jurisdictional, and a Court of Appeals may not rule on the merits of the prisoner's case until a COA has issued. 28 U.S.C.A. §§ 2253(c)(1)(B), 2255.

2 Cases that cite this headnote

[4] **Criminal Law** ⚿ Certificate of probable cause or reasonable doubt

To determine if an applicant for a Certificate of Appealability (COA) from denial of motion to vacate has made a substantial showing of

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the denial of a constitutional right, the Court of Appeals asks a threshold question: has the applicant shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further; this is not a full consideration of the factual or legal bases adduced in support of the claims, and the Court will ask only if the District Court's decision was debatable. 28 U.S.C.A. §§ 2253(c)(1)(B), 2255.

7 Cases that cite this headnote

[5] **Criminal Law** ⇐ Deficient representation and prejudice in general

To show the deprivation of effective counsel, a prisoner must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[6] **Criminal Law** ⇐ Prejudice in general

In order to show prejudice, as an element of an ineffective assistance of counsel claim, there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; the likelihood of a different result must be substantial, not just conceivable. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[7] **Criminal Law** ⇐ Prejudice in general

When a court assesses prejudice, as an element of ineffective assistance of counsel, it must consider the totality of the evidence before the judge or jury because a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. U.S. Const. Amend. 6.

[8] **Criminal Law** ⇐ Certificate of probable cause or reasonable doubt

Defense counsel's failure to investigate, litigate, or argue the weakness of the "under color of law" element with regard to the offenses of conspiring to deprive murder victim's civil rights, and depriving her of those civil rights under color of law, did not prejudice defendant, as required to justify the issuance of a Certificate of Appealability (COA) from denial of motion to vacate based on claim of ineffective assistance of counsel; evidence for the "under color of law" requirement was overwhelming where defendant, a police officer at the time, put his plan to murder the victim into action the day after he learned the victim filed a police brutality complaint against the defendant's partner, and on the day of the murder, and while on-duty, the defendant paged his accomplices, discussed with them his plan to have the victim killed, met with them at the police station, then took them in his police car to show them the areas the victim frequented, and later, while cruising in his police car while on duty, spotted the victim, and paged his accomplices to give them the victim's location, much of which the jury heard in the defendant's own voice through recorded conversations. U.S. Const. Amend. 6; 18 U.S.C.A. §§ 241, 242.

[9] **Criminal Law** ⇐ Certificate of probable cause or reasonable doubt

Insufficient evidence existed to issue a Certificate of Appealability (COA) from denial of motion to vacate based on capital murder defendant's claim that his Sixth Amendment right to a jury trial was compromised by the adverse impact of external influences and misconduct during the guilt-phase of his trial; defendant pointed to the declaration of a wife of a juror to describe her fear, but she was not on the jury, and thus, her fears were irrelevant to defendant's jury-trial claim, and while defendant complained of a juror who was dozing off and played with a small gambling machine toy to stay awake, that would have constituted an

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internal, rather than an external influence. U.S. Const. Amend. 6; 28 U.S.C.A. §§ 2253(c)(1)(B), 2255.

[10] **Criminal Law** ⇐ Certificate of probable cause or reasonable doubt

Insufficient evidence existed to issue a Certificate of Appealability (COA) from denial of motion to vacate based on capital murder defendant's claim that the Government withheld key evidence in violation of *Brady*; the district court denied defendant's claims because they had no evidentiary basis and were merely defendant's conclusions and speculation, and even if the evidence, which included the results of an FBI investigation, satisfied the first two *Brady* elements, reasonable jurists could not have debated the immateriality of the evidence in the absence of any showing that it would have proved exculpatory in any way. 28 U.S.C.A. §§ 2253(c)(1)(B), 2255.

[11] **Constitutional Law** ⇐ Evidence

To establish a due process violation under *Brady*, a habeas petitioner must satisfy three elements: first, the evidence suppressed must be favorable to the defendant; second, the Government must have suppressed the evidence, either willfully or inadvertently, and; third, prejudice must have ensued, i.e., the suppressed evidence must have been material. U.S. Const. Amend. 5.

[12] **Constitutional Law** ⇐ Evidence

For evidence to be material, for purposes of establishing a due process violation under *Brady*, a defendant must show there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; for instance, a *Brady* violation occurs when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. U.S. Const. Amend. 5.

[13] **Criminal Law** ⇐ Certificate of probable cause or reasonable doubt

Capital murder defendant's statutory claim that he was denied an evidentiary hearing with regard to his motion to vacate did not implicate a constitutional right, as required for the issuance of a Certificate of Appealability (COA). 28 U.S.C.A. §§ 2253(c)(1)(B), 2255.

[14] **Criminal Law** ⇐ Certificate of probable cause or reasonable doubt

The issuance of a Certificate of Appealability (COA) from denial of motion to vacate is a matter of jurisdictional significance; it allows the prisoner to appeal, and it allows the appellate court to consider the prisoner's arguments on the specific issue or issues that were indicated in the COA. 28 U.S.C.A. §§ 2253(c)(1)(B), 2255.

[15] **Criminal Law** ⇐ Certificate of probable cause or reasonable doubt

Because a Certificate of Appealability (COA) from denial of motion to vacate is a jurisdictional prerequisite to any appeal, an appellate court has no judicial power to do anything without it. 28 U.S.C.A. §§ 2253(c)(1)(B), 2255.

***527** Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:12-CV-752, USDC No. 2:94-CR-381-1

Attorneys and Law Firms

Tracey Nicole Knight, Kevin G. Boitmann, Assistant U.S. Attorneys, Diane Hollenshead Copes, Esq., Assistant U.S. Attorney, U.S. Attorney's Office, Eastern District of Louisiana, New Orleans, LA, Suzanne Drouet, U.S.

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Department of Justice, Washington, DC, for Plaintiff - Appellee

Rebecca Louise Hudsmith, Esq., Federal Public Defender, Federal Public Defender's Office, Middle & Western Districts of Louisiana, Lafayette, LA, Sarah Lynn Ottinger, Esq., New Orleans, LA, for Defendant - Appellant

Before Owen, Chief Judge, and Willett and Oldham, Circuit Judges.

Opinion

Andrew S. Oldham, Circuit Judge:

Len Davis was an officer in the New Orleans Police Department ("NOPD"). He used his position and the NOPD's resources to orchestrate the murder of Kim Groves. The United States prosecuted Davis for capital murder. A jury convicted him. He was sentenced to death. Davis unsuccessfully appealed and then moved for postconviction relief under 28 U.S.C. § 2255. The district court denied his claims and denied him a Certificate of Appealability ("COA"). We likewise deny a COA.

I.

A.

On October 10, 1994, Kim Groves witnessed an NOPD police officer pistol-whipping her nephew. *See United States v. Davis*, 609 F.3d 663, 670 (5th Cir. 2010). That quite obviously upset Groves. So she filed a police-brutality complaint with the NOPD's office of internal affairs. *See ibid.* It turns out that the pistol-whipper policeman was Len Davis's NOPD partner, Sammie Williams.

***528** Davis learned of the police-brutality complaint on October 12, 1994. Davis was enraged. So Davis called a drug dealer named Paul Hardy and asked him to murder Groves. Davis and Hardy routinely exchanged favors. On this occasion, Davis offered to help plan the murder; then, after Hardy committed it, Davis would cover Hardy's tracks at the crime scene. *Ibid.*

On October 13, 1994, Davis invited Hardy and another accomplice, Damon Causey, to the police station so that they could see crime-scene photos. *Ibid.* Davis then drove them around in his police cruiser so that Hardy could see Groves's neighborhood. *Ibid.*; *United States v. Causey*, 185 F.3d 407, 415 (5th Cir. 1999). [1] Later that same night, Davis drove around in his police cruiser looking for Groves. When Davis spotted her, he paged Hardy and then gave him Groves's location. *Causey*, 185 F.3d at 415. Hardy went to that location, found Groves, and shot her in the head. Groves died. Sitting by his police radio an hour or two later, Davis heard police chatter about a murder. He radioed an on-duty officer to confirm Groves was dead. She was 32 years old.

While Hardy upheld his end of the bargain, Davis did not. The FBI had been wiretapping Davis as part of an investigation into drug sales and corruption in the NOPD—"Operation Shattered Shield." *Davis*, 609 F.3d at 671. These Shattered Shield recordings included Davis's calls with Hardy and Davis's conversations planning Groves's murder. With this evidence in hand, the Government indicted Davis for (1) conspiring to deprive Groves's civil rights, in violation of 18 U.S.C. § 241, (2) depriving her of those civil rights under color of law, in violation of 18 U.S.C. § 242, and (3) tampering with a witness by planning the murder of Groves after she filed a complaint with the NOPD, in violation of 18 U.S.C. § 1512(a)(1)(c). *Causey*, 185 F.3d at 411. The Government sought the death penalty.

At trial, the jury heard from Davis's former partner, Williams, about the plan to murder Groves. Williams recounted the steps Davis took while on-duty and in their police cruiser to arrange for the murder. Williams also was with Davis for a number of wiretapped phone calls and was able to provide the jury with information about those calls. For instance, the Government asked Williams what it meant when Davis said, "I can get 'P' to come do that whore now and then we handle the 30." Williams explained that Davis was arranging for Paul Hardy ("P") to kill Kim Groves ("that whore") and that Williams and Davis would "write the [police] report whereby any evidence and any involvement with Paul Hardy would be eliminated"("handle the 30"). Williams also testified that Davis "started jumping up and down in joy" when he got confirmation over his police radio that Groves was murdered. Davis said, "Yeah, yeah, yeah, rock, rock-a-bye"—a reference to a movie where the assassin said "rock-a-bye-baby" every time she killed someone. The jury convicted Davis and recommended a death sentence. The district court imposed it.

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B.

[1] On appeal, Davis challenged his §§ 241 and 242 convictions. *See Causey*, 185 F.3d at 411. Davis argued, *inter alia*, that the jury had insufficient evidence that he organized the murder of Groves while acting "under color of law." Under Supreme Court and Fifth Circuit precedent, the Government needed to prove beyond a ***529** reasonable doubt that (1) Davis "misused or abused his official power" and (2) "there is a nexus between the victim, the improper conduct[,] and Davis's performance of official duties." *Causey*, 185 F.3d at 415 (citing *West v. Atkins*, 487 U.S. 42, 50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 n.4 (5th Cir. 1994) (en banc)). The panel found that the Government proved Davis acted "under color of law":

> Davis misused or abused his official power to access the police station, the police car, and police radio to plan, execute, and cover up [Groves's] murder. The evidence of a nexus between that abuse and the crime is likewise sufficient. Davis's status as a police officer put him in the unique position to "handle the thirty" and thus offer protection to Hardy from the consequences of the murder. The motive for the crime arose from a complaint lodged by Groves against Davis in his official capacity[;] it was facilitated by the ability of Davis to case the area in his police car without arousing suspicion and to offer assurance of police protection to his accomplices.

Id. at 415–16.[2]

Although the panel upheld Davis's §§ 241 and 242 convictions, it vacated his conviction for witness tampering and remanded for resentencing. After a subsequent appeal, *see United States v. Davis*, 380 F.3d 821, 829–30 (5th Cir. 2004), Davis's resentencing began in 2005. *See Davis*, 609 F.3d at 672. A jury once again recommended a death sentence. *Id.* at 672–73. On appeal from this death sentence, Davis argued yet again that "the evidence was insufficient to prove the 'color of law' element" for §§ 241 and 242. *Id.* at 697. But the panel declined to review his argument since Davis previously raised it on appeal. *Ibid.* After thoroughly reviewing his other arguments, the panel affirmed Davis's death sentence. *Id.* at 699.

Davis then challenged his conviction and sentence on numerous grounds in a § 2255 motion. He sought to proceed pro se. The district court granted Davis's request but appointed standby counsel. That generated *another* appeal over whether Davis's § 2255 motion should include 29 grounds (as standby counsel wanted) or only 19 grounds (as Davis wanted). We agreed with Davis. *See United States v. Davis*, 629 F. App'x 613, 618 (5th Cir. 2015) (per curiam). The district court then reviewed "the disorganized, duplicative[,] and redundant" arguments supporting Davis's 19 grounds in his 278-page motion, and the court denied them all. *United States v. Davis*, No. CR 94-381, 2018 WL 1419351, at *3 (E.D. La. Mar. 22, 2018). The district court further denied a COA.

Davis timely applied for a COA from this court.

II.

[2] [3] Before a federal prisoner can seek appellate review of a district court's denial of his § 2255 motion, he must first "obtain a COA from a circuit justice or judge." *Buck v. Davis*, —— U.S. ——, 137 S. Ct. 759, 773, 197 L.Ed.2d 1 (2017); *see* 28 U.S.C. § 2253(c)(1)(B). A COA is jurisdictional—"[a] Court of Appeals may not rule on the merits of [the prisoner's] case" until a COA has issued. *Buck*, 137 S. Ct. at 773; *see also* ***530** *Miller-El v. Cockrell*, 537 U.S. 322, 335–36, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). And a COA may only issue if the prisoner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

[4] To determine if a COA applicant has made that showing, we ask a "threshold question": has the applicant shown that " 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists

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could conclude the issues presented are adequate to deserve encouragement to proceed further' "? *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029). This is not a "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336, 123 S.Ct. 1029. Instead, we "ask 'only if the District Court's decision was debatable.' " *Buck*, 137 S. Ct. at 774 (quoting *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029).

In his application, Davis raises three claims that he says demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). We review each claim in turn. *See Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) ("COAs are granted on an issue-by-issue basis.").

A.

[5] First, Davis requests a COA on his claim that he was deprived "his constitutional right to the effective assistance of counsel at his 1996 guilt phase trial." *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court has said that "[t]he Sixth Amendment right to counsel 'is the right to the effective assistance of counsel.' " *Buck*, 137 S. Ct. at 775 (quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052). To show the deprivation of effective counsel, a prisoner "must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice." *Ibid.* (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). The district court found Davis's *Strickland* claim wanting because his "mere conclusions about [his] lawyer's performance [were] not enough to give rise to a credible assertion of a deficiency," and because Davis "fail[ed] to demonstrate a level of prejudice that is required by the *Strickland* standard."

Davis argues that his counsel provided ineffective assistance by not "investigat[ing], litigat[ing], or argu[ing] the weaknesses of the 'under color of law' element." According to an affidavit prepared for the purpose of his § 2255 motion, Davis's trial counsel asserts that he should have done more investigating, and he had no "strategic reason" for not doing so. For instance, trial counsel asserts that if only he'd known that Davis had a preexisting personal acquaintance with Groves, he would have used that to dispute the Government's theory that Davis killed Groves because of her police-brutality complaint. Davis also provides another affidavit from a private investigator, which asserts that Davis and Groves had "long-standing friction" and "personal hatred."

[6] [7] We need not decide whether Davis has made the requisite showing of his counsel's deficiency because no reasonable jurist could debate that Davis suffered no prejudice. *Buck*, 137 S. Ct. at 776. In order to show prejudice, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ibid.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). And when a court assesses prejudice, it "must consider the totality of the evidence before the judge or jury" because "a verdict or conclusion only weakly supported by the record is more ***531** likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 695–96, 104 S.Ct. 2052. Thus, the question for a COA is, in light of the totality of evidence, has Davis shown "a reasonable probability" that the result of his trial would have been different if his attorney had done more investigating into the "color of law" requirement and found Davis's personal history with Groves? *Buck*, 137 S. Ct. at 776.

[8] The answer is plainly no. The evidence for the "under color of law" requirement was overwhelming. *See Strickland*, 466 U.S. at 696, 104 S.Ct. 2052. Davis put his plan into action the day after learning of Groves's complaint with NOPD. *Causey*, 185 F.3d at 415. On the day of her murder and while on-duty, Davis "paged Hardy and Causey, discussed with them his plan to have Groves killed, met with them in the police station, then took them in his police car to show them the area that Groves frequented." *Ibid.* While cruising Groves's neighborhood later that night—on-duty and in his police car—he spotted her "and paged Hardy to give him Groves's location." *Ibid.* And Hardy went to go kill Groves with an assurance that Davis would take

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care of any evidence at the crime scene. *Ibid.* The jury heard this assurance through Davis's own voice in taped conversations and through Davis's partner's testimony. This was far more than enough to show Davis "used or abused his official power" and there was "a nexus between the victim, the improper conduct[,] and Davis's performance of official duties." *Causey*, 185 F.3d at 415.

Moreover, Davis fails to show what difference additional information about his relationship with Groves would make. For instance, the jury already heard testimony that Davis and Groves had known each other prior to the filing of the complaint that led to her death. ("Q: Did [Groves] actually name Len Davis by name [in the complaint]? A: Yes, she did. Q: Did she indicate that she had known him prior in some manner? A: Yes, she did."). And Davis does not show why that personal relationship would undermine his conviction given longstanding precedent that §§ 241 and 242 convictions can arise out of crimes committed for personal reasons. *See, e.g.*, *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991) (holding a "jealous husband" who beat up his wife's ex-lover still acted under color of law because he used his official status as a police officer to claim he could kill the other man, he summoned another police officer to join him in threatening the man, and the officers chased the man "out of town in their squad car"); *cf.* *Cooks v. United States*, 461 F.2d 530, 532 (5th Cir. 1972) (holding that counsel is not "ineffective" for failing to "foresee future pronouncements which will dispossess the court of power to impose a particular sentence which is presently thought viable" under current precedent).

Instead of making that showing, Davis appears to relitigate the "under color of law" issues that he presented in his first appeal. That is not the role of federal postconviction review. "[A] collateral challenge may not do service for an appeal." *United States v. Shaid*, 937 F.2d 228, 231 (5th Cir. 1991) (en banc) (quotation omitted). And once a claim is raised and adjudicated on direct appeal, the prisoner cannot re-raise the claim under § 2255 absent a change in law. *See, e.g.*, *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986). Davis's ineffective assistance of counsel claim is therefore not debatable.

B.

[9] Davis next requests a COA on his claim that his Sixth Amendment right to a jury trial was compromised by "the adverse impact of external influences and misconduct" during his 1996 guilt-phase ***532** trial. The district court considered this argument in conjunction with an argument that the jurors were biased. Ultimately, the district court determined that "these claims [were] without merit.... [I]t is worth remembering that in all respects there is overwhelming record evidence of [Davis's] guilt in a horrendous federal crime. There is no factual or constitutional basis warranting the relief [he] request[s]."[3]

The Supreme Court has held that the Sixth Amendment forbids "jurors from being subjected to 'private communication, contact, or tampering' and considers any such external influences presumptively prejudicial." *Oliver v. Quarterman*, 541 F.3d 329, 335 (5th Cir. 2008) (quoting *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954)). But Davis fails to point to any external influences in his COA briefing. For instance, Davis complains about the fact that his jury was sequestered during his trial. But Davis himself requested that sequestration. And, more to the point, Davis points to "absolutely no evidence" that even "suggests" that anyone "tried to talk to [the jurors] about the trial." *United States v. Fryar*, 867 F.2d 850, 853 (5th Cir. 1989) (denying "external influence" claim). Nor does he indicate that any of the officials charged with shepherding the sequestered jurors said anything inappropriate. *See* *Parker v. Gladden*, 385 U.S. 363, 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (per curiam) (reversing conviction because "a court bailiff assigned to shepherd the sequestered jury ... stated to one of the jurors in the presence of others ... 'Oh that wicked fellow [defendant], he is guilty' ").[4]

To the extent Davis relies on any evidence, that evidence reflects no external influence on the jury. He points to the declaration of a wife of a juror to describe her fear. But she wasn't on the jury, so her fears are irrelevant to Davis's jury-trial claim. *See* *Oliver*, 541 F.3d at 335 ("*Remmer* ... prohibits *jurors* from being subjected to ... external influences" (emphasis added)). Davis then says one juror was dozing off during the trial and played with a "little gambling machine toy" to stay awake. But the Supreme Court

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has explained that there is a difference between external influence claims and so-called internal influence claims. *See* *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). "[I]nternal influences ... provide no basis for relief," and these "include allegations of physical or mental incompetence of a juror, such as claims that a juror was insane, could not sufficiently understand English, or had a severe hearing impairment." *Oliver*, 541 F.3d at 336 (citing *Tanner*, 483 U.S. at 119, 107 S.Ct. 2739). Under the Supreme Court's framework, a dozing or game-playing juror is under a purely *internal* ***533** influence. And that's not a cognizable constitutional claim, *ibid.*, much less is it a debatable one.

C.

[10] The last constitutional claim for which Davis seeks a COA is that the Government withheld key evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The district court denied these claims because they had "no evidentiary basis and are merely Davis' conclusions and speculation." Jurists of reason could not debate that result.

[11] **[12]** "To establish a due process violation under *Brady*, a habeas petitioner must satisfy three elements." *In re Raby*, 925 F.3d 749, 759–60 (5th Cir. 2019) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). "First, the evidence suppressed must be favorable to the defendant." *Id.* at 760. "Second, the [Government] must have suppressed the evidence," either willfully or inadvertently. *Ibid.* "Third, prejudice must have ensued—*i.e.*, the suppressed evidence must have been material." *Ibid.* (quotation omitted). For evidence to be material, Davis must show "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). For instance, a *Brady* violation occurs when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Davis argues the Government violated these standards in two ways. First, he argues that the FBI did not disclose the results of an internal investigation into Davis's wiretaps. The FBI conducted an internal investigation to determine why FBI officials, who were listening to Davis's calls while he planned Groves's murder, did not intervene to stop that murder. The investigation concluded that "based on Davis's historical language, involvement with [NOPD] complaints, personal references, abusive language[,] and use of the phone to conduct police business, Davis's activity ... could be mistaken as routine." Thus, the FBI concluded it was understandable that the officials missed the significance of the calls at first.

Even if Davis showed that this evidence met the first two *Brady* elements, reasonable jurists could not debate the immateriality of this evidence. As the Government argued below, "[t]his report addressed why the [FBI] monitor did not catch the calls; it did not evaluate the quality of the evidence" or the meaning of the words that Davis actually used. And Davis makes no showing that this evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555; *see also* *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) ("We do not, however, automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." (quotation omitted)). After all, Sammie Williams heard the conversations firsthand and provided the jury with significant evidence about what Davis meant: he wanted Groves dead.

Second, Davis argues that the Government violated *Brady* by failing to fully disclose "302s." *See also* *Giglio*, 405 U.S. at 154, 92 S.Ct. 763. The term "302" refers to an FBI form bearing that number, which serves as an "official interview memorand[um]." ***534** *United States v. Cessa*, 861 F.3d 121, 128 (5th Cir. 2017). The FBI prepared these memoranda after talking with Williams. The Government provided Davis's trial counsel with redacted 302s for the trial. But during his postconviction proceedings at the district court, Davis obtained unredacted versions of the 302s. Davis now claims that the redactions violated *Brady* and *Giglio*.

Davis fails to make any showing that any particular part of these 302s would have impeached Williams or proved

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exculpatory in any way. *See* *United States v. Dillman*, 15 F.3d 384, 390 (5th Cir. 1994) ("Although exculpatory and impeachment evidence fall within the purview of *Brady*, neutral evidence does not."). Moreover, Davis fails to make any showing of materiality. He points to no specific redactions that if disclosed to the defense would have led to a different result in his trial. *See* *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375. For instance, Davis points to nothing that would have been vital to cross-examination, *see* *United States v. Sipe*, 388 F.3d 471, 483 (5th Cir. 2004), would have further developed "avenue[s] of impeachment," *ibid.*, or would have undermined any of the corroboration of Williams's account that the wiretapped conversations themselves provided, *see Cessa*, 861 F.3d at 129–30; *Rocha v. Thaler*, 619 F.3d 387, 396–97 (5th Cir. 2010) ("[T]he impeached testimony of a witness whose account is strongly corroborated by additional evidence supporting a guilty verdict ... generally is not found to be material." (quotation omitted)). Davis's *Brady* claims are therefore not debatable.

Davis's application for a COA is DENIED.

III.

[13] The district court also denied Davis's request for an evidentiary hearing. And Davis seeks a COA on that issue as well. But we have no power to issue such COAs. Congress specified that we can issue a COA "only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis added). The denial of a *statutory* claim for an evidentiary hearing under § 2254(e)(2) obviously does not itself implicate a constitutional right.

That's why we have held that "a petition challenging an evidentiary ruling may only be entertained as *corollary* to a constitutional violation." *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016) (quotation omitted; emphasis added). To that end, a request for an evidentiary hearing stands or falls with the applicant's COA showing. *See* *ibid.*

[14] When a prisoner has identified a substantial and reasonably debatable constitutional claim, we can issue a COA on that question. *See* 28 U.S.C. § 2253(c). The issuance of that COA is a matter of jurisdictional significance. *See* *Miller-El*, 537 U.S. at 336, 123 S.Ct. 1029 (noting a COA "is a jurisdictional prerequisite"). It allows the prisoner to appeal. It allows us to consider the prisoner's arguments on the "specific issue or issues" that we've indicated in the COA. 28 U.S.C. § 2253(c)(3); *see* *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) (holding "our review of [the prisoner's] habeas petition is limited to the issue specified in the COA"). And we've held the issuance of a COA on a constitutional claim gives us the correlative power to consider the prisoner's statutory claim to an evidentiary hearing. *See, e.g.*, *United States v. Reed*, 719 F.3d 369, 371 (5th Cir. 2013); *United States v. Cavitt*, 550 F.3d 430, 442 (5th Cir. 2008); *United States v. Edwards*, 442 F.3d 258, 264 (5th Cir. 2006); *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998); *United States v. McMillen*, 96 F. App'x 219, 221 (5th Cir. 2004) (per curiam).

*535 [15] By contrast, when the prisoner has not identified a substantial and reasonably debatable constitutional question, we cannot issue a COA. *See* 28 U.S.C. § 2253(c)(2). And because a COA is a jurisdictional prerequisite to any appeal, *see* *Miller-El*, 537 U.S. at 336, 123 S.Ct. 1029, we have no judicial power to do anything without it. *See* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (" 'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' " (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868))). That's why we've held that when an applicant's "constitutional claims fail" to make the necessary showing for a COA, "we do not address the merits of [the] request for an evidentiary hearing." *Norman*, 817 F.3d at 234. We do not address those merits because, without a COA, we have no jurisdiction to do so. *See, e.g.*, *Alix v. Quarterman*, 309 F. App'x 875, 878 (5th Cir. 2009) (per curiam); *Lewis v. Quarterman*, 272 F. App'x 347, 351 (5th Cir. 2008) (per curiam) (deferring consideration of evidentiary hearing question, if and when "the merits are addressed in a subsequent opinion"); *McMillen*, 96 F. App'x at 221.[5]

Because Davis has not made the requisite showing for the granting of a COA on his constitutional claims, we cannot

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issue a COA. And because we cannot issue a COA, we have no power to say anything about his request for an evidentiary hearing. *See* *Norman*, 817 F.3d at 234.

SO ORDERED.

All Citations

971 F.3d 524

Footnotes

1 The United States prosecuted Davis, Causey, and Hardy together. And the defendants appealed together. We first considered their appeals together in the *Causey* case, which is why we cite it for the factual and procedural background of Davis's case.

2 The text of 28 U.S.C. § 242 requires that the defendant act "under color of law," but the text of § 241 does not. Nevertheless, our court has construed § 241 to include a requirement that the defendant engage in "state action." *United States v. Tarpley*, 945 F.2d 806, 808 & n.2 (5th Cir. 1991). The appeal panel considered this requirement to be coextensive with § 242's "under color of law" requirement. *Causey*, 185 F.3d at 413–14.

3 Davis argues that the district court applied the wrong standard in reviewing his claim about external influences on the jury. Even if the district court did apply the wrong standard, "§ 2253(c) permits the issuance of a COA only where a petitioner has made a 'substantial showing of the denial of a constitutional right.' " *Miller-El*, 537 U.S. at 336, 123 S.Ct. 1029. As a consequence, it is not enough for Davis to simply say the district court was wrong; Davis must show that under the right standard, "reasonable jurists" could debate the resolution of his claim. *Ibid.*

4 In the district court, Davis made several arguments about several other alleged juror incidents, including one involving a juror's personal use of a Bible. But Davis did not raise those issues in his COA application before our court. He thus forfeited these arguments. *Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999) ("Issues not raised in the brief filed in support of [an applicant's] COA application are [forfeited]." (citing *Moawad v. Anderson*, 143 F.3d 942, 945 n.1 (5th Cir. 1998))); *Perillo v. Johnson*, 79 F.3d 441, 443 n.1 (5th Cir. 1996).

5 *Norman* also noted that, because Congress did not give us the power to grant COAs on statutory claims for evidentiary hearings, "[w]e ... construe Norman's request for a COA on this issue as a direct appeal from the denial of an evidentiary hearing." 817 F.3d at 234. But the fact that Norman *attempted* to appeal directly from the denial of an evidentiary hearing does not mean that Norman *could* so appeal. Litigants of all kinds (including but not limited to prisoners) attempt to appeal from all sorts of things, even when they cannot. *See, e.g., Lawson v. Stephens*, 900 F.3d 715, 719 (5th Cir. 2018) (holding a notice of appeal from a magistrate judge's decision is "a nullity"). That's why *Norman* did not "affirm" or "reverse" or otherwise exercise any jurisdiction whatsoever over the prisoner's request for an evidentiary hearing. The *Norman* panel simply denied the COA.

End of Document

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United States Court of Appeals for the Fifth Circuit

No. 19-70010

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LEN DAVIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:12-CV-752
USDC No. 2:94-CR-381-1

ON PETITION FOR REHEARING EN BANC

(Opinion 8/21/20, 5 CIR., _____, _____ F.3D _____)

Before OWEN, *Chief Judge,* WILLETT, and OLDHAM, *Circuit Judges.*

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THIRD SUPERSEDING INDICTMENT FOR
CIVIL RIGHTS MURDER AND WITNESS INTIMIDATION

FILED
AUG 10 10 05 AM '95
U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	**CRIMINAL DOCKET NO. 94-381**
v.	*	**SECTION: "C" (4)**
LEN DAVIS	*	**VIOLATION: 18 USC § 241**
PAUL HARDY		**18 USC § 242**
a/k/a "P", a/k/a "Cool"	*	**18 USC § 1512(a)(1)(C)**
DAMON CAUSEY		**18 USC § 2**
* * *		

The Grand Jury charges that:

COUNT 1

From on or about October 11, 1994, up to on or about December 6, 1994, in the Eastern District of Louisiana, defendant **LEN DAVIS**, who was then employed as an officer with the New Orleans Police Department, and defendants **PAUL HARDY**, a/k/a "P", a/k/a "Cool", and **DAMON CAUSEY**, did willfully combine, conspire, confederate and agree with each other and with others known and unknown to the grand jury to injure, oppress, threaten and intimidate Kim Marie Groves and another individual known to the grand jury, persons in the State of Louisiana, in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States, which include (1) the right not to be deprived of liberty without due process of law, that is, the right to be free from the use of unreasonable force by one acting under color of law, in that defendants **LEN DAVIS**, **PAUL HARDY**, a/k/a "P", a/k/a "Cool", and **DAMON CAUSEY** were acting under color of the laws of the State of Louisiana at all times relevant to this indictment, and (2) the

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right to provide information to law enforcement authorities about a federal crime, resulting in the death of Kim Marie Groves.

It was part of the plan and purpose of this conspiracy that Kim Marie Groves and the other individual known to the grand jury would be killed because a civil rights complaint had been made against defendant **LEN DAVIS** and another New Orleans Police officer known to the grand jury as a result of a beating of the known individual by the officers. The murders were planned to prevent Kim Groves and the known individual from making additional statements to law enforcement authorities regarding that civil rights complaint.

In furtherance of this conspiracy and to accomplish its plan and purposes, the defendants did commit the following overt acts, among others:

OVERT ACTS

1. After learning that Kim Marie Groves had filed a civil rights complaint against him, defendant **LEN DAVIS** contacted defendant **PAUL HARDY**, a/k/a "P", a/k/a "Cool", on several occasions by cellular telephone on or about October 13, 1994, to arrange the murder of Kim Marie Groves.

2. On or about October 13, 1994, defendant **LEN DAVIS** contacted defendant **DAMON CAUSEY** by cellular telephone to arrange a meeting whereby defendant **LEN DAVIS** would identify Kim Marie Groves to defendants **PAUL HARDY**, a/k/a "P", a/k/a "Cool", and **DAMON CAUSEY**, thereby facilitating the murder of Kim Marie Groves.

3. On or about October 13, 1994, defendant **LEN DAVIS**, while on-duty and while using his official police car, conducted surveillance of Kim Marie Groves for the purpose of

reporting Groves' physical description and location to defendant **PAUL HARDY**, a/k/a "P", a/k/a "Cool".

4. On or about October 13, 1994, at 10:01 p.m., defendant **LEN DAVIS**, during a cellular telephone conversation, ordered defendant **PAUL HARDY**, a/k/a "P", a/k/a "Cool", to "get that whore," thereby ordering the murder of Kim Marie Groves. Defendant **PAUL HARDY**, a/k/a "P", a/k/a "Cool", agreed to kill Kim Marie Groves and stated in response, "Alright, I'm on my way."

5. On or about October 13, 1994, at 10:55 p.m., defendant **PAUL HARDY**, a/k/a "P", a/k/a "Cool", shot Kim Marie Groves in the head with a 9 mm firearm, which resulted in her death.

6. Defendant **DAMON CAUSEY** did conceal the 9 mm firearm used to kill Kim Marie Groves by hiding the firearm in a chest-of-drawers in his bedroom, located at 3930 Florida Avenue, Apartment B, New Orleans, Louisiana.

7. On or about October 14, 1994, **LEN DAVIS**, in a cellular telephone conversation, spoke with **PAUL HARDY** about killing the known individual and **PAUL HARDY** replied that he wanted to kill the person that night. **LEN DAVIS** asked **PAUL HARDY** to "hold off" killing that individual that night because it would be "too suspicious."

8. On October 17, 1994, **LEN DAVIS** told **PAUL HARDY**, in a cellular telephone conversation, that there was no need to kill the other known individual unless he was persistent in complaining against **DAVIS**. **DAVIS** added that if the individual complained about **DAVIS**, it would be "Rock-A-Bye, Baby" (death) for the person.

All in violation of Title 18, United States Code, Section 241.

COUNT 2

On or about October 13, 1994, in the Eastern District of Louisiana, defendant **LEN DAVIS**, who was then employed as an officer with the New Orleans Police Department, and defendants

PAUL HARDY, a/k/a "P", a/k/a "Cool", and **DAMON CAUSEY**, all while acting under color of the laws of the State of Louisiana and while aiding and abetting each other, did willfully deprive Kim Marie Groves, a person in the State of Louisiana, of the rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of liberty without due process of law, which includes the right to be free from the use of unreasonable force by one acting under color of law, by shooting Kim Marie Groves in the head with a firearm, resulting in her death.

All in violation of Title 18, United States Code, Sections 242 and 2.

COUNT 3

On or about October 13, 1994, in the Eastern District of Louisiana, defendant **LEN DAVIS**, who was then employed as an officer with the New Orleans Police Department, and defendants **PAUL HARDY**, a/k/a "P", a/k/a "Cool", and **DAMON CAUSEY**, while aiding and abetting each other, willfully, deliberately, maliciously, and with premeditation and malice aforethought, did unlawfully kill Kim Marie Groves by shooting her in the head with a firearm with the intent to prevent the communication by Kim Marie Groves to a law enforcement officer of information relating to the commission and possible commission of a federal offense, that is, the beating by police officers of an individual known to the grand jury, in violation of Title 18, United States Code, Section 242.

All in violation of Title 18, United States Code, Sections 1512(a)(1)(C) and 2.

A TRUE BILL:

FOREMAN

EDDIE J. JORDAN, JR., #1450
UNITED STATES ATTORNEY

JAN MASELLI MANN, #9020
Chief, Criminal Division
Assistant United States Attorney

CONSTANTINE D. GEORGES, #6021
Assistant United States Attorney
Chief, Violent Crimes Task Force

MICHAEL E. McMAHON, #10095
Assistant United States Attorney

PETER McCLOSKEY
Criminal Section
U.S. Department of Justice

New Orleans, Louisiana
August 18, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	NO. 94-381
LEN DAVIS	SECTION "C"

VERDICT FORM

1. We, the jury, find the Defendant, Len Davis,

_____ Not Guilty ___✓___ Guilty

of the offense charged in Count One of the indictment.

(If you answered "Not Guilty" to Count One, proceed to Question 2.)

(If you answered "Guilty" to Count One, proceed to Question 1A. Choose ONE OR BOTH responses in Question 1A.)

1A. We the jury, find that the defendant, Len Davis, conspired to deprive Kim Marie Groves of the following rights and privileges secured by the Constitution and laws of the United States:

___✓___ The right not to be deprived of liberty without due process of law, that is, the right to be free from the use of unreasonable force by one acting under color of law;

___✓___ The right to provide information to law enforcement authorities about a federal crime or a possible federal crime.

Proceed to Question 2.

2. We the jury, find the Defendant, Len Davis,

_____ Not Guilty ___✓___ Guilty

of the offense charged in Count Two of the indictment.

Proceed to Question 3.

3. We the jury, find the Defendant, Len Davis,

_____ Not Guilty ___✓___ Guilty

of the offense charged in Count Three of the indictment.

(If you answered "Not Guilty" to Count Three, answer no further questions. Sign and date this form and return it to the Courtroom.)

(If you answered "Guilty" to Count Three, proceed to Question 3A. Choose **ONLY ONE** response in Question 3A.)

3A. We the jury, find the defendant, Len Davis, committed

✓ First Degree Murder

_____ Second Degree Murder

_____ Voluntary Manslaughter

_____ Involuntary Manslaughter

as to Count Three of the indictment.

SO SAY WE ALL.

New Orleans, Louisiana, this 23rd day of April, 1996.

David R Cloud

Foreperson

DAVID R CLOUD, SR.

D1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA — **CRIMINAL ACTION**

VERSUS — **NO. 94-381**

LEN DAVIS — **SECTION: "C"**

For each of the following aggravating factors, answer "Yes" or "No" as to whether you unanimously find that the government has proven beyond a reasonable doubt that particular factor:

1. Len Davis used his position as a police officer to affirmatively participate in conduct that seriously jeopardized the health and/or safety of other persons.

   Unanimous Yes ✓
   Not Unanimous ____

2. Len Davis poses a threat of future dangerousness to the lives and safety of other persons.

   Unanimous Yes ✓
   Not Unanimous ____

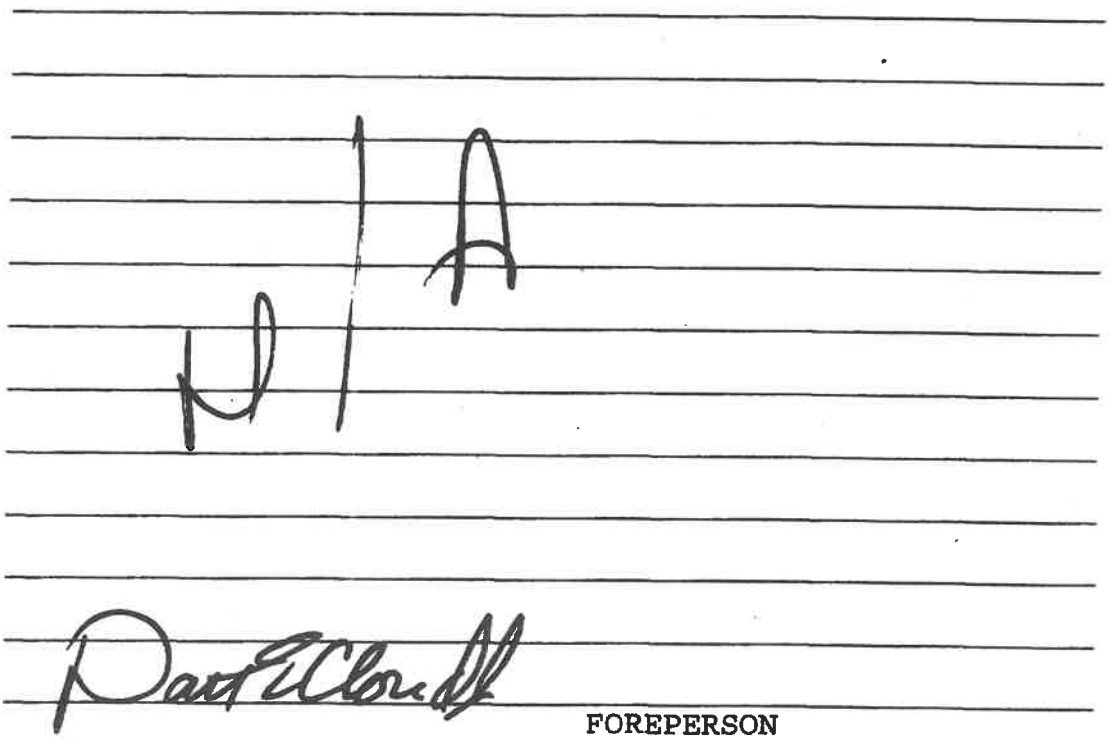
FOREMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	)	**CRIMINAL ACTION**
	)	
VERSUS	)	**94-381 C**
	)	
LEN DAVIS	)	**DECISION FORM B**

$$$$$$$$$

We, the jury, as to Len Davis, having considered and evaluated the evidence presented in light of the instructions of the Court, are not unanimously persuaded that a death sentence should be imposed in this case. However, we do unanimously agree that Len Davis should be sentenced to life imprisonment without possibility of release. Therefore, we hereby decide that Len Davis should be sentenced to life imprisonment without possibility of release.



FOREPERSON

April 26, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	)	**CRIMINAL ACTION**
	)	
VERSUS	)	**94-381 C**
	)	
LEN DAVIS	)	

SSSSSSSSS

CERTIFICATE

By signing below, each of us individually hereby certifies that consideration of the race, color, religious beliefs, national origin, or sex of Len Davis and of the victim, were not involved in reaching our respective individual decisions. Each of us individually further certifies that the same decision regarding a sentence would have been made no matter what the race, color, religious beliefs, national origin, or sex of the defendant or victim may have been.

[signature]
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[signature]
FOREPERSON

April 26, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	)	**CRIMINAL ACTION**
	)	
VERSUS	)	**94-381 C**
	)	
LEN DAVIS	)	**DECISION FORM A**

SSSSSSSSS

We, the jury, as to Len Davis, unanimously find beyond a reasonable doubt that the aggravating factor[s] proved in this case sufficiently outweigh any mitigating factors, and/or in the absence of any mitigating factors, the aggravating factors in themselves are sufficient and so serious as to justify a sentence of death. We vote unanimously that Len Davis shall be sentenced to death.

Miss. Cheryl D. [illegible]
Alice S. Deroche
Karen Plaisance
[illegible]
[illegible]
Emily H. [illegible]
Jennifer [illegible]
Evelyn A. [illegible]
Sally L. [illegible]
Wallace J. [illegible]
Sonya B. Christopher
David E. Cloud DAVID E. CLOUD, SR.
FOREPERSON

2.' 5

April 26, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA — **CRIMINAL ACTION**

VERSUS — **NO. 94-381**

LEN DAVIS — **SECTION: "C"**

PART ONE

FINDINGS ON INTENT

For each of the following, answer whether you unanimously find that the government has proven beyond a reasonable doubt that particular factor. Choose "Yes" for one or None. Do not choose "Yes" for more than one.

A. That the defendant, Len Davis, intentionally killed the victim;

Unanimous Yes _____

Not unanimous _____

OR

B. That the defendant, Len Davis, intentionally inflicted serious bodily injury that resulted in the death of the victim;

Unanimous Yes _____

Not unanimous _____

C. That the defendant, Len Davis, intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person and the victim died as a direct result of the act.

Unanimously Yes ✓

Not unanimous _____

(If you have checked "Not unanimous" as to each of the above, deliberate no further, sign this special findings form, and advise the court that you have reached a decision. If you have checked "Unanimous Yes" to either of the above, continue with your deliberations in accordance with the court's instructions and proceed to Part Two of this special findings form.)

PART TWO

FINDINGS AS TO AGGRAVATING FACTORS

For each of the following aggravating factors, answer whether you unanimously find that the government has proven beyond a reasonable doubt that particular factor.

A. That the defendant, Len Davis, committed the offense after substantial planning and premeditation by him.

Unanimously Yes ✓

Not unanimous _____

B. That the defendant, Len Davis, procured the commission of the offense by payment, or promise of payment, or anything of pecuniary value.

Unanimously Yes _____

Not unanimous ✓

DATE: 4/25/96 David E Clouds
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
DISTRICT COURT
NOV 8 9 48 AM '96
WHYTE
CLERK

UNITED STATES OF AMERICA — CRIMINAL ACTION

VS. LEN DAVIS — 433-13-8451 (SOC. SEC. NO.) — 94-00381 "C" (CASE NO./SEC.)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date ---------(Month NOVEMBER Day 6, Year 1996)

XXWITH COUNSEL DWIGHT DOSKEY AND MILTON MASINTER
(Name of Counsel)

Assistant U.S. Attorney: MICHAEL MCMAHON, CONSTANTINE GEORGES & NELSON THAYER
Court Reporter: DAVID ZAREK Courtroom Deputy: KIMBERLY COUNTY

PLEA: __**GUILTY,** and the court being satisfied __**NOLO CONTENDERE** XX**NOT GUILTY**
that there is a factual basis for the plea.

There being a verdict of

(__**NOT GUILTY.** Defendant is discharged.

(XX**GUILTY ON APRIL 24, 1996 OF COUNTS 1, 2 AND 3 OF THE THIRD SUPERSEDING INDICTMENT. ON APRIL 26, 1996, AFTER THE PENALTY PHASE OF TRIAL, THE JURY RETURNED A VERDICT THAT THE DEATH PENALTY BE IMPOSED ON THE AFOREMENTIONED COUNTS**

Defendant has been convicted as charged of the offense(s) of 18 USC § 241 - VIOLATION OF CONSPIRACY AGAINST CIVIL RIGHTS - MURDER, 18 USC § 242 - VIOLATION OF CIVIL RIGHTS, 18 USC § 1512 (a)(1)(c) - MURDER, FIRST DEGREE AND 18 USC § 2 - AIDING AND ABETTING

IT IS THE JUDGMENT OF THE COURT THAT THE DEFENDANT, LEN DAVIS, IS SENTENCED TO CONCURRENT SENTENCES OF DEATH AS TO COUNTS 1, 2 AND 3 OF THE THIRD SUPERSEDING INDICTMENT. THE SENTENCE IS MANDATORY PURSUANT TO THE UNANIMOUS VERDICT OF THE JURY. THE DEFENDANT IS COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL UNTIL EXHAUSTION OF THE PROCEDURES FOR APPEAL OF THE JUDGMENT OF CONVICTION AND REVIEW OF SENTENCE. WHEN THE SENTENCE IS TO BE IMPLEMENTED THE DEFENDANT SHALL BE RELEASED TO THE CUSTODY OF THE UNITED STATES MARSHAL, WHO SHALL SUPERVISE THE IMPLEMENTATION OF THE SENTENCE IN THE MANNER PRESCRIBED BY THE LAW OF THE STATE OF LOUISIANA.

SIGNED BY: GINGER BERRIGAN
UNITED STATES DISTRICT JUDGE
(Date) NOVEMBER 7, 1996

CERTIFIED AS A TRUE COPY
ON THIS DATE _____
BY: _____
Deputy Clerk

DATE OF ENTRY NOV 12 1996

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19-70010.2274

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Fowler v. U.S., U.S., May 26, 2011

185 F.3d 407
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Damon CAUSEY, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Paul Hardy, also known as P, also known as Cool; and Len Davis, Defendants–Appellants.

Nos. 96–30486, 96–31171.
|
Aug. 16, 1999.
|
Rehearing and Rehearing En Banc Denied Nov. 15, 1999.

Synopsis
One defendant was convicted in the United States District Court for the Eastern District of Louisiana, Ginger Berrigan, Judge, of conspiracy against civil rights and deprivation of rights under color of law and sentenced to life imprisonment, and two other defendants were convicted of conspiracy against civil rights, deprivation of rights under color of law and witness tampering and sentenced to death. Defendants appealed. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) evidence was sufficient to support convictions for deprivation of rights under color of law; (2) trial court did not abuse its discretion in denying severance motions; (3) any impropriety in prosecutor's closing argument did not require reversal; (4) other offense evidence was admissible; (5) gun barrel was properly admitted; (6) district court properly accepted stipulation; (7) trial court properly applied sentencing guidelines; but (8) evidence was insufficient to establish federal nexus required for witness tampering convictions.

Affirmed in part, reversed in part, and vacated and remanded in part.

DeMoss, Circuit Judge, concurred in part and dissented in part, and filed opinion.

Dennis, Circuit Judge, filed concurring opinion.

West Headnotes (26)

[1] **Criminal Law** ⇐ Summoning, impaneling, or selection of jury

When record contains explanation for government's peremptory challenges, Court of Appeals will review only propriety of ultimate finding of discrimination.

[2] **Criminal Law** ⇐ Jury selection

District court's decision on ultimate question of discrimination in government's use of peremptory challenges is fact finding, which is accorded great deference.

1 Cases that cite this headnote

[3] **Jury** ⇐ Peremptory challenges

Unless discriminatory intent is inherent in prosecutor's explanations for peremptory challenges, reasons offered will be deemed race-neutral.

1 Cases that cite this headnote

[4] **Civil Rights** ⇐ Offenses

"Under color of law" element of conviction of deprivation of rights under color of law requires that defendant have misused or abused his official power. 18 U.S.C.A. § 242.

22 Cases that cite this headnote

[5] **Civil Rights** ⇐ Offenses

Conviction for deprivation of rights under color of law requires nexus between improper conduct and defendant's performance of official duties. 18 U.S.C.A. § 242.

19 Cases that cite this headnote

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[6] **Civil Rights** ⇐ Offenses

If private citizens jointly engaged with police officer in the prohibited action, they could be convicted of deprivation of rights under color of law. 18 U.S.C.A. § 242.

2 Cases that cite this headnote

[7] **Civil Rights** ⇐ Prosecutions

There was sufficient evidence that defendant police officer misused or abused his official authority in planning, carrying out and covering up murder of woman who had filed complaint against him, to find that officer acted under color of state law and to support conviction of officer and his civilian accomplices for deprivation of rights under color of law. 18 U.S.C.A. § 242.

33 Cases that cite this headnote

[8] **Criminal Law** ⇐ Preferences or presumptions

There is strong preference for trying defendants who are indicted together in joint trials.

1 Cases that cite this headnote

[9] **Criminal Law** ⇐ Prejudice; fair trial

Severance should generally be granted only when there is serious risk that joint trial would compromise specific trial right of properly joined defendant or prevent jury from making reliable judgment about guilt or innocence.

6 Cases that cite this headnote

[10] **Criminal Law** ⇐ Prejudice; fair trial

Defendant seeking severance must demonstrate specific and compelling prejudice that resulted in unfair trial and such prejudice must be of type against which trial court was unable to afford protection.

5 Cases that cite this headnote

[11] **Criminal Law** ⇐ Preliminary proceedings

Denial of severance is reviewed for abuse of discretion.

[12] **Criminal Law** ⇐ Evidence admissible only against codefendant; spillover or compartmentalization

Trial court did not abuse its discretion in denying private citizen's motion to sever his trial on civil rights charges from police officer's trial on ground of spillover effect of evidence relating to federal investigation of public corruption; district court expressly excluded evidence relating to the investigation, and evidence supporting government's theory that private citizen murdered victim to placate officer and ensure continuing police protection for his drug trafficking and related violent offense was relevant and admissible against private citizen.

[13] **Criminal Law** ⇐ Evidence admissible only against codefendant; spillover or compartmentalization

There was sufficient evidence tying private citizen to defendant police officer's illegal activities of planning, carrying out and covering up murder of woman who had filed complaint against him, to support district court's refusal to sever private citizen's non-capital trial from capital trial of officer and another defendant for civil rights violations.

4 Cases that cite this headnote

[14] **Criminal Law** ⇐ Statements as to Facts, Comments, and Arguments

Improper comments by prosecutor may constitute reversible error when defendant's right to fair trial is substantially affected.

1 Cases that cite this headnote

[15] **Criminal Law** ⇐ Statements as to Facts, Comments, and Arguments

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Whether improper comments by prosecutor requires reversal depends upon magnitude of prejudicial effect, efficacy of any cautionary instruction and strength of evidence of defendant's guilt.

1 Cases that cite this headnote

[16] **Criminal Law** ⇐ Statements as to Facts, Comments, and Arguments

Any impropriety in prosecutor's closing argument did not require reversal, due to overwhelming evidence of defendant's guilt and negligible prejudicial effect of the remarks.

2 Cases that cite this headnote

[17] **Criminal Law** ⇐ Homicide, mayhem, and assault with intent to kill

Criminal Law ⇐ Other particular offenses

Criminal Law ⇐ Showing opportunity

Evidence that officer and drug dealer were involved in illegal activities that included violent crimes and drug dealing was relevant to prove both opportunity and motive under Government's theory that dealer was willing to execute victim and officer was able to order that execution, because of their mutual involvement in these activities, and because of officer's status as a police officer, and testimony that third defendant, who was alleged to be dealer's right hand man, was "in the game" was likewise relevant to motive and opportunity.

1 Cases that cite this headnote

[18] **Criminal Law** ⇐ Evidence of other offenses and misconduct

Agent's testimony that taped telephone conversations were obtained as result of "unrelated" federal investigation was presented to authenticate tapes, which were properly admitted, and any resulting prejudice from non-specific references to federal investigation complained of by defendants was insufficient to warrant reversal.

[19] **Criminal Law** ⇐ Weapons and related objects

There was sufficient evidence to support inference that gun barrel recovered from canal was murder weapon, including testimony by driver of getaway car that killer threw barrel of murder weapon out window of car and into canal, testimony of firearms expert that barrel was compatible with alleged murder weapon, and testimony of another expert that level of corrosion on barrel was consistent with it being in water between time of murder and its recovery.

[20] **Stipulations** ⇐ Construction and Operation in General

District court properly accepted stipulation by Government and two defendants that "rock-a-bye, baby" was slang expression understood to refer to killing someone, despite third defendant's contention that stipulation was overbroad and should have been changed to reflect that "rock-a-bye, baby" referred to killing of drug dealer; court accepted stipulation on basis that first two defendants were only ones who used the expression in relevant telephone conversations.

1 Cases that cite this headnote

[21] **Criminal Law** ⇐ Review De Novo

Criminal Law ⇐ Sentencing

District court's legal interpretation and application of sentencing guidelines is reviewed de novo, and its factual findings in support of sentence are reviewed for clear error. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

2 Cases that cite this headnote

[22] **Sentencing and Punishment** ⇐ Conspiracy and racketeering

Although defendant was not convicted of witness tampering accomplished by murder, district court properly used murder as underlying offense in sentencing defendant for conspiracy against civil rights and deprivation of rights under color

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of law, since murder was also the underlying offense of those counts. 18 U.S.C.A. §§ 241, 242; U.S.S.G. §§ 2A1.1(a), 2H1.1, 18 U.S.C.A.

2 Cases that cite this headnote

[23] **Obstructing Justice** ⇐ Tampering in general

Conviction for witness tampering does not require that defendant have believed that law enforcement official with whom defendant believed victim might communicate was federal. 18 U.S.C.A. § 1512(f)(2).

4 Cases that cite this headnote

[24] **Obstructing Justice** ⇐ Tampering in general

Prosecution for witness tampering is not limited to defendants who are guilty of underlying federal offense which victim reported or was expected to report. 18 U.S.C.A. § 1512(f)(2).

1 Cases that cite this headnote

[25] **Obstructing Justice** ⇐ Tampering in general

Official proceeding need not be pending or about to be instituted at time of alleged witness tampering. 18 U.S.C.A. § 1512(e)(1).

1 Cases that cite this headnote

[26] **Obstructing Justice** ⇐ Offenses relating to witnesses or potential witnesses

Evidence was insufficient to establish federal nexus required for conviction of witness tampering in connection with police officer's murder of woman who had filed complaint against him with police department's internal affairs division (IAD); defendant's specific intent was to short-circuit investigation and to send IAD message to leave him alone in his misuse of police power, and there was no evidence that likelihood or possibility that murder might impact future federal investigation played part in the crime. 18 U.S.C.A. § 1512(a)(1)(C).

10 Cases that cite this headnote

Attorneys and Law Firms

*410 Michael Edward McMahon, Assistant U.S. Attorney, Eddie J. Jordan, Jr., New Orleans, LA, for Plaintiff–Appellee.

Henry Philip Julien, Jr., Julien & Julien, New Orleans, La, for Causey.

Herbert V. Larson, Jr., New Orleans, LA, for Hardy.

Patrick Fanning, Archie B. Creech, New Orleans, LA, for Davis.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before DeMOSS, PARKER and DENNIS, Circuit Judges.

Opinion

ROBERT M. PARKER, Circuit Judge:

Appellant Damon Causey appeals his convictions and resulting life sentence for violation 18 U.S.C. § 241, conspiracy *411 against civil rights and 18 U.S.C. § 242, deprivation of rights under color of law. Appellants Paul Hardy and Len Davis appeal their respective convictions and death sentences for violation of 18 U.S.C. § 241, conspiracy against civil rights, 18 U.S.C. § 242, deprivation of rights under color of law and 18 U.S.C. § 1512(a)(1)(c), witness tampering.

We affirm Causey's convictions and sentence. We reverse Hardy and Davis's convictions for witness tampering, affirm their convictions for violation of §§ 241 and 242, vacate their death sentences and remand their cases to the district court for resentencing.

1. FACTS AND PROCEDURAL HISTORY

This is a direct appeal from convictions arising from the execution-style murder of Kim Marie Groves. Davis, a New Orleans police officer, targeted Groves because she filed a

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complaint against Davis with the Internal Affairs Division ("IAD") of the New Orleans Police Department alleging that he engaged in police brutality. Davis had a relationship with Hardy, a New Orleans drug dealer, in which Davis exchanged police protection for favors. Davis recruited Hardy and Hardy's associate Causey to kill Groves. Davis, Hardy and Causey planned the murder and subsequent coverup. Hardy was the triggerman who killed Groves.

Davis, Hardy and Causey were charged by indictment with conspiracy to injure, oppress, threaten and intimidate Groves and another individual in the right to be free from the use of unreasonable force by one acting under color of law and in the right to provide information to law enforcement authorities about a federal crime, alleging eight overt acts in furtherance of the conspiracy (Count 1, alleging violation of 18 U.S.C. § 241); with the substantive violation of Groves' civil rights (Count 2, alleging violation of 18 U.S.C. § 242 and 2); and with killing Groves with the intent to prevent her from communicating information to a federal law enforcement officer relating to the commission of a federal offense (Count 3, alleging violation of 18 U.S.C. §§ 1512(a)(1)(C) and 2). The Government, in accordance with the Federal Death Penalty Act of 1994 (FDPA), filed a Notice of Intent to Seek the Death Penalty against Davis and Hardy. *See* 18 U.S.C. § 3593(a).

Trial began on April 8, 1996. The evidence included recorded telephone conversations among the defendants before and after the murder, during which they planned and attempted to hide their involvement with the crime. The recorded interceptions of Davis's cellular phone conversations were obtained pursuant to a court-authorized investigation of a suspected drug protection racket run by Davis and other corrupt New Orleans police officers. The context of and predicate for the tapes were established by testimony from Sammie Williams, Davis's police partner who was present in the police car during many of the taped conversations. Steve Jackson, who drove the getaway car for Hardy, also testified for the Government.

On April 24, 1996, the jury returned a verdict of guilty on all three counts against Davis and Hardy. Causey was found guilty on Counts 1 and 2. The jury could not reach a verdict and the district court declared a mistrial on Count 3 as to Causey.

On April 25, 1996, sentencing hearings required by the FDPA for Davis and Hardy began in front of the same jury which had heard the guilt phase of the trial. Davis refused to participate in or attend the hearings. On the Government's suggestion, both Davis and Hardy were examined by a psychiatrist, who concluded that both were competent to proceed.

The first part of the penalty phase required the jury to make findings on intent and on the statutory aggravating factors alleged against Davis and Hardy. No new evidence was taken during this part of the hearing. The Government re-introduced ***412** all the evidence admitted during the guilt phase. The jury found that Davis intentionally participated in an act, contemplating that the life of a person would be taken or that lethal force would be used, and the victim died as a direct result of his act, pursuant to the factor set out at 18 U.S.C. § 3591(a)(2)(C). The jury similarly found that Hardy intentionally killed his victim, thus satisfying the intent element described at 18 U.S.C. § 3591(a)(2)(A). The jury also found that Davis and Hardy committed the offense after substantial planning and premeditation, consistent with the statutory aggravating factor set out at 18 U.S.C. § 3592(c)(9). The jury, however, could not reach a unanimous finding as to the other statutory aggravating factor alleged against Davis and Hardy, involving pecuniary gain.

The second portion of the penalty hearing, which focused on non-statutory aggravation and mitigation, proceeded *seriatim*. On April 26, 1996, the jury returned its finding that Davis used his position as a police officer to affirmatively participate in conduct that seriously jeopardized the health and safety of other persons and that Davis posed a threat of future dangerousness to the lives and safety of other persons, recommending a sentence of death.

The second half of Hardy's penalty phase began two days later, on April 29, 1996. On May 1, 1996, the jury found the non-statutory aggravators that he committed or participated in additional violent acts and that he poses a threat of future dangerousness to the lives and safety of others. Additionally, four jurors found the mitigating factor that Hardy was abandoned by his natural father and had no suitable male figure in his life; two jurors found that Hardy and his family lived in an abnormally violent environment; all twelve jurors found that Hardy was abused and subjected to violence during his formative years and that he had been traumatized by the death of family members and friends. Nonetheless, the jury unanimously found beyond a reasonable doubt that the

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aggravating factors sufficiently outweighed any mitigation to justify a sentence of death.

Davis and Hardy were each sentenced on November 6, 1996, to concurrent death penalties as to all three counts of the third superseding indictment. On November 27, 1996, Causey was sentenced to two concurrent life terms. All three defendants filed timely notices of appeal, which are consolidated before this court.

2. JURY SELECTION

Causey, Hardy and Davis allege that the Government exercised its peremptory strikes in a discriminatory manner, so as to exclude African–Americans, particularly African–American females, from the jury.

All three defendants are African–American males, and the victim was an African–American female. There were seventy individuals left in the jury pool after challenges for cause. The Government was allowed 24 peremptory strikes and the defendants, collectively, 26. The Government used nine of its peremptory strikes to challenge African–American females and two to challenge African–American males. One African–American female was seated on the twelve-member petit jury. Of the four alternates selected, three were African–Americans (one male, two females) and one was a white male.

After the jury was seated, the defendants asserted claims based on *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and its progeny. The district court held that defendants had not made out a prima facie case of discrimination, but nonetheless instructed the Government to articulate a race-neutral reason for each of the challenged strikes. Thereafter, the district court held that the Government's reasons were race-neutral, and denied defendants' *Batson* challenges.

[1] [2] "When the record contains an explanation for the government's peremptory challenges, this Court will review 'only the propriety of the ultimate finding of discrimination.' " ***413** *United States v. Perkins,* 105 F.3d 976, 978 (5th Cir.1997)(quoting *United States v. Forbes,* 816 F.2d 1006, 1010 (5th Cir.1987)). Moreover, the district court's decision on the ultimate question of discrimination is a fact finding, which is accorded great deference. *Id.*

Hardy concedes that the Government's articulated reasons were race-neutral and that the *Batson* challenges are without merit under Fifth Circuit precedent. However, he contends that our standard of review is too deferential and objects to the use of subjective factors when exercising peremptory strikes. This panel is bound by the circuit precedent and Hardy's criticisms of it avail him nothing.

Davis alleges that the Government selectively questioned African–American jurors about their religious views and used their responses as the basis of strikes; that the Government struck African–Americans for reasons that applied to white jurors who were not struck; and that the Government's articulated reasons were "non-quantifiable." Causey complains that the Government's articulated reasons were not credible, not quantifiable and internally inconsistent. Further, Causey characterizes the Government's jury selection as focused on eliminating African–American women due to the erroneous and racist view that they would be more likely to acquit African–American males, based on the fact that the jury that acquitted O.J. Simpson included nine African–American females.

[3] Unless a discriminatory intent is inherent in the prosecutor's explanations, the reasons offered will be deemed race-neutral. *See Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The Government's explanations were race-neutral and not outside the realm of credibility. Under the "great deference" standard of review, we affirm the district court's assessment of the Government's explanations for the exercise of its peremptory strikes. *See United States v. Perkins,* 105 F.3d 976, 979 (5th Cir.1997).

3. UNDER "COLOR OF LAW"

Defendants were all convicted for violations of 18 U.S.C. § 241 (conspiracy against rights) and § 242 (deprivation of rights under color of law). Section 241 provides, in relevant part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in ... the free exercise of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same ...

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> They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section ... they shall be fined under this title and imprisoned for any term of years, or for life, or may be sentenced to death.

18 U.S.C. § 241. Section 242 provides, in relevant part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person ... to the deprivation of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both ... and if death results from the acts committed in violation of this section ... shall be fined under this title, or imprisoned for any term of years or for life, or may be sentenced to death.

18 U.S.C. § 242. While § 242 contains an express requirement that the deprivation be "under color of law," § 241 does not. However, § 241 has been construed to require state action. *See, e.g., United States v. Tarpley,* 945 F.2d 806, 808 & n. 2 (5th Cir.1991).

***414** Causey, Davis and Hardy challenge their convictions on Counts 1 and 2, alleging that they were not supported by sufficient evidence that the defendants acted under "color of law." The verdicts must be sustained unless a reasonable trier of fact could not have found the "color of law" element beyond a reasonable doubt. *United States v. Williams,* 132 F.3d 1055, 1059 (5th Cir.1998).

Defendants argue that the offense did not have its genesis in Davis's police duties. They point out that the evidence established that Groves's IAD complaint against Davis was unfounded and that Davis was angry that she lied about him. Davis then called on his friend Hardy to vindicate his anger. Defendants note that they were "totally surreptitious" in using the police vehicle and Davis's status as a police officer to commit the crime. They characterize the murder as "personal" as opposed to "official" and therefore contend that the crimes were not committed under "color of law."

The statutes in question are Reconstruction Era civil rights statutes making it criminal to deprive a person of rights protected by the Constitution or laws of the United States under color of law. *See United States v. Price,* 383 U.S. 787, 801–806, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966)(setting out the origins of statutes and their history from 1866 through 1966). Consequently, we have ample guidance from the Supreme Court concerning the proper interpretation of the phrase "color of law." In *United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), the Supreme Court found that state election officials who altered ballots were acting under color of state law, because

> the alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

Classic, 313 U.S. at 325–26, 61 S.Ct. 1031. In *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), which involved the beating death of a man by some law enforcement officers, the Supreme Court again found action under color of law, because the defendants had

> [a]cted under "color" of law in making the arrest of [the victim] and in assaulting him. They were officers of the law who made the arrest. By their own admissions they

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> assaulted [the victim] in order to protect themselves and to keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective. Hence, their conduct comes within the statute.

Screws, 325 U.S. at 107–8, 65 S.Ct. 1031. The Supreme Court held that "acts of officers who undertake to perform their official duties are included [within the definition of 'under color of law'], whether they hew to the line of their authority or overstep it." *Id.* at 111, 65 S.Ct. 1031. However, the "acts of officers in the ambit of their personal pursuits are plainly excluded." *Id.* In *Griffin v. Maryland,* 378 U.S. 130, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964), the Supreme Court further explained that "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity." *Id.* at 135, 84 S.Ct. 1770.

In *United States v. Price,* 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), a deputy sheriff in Mississippi released three prisoners in the middle of the night, then proceeded to follow them and intercept them. He removed them from their car and placed them in his official car and took them to a deserted location, where they were met by two other policemen and fifteen private individuals, who, acting together, killed the three victims. The Court found that all the defendants, including ***415** the private citizens, were acting under color of law because

> the brutal joint adventure was made possible by state detention and calculated release of the prisoners by an officer of the State. This action, clearly attributable to the State, was part of the monstrous design described by the indictment. State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder.

Price, 383 U.S. at 795, 86 S.Ct. 1152.

In *United States v. Tarpley,* 945 F.2d 806 (5th Cir.1991), this court held that a deputy sheriff was acting under color of law when he assaulted his wife's former lover out of personal jealousy in the defendant's home. The Court explained, the "air of official authority pervaded the entire incident" because the defendant used his service revolver, summoned fellow officers from the sheriff's station to help him, claimed to have special authority as a police officer, and ran the victim out of town in a squad car. *Id.* at 809.

[4] **[5]** **[6]** In determining whether sufficient evidence supported the "under color of law" element of the convictions, we are called on to determine, first, whether Davis misused or abused his official power, *see West v. Atkins,* 487 U.S. 42, 50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) [1], second, whether there is a nexus between the victim, the improper conduct and Davis's performance of official duties, *see Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 452 n. 4 (5th Cir.1994)(en banc), and third, whether Hardy and Causey jointly engaged with Davis in the prohibited action. *See Price,* 383 U.S. at 795, 86 S.Ct. 1152.

[7] The jury heard evidence that Davis misused or abused his official authority in planning, carrying out and covering up the murder. On October 13, 1994, Davis, along with his police partner Sammie Williams, who testified for the Government, began their shift around 2:30 p.m. During that shift, Davis paged Hardy and Causey, discussed with them his plan to have Groves killed, met with them in the police station, then took them in his police car to show them the area that Groves frequented. The jury heard Davis's voice on tape telling Williams, "I could get 'P' to come do that 'hoe' now. And then we handle the thirty." [2] Williams testified that the statement meant that Davis would get Hardy to kill Groves, then Davis and Williams would respond to the murder scene and "handle" any evidence that might link Hardy to the crime. Later in the shift, while patrolling in the police car, Davis spotted Groves and paged Hardy to give him Groves's location. Hardy killed Groves shortly after Davis went off duty and Davis used his police radio to confirm the hit with the police officer at the murder scene. We conclude that this evidence is sufficient to support a finding that Davis misused or abused his official power to access the police station, the

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police car, and police radio to plan, execute, and cover up the murder. The evidence of a nexus between that abuse and the crime is likewise sufficient. Davis's status as a police officer put him in the unique position to "handle the thirty" and thus offer protection to Hardy from the consequences of the murder. The motive for the crime *416 arose from a complaint lodged by Groves against Davis in his official capacity, it was facilitated by the ability of Davis to case the area in his police car without arousing suspicion and to offer assurance of police protection to his accomplices. Finally, there is ample evidence that Hardy and Causey jointly engaged with Davis in these prohibited actions. Therefore, the Appellants' challenges to the sufficiency of the evidence on the "color of law" element fail.

4. REFUSAL TO SEVER FOR SEPARATE GUILT PHASE TRIALS

Causey and Hardy argue that their cases should have been severed from Davis' case for the guilt phase of the trial. Both filed motions for severance, and have therefore preserved error on this issue.

[8] [9] [10] [11] There is a strong preference for trying defendants who are indicted together in joint trials. *See Zafiro v. United States,* 506 U.S. 534, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993). Severance should generally be granted only when there "is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 938. The defendant seeking severance must demonstrate a "specific and compelling prejudice that resulted in an unfair trial and such prejudice must be of a type against which the trial court was unable to afford protection." *United States v. Pena–Rodriguez,* 110 F.3d 1120, 1128 (5th Cir.), *cert. denied,* 522 U.S. 819, 118 S.Ct. 72, 139 L.Ed.2d 32 (1997). The denial of severance is reviewed for abuse of discretion. *See United States v. Mulderig,* 120 F.3d 534, 542 (5th Cir.1997), *cert. denied,* 523 U.S. 1071, 118 S.Ct. 1510, 140 L.Ed.2d 664 (1998).

[12] Hardy claims he was prejudiced by spillover evidence that was not relevant to his prosecution. Specifically, Hardy claims he was prejudiced by evidence relating to the federal investigation of public corruption, which involved Davis's agreement to protect drug shipments for an undercover FBI agent posing as a major drug importer. Although the district court expressly excluded any evidence relating to the investigation, Hardy maintains that it nonetheless made its way into evidence and deprived him of a fair trial.

Hardy claims that Government witnesses were required to make references to "unrelated matters," which could only refer to the federal investigation. In addition, Davis' partner, Sammie Williams testified that Williams and Davis became partners because "it would be more convenient for us to be partners, given the other things we were involved in." Finally, Williams described at trial how Williams and Davis split $16,000 cash on the day Groves was murdered. Hardy claims that this evidence indicated that Davis was involved in drugs and that Hardy was part of the operation. Thus, the jury may have concluded that Davis and Hardy were involved in illegal operations and that Hardy killed Groves to placate Davis. That inference appears to be true. Stated differently, the record is replete with evidence that Davis and Hardy were engaged in illegal activities and that Hardy murdered Groves to placate Davis and ensure continuing police protection for his drug trafficking and related violent offenses. Indeed, that was the Government's primary theory at trial. Evidence directly tied to the Government's theory on motive is relevant and admissible against Hardy. With regard to evidence of the "unrelated" federal investigation, Hardy concedes there was no specific reference to that investigation in the guilt phase of the trial. In addition, the district court gave cautionary instructions requiring the jury to consider the evidence against each defendant individually, and not to "think of them as a group." The district court's refusal to sever as to Hardy was not an abuse of discretion.

Causey sought severance from both Davis and Hardy, arguing that he would be prejudiced by the conduct of his more *417 culpable co-defendants, and that the non-capital character of his prosecution set him apart from the other defendants. The district court held that Causey's role as Hardy's "right-hand man" made Causey an integral part of the charged conspiracy. The district court also held that Causey had not demonstrated that any compelling prejudice would result as a consequence of the non-capital character of his prosecution.

[13] Causey's first argument, that he was prejudiced by evidence of Hardy and Davis's drug relationship is unavailing. As with Hardy, there was sufficient evidence tying Causey to Davis's illegal activities to support the district court's refusal to sever. Causey also complains that his position on particular members of the venire panel and with respect to certain trial

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decisions was given less weight because of the non-capital nature of his prosecution. Causey claims that many of the African–American jurors excluded because of their views on the death penalty would have been acceptable to him. Causey further claims that he was deprived of his rights under the equal protection clause as a result of his joint trial with capital defendants.

The Supreme Court has rejected the argument that a non-capital defendant cannot receive a fair trial when tried jointly with capital defendants. *See* *Buchanan v. Kentucky,* 483 U.S. 402, 418–419, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). Thus, Causey's claim is not one of per se error. We perceive no compromise of any specific trial right nor any danger that the jury was prevented from reaching a reliable verdict in Causey's case. We therefore hold that the district court did not abuse its discretion in denying Causey's motion for severance.

5. PROSECUTORIAL MISCONDUCT

[14] **[15]** Davis maintains his right to a fair trial was substantially affected by the prosecutor's improper remarks in closing argument. Improper comments by the prosecutor may constitute reversible error when the defendant's right to a fair trial is substantially affected. *United States v. Anchondo–Sandoval,* 910 F.2d 1234, 1237 (5th Cir.1990). Whether such error requires reversal depends upon the magnitude of the prejudicial effect, the efficacy of any cautionary instruction and the strength of the evidence of the defendant's guilt. *United States v. Murrah,* 888 F.2d 24, 28 (5th Cir.1989).

[16] Steve Jackson testified at trial that he drove his light blue Maxima to the murder scene. At trial, there was conflicting evidence concerning whether the getaway car observed leaving after the murder was champagne or light blue. Davis claims the prosecutor improperly offered the prosecutor's own testimony on this issue by stating:

> Well, I have a champagne-colored vehicle, which is metallic beige, and in certain lighting conditions at night, it looks like light blue. Trust me. The lights are not very good in that poor Ninth Ward neighborhood.

Davis lodged an objection to this argument, but the district court continued without issuing a cautionary instruction.

Another issue at trial related to the police 911 tapes recorded on the night of the murder, which had inadvertently been recorded over by New Orleans Police. Defense counsel argued there was something suspicious about the absence of the 911 tapes. The prosecutor responded in argument by stating:

> There was nothing on that 911 tape that would take away the force of what you heard. It's a smokescreen.

Davis also objects to unflattering characterizations of the defendants by the prosecutor. The prosecutor called Hardy "an animal of the street." The prosecutor referred to Davis as "a street killer, a ruthless person." Davis also objects to the prosecutor's statements about the O.J. case:

> ***418** You can forget about that conspiracy theory. That may fly on the west coast, it's not going to fly here, because it makes no sense.

Davis also objects to the following remark made in rebuttal:

> [B]ut what happened on that day to that poor woman, a citizen of the United States, should not have happened in this country. Maybe somewhere else not in the United States. Because what the evidence showed what we proved to you through the very voices of those defendants was the existence of a police death squad in New Orleans, Louisiana, in the state of Louisiana.

Finally, Davis objects to the following argument made in closing:

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> [T]oday we are in a court of law in the United States of America, the finest judicial system in the world. It's time for justice. It's time to stop the killing, stop the carnage. There's only one way to get justice in the case, ladies and gentlemen, and that's to bring back a verdict of guilty on each and every one of these gentlemen.

Davis did not lodge contemporaneous objections to any of the remarks except those relating to the color of the getaway car. This Court's review of the latter remarks is therefore for plain error only.

After reviewing the record, we conclude that any error in the prosecutor's closing argument does not require reversal due to the overwhelming evidence of Davis's guilt and the negligible prejudicial affect of the remarks in the context of this case. *See* *Murrah,* 888 F.2d at 28.

6. EVIDENTIARY RULINGS

6a. "Other offense" evidence

Davis and Hardy challenge the admission of Steve Jackson's testimony that defendant Hardy committed other murders, that Hardy was a drug dealer, and that Hardy possessed many guns. Davis and Causey challenge the admission of Jackson's testimony that defendant Causey was "in the game," and Jackson's explanation that "in the game" meant selling drugs, robbing, and killing people. Davis also challenges the admission of Williams's testimony, which may have allowed the jury to deduce that Davis and Williams were in the drug business together.

Appellants argue that the introduction of these items was (1) extrinsic evidence of other offenses, (2) probative only of the defendants' bad character, (3) irrelevant to any element of the offenses, and (4) highly prejudicial. Federal Rule of Evidence 404(b) prohibits the admission of "other crimes wrongs or acts ... to prove the character of a person in order to show action in conformity therewith." However, such proof is admissible to establish motive, opportunity, intent, preparation, plan or knowledge. *See* FED.R.EVID. 404(b).

During cross-examination of Jackson, defense counsel asked whether defendant Hardy was a friend of Jackson's. Jackson replied:

> I'm a friend of his, but he's not to be trusted. He done killed seven people from the neighborhood, seven neighbors, then killed another in the neighborhood.

The district court admonished the witness to answer the questions and to testify from his own knowledge, not what he knows from someone else. Davis claims Jackson's comment was non-responsive and highly prejudicial.

Jackson also testified that he had seen Davis and Hardy together in the presence of guns and drugs, that Causey was "in the game" and that "in the game" meant that Causey was involved in dealing drugs, robbing and killing people. Williams testified that Davis had told Williams that Hardy was a drug dealer who "looked out for" Davis and that he had heard Steve Jackson was a member of Hardy's drug dealing "crew."

The Government introduced evidence of other firearms belonging to Hardy that were seized as the result of various search ***419** warrants. Davis argues that Davis's and Hardy's mutual involvement in drugs and guns is immaterial to this case. Similarly, he argues that no weapon other than the murder weapon was relevant to the Government's case.

With regard to Davis's and Hardy's drug and weapon affiliation, the district court ruled prior to trial that Davis's and Hardy's joint drug activities were relevant to establish why Davis would solicit Hardy to commit the murder.

With regard to evidence of other weapons, the district court ruled that such evidence was admissible to prove Hardy's facility with and access to weapons and Hardy's practice of scattering his weapons among his cohorts, which tended to support the Government's evidence that Hardy retrieved a gun from Causey prior to the murder.

[17] Evidence that Davis and Hardy were in involved in illegal activities that included violent crimes and drug dealing was relevant to prove both opportunity and motive under

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the Government's theory of the case, which was that Hardy was willing to execute Groves and Davis was able to order that execution, because of their mutual involvement in these activities, and because of Davis's status as a police officer. Causey was alleged to be Hardy's right hand man. Jackson's testimony that Causey was "in the game" was likewise relevant to motive and opportunity.

Davis also challenges the admission of FBI Agent Stanley Hadden's testimony, which twice referred to an "unrelated investigation" of public corruption that involved obtaining taps on the cellular phones of Davis and his partner Sammie Williams.

The district court excluded the details of the federal investigation into Davis's drug trafficking operations as irrelevant to the issues to be proven at trial. Nonetheless, FBI agent Stanley Hadden testified that the taped telephone conversations were obtained as the result of an "unrelated" federal investigation. Defendants claim they suffered unfair prejudice requiring a new trial as a result.

[18] This testimony was presented to authenticate the tapes, which were properly admitted. Any resulting prejudice from the non-specific references to the federal investigation complained of by defendants was insufficient to warrant reversal.

Defendants are not entitled to relief on this ground of error.

6b. The gun barrel

[19] Defendants complain that admission into evidence of the gun barrel recovered from the Industrial Canal was error.

At trial, Steve Jackson, driver of the getaway car, testified that Hardy threw the barrel of the murder weapon out the window of the car and into the Industrial Canal near the Florida Avenue Bridge.

Jackson did not tell the Government about the barrel being removed and thrown off the bridge until almost one year after he was originally questioned.[3] Shortly after Jackson told the Government, a Government diver recovered a barrel compatible with the 9mm weapon recovered from Causey's house and believed to be the murder weapon. Defendants argue that the barrel was not properly authenticated. Defendants note that the barrel was too corroded to be attached to the alleged murder weapon and that tests on the alleged murder weapon were inconclusive.

The evidence is sufficient to support an inference that the recovered barrel was on the murder weapon when it was used to kill Kim Groves. At trial, a firearms expert testified that the barrel was compatible ***420** with the alleged murder weapon. An FBI expert also testified that the level of corrosion on the barrel was consistent with it being in the water for thirteen months, the period of time between the murder and its recovery.[4] Further, the barrel and the circumstances of its recovery support Jackson's testimony about the events of the crime. *See United States v. Ramey,* 414 F.2d 792, 794 (5th Cir.1969)(relying on facts surrounding the discovery of a pistol to support an inference that it was used to perpetrate the robbery at issue in that case).

Defendants are not entitled to relief on this ground.

6c. "Rock-a-bye, baby" stipulation

[20] Causey complains that the district court accepted a stipulation by the Government and defendants Davis and Hardy that "rock-a-bye, baby" was a slang expression understood to refer to killing someone, as in "it will be rock-a-bye, baby for you." The expression was drawn from the movie "New Jack City." In that movie, a female drug dealer used the expression before shooting people.

Causey objected that the stipulation was over broad and should be changed to reflect that "rock-a-bye, baby" refers to the killing of a drug dealer. The district court overruled Causey's objection and accepted the stipulation on the basis that Davis and Hardy were the only ones who used the expression in the relevant telephone conversations.

Davis used the expression "rock-a-bye" when gleefully confirming with Hardy that Groves was dead. Davis said, "Yeah, yeah, yeah, rock, rock-a-bye." Davis also used the phrase to tell Hardy that if Nathan Norwood followed up on the IAD complaint against Davis, it would be "rock-a-bye, baby" for him.

The district court's decision to accept a stipulation from Davis and Hardy, to the exclusion of Causey, as to the meaning of the phrase "rock-a-bye, baby" was not error. Causey is not entitled to relief on this ground.

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7. CAUSEY'S SENTENCING

[21] Causey argues that the district court misapplied the sentencing guidelines by calculating his sentence using murder as the underlying offense notwithstanding the fact that he was not convicted on Count 3, which alleged witness tampering accomplished by the murder of Groves. We review the district court's legal interpretation and application of the sentencing guidelines *de novo,* and its factual findings in support of the sentence for clear error. *United States v. Parker,* 133 F.3d 322, 329 (5th Cir.1998).

[22] Causey's sentence was calculated using U.S.S.G. § 2H1.1, which is the appropriate guideline for Causey's convictions under 18 U.S.C. §§ 241 and 242. Under § 2H1.1, the base offense level is the *greatest* of (1) the offense level applicable to any underlying offense, or (2) 12, 10 or 6, depending upon the circumstances of the offense. The PSR derived the base offense level from U.S.S.G. § 2A1.1(a), the guideline applicable to First Degree premeditated murder. That guideline provides a base offense level of 43, which requires a mandatory term of life imprisonment. *See also* U.S.S.G. § 2X1.1 (establishing the base offense level for conspiracy as that of the substantive offense). Causey objected that he had not been convicted of murder, but the district court adopted the PSR and sentenced Causey accordingly.

Application note 1 to § 2H1.1 provides that "offense level applicable to any underlying offense" means "the offense guideline applicable to any *conduct established by* *421 *the offense of conviction* that constitutes an offense under federal, state, or local law." (emphasis added). The conduct established by the offenses of conviction—conspiring to murder and participating in the murder of Groves—was appropriately employed by the district court in determining Causey's base offense level of 43. *See United States v. Woodlee,* 136 F.3d 1399 (10th Cir.1998). The jury's failure to reach a verdict on Count 3 has no bearing on this determination. Causey mischaracterizes Count 3 as the "murder" count and as the "underlying offense" count. In fact, Count 3 was the witness tampering count, while Counts 1 and 2 charged violation of civil rights under color of law. All three Counts involved the underlying offense of murder. We therefore affirm the district court's application of the sentencing guidelines to Causey.

8. TAMPERING WITH A WITNESS

Davis and Hardy were convicted on Count 3 for violation of 18 U.S.C. § 1512(a)(1)(C), which provides, in pertinent part:

> Whoever kills or attempts to kill another person, with intent to—
>
> (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense ... shall be punished as provided in paragraph (2).
>
> (2) The punishment for an offense under this subsection is —
>
> (a) in the case of murder ... the death penalty or imprisonment for life....

18 U.S.C. § 1512(a)(1)(C) & (a)(2)(A). "Law enforcement officer" as used in § 1512 "means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant ... authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense." 18 U.S.C. § 1515(a)(4). However, § 1512 also provides:

> In a prosecution under this section, no state of mind need be proved with respect to the circumstance ... that the judge is a judge of the United States, or that the law enforcement officer is an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government, or serving the Federal Government as a adviser or consultant.

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18 U.S.C. § 1512(f)(2).

Defendants Davis and Hardy argue that the evidence is insufficient to support their convictions on Count 3 of the indictment because the Government failed to prove the required federal nexus of potential communication. Defendants argue that conviction under § 1512(a)(1)(C) requires proof of the following elements: (1) that defendant killed a person; (2) that defendant was motivated by a desire to prevent communication between any person and law enforcement authorities about the commission of an offense; (3) that the offense was, in fact, a federal offense; and (4) that the defendant *believed* the person might communicate with federal authorities.

[23] [24] Based on the plain language of § 1512(f)(2), the fourth element identified by defendants is incorrect —there is no requirement that the Government prove that the defendants believed the law enforcement officials to be federal. Further, defendants' argument that Williams, rather than Davis, committed the act of police brutality alleged by Groves's complaint is irrelevant. Prosecution under § 1512 is not limited to defendants who are guilty of the underlying federal offense which the victim reported or was expected to report.

[25] Further, defendants argue that Groves's internal complaint to local police had not been reported to federal law enforcement and was not yet a ripe civil rights complaint as the Government characterized ***422** it. However, this lack of "ripeness" is not controlling. "An official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(e)(1); *see also* *United States v. Galvan,* 949 F.2d 777, 783 (5th Cir.1991)(fact that Government informer was no longer communicating with the Government at time of offense did not render prosecution under § 1512(a)(1)(C) inappropriate). Nonetheless, we are convinced that the evidence was not sufficient to establish the federal nexus required by § 1512.

The evidence was clearly sufficient to allow the jury to conclude (1) that defendants killed Groves; (2) that defendants were motivated by a desire to prevent communication between Groves and law enforcement authorities about the alleged police brutality offense; and (3) that the offense which was the subject of Groves's complaint —a civil rights violation—could, in fact, be charged as a federal offense.

What remains is to determine what conclusions the evidence will support concerning whether the communication defendants sought to prevent would in fact be to *federal* law enforcement officers. This circuit has not previously addressed an analogous situation. However, the Third Circuit in *United States v. Bell,* 113 F.3d 1345 (3rd Cir.1997), has considered this issue, stating:

> In view of the statute's clear command that the government need not prove any "state of mind" on the part of the defendant with respect to the federal character of the proceeding or officer, 18 U.S.C. § 1512(f), we do not read [the statute] as requiring proof that the defendant believed the victim might communicate with law enforcement officers *whom the defendant knew or believed to be federal officers.* Rather, we read this sentence as recognizing that what the statute mandates is proof that the officers with whom the defendant believed the victim might communicate *would in fact be federal officers.*

Bell, 113 F.3d at 1349 (emphasis added). This element "may be inferred by the jury from the fact that the offense was federal in nature, plus appropriate evidence." *Id.* at 1349.

The Eleventh Circuit, interpreting the similarly worded § 1512(b)(3) [5] has held, "all that was required [to establish a] ... violation of § 1512(b)(3) was the possibility or likelihood that [the defendants'] false and misleading information would be transferred to federal authorities irrespective of the governmental authority represented by the initial investigators." *United States v. Veal,* 153 F.3d 1233, 1251–52 (11th Cir.1998). The Eleventh Circuit cited *United States v. Galvan,* 949 F.2d 777, 783 (5th Cir.1991)("[T]he statute focuses on the defendant's intent: whether she thought

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she might be preventing [the witness's] future communication of information"), from this court, as well as other Circuits' interpretations of § 1512(a)(1)(C), as authority for their interpretation of § 1512(b)(3). We do not find the Eleventh Circuit's reasoning persuasive in resolving the question before us in this case. Rather, as dictated by *Galvan,* we parse the record focusing on the defendants' intent.

[26] The evidence reveals that Davis's specific intent was to short-circuit the IAD investigation and to send the IAD a message to leave him alone in his misuse of police power. There is no evidence that the likelihood or possibility that the murder ***423** might impact a future federal investigation played a part in this crime. The evidence was sufficient to establish that Groves's police brutality complaint concerned a federal crime and that the defendants intended to interfere with Groves's pursuit of that complaint. However, prior to her death, the only agency to which Groves had complained was the New Orleans Police Department. There is nothing in this record which would support a jury finding that any of the persons to whom Groves complained were federal officers. Likewise, there is nothing in this record which would support a jury finding that Groves had any intention of communicating with any federal law enforcement officer prior to her death. Finally, there is no evidence in the record that would support an inference that Davis intended to prevent Groves from pursuing her complaint beyond the New Orleans Police Department IAD and communicating with authorities who were in fact federal officers. We therefore reverse Hardy's and Davis's convictions on Count 3.

9. CAPITAL SENTENCING ISSUES—DAVIS AND HARDY

Davis and Hardy were sentenced to death pursuant to the provisions of the Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591—3597 (FDPA). The Government provided notice of its intent to seek the death penalty, and notice of the aggravating factors upon which it intended to rely, as required in § 3593(a).

The jury did not make separate recommendations concerning the appropriate penalties for each count of conviction. Because it is impossible to say that the jury's penalty phase recommendations of the death penalty were not influenced by the fact that Davis and Hardy had received three death eligible convictions, rather than two, we must vacate the death sentences and remand for new sentencing hearings pursuant to 18 U.S.C. § 3593(b)(2)(D)(providing that the penalty phase be conducted before a jury impaneled specifically for the purpose of the sentencing hearing if, after initial imposition of a sentence, reconsideration of the sentence is necessary). Our remand of Hardy's and Davis's cases for a new sentencing hearing moots the remaining issues raised in their appeals alleging error in their initial penalty phase proceedings.

10. CONCLUSION

For the foregoing reasons, we affirm Causey's convictions and sentences; affirm Hardy's and Davis's convictions as to Counts 1 and 2; reverse Hardy's and Davis's convictions as to Count 3; vacate Hardy's and Davis's death sentences; and remand Hardy's and Davis's cases for resentencing.

AFFIRMED in part, REVERSED in part, VACATED AND REMANDED in part.

DeMOSS, Circuit Judge, concurring in part and dissenting in part:

I wholeheartedly concur in the majority's conclusion that the evidence was insufficient to establish the federal nexus required to support Davis' and Hardy's convictions on count 3, which alleges tampering with a witness in order to prevent communication with a federal law enforcement officer. I also concur with the majority's determination that Davis' and Hardy's death sentences must be set aside and a new penalty hearing conducted because it is not possible to separate the jury's death penalty determination as to the various counts in the indictment. Finally, I concur with the majority's treatment of various other issues in parts 2, 5, 6 and 7 of the majority opinion.

I disagree, however, and therefore must dissent from the majority's decision to affirm Davis' and Hardy's convictions on counts 1 and 2, which alleges conspiracy to deprive and deprivation of Kim Groves' civil rights in violation of 18 U.S.C. § 241 and § 242, on the theory that those defendants' ***424** actions against Groves constituted conduct under color of state law. I also dissent from the majority's spartan and conclusory treatment of Causey's compelling argument that the trial of the noncapital charges against him

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should have been severed from the trial of the capital charges against Davis and Hardy.

Murder Under "Color of Law"

Conduct under color of law, or its equivalent state action, is an essential element for conviction under 18 U.S.C. §§ 241 and 242, and provides the federal nexus required to turn a garden-variety state law murder into a federal offense punishable by the death penalty. The majority opinion impermissibly and inadvisably waters down this historical and statutory requirement by holding that state action existed in this case because an "air of official authority pervaded the entire incident." This ethereal and poorly defined test subverts the color of law inquiry, traditionally rooted in some assertion of actual or apparent official authority, and transforms every abuse of official position into conduct attributable to the state.

As the majority concedes, the relevant principles are to be derived in large part from a trilogy of Supreme Court cases. In *United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), the Supreme Court addressed the color of law requirement under the statutory predecessors to §§ 241 and 242. *Classic* held that election officials who altered ballots were acting under color of law because the acts were committed in the course of their performance of official duties. *Id.* at 1042–43. The Court held that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 1043.

Four years later, in *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), the Supreme Court found action under color of law in another criminal case involving the predecessor to § 242. In *Screws* the defendants, a sheriff, a policeman, and a special deputy, beat a young man to death in the course of effecting an arrest. The Court found action under color of law because the officers were acting pursuant to their "duty under Georgia law to make the arrest effective." *Id.* at 1038. The Court took special pains to note that the criminal statutes must be construed in a manner that "respect[s] the proper balance between the States and the federal government in law enforcement." *Id.* at 1039.

Finally, in *United States v. Price,* 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), the Supreme Court directly examined the color of law requirement embedded in §§ 241 and 242. *Price* involved the brutal murder of three civil rights activists at the hands of a Mississippi sheriff, two other officers and some private citizens. The civil rights activists had been arrested and held prisoner in the county jail. Law enforcement authorities subsequently pretended to release the men in the middle of the night, having arranged that they would be ambushed on the road. The men were intercepted on the road out of town and taken to a remote place where at least eighteen people participated in their murder. The Court found action under color of law, observing that the conduct "was made possible by state detention and calculated release of the prisoners by an officer of the State." *Id.* at 1157.

The *Classic /Screws /Price* trilogy illustrates the principle embraced by our Court that a defendant is not acting under "color of law" when he or she is "pursuing private aims and not acting by virtue of state authority." *Harris v. Rhodes,* 94 F.3d 196, 197 (5th Cir.1996) (quoting *United States v. Tarpley,* 945 F.2d 806, 809 (5th Cir.1991)); *see also Price,* 86 S.Ct. at 1157 n. 7. The Court has held that such defendants are not acting under color of law "purely because they are state officers." *Harris,* 94 F.3d at 197 (quoting *Tarpley,* 945 F.2d at 808). To the contrary, conduct is not ***425** committed under color of law unless the conduct includes some assertion of actual or apparent authority granted by the state. *See Price,* 86 S.Ct. at 1157; *Screws,* 65 S.Ct. at 1039; *Classic,* 61 S.Ct. at 1042–43; *see also Tarpley,* 945 F.2d at 809 ("Tarpley did more than simply use his service weapon and identify himself as a police officer. At several points during his assault of Vestal, he claimed to have special authority for his actions by virtue of his official status.").

That principle is aptly illustrated by the Supreme Court cases. In *Classic,* Louisiana election officials charged with altering and falsely counting ballots cast in a primary election were acting under color of law because the conduct was "committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election." *Classic,* 61 S.Ct. at 1042–43 (internal quotations omitted). Thus, it is clear that the defendants in *Classic* committed the offense while in the course of performing their

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official duties. They abused that position by exceeding the scope of the authority granted by the state. But it was more than the mere abuse of their position that caused the Supreme Court to hold that the defendants' conduct was committed under color of state law. The Court's analysis placed equal emphasis on the fact that the defendants' conduct would not have been possible but for the state's grant of access to and authority over the election ballots that were fraudulently altered or falsely counted. *Id.* at 1043–44.

The majority relies heavily upon Davis' use of his police pager, radio, and patrol car to facilitate the offense. But these items did no more than just that. There is nothing about these items that rendered the offense possible and nothing about the absence of these items that would have rendered the offense impossible. This is because both Davis' malevolent plan to execute Groves and his conduct to set that plan in motion were separate and apart from his status as a police officer. Davis' reliance upon the accouterments of his office, such as his use of the police radio to confirm Groves' murder, were matters of convenience or expediency, rather than matters of necessity. I conclude that the conduct in this case presents nothing more than abuse of position, which *Classic* teaches is insufficient standing alone to establish conduct fairly attributable to the state as state action.

In *Screws,* Georgia law enforcement officials who beat a young man to death in the course of an arrest were acting under color of state law because they were acting pursuant to "their duty under Georgia law to make the arrest effective." *Screws,* 65 S.Ct. at 1038. The color of law inquiry in *Screws,* like *Classic,* focuses upon the fact that the defendants had embarked upon the execution of some official duty when the breach of public trust or authority occurred. *Id.* at 1039 ("*Classic* is, therefore, indistinguishable from this case so far as 'under color of' state law is concerned. In each officers of the State were performing official duties; in each the power which they were authorized to exercise was misused.").

Applying *Classic* and *Screws* to the case at hand, it is clear that Davis had not been delegated any authority or discretion though official channels to vindicate his personal animus against Groves by killing her. Indeed, such conduct is affirmatively prohibited by state law. *See Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 481–86 (5th Cir.1994) (en banc) (Garza, J., concurring in part and dissenting in part) (citing *Barney v. City of New York,* 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737 (1904) for proposition that "state action does not exist when the act complained of was not only not authorized, but was forbidden by state legislation" (internal quotations and alterations omitted)). Davis' fortuitous and dispensable use of the equipment issued to him was simply an abuse of his position, ***426** rather than abuse in the course of some official duty.

In *Price,* Mississippi law enforcement officers asserted their official capacity to first detain, and then arrange a calculated release of, their intended victims for the purpose of assaulting, and ultimately killing, their victims. *Price,* 86 S.Ct. at 1155. *Price,* which creates the possibility that ordinary citizens may act in concert with state officials under color of state law, hinges upon the defendants' assertion of actual or apparent authority to arrest the victims, a duty delegated to the relevant law enforcement authorities as a matter of state law. *Id.* at 1156–57. Although state officials pretended to relinquish control over the victims in *Price,* the defendants/law enforcement officers in that case never actually relinquished control, but instead delivered the victims unto a brutal demise at the hands of other law enforcement officers and their co-conspirators. Thus, *Price* embodies those principles inherent in *Classic* and *Screws.* The incident would not have been possible but for the defendants' controlled release of their intended victims from official police custody, and the incident was the direct result of the defendants' assertion of actual or apparent authority to arrest.

This case involves none of those factors. There is no but for relationship between Davis' status as a police officer and Groves' murder. Davis' conduct was not committed in the course of any ordinary police duty. [1] Moreover, neither Davis nor any other defendant asserted any actual or apparent authority granted by the state as an initial or final justification for Groves' murder. Applying the principles established in *Classic, Screws* and *Price,* [2] I find the theory that the defendants (a rogue police officer, a drug dealer, and the drug dealer's side kick) were in this case engaged in state action under color of state law to be nothing short of ridiculous.

Our Circuit authority is consistent. In *United States v. Tarpley,* 945 F.2d 806, 808 & n. 2 (5th Cir.1991) a jealous husband lured his wife's lover, Vestal, to the defendant's home. When Vestal arrived, Tarpley beat him with "sap gloves" filled with lead and stuck his service revolver into Vestal's mouth, telling Vestal that "he was a Sergeant on the police department, and that he would and should kill Vestal, and that he could get away with it because he was

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a cop." *Id.* at 808. Defendant continued beating Vestal and then instructed his wife to call another police officer to the house. When that officer arrived, the officer confirmed to Vestal that the defendant *427 had shot people in the past. *Id.* The Court found action under color of law, in large part because Tarpley had claimed to have special power by virtue of being a police officer to beat, or even kill Vestal, with impunity. *Id.* (Tarpley told Vestal: "I'll kill you. I'm a cop. I can."). Similarly, in *Bennett v. Pippin,* 74 F.3d 578, 589 (5th Cir.1996), an analogous § 1983 case, a sheriff raped a witness whom he had just interviewed. When his victim resisted his advances, the sheriff told her "I can do what I want, I'm the Sheriff." *Id.* The Court found action under color of law because the Sheriff's actions were an abuse of power uniquely held by virtue of the Sheriff's position, and because "the explicit invocation of governmental authority constituted a 'real nexus' between the duties of Sheriff and the rape." *Id.* (citing *Taylor Indep. Sch. Dist.,* 15 F.3d at 452 n. 4). In sum, Supreme Court and Fifth Circuit precedent are consistent—when the defendant is acting *pursuant to* state granted authority or an assertion of state granted authority, but exceeds or abuses that authority, the defendant is acting under color of law.

For example, the conduct of a bad law enforcement officer in the process of arresting someone or interviewing a witness, or even, under current precedent, the misconduct of a public school teacher who places a child's physical well being in grave danger, *see Taylor Indep. Sch. Dist.,* 15 F.3d 443, may constitute conduct under color of state law.[3] When, however, the defendant is acting in an area that is completely apart from and derives no "color" from the state's affirmative grant of authority or discretion to the official, the conduct is not committed under "color of law." Our decision in *Tarpley* is the only binding case that even potentially deviates from that pattern, and that case is distinguishable (and was distinguished by the panel hearing the case) by the defendant's express invocation of his police authority.

Our error in diminishing the test for conduct under color of law is compounded in this case because the majority has borrowed, without apology, elaboration, or explanation, from the host of § 241 and § 242 cases that involve a relatively minor penalty. Title 18 U.S.C. § 241 and § 242 were passed to address the residual effects of slavery. For most of the significant history of these civil and criminal provisions, the maximum penalty to be assessed was a fine and a term of imprisonment not to exceed ten years. While Congress increased the potential penalty under these statutes in the 1960's, it was not until September 1994 that the death penalty became an available sanction, and this case appears to be the first case in which the death penalty has been imposed upon defendants charged with a deprivation of civil rights in violation of these Civil War reconstruction statutes. Surely where the ultimate penalty of death is at issue, for the crime of murder which is traditionally punished under state law, we should be *428 even more diligent in requiring that the evidence clearly support the hypothesis that the offender's conduct was colored by some grant of state authority. Surely we should not be willing to torture the meaning ascribed by the Supreme Court to the requirement that conduct be committed under color of state law by adopting, sheared of its factual context, a new legal standard requiring only that an air of official authority pervade the incident, particularly when that standard is based upon a single descriptive phrase in this Court's disposition in *Tarpley.*

The facts of this case are chilling. Davis and Hardy deserve the death penalty for their part in the premeditated murder of Kim Groves. But we should not dilute or obscure the statutory requirement that conduct be committed under color of state law just to save these federal convictions. The Supreme Court has cautioned that statutes requiring conduct under color of law "should be construed so as to respect the proper balance between the States and the federal government in law enforcement." *Screws,* 65 S.Ct. at 1039. If this concept of federalism is to have any meaning at all, then the State of Louisiana is the proper governmental entity to proscribe and punish the murderers in this case. As the Supreme Court said in *Screws:*

> Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States. As stated in *United States v. Cruikshank,* 92 U.S. 542, 553, 554, 23 L.Ed. 588 [(1875)], "It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." It is only state action of a "particular character" that is prohibited by the Fourteenth Amendment and against which the Amendment authorizes Congress to afford relief. Thus Congress in § 20 of the Criminal Code did not undertake to make all torts of

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> state officials federal crimes. It brought within § 20 only specified acts done "under color" of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

Id. (internal citations omitted); *see also id.* at 1037. I would hold that the government failed to satisfy its burden of establishing a sufficient federal nexus with respect to counts 1 and 2 against all defendants. I would therefore vacate the defendants' federal convictions for violation of 18 U.S.C. §§ 241 and 242 and remand the case to the district court for dismissal of the indictments. Under our federal system, the State of Louisiana is the only right and proper forum for the trial and punishment of these defendants.

CAUSEY'S TRIAL WITH CAPITAL DEFENDANTS

I also dissent from that portion of part 4 of the majority opinion that affirms the district court's refusal to sever the trial of the noncapital charges against Causey from the trial of the capital charges against Davis and Hardy.

The majority applies what appears to be an almost per se rule that the trial of a capital defendant with a noncapital defendant will never raise concerns sufficient to justify severance. The majority supports this remarkable position with *Buchanan v. Kentucky,* 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). But *Buchanan* involved Supreme Court review of a state law conviction. Moreover, the Supreme Court made express note of the fact that the noncapital defendant did not seek severance in that case. *Id.* at 2909. Rather, *Buchanan* involved only a state prisoner's constitutional claim that his joint trial with capital co-defendants violated his Sixth Amendment right to an impartial jury ***429** drawn from a fair cross section of the community. *Id.* at 2908.

This case is easily distinguishable. First, this is a direct appeal from federal convictions. Indeed, this is the first reported decision in which a noncapital defendant was tried with multiple capital defendants in federal court under the procedures set forth in the Federal Death Penalty Act, 18 U.S.C. § 3591–3598. Thus, no federal appellate court has ever considered, as a matter of direct appeal, whether the trial of a noncapital defendant with multiple capital defendants under the Federal Death Penalty Act may infringe upon the trial rights of the noncapital defendant. Further, the Federal Death Penalty Act, which specified a number of the procedures and substantive issues material to Davis' and Hardy's capital trial, was not passed until 1994, long after the decision in *Buchanan,* and only one month before the offense at issue in this case. Even if *Buchanan* is binding as to the relatively modest principle that the trial of noncapital defendants with capital defendants is not per se error, that principle does nothing to preclude the possibility of error based upon the statutory structure of the Federal Death Penalty Act or the facts of this case. I think our review should acknowledge and meet head on the particular issues raised by application of this new federal sentencing scheme with its many requirements, in this trial involving a noncapital defendant.

Second, Causey sought and was denied severance. Unlike the relatively limited issue in *Buchanan,* Causey's challenge to his federal conviction on direct appeal calls into question whether he was prejudiced with respect to a number of his statutory and constitutional trial rights. Indeed, the record in this particular case establishes that many of the federal district court's decisions in this matter, from jury selection through jury submission, were driven by the fact that both Davis and Hardy faced the death penalty. Because I believe that these decisions compromised Causey's right to a fair trial, I would hold that the district court's refusal to sever noncapital defendant Causey's trial from the trial of capital defendants Davis and Hardy constituted an abuse of the court's discretion on the facts of this case.

I recognize that there is a preference for jointly trying defendants who have been jointly named in the same indictment. *See Zafiro v. United States,* 506 U.S. 534, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993); *see also* FED. R.CRIM. P. 8(b). But severance is appropriate when a joint trial will compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about the guilt or innocence of one of the defendants. *See Zafiro,* 113 S.Ct. at 938; *see also* FED. R.CRIM. P. 14 (permitting severance when joint trial would prejudice a party). Causey contends that his statutory and constitutional rights to a speedy trial, his right to participate fully and fairly in the jury selection process, and his right to be free from the effect of unduly prejudicial and irrelevant spillover evidence with no relevance to his prosecution, were violated in this particular case by the district court's refusal to sever his trial. The majority opinion states, in a single conclusory sentence, that Causey failed to make the showing

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of strong prejudice required to justify severance. I disagree. To the contrary, this case is rife with the type of prejudice that should cause us to hold that a noncapital defendant like Causey should not be tried together with capital defendants in federal court.

Causey's joint trial with capital co-defendants operated to deprive him of his statutory and constitutional right to a speedy trial. [FN] Title 18 U.S.C. § 3161(c)(1) provides the general rule that trial should occur within seventy days of indictment or arraignment. Causey was indicted and detained on the charges in this case in December 1994. Causey was not tried on those charges until April 1996, a delay of sixteen months. Three of the four continuances ***430** sought in Causey's case were expressly tied to the fact that the government was seeking the death penalty against Davis and Hardy. The last two continuances, which together engendered a delay of four months, were granted over Causey's express objection that his speedy trial rights were being compromised and that severance was required. While the speedy trial statute permits "a reasonable period of delay" attributable to co-defendants, *see* [FN] 18 U.S.C. § 3161(h)(7), I do not consider the extended period attributable to Davis' and Hardy' capital status reasonable in this case. Whatever judicial expedience might justify the joint trial of capital and noncapital defendants, that expedience is severely undermined when the capital status of one defendant causes a delay of more than one year in the trial of a noncapital defendant.

Causey's joint trial with capital co-defendants compromised his right to participate fully and fairly in the selection of his jury. The district court initially allowed each side twenty-six peremptory challenges. Causey complained in the district court, and urges again on appeal, that his noncapital status was used, first by his co-defendants and then by the district court, to deny his right to participate equally in the jury selection process. When Causey raised this complaint, Causey maintains, and the government does not dispute, that the district court informed him that, if forced to intervene, the district court would allow Causey only six peremptory challenges, while permitting each of his capital co-defendants ten peremptory challenges each. There does not appear to be any sound justification for limiting Causey's participation in the process of jury selection in this manner.

Causey's joint trial with capital co-defendants also raises important questions about the fundamental fairness of subjecting a noncapital defendant to the process required to assemble a death qualified jury in a capital case. The process of selecting a jury in a capital case is, and should necessarily be, different from the process involved in selecting the jury in a noncapital case. To the extent that the prosecution exercises its rights to qualify all jurors on their ability to assess the death penalty, there will inevitably be individuals excluded on those grounds in a capital case who would not have been excluded in a noncapital case. Consequently, if you try a noncapital defendant with a capital defendant the government will be permitted to exclude jurors for cause on grounds which it could not use as a grounds for exclusion if the noncapital defendant was being tried separately. Surely if a noncapital defendant were being tried separately, the government could not exclude jurors for cause on the grounds of their opposition to the death penalty since that would be a matter completely irrelevant to the decision in that particular case. Likewise, in a joint trial involving capital and noncapital defendants, the capital defendants can exercise peremptory challenges against prospective jurors who express sentiments in favor of the death penalty. These same jurors may be acceptable, or even desirable, to a noncapital defendant for reasons other than their being prepared to assess the death penalty. The noncapital defendant, therefore, gets whipsawed between the state's objection for cause and the capital defendant's peremptory challenge into having a jury composed of individuals who are entirely different from those who would be selected if the noncapital defendant was being tried without capital defendants.

This is precisely what Causey says happened in this case. Given the capital charges against Davis and Hardy, the district court permitted the parties to circulate an extensive questionnaire to potential jurors prior to the time formal voir dire began. Those questionnaires provide a great deal of insight into the potential jurors' views as to the death penalty and other issues. The record reflects that Causey objected both to government strikes eliminating potential jurors expressing ***431** sentiment against the death penalty, as well as to his co-defendants' strikes eliminating jurors expressing sentiment in favor of the death penalty. Causey asserts that many of these jurors would have been acceptable, or even desirable, to him. For example, Causey claims that some of the jurors eliminated by the government for expressing anti-death penalty sentiment also expressed a skepticism about government testimony induced by a plea bargain. Causey also claims that his co-defendants eliminated certain African–American jurors who were perceived to be leaning toward the death penalty. Viewed as whole, the record

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reflects that Causey's right to participate fully and fairly in the jury selection process was compromised by the capital nature of the charges brought against Davis and Hardy.

Another problem that raises its ugly head is the contention that a death qualified or capital jury is necessarily more conviction prone. I recognize that several courts, including this one, have expressed reservations about the scientific evidence supporting the proposition that a death qualified jury is necessarily more conviction prone. *See, e.g., Lockhart v. McCree,* 476 U.S. 162, 106 S.Ct. 1758, 1762–64, 90 L.Ed.2d 137 (1986); *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 1774–75, 20 L.Ed.2d 776 (1968); *Spinkellink v. Wainwright,* 578 F.2d 582, 593 (5th Cir.1978). Without regard to the empirical basis for the scientific evidence, I believe that most trial judges (including the district court judge in this case who said as much in the hearing on Causey's motion to sever) would be willing to acknowledge the common sense proposition that death qualified juries tend to be more conviction prone. The real question is whether that fact necessarily operates to prejudice a noncapital defendant and whether there are strong governmental interests supporting the empanelment of a death qualified jury for trial of a noncapital defendant. *See, e.g., Buchanan,* 107 S.Ct. at 2913–16.

Courts have been hesitant to indulge such a presumption, for example, when to do so would require that trial courts empanel a different jury for the guilt and punishment phases of a capital trial. *See Lockhart,* 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137. In such cases, the government has a strong interest in its legislation specifying a unitary jury system. *See id.* at 1769–69. Moreover, the possibility that a capital jury which heard the guilt phase of the trial will entertain a residual doubt as to the defendant's guilt, which might serve to benefit the capital defendant during the penalty phase of the capital trial, is used to justify the premise that the use of a death qualified jury during the guilt phase of the capital trial may be beneficial to a capital defendant. *Id.* Obviously, that justification for rejecting the common sense proposition that death qualified juries are more likely to convict is not applicable when the issue is whether a noncapital defendant should be tried with co-defendants who face the death penalty. In the federal system a noncapital defendant will never face a separate jury determination of punishment.

The empanelment of a death qualified jury in a case involving a noncapital defendant, or at least a refusal to sever, may also be supported by the state's interest in avoiding the burden and expense of two trials. *Buchanan,* 107 S.Ct. at 2915; *Lockhart,* 106 S.Ct. at 1769. However, that rationale is inapplicable in this case because the district court expressly found that the evidence to be offered at the guilt phase of trial was such that the burden of trying Causey separate would be minimal. I conclude, therefore, that there were no important governmental interests to be vindicated and no potential benefit to Causey to be obtained from trying the noncapital charges against him before the death qualified jury empaneled to hear the capital charges against Davis and Hardy.

Moreover, and without regard to whether death qualified juries are more conviction prone in the run of cases, my review ***432** of this record persuades me that the need to death qualify the jury in this case resulted in a panel that was clearly prosecution oriented and that was much more likely to convict. Of the twelve jurors selected, ten described themselves in the jury questionnaire as "pro-death penalty." Eleven of the twelve jurors agreed that the "death penalty gives the criminal what he deserves," and disagreed that the death penalty was unfair to minorities. Ten of the twelve jurors stated that they disagreed or strongly disagreed with the statement that our system should err on the side of letting a few guilty people go free rather than on the side of convicting the innocent. All twelve jurors were comfortable with the use of undercover agents and informants and ten of the twelve jurors had no objection to the use of government wire taps. Of the five jurors that gave responses, four indicated they would have no concern about government testimony induced by lenient treatment. These last responses are particularly troubling given the role that government undercover operations and induced testimony played in this case, and Causey's assertion that certain pro-death penalty jurors eliminated by his co-defendants displayed a healthy measure of skepticism about the relative weight of testimony procured by those means. Having reviewed this record, including the questionnaires submitted by the larger venire panel as compared to the jury selected, it is clear to me that the jury selection process necessitated by Davis' and Hardy's capital status led to the empanelment of a strongly pro-government or conviction-prone jury. Given that Causey was not exposed to the death penalty, I do not feel that whatever societal or governmental interests may weigh in favor of permitting a death qualified jury to hear the guilt portion of

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a capital trial should have been permitted to operate to his detriment in this case. *Cf.* *Spinkellink,* 578 F.2d at 593–94 (commenting upon the absence in that case of evidence that death qualification led to a more conviction prone or impartial jury).

I am also concerned that death qualification may, in some cases, operate to systematically exclude certain distinctive groups from jury service. *See* *Lockhart,* 106 S.Ct. at 1771 (Marshall, J., dissenting) ("The data strongly suggest that death qualification excludes a significantly large subset—at least 11% to 17%—of potential jurors who could be impartial during the guilt phase of trial. Among the members of this excludable class are a disproportionate number of blacks and women." (footnote omitted)). In this case, three African–American defendants were tried in New Orleans, Louisiana, a community with a very large African–American population. The jury selection process used in this case makes it difficult to set exact numbers, but it is clear that the panel of potential jurors included a significant number of African–American citizens. Of the 151 prospective jurors who answered the questionnaire, at least 42 (or 28 percent) were African–American. And yet only one African–American was selected to sit on the jury during the trial. I do not posit that race may be used as a proxy for determining how a particular juror will vote, or whether a particular jury is impartial. I do contend that death qualification may have unintended and undesirable consequences, such as those identified by the dissenting Justices in *Lockhart* and *Buchanan,* and those identified by Causey in this appeal. Once again, to whatever extent those consequences might be tolerable when balanced against the government's strong interest in empaneling a qualified jury as to capital charges, I would hold that such a consequence is intolerable and impermissible when applied to a case such as Causey's, in which the government did not seek the death penalty, and in which the burden of separate trial would be minimal.

I recognize that Causey's evidence that the death qualification procedure in this case had the effect of producing a conviction prone jury or excluding African–American jurors may not be sufficient ***433** standing alone to establish a Sixth Amendment claim that he was deprived of an impartial jury drawn from a fair cross section of the community. But we are dealing here with the narrower issue of severance. In this case, evidence that the death qualification procedure excluded African–American citizens tends to establish another form of prejudice required to support his motion for severance.

Finally, Causey was also prejudiced by a large quantity of prejudicial spillover evidence relating to the criminal relationship between Davis and Hardy that had little, if any, bearing upon Causey's case. Causey points, for example, to the prejudicial testimony of Davis' police partner, Sammie Williams, and of unindicted co-conspirator Steve Jackson, both of whom testified they had only very limited knowledge concerning Causey. Moreover, there was an amazing volume of evidence documenting the grisly details of the Davis/Hardy relationship and their brutal and mercenary crimes that had only tangential, if any, relevance to Causey.

There is also evidence in the record that the district court's evidentiary rulings were guided by considerations relevant to Davis' and Hardy's capital status and without any consideration of Causey's position or interest. For example, Causey objected to certain prejudicial evidence relating to the meaning of the phrase "rock-a-bye-baby." Causey's co-defendants desired to enter a stipulation as to the meaning of that phrase, to which Causey objected. At a hearing in which that stipulation was entered over Causey's objection, the following exchange occurred:

> Counsel for Causey: Yesterday the proposed stipulation about this rock-a-bye-baby came up. Nobody asked me, which is par for the course.
>
> District Court: That's because your client is not facing the death penalty.

This example, in which the district court expressly invoked Davis' and Hardy's capital status as a basis for providing notice of certain evidentiary decisions illustrates the extent to which those defendants' capital status infused the entire trial and caused a subjugation of Causey's rights to those of the capital defendants.

For the foregoing reasons, I would hold that the district court's refusal to grant Causey a separate trial constituted an abuse of discretion on the facts of this case. I think the majority opinion fails to grapple with the vexatious issues arising from the trial of a noncapital defendant such as Causey, who played a relatively minor role in the conspiracy, with capital defendants such as Davis and Hardy, against whom the government offered an impressive quantity of evidence relating to larger criminal enterprises in which defendant Causey had no role. I respectfully dissent from that portion of the majority's decision affirming the district court's denial

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of Causey's motion to sever his trial from that of his co-defendants Davis and Hardy.

DENNIS, Circuit Judge, concurring:
I join fully in the majority opinion and assign additional reasons for concurring.

I. The Defendants' Convictions Under 18 U.S.C. § 242

The defendants did not object below or argue here that the due process "fair warning requirement" was not satisfied in these cases, i.e., that they have been held criminally responsible for conduct which they could not reasonably understand to be proscribed by 18 U.S.C. § 242. During the pendency of this appeal, the Supreme Court, in *United States v. Lanier,* 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), clarified the fair warning requirement. That decision caused me to have concern that a failure to satisfy the fair warning requirement, which may have been an unclear error at trial, may now have become clear on appeal because the applicable law has been clarified. "In exceptional circumstances, especially in criminal cases, appellate courts, in the public ***434** interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936). *See also* FED. R.CRIM. P. 52(b); *United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Also, even if there is not plain error in this respect, *Lanier* must be taken into account in this court's evaluation of the defendants' insufficiency-of-evidence arguments. It now may be inferred from *Lanier* that we must determine that each defendant was given fair warning, as clarified by *Lanier,* prior to his charged criminal conduct, that such particular course of conduct would amount to an act under color of law in deprivation of a person's constitutional right, in order to determine correctly whether there was sufficient evidence for a reasonable juror to find beyond a reasonable doubt that the defendant violated 18 U.S.C. § 242 by engaging in such conduct.

I ultimately conclude that the fair warning requirement, as clarified by *Lanier,* was satisfied as to each defendant, and that there was sufficient evidence as to each element of the charged crimes to constitutionally support their convictions. Accordingly, I concur in the majority opinion and judgment, but express my reasoning in this separate opinion to give defense counsel, as well as colleagues of the bench and bar, a fair opportunity to point out any flaws that it may contain.

A. The Statute and the Issues

Section 242, Title 18, United States Code, in pertinent part, provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens,[shall be subject to specified criminal penalties].

Specifically stated, the issues of concern are: (1) whether 18 U.S.C. § 242, the constitutional provisions it incorporates, and the federal court decisions interpreting them, gave fair warning to the defendant, Len Davis, that a state officer who, while acting under color of law, intentionally and without justification causes a person to be deprived of her right to life, violates a right that had been made specific either by the express terms of the Constitution or laws of the United States, or by decisions interpreting them; (2) whether the defendant police officer, Len Davis, also was given fair warning by the statute, its incorporated constitutional provisions, and decisions interpreting them, that his course of conduct in causing Kim Marie Groves to be deprived of her right to life amounted to acts under color of law; and (3) whether the private person defendants, Paul Hardy and Damon Causey, were given fair warning that Len Davis was a state official acting under color of law when he caused Kim Marie Groves to be deprived of her right to life, and that their intentional participation with Davis in that homicide would therefore also constitute acts under color of law in violation of Kim Marie Groves's constitutional right to

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life that had been made specific by 18 U.S.C. § 242, its incorporated constitutional and statutory provisions, and the federal court decisions interpreting them.

B. United States v. Lanier

In *United States v. Lanier,* 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), a state judge had been convicted under 18 U.S.C. § 242 of criminally violating the constitutional rights of five women by assaulting them sexually in his chambers. A panel of the Court of Appeals for the Sixth Circuit affirmed the convictions and sentence, ***435** *United States v. Lanier,* 33 F.3d 639 (6th Cir.1994), but the full court, on rehearing en banc, set aside the convictions for lack of any notice to the public that § 242 covers simple or sexual assault crimes, holding that § 242 criminal liability may be imposed only if the constitutional right allegedly violated is first identified by a decision of the Supreme Court, and only when the right has been held to apply in a factual situation "fundamentally similar" to the one at bar. *United States v. Lanier,* 73 F.3d 1380, 1393 (6th Cir.1996) (en banc). The Supreme Court granted certiorari, declared that "[t]he question is whether this standard of notice is higher than the Constitution requires, and we hold that it is[,]" *Lanier,* 520 U.S. at 261, 117 S.Ct. 1219, vacated the judgment, and remanded for application of the proper standard "[b]ecause the Court of Appeals used the wrong gauge in deciding whether the prior judicial decisions gave fair warning that respondent's actions violated constitutional rights...." *Id.* at 272, 117 S.Ct. 1219.

Because § 242, in lieu of describing the specific conduct it forbids, incorporates constitutional guarantees by reference, which themselves are stated "with some catholicity of phrasing[,][t]he result is that neither the statute[ ] nor a good many of [its] constitutional referents delineate the range of forbidden conduct with particularity." *Id.* at 265, 117 S.Ct. 1219. The irony of this is that a prosecution to enforce one application of § 242's protection of due process can threaten the accused with deprivation of another: "what Justice HOLMES spoke of as 'fair warning ... in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' " *Id.* (quoting *McBoyle v. United States,* 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931)). " ' "The ... principle is that no man shall be criminally responsible for conduct which he could not reasonably understand to be proscribed." ' " *Id.* (quoting *Bouie v. City of Columbia,* 378 U.S. 347, 351, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (quoting *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954))).

In *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), a plurality of the Supreme Court recognized that the openness of the constitutional guarantees, when incorporated by reference into § 242, generally are ill-suited to the task of giving fair warning about the scope of criminal responsibility. At the same time, that plurality declared that this constitutional difficulty does not arise when the accused is charged with violating 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.' " *Lanier,* 520 U.S. at 267, 117 S.Ct. 1219 (quoting *Screws,* 325 U.S. at 104, 65 S.Ct. 1031). "Accordingly, *Screws* limited the statute's coverage to rights fairly warned of, having been 'made specific' by the time of the charged conduct." *Id.*

Consequently, the Supreme Court in *Lanier* concluded that the Sixth Circuit erred in adding as a gloss to this standard the requirement that a prior decision of the Supreme Court has defined the constitutional right at issue in a factual situation "fundamentally similar" to the one at bar. *Id.* at 268, 117 S.Ct. 1219. The Court explained that the *Screws* plurality "referred in general terms to rights made specific by 'decisions interpreting' the Constitution, and no subsequent case has held that the universe of relevant interpretive decisions is confined to our opinions." *Id.* (internal citation omitted). It further explained that the Court has specifically referred to court of appeals decisions in defining the established scope of a constitutional right under § 241 (citing *Anderson v. United States,* 417 U.S. 211, 223–27, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974)); and in inquiring whether a right was "clearly established" when applying the qualified immunity rule under § 1983 and ***436** *Bivens v. Six Unknown Narcotics Agents,* 403

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U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *Lanier*, 520 U.S. at 268, 117 S.Ct. 1219. According to the Court, "[D]isparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, [but] such a circumstance may be taken into account in deciding whether the warning is fair enough...." *Id.* at 269, 117 S.Ct. 1219.

Further, the Supreme Court in *Lanier* stated, it had not demanded precedents applying the constitutional right at issue to a "fundamentally similar" factual situation, but that it had upheld convictions under §§ 241 or 242 despite notable factual distinctions between the precedents relied upon and the cases then before the court, "so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* The Sixth Circuit erred, the Supreme Court stated, in concluding that due process fair warning under § 242 demands more than the "clearly established" qualified immunity test under § 1983 or *Bivens*. *Id.* "[T]he object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying § 242.... To require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.' " *Id.* at 270–71, 117 S.Ct. 1219.

"In sum," the Court in *Lanier* concluded, "as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, 'in the light of pre-existing law the unlawfulness [under the Constitution is] apparent[.]' Where it is, the constitutional requirement of fair warning is satisfied." *Id.* at 271–72, 117 S.Ct. 1219 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

C. Fair Warning as to the Constitutional Right Violated

The Supreme Court in *Lanier* pointed out that "general statements of the law are not inherently incapable of giving fair and clear warning, and in [some] instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.' " *Id.* at 271, 117 S.Ct. 1219 (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034). In my opinion, the guarantees of the Fifth Amendment that "[n]o person shall be deprived of life ... without due process of law," and of the Fourteenth Amendment that "nor shall any State deprive any person of life ... without due process of law," together with § 242, made specific every person's right not to be deprived of life without due process of law so as to give "adequate advance notice" that a person who caused such a deprivation while acting under color of law " 'would be visited with punishment ... [and] not punished for an unknowable something.' " *Id.* at 267, 107 S.Ct. 3034 (quoting *Screws*, 325 U.S. at 105, 65 S.Ct. 1031). Moreover, prior court decisions have given fair warning that willful or intentional deprivation of a person's life without due process of law committed under color of law is punishable under 18 U.S.C. §§ 241 and 242.

In *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), the Supreme Court declared that: (1) § 241 reaches conspiracies to injure any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution; (2) this language includes rights or privileges protected by the Fourteenth Amendment; and (3) this language extends to conspiracies otherwise within the scope of the section participated in by officials alone or in collaboration with private persons. *Id.* at 798, 86 S.Ct. 1152.

Moreover, the *Price* Court concluded that "an allegation of official, state participation in murder, accomplished by and through its officers with the participation of others," is an "allegation of state action ***437** which, beyond dispute, brings the conspiracy within the ambit of the Fourteenth Amendment." *Id.* at 799, 86 S.Ct. 1152.

The Fifth Circuit in *Crews v. United States*, 160 F.2d 746 (5th Cir.1947), followed the legal principles set forth by the Supreme Court in *Screws* in affirming the conviction under 18 U.S.C. § 52 (now § 242) of a town marshal who murdered a black man. The defendant, who had personal animosity toward McFadden (the decedent), was riding in his nephew's automobile when he spotted McFadden, who allegedly was drunk. Crews guided McFadden without resistance to his

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nephew's car, put him in the rear seat and drove McFadden to a bridge, where Crews forced him to jump into the river, even though McFadden told him that he could not swim. McFadden drowned. *Id.* at 747–48.

This court affirmed Crews's conviction, concluding that Crews acted "under color of law" in depriving McFadden of the "constitutional right to life or liberty or to a fair trial under due processes of law rather than a trial by ordeal." *Id.* at 749.

In a civil case arising under §§ 1983, 1981, 1985(3), and 1986, this court in *Brazier v. Cherry,* 293 F.2d 401 (5th Cir.), *cert. denied,* 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961) (Brown, J.), held that an action against Georgia police officers for the wrongful death of the deceased, allegedly resulting from violations of Federal Civil Rights Statutes, gave rise, by virtue of the Georgia survival statute, of a federally enforceable claim for damages during his lifetime and by his survivors. Before answering the ultimate question of whether such a remedy was available, the court concluded that the Civil Rights Statutes express a "clear congressional policy to protect the life of the living from the hazard of death caused by unconstitutional deprivations of civil rights." *Id.* at 405. According to the court:

> [I]t defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple.
>
> We have fresh evidence of the broad and sweeping aims of Congress with specific regard to § 1983. *Monroe v. Pape* makes an extensive re-examination of the legislative history and summarizes its purpose in this way. "The debates are long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claim of citizens to the enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by the state agencies." *"It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the State and the state remedy need not be first sought and refused before the federal one is invoked."*

Id. at 404–05 (emphasis added) (internal citations and footnote omitted).

Other courts and judges expressly have recognized that § 242 criminalizes "murder by state officers in the course of official conduct and done with the aid of state power." *Screws,* 325 U.S. at 129, 65 S.Ct. 1031 (Rutledge, J., concurring). *See Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir.1982) (Posner, J.) ("There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law.") (citing *Brazier,* 293 F.2d at 404–05). *Cf. Beard v. O'Neal,* 728 F.2d 894, 898 (7th Cir.1984) ***438** ("The Fifth Amendment guarantees, among other things, that a person will not be deprived of life without due process of law. Jeff Beard had a constitutional right, therefore, not to be murdered by someone acting under color of federal authority." (citing *Brazier*)), *cert. denied,* 469 U.S. 825, 105 S.Ct. 104, 83 L.Ed.2d 48 (1984). See also, discussed in more depth below, *United States v. Robinson,* 503 F.2d 208 (7th Cir.1974), in which the rogue cop who killed Beard (of *Beard v. O'Neal, supra*), was convicted of violations of §§ 241 and 242 for committing the murder for hire. In *Robinson,* however, the defendant did not raise and the opinion does not discuss, but apparently assumes, fair warning and color of law requirements were met.

These cases, along with others discussed later, make it apparent that the "very action in question," i.e., deprivation of a person's life by a state officer in the course of official conduct and done with the aid of state power, is unlawful under the Constitution. *See Lanier,* 520 U.S. at 271, 117 S.Ct. 1219.

Arguably, a person also has a separately "defined right" protected by the Constitution not to be deprived of *liberty* without due process of law, and this right is also violated by having his or her life taken willfully by a state officer acting under color of law. In *United States v. Gwaltney,* 790 F.2d 1378 (9th Cir.1986), *cert. denied,* 479 U.S. 1104, 107 S.Ct. 1337, 94 L.Ed.2d 187 (1987), the Ninth Circuit affirmed the

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criminal conviction under § 242 of a California Highway Patrol officer who raped and murdered a woman traveling on the highway. According to the indictment, Gwaltney, "acting under color of law, *willfully assaulted and shot* Bishop, thereby causing her death and *violating her constitutionally protected right not to be deprived of life or liberty* without due process of law." *Id.* at 1380–81 (emphasis added).

The *Gwaltney* court held that the following jury instructions were not plainly erroneous:

> [T]he government was obliged to prove that Gwaltney deprived Bishop of a right secured or protected by the Constitution or laws of the United States; that the right not to be deprived of life or liberty without due process of law is such a right; that the *right to liberty* includes the principle that no person may be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under color of state law; *and* that the *right not to be deprived of life* without due process of law prohibits a police officer acting under color of law from killing any person without justification.

Id. at 1387 (emphasis added).

Other courts, including the Fifth Circuit, sometimes have framed the "defined right" exclusively as the right to liberty without due process. In *United States v. Hayes,* 589 F.2d 811 (5th Cir.), *cert. denied,* 444 U.S. 847, 100 S.Ct. 93, 62 L.Ed.2d 60 (1979), this court affirmed the conviction under § 242 of a police chief who, along with his son-in-law and two other officers, arrested a suspected burglar, drove him to a deserted area, and shot him to death. The police chief later arranged for his wife, daughter, and sister-in-law to transport the body 400 miles, where they buried the body in a shallow grave in an isolated area. The indictment in *Hayes* charged the police chief with "depriving Richard A. Morales of the *right to liberty* without due process of law, resulting in the death of Richard A. Morales." *Id.* at 816 (emphasis added).

This court in *Hayes* declared that the "defined right" which had been violated was the "right to be tried by a court, and not by ordeal, and thus *to be free from unlawful assault* by state law enforcement officers when lawfully in their custody." *Id.* at 820 (emphasis added). According to the court, the 1968 amendment to § 242, which added life imprisonment where "death results," "alter[ed] the statute only insofar as requiring the additional element ***439** that death ensued as a proximate result of the accuseds' willful violation of the victim's defined rights." *Id.* Significantly, this court declared:

> The amendment to Section 242 ... did not proscribe any additional Conduct which was not already punishable under the unamended version of Section 242. Rather, those cases of infringement with defined rights which result in death are a subset of the universe defined as those cases of infringement with defined rights. Activities which fall within the former naturally fall within the latter.

Id. at 821. [1]

Even though the Fifth Circuit held in the earlier case of *Crews,* and suggested in *Brazier,* that when a murder is committed under color of state law, the "defined rights" are life or liberty, *Hayes* made it apparent that whether the victim of an assault lives or dies, the "defined right" is liberty, rather than life. Thus, under *Hayes,* the jury in the present cases was properly instructed. [2]

Similarly, in *United States v. Lebron–Gonzalez,* 816 F.2d 823 (1st Cir.), *cert. denied,* 484 U.S. 843, 857, 108 S.Ct. 135, 98 L.Ed.2d 92 (1987), the First Circuit, in affirming the criminal conviction under §§ 241 and 242 of a police officer who murdered a prosecution witness, found no clear error in the following jury instruction:

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> [O]ne of the liberties secured to the victim involved in this case by the Constitution is the *liberty to be free from unlawful attacks upon her person.* It has always been the policy of the law to protect the *physical integrity of every person from unauthorized violence. Liberty thus includes the principle that no person may ever be physically assaulted, intimidated, or otherwise abused intentionally* and without justification by a person acting under the color of law of any state.

Id. at 829 (emphasis added).

In sum, whether the "defined right" is one of liberty or of life, or both, the foregoing decisions, together with the express guarantees of due process of law of the Fifth and Fourteenth Amendments, give fair warning that a person's right to life is a protected constitutional right, and that an intentional violation of that right under color of law is proscribed criminal conduct under §§ 241 and 242.

D. Fair Warning That Conduct Is Under Color of Law

The Supreme Court in *Lanier* dealt only with the "right made specific" element of § 242. *Lanier,* 520 U.S. at 264, 117 S.Ct. 1219.[3] It is difficult to conceive of any reason, however, that the Due Process fair warning requirement should not apply also to the "under color of law" element of § 242. Assuming that it does, it also follows that the principles and methodology set forth in *Lanier* for determining whether the requirement was satisfied with respect ***440** to a "defined right" may also be applied to decide whether an accused was given fair warning that the charged conduct amounted to acts under color of law before he engaged in that conduct.

Court decisions interpreting the "under color of law" element of § 242 prior to the offenses at issue in these cases gave fair warning to all of the defendants that Len Davis's actions that caused the deprivation of Groves's right to life constituted conduct under color of law. In *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled in part on other grounds, Monell v. Department of Soc. Servs. of N.Y.,* 436 U.S. 658, 663, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that the "under color of" provision of 42 U.S.C. § 1983 applied to unconstitutional actions taken without state authority as well as unconstitutional action authorized by the state. In that case, the complaint alleged that 13 Chicago police officers: (1) invaded the plaintiffs' home and searched it without a warrant; (2) arrested and detained Mr. Monroe without a warrant and without arraignment; (3) detained him on "open" charges at the police station for 10 hours, interrogated him about a two-day-old murder, and refused to allow him to call an attorney or his family; and (4) subsequently released him without criminal charges being preferred against him.

The Supreme Court in *Monroe* stated and answered the question presented as "whether Congress, in enacting [42 U.S.C. § 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.... We conclude that it did so intend." *Monroe,* 365 U.S. at 172, 81 S.Ct. 473. The Court specifically rejected the argument "that 'under color of' enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did." *Id.* The Court noted that, although one of the aims of the statute was "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice[,]" *id.* at 174, 81 S.Ct. 473, the legislation has general and independent application regardless of the substance of state laws or the quality of their enforcement. The Court stated:

> Although the legislation [42 U.S.C. § 1983] was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy,

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> and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.

Id. at 183, 81 S.Ct. 473.

Moreover, the Supreme Court in *Monroe* concluded that the meaning given "under color of" law "in the *Classic* case and in the *Screws* and *Williams* Cases was the correct one; and we adhere to it." *Id.* at 187, 81 S.Ct. 473. The Court recalled that in *Classic,* it had ruled, " 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.' " *Id.* at 184, 81 S.Ct. 473 (quoting *United States v. Classic,* 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941)). " The right involved in the *Classic* case was the right of voters in a primary to have their votes counted. The laws of Louisiana required the defendants 'to count the ballots, to record the result of the count, and to certify the result of the election.' " *Monroe,* 365 U.S. at 183–84, 81 S.Ct. 473 (quoting *Classic,* 313 U.S. at 326, 61 S.Ct. 1031). "But according to the indictment they did not perform their duty." *Id.* at 184, 61 S.Ct. 1031. The *Monroe* Court further noted that the *Classic* case's view of the ***441** meaning of the words "under color of" state law, in 18 U.S.C. § 242, was reaffirmed in *Screws,* 325 U.S. at 108–13, 65 S.Ct. 1031; that in *Screws,* the Court had rejected, as it did in *Monroe,* the argument that "under color of" state law included only action taken by officials pursuant to state law; that the Court had adhered to *Classic 's* view in *United States v. Williams,* 341 U.S. 70, 99, 71 S.Ct. 581, 95 L.Ed. 758 (1951); that "[t]he meaning which the *Classic* case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it." *Monroe,* 365 U.S. at 185, 81 S.Ct. 473; that it is beyond doubt that this phrase should be accorded the same construction in both 42 U.S.C. § 1983 and 18 U.S.C. § 242. *Id.;* and that since the *Screws* and *Williams* decisions, Congress had several pieces of civil rights legislation before it, but on none of those occasions was a word of criticism directed to the prior construction given by the Court to the words "under color of" law. *Id.* at 186, 81 S.Ct. 473.

The Supreme Court's opinion in *United States v. Price,* 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), contains a short treatise on "under color of law" that contributes to fair warning that Len Davis's conduct was within the scope of that term, and that private persons, jointly engaged with him in the prohibited action, would be acting "under color" of law for purposes of the statute. In footnote 7, the Court stated:

> "Under color" of law means the same thing in § 242 that it does in the civil counterpart of § 242, 42 U.S.C. § 1983. In cases under § 1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment. The contrary view in a § 242 context was expressed by the dissenters in *Screws,* and was rejected then, later in *Williams II,* and finally—in a § 1983 case—in *Monroe v. Pape.* Recent decisions of this Court which have given form to the "state action" doctrine make it clear that the indictments in this case allege conduct on the part of the "pr[i]vate" defendants which constitutes "state action," and hence action "under color" of law within § 242. In *Burton v. Wilmington Parking Authority[,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961)], we held that there is "state action" whenever the "State has so far insinuated itself into a position of interdependence (with the otherwise 'private' person whose conduct is said to violate the Fourteenth Amendment) * * * that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."

Id. at 794 n. 7, 86 S.Ct. 1152 (internal citations omitted).

Several courts of appeals have dealt with the question of when a state law enforcement officer, whose conduct is usually considered to be state action, becomes a private citizen for state action/under color of law purposes. In *United States v. Tarpley,* 945 F.2d 806 (5th Cir.1991), involving 18 U.S.C. § 242, the defendant deputy sheriff was accused of assaulting

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his wife's former lover under color of law. Affirming his conviction, the Fifth Circuit stated:

> Tarpley did more than simply use his service weapon and identify himself as a police officer. At several points during his assault of Vestal, he claimed to have special authority for his actions by virtue of his official status. He claimed that he could kill Vestal because he was an officer of the law. Significantly, Tarpley summoned another police officer from the sheriff's station and identified him as a fellow officer and ally. The men then proceeded to run Vestal out of town in their squad car. The ***442** presence of police and the air of official authority pervaded the entire incident.

Id. at 809.

Stengel v. Belcher, 522 F.2d 438 (6th Cir.1975), *cert. granted,* 425 U.S. 910, 96 S.Ct. 1505, 47 L.Ed.2d 760, *cert. dismissed as improvidently granted,* 429 U.S. 118, 97 S.Ct. 514, 50 L.Ed.2d 269 (1976), dealt with an off-duty, out-of-uniform police officer whose involvement in a bar room brawl resulted in his shooting several and killing two persons. The officer did not identify himself as such when he intervened. On the other hand, police department regulations imposed a continuing duty on police officers, even when off duty, to act in connection with any type of police or criminal activity. Also, the officer used mace issued by the department and a gun, similarly issued by the department, which he was required to carry at all times. The Sixth Circuit indicated that the officer was acting under color of law as a matter of law: "The fact that a police officer is on or off duty, or in or out of uniform is not controlling. 'It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law.' " *Id.* at 441.

In *Revene v. Charles County Commissioners,* 882 F.2d 870 (4th Cir.1989), an off-duty deputy sheriff shot and killed plaintiff's decedent. The Fourth Circuit reversed the district court's dismissal on state action grounds. Even though the defendant was off duty, out of uniform, and driving his own vehicle, as a matter of local law he was on duty twenty-four hours a day and was expected to take proper police action when appropriate. *Id.* at 873.

Other cases have drawn helpful distinctions: *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir.1982) ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.... [However,] [i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."); *Beard v. O'Neal,* 728 F.2d 894, 897 (7th Cir.1984) ("This case is unlike a situation where a uniformed police officer, who is in a position to prevent violence, observes a murder without intervening in any way.... Indeed, the officer's presence and authority might facilitate the murder by providing the symbolic support of the government. In such a case, the officer might be personally liable for the acts of the person who operated the murder weapon.").

Accordingly, an act is under color of law when it constitutes a " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Monroe,* 365 U.S. at 184, 81 S.Ct. 473 (quoting *Classic,* 313 U.S. at 326, 61 S.Ct. 1031); *Tarpley,* 945 F.2d at 809; *Lanier,* 33 F.3d. at 653. "It is clear that under 'color' of law means under 'pretense' of law." *Screws,* 325 U.S. at 111, 65 S.Ct. 1031. *Accord Tarpley,* 945 F.2d at 809; *Lanier,* 33 F.3d at 653. Individuals pursuing private aims but not using or misusing state authority are not acting under color of law purely because they are state officers. See *Tarpley,* 945 F.2d at 809; *Lanier,* 33 F.3d at 653. However, "[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Screws,* 325 U.S. at 111, 65 S.Ct. 1031. *Screws* does not "mean that if officials act for purely personal reasons, they necessarily fail to act 'under color of law.' " *Tarpley,* 945 F.2d at 809 (citing *Brown v. Miller,* 631 F.2d 408 (5th Cir.1980); *United States v. Davila,* 704 F.2d 749 (5th Cir.1983)).

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Consequently, Davis, Hardy, and Causey had adequate advance notice that their actions were not merely part of Davis's pursuit of a purely personal goal, but also involved a substantial use or misuse of the ***443** authority and power vested in him by state law: (1) Davis's actions were taken to protect his position as a police officer, to retaliate against Groves for informing the IAD of his alleged previous acts under color of law in misuse of his authority, and to send the IAD a message to leave him alone in his exercise of the powers of his office; (2) While acting under the pretense of performing his official duties, Davis used the police station, police squad car, police radio, and police telephone, as well as his presence as a fully armed and equipped, uniformed policeman, driving a marked police squad car, to plan, direct, and effectuate the murder of Groves; (3) Davis had the power as a police officer to either protect or not protect Hardy and Causey from investigation and arrest for numerous crimes; Davis used this power vested in him by the state to persuade and require Hardy and Causey to murder Groves; (4) Davis used his authority and the power of his office to provide, on his own watch, surveillance, lookout, and cover for the killers under which they began and carried out most of the homicide operation; (5) After setting the murder scheme in motion, Davis continued to misuse his authority and responsibility by deliberately allowing the criminal activity to proceed unimpeded, contrary to his obligation as a police officer, whether on duty or off, to interdict known breaches of the peace; (6) Hardy and Causey joined and executed the murder operation with full knowledge and consent to the foregoing facts.

It is true that, unlike the present case, most of the previous decisions upholding convictions under §§ 241 and 242, and civil judgments under § 1983, for unconstitutional deprivations of life and liberty by law enforcement officers involved the officer's personal operation of the weapon or other criminal means. There is no reason in law, common sense, or morality, however, for any rational person, whether he is a police officer or a co-participant in an offense with the officer, to believe that the deprivation of a person's constitutional right to life by an officer's use and misuse of his authority through an intermediary would not be equally as unlawful as such a deprivation by the officer's own hand. The Supreme Court has "upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Lanier,* 520 U.S. at 269, 117 S.Ct. 1219 (citing authorities). "In sum, as with civil liability under § 1983 or *Bivens,* all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, 'in the light of pre-existing law the unlawfulness [under the Constitution] is apparent[.]' Where it is, the constitutional requirement of fair warning is satisfied." *Id.* at 271–72, 117 S.Ct. 1219 (internal citation omitted).[4]

***444** Applying the fair warning standard, principles, and methodology clarified by the Supreme Court in *Lanier,* by analogy, I conclude that each of the defendants in the present cases was given fair warning by prior decisions that the conduct he intentionally chose to engage in would amount to acts under color of law and subject him to criminal liability under 18 U.S.C. § 242.

II. Effect of Erroneous Conviction of Witness Tampering

I agree that the witness tampering conviction must be reversed and the case remanded for resentencing.

I write further only to add authorities that tend to support the majority opinion's conclusion that "[b]ecause it is impossible to say that the jury's penalty phase recommendations of the death penalty were not influenced by the fact that Davis and Hardy had received three death eligible convictions, rather than two, we must vacate the death sentences and remand for new sentencing hearings."

This court has declared that "unless it can be ascertained from the record that a trial court's sentence on a valid conviction was not affected by a subsequently invalidated conviction on another count of the indictment, a defendant must be resentenced on the valid conviction." *Bourgeois v. Whitley,* 784 F.2d 718, 721 (5th Cir.1986). *See also Jerkins v. United States,* 530 F.2d 1203, 1204 (5th Cir.1976); *United States v. Garcia,* 821 F.2d 1051, 1053 (1987) (citing ***445** *United States v. Tucker,* 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972)).

In capital cases, "[e]volving standards of societal decency have imposed a correspondingly high requirement of

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reliability on the determination that death is the appropriate penalty in a particular case." *Mills v. Maryland,* 486 U.S. 367, 383–84, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Therefore, "[t]he *possibility* that [defendant's] jury conducted its task improperly certainly is great enough to require resentencing." *Id.* at 384, 108 S.Ct. 1860 (emphasis added). Furthermore, " '[t]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty ... is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.' " *Id.* at 376–77, 108 S.Ct. 1860 (quoting *Lockett v. Ohio,* 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)).

In this case, defendants Davis, Hardy, and Causey were charged with three counts alleging violations of: (1) 18 U.S.C. § 241, "Conspiracy against rights"; (2) 18 U.S.C. § 242, "Deprivation of rights under color of law"; and (3) 18 U.S.C. § 1512, "Tampering with a witness, victim, or an informant." Conviction on each of these counts is punishable by the death penalty. While the government filed a "Notice of Intent to Seek the Death Penalty" for each of the three counts with respect to Davis and Hardy, the government did not seek the death penalty with respect to Causey. Davis and Hardy were convicted on all three counts; Causey was convicted on counts one and two, and the jury was unable to render a unanimous verdict with respect to Causey on count three, which subsequently was dismissed without prejudice.

"There is, of course, no extrinsic evidence of what the jury in this case actually thought. We have before us only the verdict form and the judge's instructions." *Mills,* 486 U.S. at 381, 108 S.Ct. 1860. However, my reading of those parts of the record leads me "to conclude that there is at least a substantial risk that the jury was misinformed." *Id.*

During each of the separate penalty phases of Davis and Hardy, the jury was instructed that it "must consider any mitigating factors that may be present in this case." The jury was permitted to consider "*anything* about the commission of the crime or about [the defendant's] background or character that would mitigate against the imposition of the death penalty." Specifically, the jury was told that the defendant relied upon the mitigating factor "that *another person, equally culpable in the crime will not be punished by death.*" (emphasis added) This instruction permitted the jury to take into account as a reason not to impose the death penalty the fact—if the juror found it to be so by the preponderance of the evidence—that other participants in the killing would not be sentenced to death and executed, even though they might be equally or even more responsible than the defendant for the victim's death. According to the jury instructions, "[t]he law requires consideration of this mitigating factor to allow juries to consider what is fair, considering all of the persons responsible for an intentional killing, before imposing a sentence of death." Significantly, however, the jury also was instructed that "[i]f *even one juror finds a mitigating factor present which, in that juror's mind, is not outweighed beyond a reasonable doubt by the aggravating factors proved, then the jury may not sentence Hardy to death.*" (emphasis added).

This panel has decided to reverse the convictions of Davis and Hardy on count three, for lack of sufficient evidence, and to affirm Causey's convictions on counts one and two. Therefore, all three defendants will stand convicted of only counts one and two. However, Davis and Hardy have been sentenced to death, while Causey has been sentenced to life imprisonment.

Given this disposition of the defendants' appeals, we cannot rule out the substantial ***446** possibility that, during the death penalty deliberations with respect to Davis and Hardy, had the jury been presented with the circumstances as they now exist, i.e., all three defendants standing convicted on counts one and two, but not count three, and only Causey having been spared from the death penalty, that one or more jurors would have found by a preponderance of the evidence with respect to Davis and Hardy that "another defendant or defendants, equally culpable in the crime, [namely, Damon Causey, would] not be punished by death." If even one juror had found this mitigating factor to be present in the penalty phase of either Davis or Hardy, or both, and had further found the mitigation not to be outweighed beyond a reasonable doubt by the aggravating factors proved, then the jury could not have sentenced the defendant to death in any penalty phase in which a single juror was so influenced by the mitigating factor. " 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence,' " this case must be remanded for resentencing. *See Mills,* 486 U.S. at 375, 108 S.Ct. 1860 (quoting *Eddings v. Oklahoma,* 455 U.S. 104, 117, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (O'Connor, J., concurring)).

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III. Conclusion

I join in the majority opinion for the reasons expressed therein and for the additional reasons herein assigned.

All Citations

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Footnotes

1 Defendants point out that appellate decisions affirming civil verdicts for money damages under 42 U.S.C. § 1983 are distinguishable because the evidence need only support a finding by a preponderance of the evidence rather than the more stringent beyond a reasonable doubt criminal standard applicable in this matter. Keeping in mind that distinction, we nonetheless find analysis concerning the meaning of "under color of law" language in § 1983 instructive in the proper interpretation of the same language used in §§ 241 & 242. *See West v. Atkins,* 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988)(noting that the traditional definition of acting under color of law articulated in *Classic* had been adopted for purposes of § 1983 analysis).

2 "Thirty," is New Orleans Police jargon for homicide, corresponding to the Louisiana Criminal Code definition of first degree murder, at LSA–R.S. 14:30.

3 Defendants claim that Jackson had an incentive to lie to help himself on pending charges in another matter. The district court correctly found that this point goes to weight rather than admissibility.

4 The expert testified that the barrel could have been in the water for anywhere from 6 months to 2 years.

5 18 U.S.C. § 1512(b)(3) provides:

> (b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
>
> shall be fined under this title or imprisoned not more than ten years, or both.

1 The majority finds great significance in Davis' statement that he could get Hardy to murder Groves and then handle the "thirty." But Davis' speculation to his partner was never borne out. Davis did not, in fact, handle the "thirty," and there is no evidence in the record that he in fact would have had any authority to do so.

2 Both the majority and concurring opinions purport to rely upon *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) as breaking new ground for purposes of determining when conduct is committed under color of law. But *Monroe* does not purport to adopt any new standards relevant to the inquiry. To the contrary, *Monroe* merely reaffirms the principles previously announced in *Classic* and *Screws. See Monroe,* 81 S.Ct. at 484 ("We conclude that the meaning given 'color of' law in the *Classic* case and in the *Screws* and *Williams* case was the correct one; and we adhere to it."); *see also Williams v. United States,* 341 U.S. 97, 71 S.Ct. 576, 577, 95 L.Ed. 774 (1951) ("The question in this case is whether a special police officer who in his official capacity subjects a person suspected of crime to force and violence in order to obtain a confession may be prosecuted" for conduct under color of law.); *id.* at 578 (noting that the victim was interrogated pursuant to "an investigation conducted under the aegis of the State"); *id.* (noting that the defendant "had a semblance of policeman's power from Florida ... [;] acted under authority of Florida law; and ... was asserting the authority granted him and not acting in the role of a private person"). *Monroe,* which presented the question of whether

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police exceeded their authority in the scope of an official investigation, cannot faithfully be cited as extending or broadening the color of law concept as defined in earlier Supreme Court cases.

3 Whatever color of law there is in this case must be derived from the conduct of Davis, the New Orleans police officer. It is true that even a patrolman at the bottom of the police totem pole, like Davis in this case, may exercise certain powers and duties which are derivative of his authority as a police officer and the exercise of these powers is clearly under "color of law." A patrolman may enforce the traffic laws of the city and issue a ticket or citation to a citizen whom he observes in violation of such laws; but Davis never issued any kind of citation or ticket to Groves in this case. A patrolman may make an investigative stop of a citizen if he has a reasonable suspicion that the citizen may be engaging in some sort of criminal activity; but Davis never made an investigative stop of Groves in this case. A patrolman may serve and execute a warrant for arrest upon a citizen; but Davis never executed any warrant for arrest on Groves in this case. A patrolman may arrest without a warrant and take into custody any citizen whom he observes to be committing a crime; but Davis never purported to arrest Groves and never had any custody of any kind of Groves. A patrolman may direct traffic, order individual citizens to stay behind police barricades at an accident or crime scene, and order individual citizens to leave or vacate certain premises on the grounds of public safety; but there is no evidence in this case that Davis ever exercised any such authority as to Groves.

1 The Fifth Circuit in *United States v. Stokes,* 506 F.2d 771 (5th Cir.1975), held that when a prisoner is assaulted (but not killed) by police, the right to due process under § 242 is not limited to "a right not to be summarily punished or deprived of a trial by law," but also includes the *right not to be deprived of liberty,* which encompasses the right to be *"free from unlawful attacks upon the physical integrity of his person."* *Id.* at 773 & n. 2, 774 (emphasis added).

2 The jury was instructed that the defendant was charged with depriving the victim of "the right not to be deprived of liberty without due process of law, that is, the right to be free from the use of unreasonable force by one acting under color of law," which is a right "secured by the Constitution and laws of the United States."

3 According to the Court:

> Section 242 is a Reconstruction Era civil rights statute making it criminal to act (1) "willfully" and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States. The en banc decision of the Sixth Circuit dealt only with the last of these elements, and it is with that element alone that we are concerned here.

Id. (internal citations and footnote omitted).

4 There are other §§ 241 and 242 cases involving facts similar to Len Davis's "rogue cop" conduct in which, apparently, the "color of law" and "right protected" elements were so clear that these issues were not raised as assignments of error in either case.

In *United States v. Robinson,* 503 F.2d 208 (7th Cir.1974), *cert. denied,* 420 U.S. 949, 95 S.Ct. 1333, 43 L.Ed.2d 427 (1975), the Seventh Circuit affirmed the §§ 241 and 242 criminal convictions of a police officer who conspired with lay-person accomplices to murder drug dealers in order to finance a scheme to rob an armored car.

In *Robinson,* one indictment charged two Chicago police officers with conspiring with others to "deprive citizens of their rights to life, liberty, and property without due process of law, and that the operation of the conspiracy resulted in the deaths of Jeff Beard and Verdell Smith, in violation of 18 U.S.C. § 241"; and two counts charged Robinson, while acting under color of law, with depriving Joseph Rubio and Jeff Beard of "constitutional rights and protections" in violation of 18 U.S.C. § 242. *Id.* at 210.

Police officer Robinson entered into a conspiracy with Holmes and O'Neal (an undercover paid FBI informant) to "shake down" drug pushers in order to finance what was called a "milkrun," which was a scheme to rob $1 million from an armored car. *Id.* at 211. As part of the conspiracy, Officer Robinson obtained a contract to murder Chuck McFerren, a witness in a state murder trial, with the money to be used to fund the "milkrun." *Id.* After Robinson, Tolliver (a second police officer who was acquitted), Holmes, and

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O'Neal staked out the lounge owned by McFerren, they followed McFerren in Robinson's car. When they pulled up next to McFerren's car, Officer Tolliver fired a rifle through the rear window of the vehicle, killing Verdell Smith, a passenger in the car. *Id.*

Nine days later, Officer Robinson obtained a $5,000 murder contract on Joe Rubio, a reputed narcotics pusher. *Id.* at 211–12. Officer Robinson, O'Neal, and a third conspirator, Bruce, stopped Rubio's car. Robinson and Bruce handcuffed Rubio's hands behind his back, put him in the back seat of O'Neal's car, and drove him to a public park forest. *Id.* at 212. Instead of killing Rubio, Robinson "shook him down," getting Rubio to pay each conspirator $100 and agree to sell narcotics for them. *Id.*

Two days later, Officer Robinson told O'Neal that he had a $1,000 "contract" to murder Jeff Beard, another narcotics dealer. *Id.* Robinson and O'Neal spotted Beard at a pool hall, and Robinson accosted him when he left. Robinson told Beard that he had a warrant and that he was going to take Beard to the police station. *Id.* Robinson searched Beard, handcuffed him, and placed him in the back of a car driven by O'Neal. *Id.* Robinson and O'Neal drove Beard to Indiana, where Robinson shot and clubbed Beard to death. *Id.*

Another case with similar criminal conduct is *United States v. Simon*, 964 F.2d 1082 (11th Cir.1992), *cert. denied*, 507 U.S. 1033, 113 S.Ct. 1854, 123 L.Ed.2d 476 (1993), in which the Eleventh Circuit affirmed the conviction under § 241 of a police officer who murdered a drug dealer after attempting to rob him in his home. As in *Robinson*, the *Simon* court did not discuss the "color of law" and "right protected" elements of § 241. However, the indictment defined the constitutional rights violated as the "rights to be secure in his person and property." *Id.* at 1085.

In *Simon*, after an officer obtained consent to enter the victims' residence by claiming to be investigating drug violations, the officer then called fellow officer Simon on the police radio and told him to come inside. *Id.* When Officer Simon could find no drugs or money in the house, he shot the drug dealer and his female companion in the back of the head because "he did not want to leave any witnesses behind because they were involved in an armed robbery." *Id.*

Although the defendants in *Robinson* and *Simon* did not raise, and the courts did not address, the "color of law" or "right protected" elements of the criminal statutes, I cite these cases because the Seventh and Eleventh Circuits affirmed the criminal civil rights convictions of police officers whose conduct was similar to that in the cases before us. Because these cases all involve "rogue cops" who abused police authority for personal gain, and who were charged with criminal civil rights violations that resulted in death, I think these cases may give fair warning that the particular *type of conduct* at issue violates constitutional rights.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	NO. 94-381
LEN DAVIS	SECTION "C"

VERDICT FORM AS TO COUNT ONE

PART ONE - AGGRAVATING FACTORS

For each of the following aggravating factors, answer as to whether you unanimously find that the government has proven beyond a reasonable doubt that particular factor as to Count One:

A. Len Davis used his position as a police officer to affirmatively participate in conduct that seriously jeopardized the health and/or safety of other persons.

Unanimous Yes ✓
Not Unanimous ____

Proceed to B.

B. Len Davis poses a threat of future dangerousness to the lives and safety of other persons in prison.

Unanimous Yes ✓
Not Unanimous ____

Proceed to C.

C. The death of Kim Marie Groves has created harmful emotional distress upon her daughter.

Unanimous Yes ✓
Not Unanimous ____

Proceed to D.

D. Len Davis committed the offense for the purpose of preventing his victim, Kim Marie Groves, from, or retaliating against the victim for, providing information and assistance to law enforcement authorities in regard to the investigation or prosecution of the commission or possible commission of another offense.

Unanimous Yes ✓
Not Unanimous ____

Proceed to Part Two.

PART TWO - MITIGATING FACTORS

For each of the following factors indicate the number of jurors who find the factor established by a preponderance of the evidence as to Count One:

A. Other participants in one or more of the capital offenses who are equally or more culpable than Len Davis will not be punished by death, including, but not necessarily limited to, the following individuals: Sammie Williams, Steven Jackson, Damon Causey. Other participants in the capital offenses received reduced sentences as a result of plea agreements with the government. Other participants in the drug trafficking conspiracy are now eligible to receive reduced sentences as a result of their testimony against Mr. Davis and plea agreements with the government.

0 Jurors so find.

Proceed to B.

B. Although the evidence presented at trial was sufficient to prove Len Davis's guilt beyond a reasonable doubt, his guilt was not proved to an absolute certainty and there is residual doubt as to his guilt.

0 Jurors so find.

Proceed to C.

C. As a police officer, Len Davis frequently risked his own life to apprehend criminal suspects, assist fellow officers and save innocent victims. Len Davis was a decorated police officer and received many commendations, including a Purple Heart, while with the New Orleans Police Department.

0 Jurors so find.

Proceed to D.

D. Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by the stress of working in a high crime area, being shot at on numerous occasions, including on one occasion being shot in the stomach while coming to the assistance of fellow officers

0 Jurors so find.

Proceed to E.

E. Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by his partner, Sammie Williams, who had a history of committing violent crimes against the citizens of New Orleans.

0 Jurors so find.

Proceed to F.

F. Len Davis does not pose a threat of future dangerousness in prison.

0 Jurors so find.

Proceed to G.

G. Other factors in Len Davis's background or character mitigate against imposition of a death sentence.

0 Jurors so find.

Proceed to Part Three.

PART THREE - SENTENCE AS TO COUNT ONE

A. We, the jury, unanimously find that the aggravating factor[s] proved in this case sufficiently outweigh any mitigating factors so as to justify a sentence of death. We vote unanimously that Len Davis shall be sentenced to death as to Count One.

Unanimous Yes ✓
Not Unanimous ____

If you answered "Unanimous Yes" to A, proceed to Part Four.
If you answered "Not Unanimous" to A, proceed to B.

B. We, the jury, are not unanimously persuaded that a death sentence should be imposed in this case. However, we do unanimously agree that Len Davis should be sentenced to life imprisonment without possibility of release. Therefore, we hereby decide that Len Davis should be sentenced to life imprisonment without possibility of release as to Count One.

Unanimous Yes ____
Not Unanimous ____

If you answered "Unanimous Yes" to B, proceed to Part Four.
If you answered "Not Unanimous" to B, proceed to C.

C. We, the jury, do unanimously agree that Len Davis should be sentenced to imprisonment for a number of years lesser than life as to Count One.

Unanimous Yes ____
Not Unanimous ____

Proceed to Part Four.

PART FOUR - CERTIFICATE

By signing below, each of us individually hereby certifies that this Verdict represents his or her decision as to Count One and that consideration of the race, color, religious beliefs, national origin, or sex of Len Davis and of the victim, were not involved in reaching our respective individual decisions. Each of us individually further certifies that the same decision regarding a sentence would have been made no matter what the race, color, religious beliefs, national origin, or sex of the defendant or victim may have been.

FOREPERSON

New Orleans, Louisiana, this 9th day of August, 2005.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	NO. 94-381
LEN DAVIS	SECTION "C"

VERDICT FORM AS TO COUNT TWO

PART ONE - AGGRAVATING FACTORS

For each of the following aggravating factors, answer as to whether you unanimously find that the government has proven beyond a reasonable doubt that particular factor as to Count Two:

A. Len Davis used his position as a police officer to affirmatively participate in conduct that seriously jeopardized the health and/or safety of other persons.

Unanimous Yes ✓
Not Unanimous ____

Proceed to B.

B. Len Davis poses a threat of future dangerousness to the lives and safety of other persons in prison.

Unanimous Yes ✓
Not Unanimous ____

Proceed to C.

C. The death of Kim Marie Groves has created harmful emotional distress upon her daughter.

Unanimous Yes ✓
Not Unanimous ____

Proceed to D.

D. Len Davis committed the offense for the purpose of preventing his victim, Kim Marie Groves, from, or retaliating against the victim for, providing information and assistance to law enforcement authorities in regard to the investigation or prosecution of the commission or possible commission of another offense.

Unanimous Yes ✓
Not Unanimous ____

Proceed to Part Two.

PART TWO - MITIGATING FACTORS

For each of the following factors indicate the number of jurors who find the factor established by a preponderance of the evidence as to Count Two:

A. Other participants in one or more of the capital offenses who are equally or more culpable than Len Davis will not be punished by death, including, but not necessarily limited to, the following individuals: Sammie Williams, Steven Jackson, Damon Causey. Other participants in the capital offenses received reduced sentences as a result of plea agreements with the government. Other participants in the drug trafficking conspiracy are now eligible to receive reduced sentences as a result of their testimony against Mr. Davis and plea agreements with the government.

0 Jurors so find.

Proceed to B.

B. Although the evidence presented at trial was sufficient to prove Len Davis's guilt beyond a reasonable doubt, his guilt was not proved to an absolute certainty and there is residual doubt as to his guilt.

0 Jurors so find.

Proceed to C.

C. As a police officer, Len Davis frequently risked his own life to apprehend criminal suspects, assist fellow officers and save innocent victims. Len Davis was a decorated police officer and received many commendations, including a Purple Heart, while with the New Orleans Police Department.

0 Jurors so find.

Proceed to D.

D. Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by the stress of working in a high crime area, being shot at on numerous occasions, including on one occasion being shot in the stomach while coming to the assistance of fellow officers.

0 Jurors so find.

Proceed to E.

E. Although Len Davis can distinguish right from wrong and deserves to be held accountable for his actions, his behavior was negatively impacted by his partner, Sammie Williams, who had a history of committing violent crimes against the citizens of New Orleans.

0 Jurors so find.

Proceed to F.

F. Len Davis does not pose a threat of future dangerousness in prison.

0 Jurors so find.

Proceed to G.

G. Other factors in Len Davis's background or character mitigate against imposition of a death sentence.

0 Jurors so find.

Proceed to Part Three.

PART THREE - SENTENCE AS TO COUNT TWO

A. We, the jury, unanimously find that the aggravating factor[s] proved in this case sufficiently outweigh any mitigating factors so as to justify a sentence of death. We vote unanimously that Len Davis shall be sentenced to death as to Count Two.

Unanimous Yes ✓
Not Unanimous ____

If you answered "Unanimous Yes" to A, proceed to Part Four.
If you answered "Not Unanimous" to A, proceed to B.

B. We, the jury, are not unanimously persuaded that a death sentence should be imposed in this case. However, we do unanimously agree that Len Davis should be sentenced to life imprisonment without possibility of release. Therefore, we hereby decide that Len Davis should be sentenced to life imprisonment without possibility of release as to Count Two.

Unanimous Yes ____
Not Unanimous ____

If you answered "Unanimous Yes" to B, proceed to Part Four.
If you answered "Not Unanimous" to B, proceed to C.

C. We, the jury, do unanimously agree that Len Davis should be sentenced to imprisonment for a number of years lesser than life as to Count Two.

Unanimous Yes ____
Not Unanimous ____

Proceed to Part Four.

PART FOUR - CERTIFICATE

By signing below, each of us individually hereby certifies that this Verdict represents his or her decision as to Count Two and that consideration of the race, color, religious beliefs, national origin, or sex of Len Davis and of the victim, were not involved in reaching our respective individual decisions. Each of us individually further certifies that the same decision regarding a sentence would have been made no matter what the race, color, religious beliefs, national origin, or sex of the defendant or victim may have been.

FOREPERSON

New Orleans, Louisiana, this 9th day of August, 2005.

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 1

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2005 OCT 27 PM 12:10
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN District of LOUISIANA

UNITED STATES OF AMERICA
V.

LEN DAVIS

JUDGMENT IN A CRIMINAL CASE

Case Number: 94-00381 "C"

JULIAN MURRAY, CAROL KOLINCHAK AND LEN DAVIS, PRO SE
Defendant's Attorney

THE DEFENDANT:

Last 4 digits of Social Security No. xxx-xx-8451

☐ pleaded guilty to count

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ was found guilty on count(s) 1 AND 2 OF THE THIRD SUPERSEDING INDICTMENT ON APRIL 24, 1996. ON AUGUST 9, 2005, AFTER THE PENALTY PHASE OF TRIAL, THE JURY RETURNED A VERDICT THAT THE DEATH PENALTY BE IMPOSED ON THE AFOREMENTIONED COUNTS after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Counts
18 U.S.C. § 241	VIOLATION OF CONSPIRACY AGAINST CIVIL RIGHTS - MURDER	1
18 U.S.C. § 242	VIOLATION OF CIVIL RIGHTS	2
18 U.S.C. § 2	AIDING AND ABETTING	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Federal Death Penalty Act of 1994, and the Special Findings of the Jury.

X The 5TH Circuit Court of Appeals having Reversed and Vacated verdict as to Count 3 of the 3rd Superseding Indictment Count 3 of the 3rd superseding Indictment is dismissed

X Counts remaining in the original indictment, the superseding indictment and the ☐ is second superseding indictment x are dismissed on the oral motion of the United States on this date and by written motion and order filed into the record on November 13, 1996.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

COURT REPORTER: TONI TUSA

U. S. ATTORNEY: MICHAEL MCMAHON, MARK MILLER & JIM LETTEN

PROBATION OFFICER: CATHERINE HARBISON

COURTROOM DEPUTY: KIMBERLY COUNTY

OCTOBER 26, 2005
Date of Imposition of Judgment

Signature of Judge

HELEN G. BERRIGAN, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

OCTOBER 27, 2005
Date

CERTIFIED AS A TRUE COPY
ON THIS DATE _____
BY: _____
Deputy Clerk

___ Fee
___ Process KC (12)
X Dktd
✓ CtRmDep
___ Dkt-70010.5170

AO 245B (Rev. 12/03) Judgment in Criminal Case
Sheet 2 — Sentence

DEFENDANT: LEN DAVIS
CASE NUMBER: 94-00381 "C"

SENTENCE

IT IS THE JUDGMENT OF THE COURT THAT THE DEFENDANT, LEN DAVIS, IS HEREBY SENTENCED TO CONCURRENT SENTENCES OF DEATH AS TO COUNTS 1 AND 2 OF THE THIRD SUPERSEDING INDICTMENT. THE SENTENCE IS MANDATORY PURSUANT TO THE UNANIMOUS VERDICT OF THE JURY. THE DEFENDANT IS COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL UNTIL EXHAUSTION OF THE PROCEDURES FOR APPEAL OF THE JUDGMENT OF CONVICTION AND FOR REVIEW OF THE SENTENCE. WHEN THE SENTENCE IS TO BE IMPLEMENTED, THE DEFENDANT SHALL BE RELEASED TO THE CUSTODY OF A UNITED STATES MARSHAL, WHO SHALL SUPERVISE IMPLEMENTATION OF THE SENTENCE IN THE MANNER PRESCRIBED BY THE LAW OF THE STATE OF LOUISIANA.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 12 noon on _____ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: LEN DAVIS
CASE NUMBER: 94-00381 "C"

CRIMINAL MONETARY PENALTIES

The defendant must pay any imposed fine or restitution under the schedule of payments on Sheet 6.
The special assessment is due immediately.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ 0	$ 0

X The Court Finds that the defendant does not have the ability to pay a fine. The Court waives the fine in this case.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $_____ $_____

☐ **Restitution amount ordered pursuant to plea** _____

☐ **The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).**

☐ **The court determined that the defendant does not have the ability to pay interest and it is ordered that:**

☐ **the interest requirement is waived for** ☐ **fine** ☐ **restitution.**

☐ **the interest requirement for** ☐ **fine** ☐ **restitution is modified as follows:**

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.**

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: LEN DAVIS
CASE NUMBER: 94-00381 "C"

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $_____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time;

F X Special instructions regarding the payment of criminal monetary penalties:

THE SPECIAL ASSESSMENT IS ORDERED DUE IMMEDIATELY.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
VERSUS	**NO. 94-381**
LEN DAVIS AND PAUL HARDY	**SECTION "B"**

ORDER AND REASONS

NATURE OF MOTIONS AND RELIEF SOUGHT

On September 1, 2017 this Court ordered Petitioners Len Davis and Paul Hardy (collectively, "Petitioners") to file supplemental memoranda regarding which of their §2255 claims might require evidentiary hearing (Rec. Doc. 2449). Before the Court is petitioner Hardy's "Supplemental Memorandum Regarding Evidentiary Claims" (Rec. Doc. 2462), petitioner Davis' "Memorandum in Support of Granting Evidentiary Hearing" (Rec. Doc. 2463"), and the Government's "Response to Paul Hardy's and Len Davis's Requests for Evidentiary Hearing" (Rec. Doc. 2465). For the reasons outlined below,

IT IS ORDERED that Petitioners' requests for evidentiary hearing is **DENIED.**

In conjunction with their § 2255 motions, Petitioners seek evidentiary hearing on particular claims therein. 28 U.S.C. § 2255 provides that:

> [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be

> served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C.A. § 2255 (2008).

However, where the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the Court may deny a §2255 motion without an evidentiary hearing. *U.S. v. Auten,* 632 F.2d 478 (5th Cir.1980). A district court's denial of an evidentiary hearing on a § 2255 is reviewed for abuse of discretion. *See United States v. Bartholomew,* 974 F.2d 39, 41 (5th Cir. 1992). To establish an "abuse of discretion," Petitioners must present "independent indicia of the likely merit of allegations." *United States v. Cavitt,* 550 F.3d 430, 442 (5th Cir. 2008).

To be discussed, *infra,* Petitioners fail to meet their burden of presenting "independent indicia" of the likely merit of their claims. Even after this Court allowed for additional exchange of discovery (Rec. Doc. 2249), Petitioners present no new facts or evidence in support of their conclusory claims. Petitioners' mere recitation of incredible conclusions does not warrant evidentiary hearing, and this issue will be "heard" on the briefing already submitted to the Court. *See United States v. McGill,* 11 F.3d 223, 225 (1st Cir. 1993)("In most situations, motions can be "heard" effectively on the papers, with the parties submitting evidentiary proffers by means of affidavits, documentary

exhibits, and the like.").

Also before the Court is Len Davis' "Motion to Vacate under 28 U.S.C. § 2255" (Rec. Doc. 2265), the "Government's Response to Guilt Related Issues Under 28 U.S.C. § 2255 for Collateral Relief" (Rec. Doc. 2265), Paul Hardy's "First Motion to Vacate Under 28 U.S.C. § 2255" (Rec. Doc. 2378), and the "Government's Opposition to Hardy's Motion for Collateral Relief Under 28 U.S.C § 2255" (Rec. Doc. 2378). For the reasons mentioned below,

IT IS FURTHER ORDERED that Petitioners claims are **DISMISSED**, along with all other pending motions.

FACTS AND PROCEDURAL HISTORY

The Third Superseding Indictment charged Len Davis and Paul Hardy with offenses relating to the murder of Kim Marie Groves (Rec. Doc. 187). The first count charged petitioners with a conspiracy to violate Groves' constitutionally protected right to liberty by the use of excessive force, while acting under the color of the law, which resulted in her death (Rec. Doc. 187). The second count alleged that petitioners' actions substantively constituted the deprivation of rights under the color of law pursuant to 18 U.S.C § 242 (Rec. Doc. 187). The third and final count of the indictment alleged that petitioners willfully killed Groves to prevent communication to law enforcement of a possible federal crime (Rec. Doc. 187).

A jury was empaneled and petitioners' trial started on April 8, 1996 (Rec. Doc. 465). On April 24, 1996 the jury found petitioner Davis and petitioner Hardy guilty as to all three counts (Rec. Doc. 524).

On November 6, 1996 petitioner Davis received concurrent sentences for all three counts of the Third Superseding Indictment (Rec. Doc. 631). Davis filed a timely Notice of Appeal and the Fifth Circuit Court of Appeals affirmed the district court's decision as to Count 1 and 2 and reversed and vacated the sentence as to Count 3 (Rec. Doc. 714). Davis was resentenced to two concurrent sentences as to Counts 1 and 2 (Rec. Doc. 1530). Davis filed a timely Notice of Appeal. On September 2, 2010 the Fifth Circuit affirmed his sentence (Rec. Docs. 1542 and 2165). Davis timely filed a Petition for a Writ of Certiorari to the Supreme Court of the United States, which was denied on March 22, 2011 (Rec. Doc. 2205).

On November 6, 1996 petitioner Hardy received concurrent sentences on all three counts (Rec. Doc. 630). Petitioner Hardy filed a timely Notice of Appeal (Rec. Doc. 633). The Fifth Circuit affirmed his convictions on Counts 1 and 2 but reversed his conviction on Count 3. The case was remanded to back to the district court for resentencing (Rec. Doc. 715). In December 2011, petitioner Hardy was resentenced on Counts 1 and 2 and received concurrent terms of life imprisonment, 5 years supervised release,

$3,593.05 restitution, and a $200 Mandatory Special Assessment Fee (Rec. Doc. 2257). On December 29, 2011 petitioner Hardy timely filed a Notice of Appeal and on January 3, 2013 the Fifth Circuit Court of Appeals affirmed his sentences on Counts 1 and 2 (Rec. Docs. 2259 and 2316). On April 3, 2013 Hardy timely filed a Petition for a Writ of Certiorari to the Supreme Court of the United States and on October 9, 2013 it was denied (Rec. Doc. 2342). This Court now reviews petitioners' application for relief under 28 U.S.C § 2255.

FACTUAL AND LEGAL FINDINGS

Petitioners request relief pursuant to 28 U.S.C. § 2255,[1] which allows a prisoner to collaterally attack his or her sentence post-conviction. "After conviction and exhaustion or waiver of any right to appeal, [a defendant is presumed to stand] fairly and finally convicted." *U.S. v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991) (citing *U.S. v. Frady*, 456 U.S. 152, 164 (1982)) (internal quotations omitted). As the Fifth Circuit has noted, § 2255 is "reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on

[1] This statute provides that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

direct appeal and, would, if condoned, result in a complete miscarriage of justice." *U.S. v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981).

Thus, a defendant typically may only challenge a final conviction on constitutional or jurisdictional issues in collateral review. *U.S. v. Shaid*, 937 F.2d at 232 (citing *Hill v. U.S.*, 368 U.S. 424, 428 (1962)). Furthermore, "mere conclusory allegations on a critical issue are insufficient to raise a constitutional issue." *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993). The Fifth Circuit has explained "absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue . . . to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

Petitioners' Claims

Petitioner Len Davis' request for relief is a 278 page motion that raises issues previously considered and decided by both the appellate court and this Court. As the government highlights, many of petitioner's arguments are disorganized, duplicative and redundant. When analyzing the petitioner's claims this Court will refer to the government's structure for the sake of clarity. Additionally, petitioner Paul Hardy's claims are categorically similar and will be discussed with petitioner Len Davis' relevant claims.

1. Issues 1, 8(A), 8(B), and 28

Davis makes various thematically related claims in these sections of his motion. Petitioner Davis alleges that prosecutors and the FBI had prior notice of Ms. Groves' planned murder but failed to intervene in an attempt to ensnare more corrupt law enforcement individuals. Davis alleges that there was suppression of information about an after-the-fact-report detailing the FBI monitor's misinterpretation of phone calls relating to the crime. Davis also argues that there was additional suppression when the government first realized the petitioner's involvement in Grove's murder. Finally petitioner argues that the government only prosecuted Davis to "compensate" for previously ignoring his violent propensities and that there was a conflict of interest.

As the government clearly explains, these allegations have no evidentiary basis and are merely Davis' conclusions and speculation. As previously stated, "absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue . . . to be of probative evidentiary value." *Id.* None of these claims constitute cognizable constitutional violations that justify providing the petitioner relief.

2. Issues 4, 10, 11(A)(2), 11 (B) (2), 18, 8 (C), 2, 3, 4, and 20

Davis makes a number of arguments here and concludes that the prosecution violated the Equal Protection Clause because he was targeted and singled out as an African-American man. Davis argues that prosecution under 18 U.S.C. §§ 241 and 242 can only apply when a white defendant, acting under color of law, targets a victim because of race. Moreover, Davis contends that his convictions pursuant to §§ 241 and 242 violated the Double Jeopardy Clause. Davis further argues that the "color of law" jurisdictional element in §§ 241 and 242 was not met.

In addition, Davis argues that Sammie Williams had an undisclosed deal with the government and that the indictment was insufficient to support either a death sentence or life imprisonment. There is no indication that there is any direct or circumstantial evidence to demonstrate that the petitioner's Equal Protection rights were violated nor does the record reflect that this was a selective or racially motivated prosecution. In addition, petitioner Hardy argues: 1) his counsel did not object to purportedly faulty jury instructions, 2) his counsel failed to raise a double jeopardy objection to his prosecution, and that 3) the indictment was insufficient.

As the government points out, all of these issues have been decided against Davis and Hardy by previous court decisions and

under the law of the case doctrine, this Court is foreclosed from further review. The Fifth Circuit explains, "the law of the case doctrine contemplates that an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *United States v. Williams*, 517 F.3d 801, 806 (5th Cir. 2008) (internal quotations omitted). Moreover,

> [t]his prohibition covers issues decided both expressly and by necessary implication, and reflects the jurisprudential policy that once an issue is litigated and decided, that should be the end of the matter. This rule is essential to the orderly administration of justice, as it is aimed at preventing obstinate litigants from repeatedly reasserting the same arguments and at discouraging opportunistic litigants from appealing repeatedly in the hope of acquiring a more favorable appellate panel.

United States v. Pineiro, 470 F.3d 200, 205 (5th Cir. 2006) (*internal quotations omitted*). Davis' and Hardy's color of law arguments have already been adjudicated in two prior proceedings. *United States v. Causey*, 185 F.3d 407, 413-416 (5th Cir. 1999); *United States v. Davis*, 609 F.3d 663,697 (5th Cir. 2010). Davis' and Hardy's double jeopardy argument was raised and rejected by the Fifth Circuit during a prior proceeding. *United States v. Davis*, 609 F.3d 663, 697-698 (5th Cir. 2010); *Causey*, 185 F.3d at 413-416.

Additionally, the allegation that Sammie Williams had an undisclosed deal with the government was addressed at a previous

evidentiary hearing (Rec. Doc. 910) and dismissed by the Fifth Circuit Court of Appeals. *Davis*, 609 F.3d at 696-697. Furthermore, the law of the case doctrine forecloses the Davis' and Hardy's challenge to the sufficiency of the indictment as prior proceedings have adjudicated that claim. *United States v. Davis*, 609 F.3d 663, 697 (5th Cir. 2010); *United States v. Hardy*, 499 Fed. Appx. 388, 390 (5th Cir. 2012).

3. Ineffective Assistance of Counsel Claims

Petitioners Davis and Hardy raise various claims alleging ineffective assistance of counsel during their respective trials and multiple appeals. However, a federal inmate cannot assert a non-constitutional claim on collateral attack if he did not raise it on appeal. *Davis v. United States*, 417 U.S. 333, 345-46 n. 15 (1974). Furthermore, unlike direct appeals, motions under § 2255 reach only errors of constitutional or jurisdictional magnitude. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981).

To obtain habeas corpus relief based on ineffective assistance of counsel petitioner must show that counsel's performance was deficient and he must establish that prejudice occurred. *Strickland v. Washington*, 466 U.S. 668(1984). Under *Strickland*, in order to establish prejudice, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding but the petitioner must demonstrate a "reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. 668, 693-694(1984).

As the Fifth Circuit explains, "the likelihood of a different result must be substantial, not just conceivable." *Clark v. Thaler*, 673 F.3d 410, 423 (5th Cir. 2012). When evaluating an ineffective assistance of counsel claim the Court need not analyze both prongs of the Strickland standard but may render judgment based solely on one prong. *Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994). Neither petitioner Davis nor Hardy proffer any evidence or facts that demonstrate prejudice. Petitioner Davis mentions various facts that allegedly demonstrate ineffective assistance of counsel, such as no videotaping of the crime scene and counsel's failure to challenge forensic evidence. Petitioner Hardy alleges that his trial counsel failed to conduct an independent pretrial investigation, failed to conduct an adequate cross-examination of witnesses, failed to inform Hardy of the consequences of pleading guilty, failed to negotiate a favorable plea agreement, failed to challenge the guidelines calculation and application, did not sufficiently consult Hardy regarding the sentencing guidelines, did not object to jury instructions, and failed to raise multiplicity and constructive amendment issues regarding the Third Superceding Indictment.

Davis' and Hardy's allegations of ineffective assistance of counsel are based on contentions that are not supported by the law or the evidence. Petitioners' mere conclusions about their lawyer's performance is not enough to give rise to a credible

assertion of a deficiency and they both fail to demonstrate a level of prejudice that is required by the *Strickland* standard. Furthermore, the government points out that a plea agreement was never contemplated. This defeats petitioners' arguments because as the Fifth Circuit has held "an attorney's failure to raise a meritless argument cannot form the basis of an ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue." *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999). Petitioners' arguments regarding ineffective assistance of counsel are without merit.

4. Issues 9, 23, 24, 25, and 26

Petitioner Davis argues that there was juror misconduct and unchecked bias. However, in order to obtain a new trial for juror bias, Davis must meet the *McDonough Power Equipment* test where "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *United States v. Doke*, 171 F.3d 240, 246-47 (5th Cir. 1999). Davis failed to demonstrate that any of the jurors were actually or fundamentally incompetent as required by the Fifth Circuit. *United States v. Soto-Silva*, 129 F.3d 340, 343 (5th Cir. 1997). The selective quotes that petitioner Davis cites from the jury selection transcripts do not give rise to an ineffective

assistance of counsel claim that warrant a modification of the petitioner's sentence. These claims are also without merit.

Finally, it is worth remembering that in all respects there is overwhelming record evidence of Petitioners' guilt in a horrendous federal crime. There is no factual or constitutional basis warranting the relief they request.

New Orleans, Louisiana, this 22nd day of March, 2018.

SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
VERSUS	**No. 94-381**
LEN DAVIS	**SECTION: "B" (5)**

JUDGMENT

Considering this Court's separate order and reasons **denying** Petitioner Len Davis' §2255 Motion for Post-Conviction Relief (Rec. Doc. 2265),

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the respondent, the United States of America, and against petitioner, Len Davis, **DENYING** his motion **with prejudice.**

New Orleans, Louisiana, this 22nd day of March, 2018.

SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
VERSUS	**No. 94-381**
LEN DAVIS	**SECTION: "B"(5)**

CERTIFICATE OF APPEALABILITY

Having separately issued a final order denying Petitioner's 28 U.S.C. § 2255 Motion, in which the detention complained of arises out of process issued by a federal court, the Court, after considering the record and the requirements of 28 U.S.C. § 2253 and Fed. R. App. P. 22(b), hereby orders that,

_____ a certificate of appealability shall be issued having found that petitioner has made a substantial showing of the denial of a constitutional right related to the following issue(s):

__X__ a certificate of appealability shall not be issued for the following reason(s):

No substantial showing of denial of a constitutional right.

New Orleans, Louisiana, this 22nd day of March, 2018.

SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
VERSUS	**NO. 94-381**
LEN DAVIS	**SECTION: "B"**

ORDER AND REASONS

Before the Court are Petitioner's Motion to Alter or Amend Judgment (Rec. Doc. 2471) and the Government's Opposition (Rec. Doc. 2473). For the reasons discussed below,

IT IS ORDERED that the motion is **DISMISSED.**

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioner Len Davis was charged with three counts. The first being one count of a conspiracy to violate Kim Marie Groves' constitutionally protected right to liberty by the use of excessive force, while acting under the color of the law, which resulted in her death. *See* Rec. Doc. 187. The second being that petitioner's actions substantively constituted the deprivation of rights under the color of law pursuant to 18 U.S.C. § 242. *See id.* The third being that petitioner willfully killed Groves to prevent communication to law enforcement of a possible federal crime. *See id.* On April 24, 1996, the jury found Petitioner guilty as to all three counts. *See* Rec. Doc. 524 at 3.

After receiving concurrent sentences for all three counts, Davis filed a timely notice of appeal in which the Fifth Circuit Court of Appeals affirmed the District Court's decisions as to Count 1 and 2 and reversed and vacated the sentence as to Count 3. *See* Rec. Doc. 714 at 3. After being resentenced for Count 3, Petitioner again filed a notice of appeal, and on September 2, 2010, the Fifth Circuit affirmed his sentence. *See* Rec. Doc. Nos. 1542 and 2165. On March 22, 2011, the Supreme Court of the United States denied Petitioner's Writ of Certiorari. *See* Rec. Doc. 2205.

On March 20, 2012, Petitioner filed a motion under 28 U.S.C. § 2255 for relief from his 1996 convictions. *See* Rec. Doc. Nos. 2265, 2340, 2341. The motion alleged violations of Davis' rights to due process and a fair trial due to conflict of interest, race discrimination, juror misconduct, and ineffective assistance of counsel at the guilt phase trial. On September 1, 2017, this Court ordered Petitioner to file supplemental memoranda regarding which of his § 2255 claims might require evidentiary hearing. *See* Rec. Doc. 2449. On March 22, 2018, this Court issued its Order and Reasons denying Petitioner's request for an evidentiary hearing and ordering that Petitioner's claims and all other motions be dismissed. *See* Rec. Doc. 2466.

LAW AND ANALYSIS

A Rule 59(e) motion contemplates the correctness of a judgment and argues legal error. See *Templet v. Hydrochem Inc.*, 367 F.3d

473, 479 (5th Cir. 2004). Under Federal Rules of Civil Procedure Rule 59(e), district courts have the power to consider altering or amending a judgment that would otherwise be final. *See Burnam v. Amoco Container Co.*, 738 F.2d 1230 (11th Cir. 1984).

To succeed under Rule 59(e), the party must show that there is a change in controlling law, new evidence, and/or a need to correct a clear and manifest error. *See Bollinger Shipyards Lockport, LLC v. AmClyde Engineered Prods. Co.*, 2003 U.S. Dist. LEXIS 10577, at *3-4 (E.D. La. June 10, 2003). Evidence is not newly discovered evidence if it was available before entry of the challenged decision. *See, e.g., Schiller v. Physicians Res. Group Inc.* 342 F.3d 563, 567-68 (5th Cir. 2003); Waltman v. International Paper Co., 875 F.2d 468, 473-74 (5th Cir. 1989). In addition, a petitioner does not identify a manifest error of law or fact if he or she simply repeats arguments it made before this court's ruling.

According to the Fifth Circuit, "altering and amending a judgment under Rule 59(e) is an extraordinary remedy that courts should use sparingly." *Templet*, 367 F.3d at 479. The court in *Resolution Trust Corp. v. Holmes*, concluded that Rule 59 is not the "proper vehicle for rehashing old arguments or advancing theories of the case that could have been presented earlier," 846. F. Supp. 1310, 1316 (S.D. Tex. 1994).

Pursuant to 28 U.S.C. § 2255 a prisoner may collaterally attack his or her sentence post-conviction. 28 U.S.C. § 2255 provides that:

> [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

However, where the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the Court may deny a 28 U.S.C. § 2255 motion without an evidentiary hearing. *U.S. v. Auten*, 632 F.2d 478 (5th Cir. 1980).

28 U.S.C. § 2255 is "reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice." *U.S. v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). Mere conclusory allegations on a critical issue are insufficient to raise a constitutional issue. *U.S. v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993). "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue . . . to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

Petitioner fails to show that he is entitled to an alteration or amendment of the judgment due to manifest error. According to

Petitioner, his constitutional rights were violated due to a conflict of interest. Specifically, Petitioner argues that the FBI had prior notice of Ms. Groves' planned murder but failed to stop Operation Shattered Shield while it collected more evidence. *See* Rec. Doc. 2471-1 at 3. However, Petitioner's bald assertions on critical issues cannot be taken to be of probative evidentiary value when there is no basis for speculative and conclusory claims. Petitioner planned for the intentional violent act of murder and arranged for it to occur. He and his accomplices are criminally responsible for this murder. The alleged negligence of others and overwhelming evidence of his own guilt neither absolve Petitioner nor mitigate his criminal conduct and consequences.

Similarly, Petitioner's argument of ineffective assistance of counsel are mere conclusions not supported by the record or law. To obtain relief based on ineffective assistance of counsel, Petitioner must show that counsel's performance was deficient and that prejudice occurred. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish prejudice, Petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693-94. "The likelihood of a different result must be substantial, not just conceivable." *Clark v. Thaler*, 673 F.3d 410, 423 (5th Cir. 2012). One of Petitioner's main arguments is that counsel failed to challenge the "color of law" requirement. *See* Rec. Doc. 2471-1

at 5. However, the court previously reviewed Petitioner's color of law argument. It was found that Petitioner misused and abused his official power to access the police station, police car, and police radio to plan, execute, and cover-up the murder. Petitioner met with the other defendants at the police station and drove them in a police car to point out where the victim frequented. Petitioner said on tape that he and his partner could handle the evidence after the shooting and used police radio to confirm the hit with the police officer at the murder scene. Thus, previous rulings determined that the color of law element was met.

As the government clearly explains, Petitioner repeats arguments that have already been made before this Court's ruling, as well as the Fifth Circuit. Thus, under the law of the case doctrine, further review has not been shown appropriate here. According to the Fifth Circuit, "the law of the case doctrine contemplates that an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *United States v. Williams*, 517 F.3d 801, 806 (5th Cir. 2008) (internal quotations omitted). The court in *United States v. Pineiro*, stated that this doctrine is aimed at preventing litigants from repeatedly reasserting the same arguments, 470 F.3d 200, 205 (5th Cir. 2006).

Thus, Petitioner does not meet the requirements of a motion to alter or amend judgment. Petitioner does not present any newly

discovered evidence, there is no new controlling law, and there is no evidence of a manifest error. Petitioner simply repeats old arguments that have already been decided by the courts. A Rule 59(e) motion should not be used to reargue previous issues. *Resolution Trust Corp.*, 846 F. Supp. at 1316.

Accordingly, the instant motion is dismissed.

New Orleans, Louisiana, this 13th day of March, 2019.

SENIOR UNITED STATES DISTRICT JUDGE

EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CASE NO. 2:94-cr-00381
VERSUS	*	SECTION: "C"
LEN DAVIS	*	

AFFIDAVIT OF DWIGHT DOSKEY

I, DWIGHT DOSKEY, do hereby depose and state that the following is true and correct:

1. I am an attorney licensed to practice in the State of Louisiana.

2. On December 13 1995, Doc. 342, I was appointed to represent Mr. Len Davis after the removal of Mr. Curklin Atkins, who had represented Mr. Davis since his December 20, 1994, arraignment, Doc. 12, on the indictment filed on December 12, 1994, Doc. 4. Thereafter, I served as lead counsel for Mr. Davis along with co-counsel Mr. Milton Masinter, who had been appointed to represent him as of March 29, 1995. Doc. 105. Jury trial began less than four months later, on April 8, 1996. Doc. 465.

3. I am aware that on July 31, 1995, the Government gave notice of its intent to seek the death penalty against Mr. Davis, Doc. No. 178, but I am not aware of and have never seen any written submission prepared by counsel for Mr. Davis in connection with counsel's representation of Mr. Davis in the pre-authorization process before the local U.S. Attorney's Office or the Department of Justice.

4. Mr. Davis was charged by grand jury indictment with violation of 18 U.S.C. § 241 (conspiracy against rights) and § 242 (deprivation of rights under color of law), both of which require state action under color of law. Despite the critical nature of this element of the offenses charged, I do not recall any discussion or consideration of filing a pretrial motion challenging the federal death penalty prosecution of Mr. Davis on this basis even though, as the dissent noted on appeal "it was not until September of 1994 that the death penalty became an available sanction, and this case appears to be the first case in which the death penalty has been imposed upon defendants charged with a deprivation of civil rights in violation of these Civil War reconstruction statutes." *United States v. Causey, et al.*. 185 F.3d 407, 427 (5th Cir. 1999), DeMoss, J., dissenting. Nor did I have any strategic reason for not pursuing a pretrial motion challenging federal jurisdiction on this basis.

5. I also did not conduct an investigation on behalf of Mr. Davis prior to trial on the "under color of law" element in order to challenge the Government's evidence that Mr. Davis misused or abused his official power and that there is a nexus between the victim, the improper conduct, and Mr. Davis's performance of his official duties. *See United States v. Causey, et al.*, 185 F.3d 407, 415 (5th Cir. 1999). I am now aware, for example, that there is evidence that Mr. Davis knew Ms. Groves in another context that would have been used to counter the Government's theory that "the motive for the crime arose from a

complaint lodged by Groves against Davis in his official capacity," *Id.* at 415-16, as opposed to some personal motive. I did not have any strategic reason for not conducting such an investigation.

6. I have been made aware that the FBI conducted an internal investigation into the failure of the FBI to act on the Title III wiretap of conversations of Mr. Davis overheard contemporaneously by the FBI on the date of the killing of Ms. Groves, which investigation noted that both the individual monitoring the conversations and the FBI agent who reviewed the tapes the following day did not determine the conversations to be relevant and concluded that they "could be mistaken as routine." If I had this information prior to trial, I would have used it to raise the issue pretrial of the Government's conflict of interest, an issue that I did not consider raising pretrial or investigating at the time of the trial. I would have also used this information during trial to challenge the Government's case regarding the proper interpretation of these conversations, a critical issue at trial.

7. I have been made aware that James L. Churchman, a forensic scientist with the state police lab at the time, who testified on behalf of the Government at trial, produced notes in his review of the gun barrel recovered from a canal stating that he made no attempt to clean due to advanced barrel damage, that there was no chance of the original individual characteristics surviving and that it was not submitted. I would have used this information at trial to challenge the Government's forensic evidence regarding the murder weapon. Additionally, I did not consider hiring an expert on crime scene investigation to address how the crime scene investigation fell below applicable standards, and did not fail to do so for any strategic reason.

8. I have been made aware of 302s of key government witness Sammie Williams that were not made available to the defense prior to or during trial in 1996. If I had these 302s in connection with that trial, I would have used this information both to challenge the credibility of Mr. Williams, who testified in several respects contrary to the 302s, and to inform the theory of defense against the charges, particularly with regard to the state action under color of law element.

9. I have been made aware of the extent to which marshals went allegedly to protect jurors and family members from Mr. Davis. During trial, I did not know jurors were transported in a van with paper covering the windows, or that mailboxes along their route were covered, or that each juror had a marshal stationed outside his or her hotel room at night. I also did not know that marshals told family members that Mr. Davis had a far reach and they should be careful. Nor did I know that marshals checked in on family members' safety on the phone in the presence of jurors. And I did not know marshals patrolled the neighborhoods of family members or escorted them home at times. Had I known these things I would certainly have objected to them.

10. I have recently been made aware that one of the jurors slept a fair amount and was very distracted at trial—to the extent that he does not remember the trial. While the issue came up at some point during trial, I did not challenge it. Had I know the extent to which the juror was not taking in evidence, I would have objected to his continued presence on the jury.

11. I have been made aware that the wife of one of the jurors attended trial every day and sat with the U.S. Attorney and other members of his office in court. Had I been aware this was going on, I would have objected to it.

DWIGHT DOSKEY

THUS DONE AND SIGNED before me, a Notary Public, on this 19 day of December, 2017.

NOTARY PUBLIC
Sara Mieczkowski

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	**CRIMINAL ACTION**
VERSUS	*	**NO. 94-381**
LEN DAVIS	*	**SECTION "B"**

AFFIDAVIT OF BRUCE JOHNSTON

I, BRUCE JOHNSTON, do hereby state that the following declaration is true and correct:

1. I am an investigator licensed in the State of Louisiana.

2. At the direction of counsel for Mr. Davis, I conducted an investigation relevant to the "under color of law" element of the Government's case against him.

3. As a result of this investigation, I learned that Mr. Davis and Kim Groves knew each other for years prior to Davis becoming a police officer, that they had a personal relationship at one time and that, since the dissolution of that relationship, there was long-standing friction and hatred between the two. One witness indicated that Ms. Groves was motivated to file the IAD complaint against Davis because of this ongoing personal animosity. Witnesses who could confirm that Davis and Ms. Groves knew each other and that there were long-standing tensions between them include Lorraine Ford, who was a friend of Kim Groves, and Corey Groves, who is Ms. Groves' son.

4. At the direction of counsel for Mr. Davis, I related information I learned regarding the extent and nature of the prior relationship between Davis and Ms. Groves to Mr. Dwight Doskey, which is the information referenced in Paragraph 5 of his affidavit filed as Exhibit A to Mr. Davis' Memorandum in Support of Granting Evidentiary Hearing.

5. Consistent with Mr. Doskey's Affidavit, I determined during the course of my investigation that witnesses were not questioned by representatives of Mr. Davis at the time of his trial in 1996 regarding the "under color of law" element.

6. At the direction of counsel for Mr. Davis, I also made Mr. Doskey aware that James L. Churchman, a forensic scientist with the state police lab at the time, who testified on behalf of the Government at trial, produced notes in his review of the gun barrel recovered from a canal stating that he made no attempt to clean it due to the advanced barrel damage, that there was no chance of the original individual characteristics surviving and that it was not submitted. The documentation in support of

this information is attached to my affidavit and is referenced in Paragraph 7 of Mr. Doskey's affidavit.

BRUCE JOHNSTON

THUS DONE AND SIGNED before me, a Notary Public, on this 19th day of April, 2018.

NOTARY PUBLIC
Carol A. Kolinchak
LA Bar # 22495

***** CAPITAL CASE *****

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEN DAVIS,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, certifies that pursuant to Supreme Court Rules 29.3 & 29.4, that on this 18th day of March 2021, she served the Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari on counsel for Respondent by sending a copy of each by first class mail to:

The Honorable Elizabeth Prelogar
Acting Solicitor General of the United States
U.S. Department of Justice. Room 5616
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001

The undersigned further certifies that all parties required to be served have been served.

Respectfully submitted,

/s/ Sarah L. Ottinger
Sarah L. Ottinger
Counsel of Record
2563 Bayou Road, Second Floor
New Orleans, LA 70119
Telephone: (504) 258-6537
Email: sottinger1010@gmail.com

Rebecca L. Hudsmith
Office of the Federal Public Defender for the
Western & Middle Districts of Louisiana
102 Versailles Boulevard, Ste. 816
Lafayette, LA 70501
Telephone: 337-262-6336
Facsimile: 337-262-6605
Email: rebecca_hudsmith@fd.org

ATTORNEYS FOR PETITIONER