Nos. 08-3161; 08-3164

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STEVEN SANDSTROM & GARY EYE,

Defendants-Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
UNITED STATES DISTRICT COURT JUDGE ORTRIE D. SMITH

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# BRIEF FOR THE UNITED STATES AS APPELLEE

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## SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Defendants were convicted of several violations of federal law arising from the shooting death of William McCay and their subsequent attempts to avoid responsibility for his death. Defendants were each convicted on one count of interfering with McCay's federally protected rights resulting in death, in violation of 18 U.S.C. 245; one count of tampering with a witness, in violation of 18 U.S.C. 1512; two counts of using a firearm during a crime of violence causing murder, in violation of 18 U.S.C. 924(c); one count of obstruction, in violation of 18 U.S.C. 1519; and, one count of using fire to commit a felony, in violation of 18 U.S.C. 844. Defendant Eye was also convicted on an additional 18 U.S.C. 245 count and a related 18 U.S.C. 924(c) count; Defendant Sandstrom was also convicted on one count of retaliating against a witness, in violation of 18 U.S.C. 1513.

Defendants appeal their convictions, together alleging: (1) the district court abused its discretion in denying their requests for severance; (2) the indictment was multiplicitous; (3) Congress lacked authority to enact 18 U.S.C. 245; and (4) prosecutorial misconduct during the government's closing argument. Defendant Eye also challenges the sufficiency of the evidence supporting his conviction on one of the 18 U.S.C. 245 counts and a related firearms count.

The United States has no objection to oral argument in this appeal.

## TABLE OF CONTENTS

**PAGE**

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

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

## TABLE OF AUTHORITIES

**CASES:** **PAGE**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**



**CONSTITUTION:**



**STATUTES:**

**STATUTES (continued):** **PAGE**



**LEGISLATIVE HISTORY:**



**RULES:**

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# BRIEF OF THE UNITED STATES AS APPELLEE

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## JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of a district court in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment for both defendants on September 11, 2008. R. 506; R. 508.[1] The

[1] Citations to "R. __ at __" refer by page number to documents in the district court record. Citations to "Sandstrom Br. __" refer to pages in defendant Sandstrom's opening brief. Citations to "Eye Br. __" refer to pages in defendant Eye's opening brief.

defendants filed timely notices of appeal on September 12, 2008. R. 509; R. 511. This Court has jurisdiction under 28 U.S.C. 1291.

## STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether the district court abused its discretion in denying defendants' motions to sever based on alleged mutually antagonistic defenses.

*United States* v. *Flores*, 362 F.3d 1030 (8th Cir. 2004)

*United States* v. *DeLuna*, 763 F.2d 897 (8th Cir. 1985)

*United States* v. *Delpit*, 94 F.3d 1134 (8th Cir. 1996)

*United States* v. *Bostic*, 713 F.2d 401 (8th Cir. 1983)

2. Whether the district court abused its discretion in denying Eye's motion to sever based on alleged violations of the Confrontation Clause.

*Richardson* v. *Marsh*, 481 U.S. 200 (1987)

*United States* v. *Logan*, 210 F.3d 820 (8th Cir. 2000)

*United States* v. *Coleman*, 349 F.3d 1077 (8th Cir. 2003)

3. Whether the district court erred in denying defendants' motions to dismiss certain counts of the indictment as multiplicitous.

*Blockburger* v. *United States*, 284 U.S. 299 (1932)

*United States* v. *Chipps*, 410 F.3d 438 (8th Cir. 2005)

*United States* v. *Lucas*, 932 F.2d 1210 (8th Cir. 1991)

4. Whether the district court erred in denying defendants' motions to dismiss certain counts of the indictment on the ground that Congress lacked authority to enact 18 U.S.C. 245.

*Griffin* v. *Breckenridge*, 403 U.S. 88 (1971)

*United States* v. *Bledsoe*, 728 F.2d 1094 (8th Cir. 1984)

*United States* v. *Allen*, 341 F.3d 870 (9th Cir. 2003)

*United States* v. *Nelson*, 277 F.3d 164 (2d Cir. 2002)

5. Whether the evidence was sufficient to support Eye's convictions on Counts 1 and 2.

*United States* v. *Thompson*, 560 F.3d 745 (8th Cir. 2009)

*United States* v. *Abfalter*, 340 F.3d 646 (8th Cir. 2003)

*United States* v. *Vazquez Garcia*, 340 F.3d 632 (8th Cir. 2003)

6. Whether the district court abused its discretion in denying defendants' objections and motions for mistrial based on the prosecutor's statement during closing argument.

*United States* v. *Gardner*, 396 F.3d 987 (8th Cir. 2005)

*United States* v. *Triplett*, 195 F.3d 990 (8th Cir. 1999)

*United States* v. *Burns*, 432 F.3d 856 (8th Cir. 2005)

## STATEMENT OF THE CASE

On May 17, 2006, a federal grand jury returned a nine count superseding indictment charging Steven Sandstrom and Gary Eye with violating federal law for their roles in the shooting death of William McCay, an African-American, because of his race and because he was using a public facility (*i.e.*, walking on the street), and their resultant attempts to avoid responsibility for their underlying crimes. R. 124. The indictment charged both defendants with: (1) interfering with federally protected activities, in violation of 18 U.S.C. 245(b)(2)(B) and 18 U.S.C. 2 (Count 1); (2) using a firearm during and in relation to a crime of violence as set forth in Count 1, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and 18 U.S.C. 2 (Count 2); (3) interfering with federally protected activities with death resulting, in violation of 18 U.S.C. 245(b)(2)(B) and 18 U.S.C. 2 (Count 3); (4) using a firearm during and in relation to a crime of violence causing murder as set forth in Count 3, in violation of 18 U.S.C. 924(c)(1)(A)(iii), (j)(1) and 18 U.S.C. 2 (Count 4); (5) tampering with a witness, in violation of 18 U.S.C. 1512(a)(1)(C), (a)(3)(A) and 18 U.S.C. 2 (Count 5); (6) using a firearm during and in relation to a crime of violence causing murder as set forth in Count 5, in violation of 18 U.S.C. 924(c)(1)(A)(iii), (j)(1) and 18 U.S.C. 2 (Count 6); (7) destroying records in a Federal investigation, in violation of 18 U.S.C. 1519 and 18 U.S.C. 2 (Count 7),

and (8) using fire to commit a felony as set forth in Count 7, in violation of 18 U.S.C. 844(h)(1) and 18 U.S.C. 2 (Count 8). R. 124. Sandstrom was also charged with retaliating against a witness, in violation of 18 U.S.C. 1513(b)(2) (Count 9). R. 124.

On May 8, 2008, after a two and a half week trial, the jury found Eye guilty on Counts 1-8 and Sandstrom guilty on Counts 3-9; the jury acquitted Sandstrom on Counts 1 and 2. R. 530 at 2145-2149. On September 9, 2008, the district court sentenced the defendants to life imprisonment. R. 505; R. 508. These appeals followed. R. 509; R. 511.

## STATEMENT OF FACTS

*1. Criminal Conduct*

Viewed in the light most favorable to the government, and making all reasonable inferences in favor of the jury's verdict, *United States* v. *Abfalter*, 340 F.3d 646, 654-655 (8th Cir. 2003), cert. denied, 540 U.S. 1134 (2004), the evidence presented at trial established the following facts.

On the evening of March 8, 2005, Steven Sandstrom, Gary Eye and Regennia Rios drove around Kansas City in a stolen Intrepid, R. 523 at 460, 463, looking for another car to steal, R. 525 at 932. Sandstrom and Eye eventually stole a Jeep; afterwards, Eye and Rios left in the Jeep and Sandstrom left in the

Intrepid. R. 525 at 933. The parties briefly separated, but later met up outside the home of Jonnie Renee Chrisp, who was Rios's cousin. R. 525 at 933-935. Once there, Sandstrom, who was "frantic" and "intense," R. 525 at 936, told Eye and Rios that he "just shot at a nigger at 7-Eleven," R. 525 at 935. The group then went to Sandstrom's house, where Sandstrom repeated to his mother that he "just shot a nigger." R. 525 at 936-937. The trio smoked meth in Sandstrom's house, then returned to Chrisp's house in the Intrepid to pick up their friend, Vincent Deleon. R. 525 at 930, 937-938. Sandstrom brought a gun with him. R. 525 at 940.

Sandstrom, Eye, Rios and Deleon, all high on meth, R. 522 at 269; R. 525 at 931-932, left in the Intrepid to steal another car. R. 522 at 245-247. During the drive, Sandstrom told Deleon that he "shot at some nigger." R. 525 at 939. Eye responded to Sandstrom, "If you get to do one, I get to do one." R. 525 at 939. Sandstrom told Eye that "it wasn't like that," to which Eye responded, "You started it. Let's finish it." R. 525 at 939. At some point during the drive, Sandstrom removed a .22 caliber revolver from a brace-like holster on his back, R. 522 at 252-253, and told Deleon that he "could kill a nigger quick." R. 522 at 261. When Deleon responded that he would shoot someone in the legs instead of killing him, Eye declared that, like Sandstrom, he would "kill a nigger quick." R. 522 at

263; see also R. 522 at 264. Sandstrom and Eye passed the gun back and forth between them. R. 523 at 434.

The four drove into a neighborhood where Sandstrom and Eye stole another Jeep. R. 522 at 269-270. Sandstrom, Eye and Rios returned to Sandstrom's house in the Intrepid, R. 525 at 940-941; Deleon returned to Chrisp's house in the Jeep, R. 522 at 272. Sandstrom, Eye and Rios remained at Sandstrom's house until the early morning hours of March 9, 2005. R. 525 at 941. Around 5 a.m., Deleon called and asked the group to pick up Chrisp from a gas station. R. 525 at 941-942. Eye told Sandstrom during the drive to get Chrisp that when he saw an African-American, "it's on site," meaning there would be a problem or a fight. R. 525 at 945; see also R. 525 at 1080-1081 (Rios testifying that "on site" in that context means that "the first black person [Eye] saw, there was going to be an issue").

The trio picked up Chrisp, who told the group that she wanted to go home. R. 525 at 944. Eye responded that that was a good idea because, if she stayed with them, "she would probably see something she didn't want to see." R. 525 at 944. Sandstrom held up a revolver and told Chrisp, "You're about to witness a homicide." R. 527 at 1613, 1615-1616. Sandstrom also told her that he "shot at some nigger" earlier in the evening. R. 525 at 944.

After dropping off Chrisp, the trio drove down 8th Street because it was around the time of the police "shift change" and they wanted to avoid the police. R. 525 at 946-949. As their car neared a cross street, they saw William McCay, an African-American man, walking alone on 9th Street. R. 525 at 949-950. Apart from McCay, the streets were empty. R. 525 at 950. Eye told Sandstrom to "hit the alley" and give him the gun. R. 525 at 949, 951. Sandstrom did so without hesitating, R. 525 at 952, 955, and turned down the alley connecting 8th and 9th Streets. R. 525 at 951.

Rios testified that it was obvious what was going to happen next. R. 525 at 954, 991. Sandstrom drove to the end of alley, and Eye put his arm out the window and fired at least two shots at McCay from roughly three to four feet away. R. 525 at 951-952. Rios looked directly at McCay's face before ducking behind the seat. R. 525 at 952-953, 1036. The shots were heard around 6 a.m. by a man outside a restaurant, which was located approximately 80 feet from the intersection.[2] R. 525 at 1223-1224, 1233. The man did not notify the police, R. 525 at 1225, because it was not uncommon to hear gunshots in that neighborhood, R. 525 at 1227-1228.

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[2] The witness testified that it had been his "standard routine" for "several years" to eat breakfast at the restaurant "around 6:00" a.m. "three times a week." R. 525 at 1223.

After shooting at McCay, Eye told Sandstrom to drive around the block; Sandstrom did. R. 525 at 953. They returned to the intersection to confirm that McCay was dead. R. 525 at 953. Eye then "started freaking out" and became "frantic" because McCay was no longer on 9th Street. R. 525 at 953. The trio then discussed what they should do next. R. 525 at 953-954. Eye wanted to find McCay, so Rios told Sandstrom to "go back" and "find him," R. 525 at 953, because he was a "witness," R. 525 at 1041, and they could "catch a case," R. 525 at 1103 (meaning they could be implicated in the shooting, R. 525 at 1104). Sandstrom, following Eye's instructions, drove down 9th Street for several blocks, turned north and then squared another block. R. 525 at 954.

Rios spotted McCay at the intersection of 9th and Brighton. R. 525 at 954. Eye told Sandstrom to pull the car over; Sandstrom complied. R. 525 at 955-956. Eye got out of the car and walked toward McCay with the gun in the pocket of his sweatshirt. R. 525 at 957-958. The two men met in the middle of 9th Street and began to struggle.[3] R. 525 at 957; see also R. 524 at 880. Eye fired at McCay. R. 525 at 958, 1192. McCay stumbled to the other side of the street, R. 525 at 959, and collapsed, R. 525 at 1198. He died from a single, .22 caliber gunshot wound

[3] Eye's DNA was later recovered from underneath McCay's fingernails. R. 527 at 1718-1720.

to the chest. R. 526 at 1286; R. 524 at 825. This shooting occurred around 6:12 a.m. R. 522 at 107.

Sandstrom picked up Eye and the trio "sped off." R. 525 at 959. They first went to Sandstrom's house, where Eye and Rios retrieved the stolen Jeep; Sandstrom remained in the Intrepid. R. 525 at 960-961. Sandstrom then led Eye and Rios to a location under the Manchester Street Bridge, R. 525 at 962, where Sandstrom and Eye set the Intrepid on fire. R. 522 at 179-180; R. 525 at 962-963. The trio left in the Jeep and drove to a friend's house to pick up Deleon. R. 525 at 964.

When the trio arrived at their friend's house, the news was reporting that three black males were suspected in the homicide at 9th and Brighton, which made Sandstrom and Eye laugh. R. 522 at 281-282. Sandstrom declared "that's my car" when the news reported on the burning Intrepid. R. 522 at 282. Deleon and Eye went outside, where Eye told Deleon that he "did that shit," R. 522 at 283, and "smoked that nigger," R. 522 at 284. Sandstrom then came outside, laughing, and said "yep," R. 522 at 285, which Deleon took as Sandstrom confirming what Eye had said, R. 522 at 286.

Once the four (Sandstrom, Eye, Rios and Deleon) were back in the car, Eye told Deleon that he "killed a nigger on 9th Street." R. 525 at 965. The four drove

past the intersection of 9th and Brighton, R. 522 at 289, where emergency vehicles and news vans were present, R. 525 at 966. When Deleon asked what was going on, Eye bragged, "Did you think this was a game? I told you, I killed some nigger." R. 525 at 966. Sandstrom said, "That's where [Eye] shot that nigger." R. 522 at 290. Eye started laughing and said, "Here, nigger, nigger, nigger." R. 522 at 291.

The four returned to Chrisp's house, R. 522 at 293; R. 525 at 967, and turned on the news, which was reporting on the car fire. R. 525 at 967-968. Sandstrom declared that it was "a waste of a perfectly good car." R. 525 at 968. Chrisp testified that she overheard bits and pieces of their conversation, including someone saying, "I got that one off, you got that one off." R. 527 at 1621. The four then split up, with Deleon and Eye going to one location, R. 522 at 294-295, and Sandstrom and Rios going to another, R. 525 at 971. Eye told Deleon that he and Sandstrom had been playing a game called "nigger, nigger, nigger." R. 522 at 295. Deleon described the game as "kill[ing] black people." R. 523 at 358-359.

A few days after the shooting, R. 525 at 972, Sandstrom, Eye, Rios, Sandstrom's girlfriend Kristina Chirino, and a few others were in Chirino's basement. R. 523 at 530, 532-533. Eye bragged to the group that he killed a "nigger." R. 523 at 536-537; see also R. 523 at 539-540 (Kristina Chirino

testifying that Eye said that he "smoked [McCay's] ass"). Eye expressed disbelief that McCay was not at the intersection of 9th and Spruce after the first shooting, R. 525 at 974, and explained that he shot McCay because McCay was in "my hood on my time." R. 523 at 536; see also R. 523 at 611 (Kristina Chirino testifying that Eye said McCay "was walking in my hood on my time so I smoked him"); see also R. 524 at 647, 657-658 (Sandstrom's sister testifying that after the homicide, Eye explained that "he shot a nigger on 9th Street" because he "was walking on [Eye's] block on [Eye's] time); see also R. 525 at 974 (Rios testifying that Eye explained he shot McCay "because he was a nigger in my hood"). Rios explained that she told Sandstrom to turn the car around and "finish [McCay] off" because Eye had already shot at him once. R. 524 at 659. Rios also said, referring to the earlier shooting Sandstrom claimed to have committed at 7-Eleven, R. 525 at 975, that if Sandstrom had better aim, "there would be two dead niggers instead of one," R. 525 at 974.

About a week later, the police came to the Chirino home to take Sandstrom into custody. R. 524 at 634. Before the police entered the house, Sandstrom hid a gun in the closet. R. 524 at 635. Sandstrom's sister eventually retrieved the gun and threw it in the river. R. 524 at 672-675. The police later recovered a .22 revolver from the river. R. 524 at 769-773.

In late July 2005, while in custody, Sandstrom wrote a letter to one of Rios's friends. R. 526 at 1341. In it, Sandstrom wrote that "that bitch [Rios] better be out my hood when I get out." R. 526 at 1341. Sandstrom also wrote, "[Rios] knows as much as you do I'm a killer," R. 526 at 1343, and that he would "beat [Rios's] ass" when he saw her, R. 526 at 1344.

*2. Pre trial Motions*

Both defendants moved for severance prior to trial. R. 61; R. 80. Sandstrom based his motion on potential prejudice from the "spillover" effect from evidence admitted against Eye, potential Confrontation Clause violations, see *Bruton* v. *United States*, 391 U.S. 123 (1968), the inability to call Eye as a witness, mutually antagonistic defenses, and the potential for confusing the jury. R. 61 at 3-4. Eye based his motion on potential prejudice from mutually antagonistic defenses and possible *Bruton* violations. R. 80 at 4-10. The magistrate denied the motions. R. 104; R. 105. Eye objected, R. 122; the district court denied the motion, R. 236.

Defendants filed motions to dismiss certain counts as multiplicitous. R. 60; R. 68. The magistrate recommended denying the motions. R. 120; R. 168. The defendants objected, R. 157; R. 179; the district court denied the motions, R. 176; R. 189.

Defendants filed a joint motion to dismiss Counts 1 and 3 (alleging violations of 18 U.S.C. 245(b)(2)(B)), on the ground that Congress exceeded its authority in enacting the statute. R. 66. The magistrate recommended denying the motion. R. 121. Defendants objected, R. 158; R. 159; the district court denied the motions, R. 177.

*3. Closing Argument*

During closing argument, the prosecutor explained to the jury that in order to establish a violation of 18 U.S.C. 245(b)(2)(B), the government was not required to prove that the defendants are racists. R. 529 at 1978. The prosecutor then explained that the jury could consider the defendants' words and deeds as circumstantial evidence of their intent, and asked the jury to consider why, if not for the victim's race, the defendants committed the crime. R. 529 at 1979. The prosecutor then stated: "Not a single alternative motive has been supplied." R. 529 at 1979. Defendants objected to this statement, R. 529 at 1979; the district court overruled the objections, R. 529 at 1980.

## SUMMARY OF ARGUMENT

1.a. The district court did not abuse its discretion in denying defendants' motions to sever based on alleged mutually antagonistic defenses. As an initial matter, defendants have not established that the defenses they presented at trial

were mutually antagonistic. But even assuming that their defenses were mutually antagonistic, defendants have failed to show that severance was warranted. Mutually antagonistic defenses warrant severance only when the jury may unjustifiably infer that the conflict between the two defenses *alone* demonstrates that both defendants are guilty. The basis for the jury's verdict was not a conflict between the defendants' respective defenses, but rather a conflict between their defenses and the evidence presented by the government – including testimony from a witness who was present during the crimes charged. Even if severance was warranted, however, the defendants have failed to establish prejudice because the witnesses' testimony would have remained the same even if the defendants were tried separately, and, for this reason, the defendants cannot demonstrate that they would have faired better in separate proceedings. Moreover, the Supreme Court and this Court have recognized that the risk of prejudice from a joint trial is best resolved by thorough jury instructions. The district court here provided sufficient instructions to deal with any prejudice resulting from the joint trial.

b. The district court did not abuse its discretion in denying Eye's motion for severance based on an alleged Confrontation Clause violation. At trial, the district court permitted two law enforcement officers to each read to the jury a document created by the officer based on statements made to him by Sandstrom. The district

court instructed the jury several times that the statements could be used against Sandstrom, but not against Eye. All references to Eye were eliminated or replaced with neutral pronouns so the statements did not facially identify Eye. This Court has held that, provided a statement by a non-testifying co-defendant does not facially identify the defendant and the district court properly instructs the jury, admitting the statement does not violate the Confrontation Clause even though other, properly admitted evidence may be linked with the statement to identify the defendant. Even if the district court did err in admitting the statements, the error was harmless beyond a reasonable doubt. The evidence of Eye's guilt was overwhelming and the statements were merely cumulative of other evidence admitted at trial.

2.a. The district court did not abuse its discretion in denying defendants' motions to dismiss certain counts of the indictment as multiplicitous. Counts 1 and 3 charged the defendants with interfering with McCay's federally protected right to walk on a public street, in violation of 18 U.S.C. 245(b)(2)(B), and were based on the two separate shootings (*i.e.*, the first shooting at 9th and Spruce, and the second shooting at 9th and Brighton). The plain language of the statute indicates that Congress intended to punish each injury, intimidation, or act of interference with a victim's participation in, or enjoyment of, a federally protected

activity. But even if Congress intended to punish 18 U.S.C. 245(b)(2)(B) as a "course-of-conduct" offense, Counts 1 and 3 were not multiplicitous. The Supreme Court has held that separate charges are appropriate in "course-of-conduct" offenses where, as here, each act arises from a separate impulse.

b. Counts 3 (18 U.S.C. 245(b)(2)(B)) and 5 (18 U.S.C. 1512(a)(1)(C)) were not multiplicitous even though both arose from the second shooting at 9th and Brighton. The government may prosecute a defendant for both racially motivated violent interference with federal rights and witness tampering with respect to that offense.

c. Counts 2, 4 and 6, which charged the defendants with firearms violations arising from the predicate offenses charged in Counts 1, 3 and 5, were not multiplicitous. It is well-settled that multiple firearms offenses may be charged in the same indictment if they are based on separate predicate crimes of violence, provided the predicate crimes of violence are not themselves multiplicitous. Here, each firearms violation was based on a separate predicate offense.

3. The district court properly dismissed defendants' challenges to the constitutionality of 18 U.S.C. 245(b)(2)(B). Congress acted well within its authority under both Section 2 of the Thirteenth Amendment and under the Commerce Clause in passing the statute. Moreover, every court to have

considered the issue – including this Court – has upheld the constitutionality of the statute.

4. The evidence was more than sufficient to support Eye's convictions on Counts 1 and 2. The evidence showed that: (1) two shootings occurred and (2) McCay was the victim of both shootings.

5. The district court did not abuse its discretion in denying defendants' motions for a mistrial based on the prosecutor's closing argument. The prosecutor's indirect comment did not demonstrate an intent by the prosecutor to draw attention to the defendants' silence, nor would a jury naturally and necessarily understand the comment as highlighting the defendants' failure to testify. The prosecutor made the comment as he was explaining to the jury what the government must establish to prove a violation of 18 U.S.C. 245(b)(2)(B), and it was a permissible comment on defense counsels' failure to counter the evidence presented by the government. Even if the comment was improper, the district court did not abuse its discretion in denying defendants' motions for mistrial because the defendants were not prejudiced by the isolated comment. The government provided overwhelming evidence of the defendants' guilt, and the district court provided sufficient instructions to the jury regarding the government's burden of proof and the defendants' right not to testify. Under these

circumstances, defendants were not deprived of a fair trial.

## ARGUMENT

## I

## THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTIONS TO SEVER

### *A. Standard Of Review*

This Court will not reverse a denial of a motion to sever unless the appellant demonstrates an abuse of discretion resulting in clear prejudice. *United States* v. *Flores*, 362 F.3d 1030, 1039 (8th Cir. 2004). In deciding a motion for severance, this Court "must weigh the inconvenience and expense of separate trials against the prejudice resulting from a joint trial of co-defendants." *United States* v. *Pherigo*, 327 F.3d 690, 693 (8th Cir.), cert. denied, 539 U.S. 969 (2003). Whether the failure to sever violates the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968), is a question of law that this Court reviews *de novo*. See *United States* v. *Edwards*, 159 F.3d 1117, 1125 n.4 (8th Cir. 1998).

### *B. The District Court Did Not Abuse Its Discretion In Denying Defendants' Motions To Sever Based On Mutually Antagonistic Defenses*

The district court did not abuse its discretion in denying defendants' motions to sever their trials. When defendants are joined properly, as Sandstrom and Eye were here, see Federal Rule of Criminal Procedure 8(b), "there is a strong

presumption for their joint trial, as it 'gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome.'" *Flores*, 362 F.3d at 1039 (citation omitted); see also *United States* v. *Adkins*, 842 F.2d 210, 211 (8th Cir. 1988) (explaining that defendants who are "jointly indicted on similar evidence from the same or related events should be tried together"); see also *United States* v. *Delpit*, 94 F.3d 1134, 1143 (8th Cir. 1996) ("The presumption against severing properly joined cases is strong.").

A district court may sever defendants, however, if the joinder "appears to prejudice a defendant or the government." Fed. R. Crim. P. 14. But the standard for establishing prejudice is demanding: any prejudice from a joint trial must be "severe or compelling." *United States* v. *Crumley*, 528 F.3d 1053, 1063 (8th Cir. 2008). "[T]he mere presence of hostility among defendants or the desire of one to exculpate himself * * * by inculpating another" are insufficient grounds on which to require severance. *United States* v. *DeLuna*, 763 F.2d 897, 921 (8th Cir.) (citation omitted), cert. denied, 474 U.S. 980 (1985). Moreover, this Court has recognized that "[t]he mere fact that one defendant tries to shift the blame to another defendant does not mandate separate trials, as a codefendant frequently attempts to 'point the finger,' to shift the blame, or to save himself at the expense of the other." *Flores*, 362 F.3d at 1039-1040 (internal citations & quotation marks

omitted); see also *United States* v. *Bordeaux*, 84 F.3d 1544, 1547 (8th Cir. 1996) (explaining that blame-shifting on the part of defendants "is not a sufficient reason for severance"). Nor is severance required "even when one defendant takes the stand and blames his * * * co-defendant for the crime." *DeLuna*, 763 F.2d at 921 (citation omitted).

Severance may be warranted if a defendant shows "that his defense was irreconcilable with that of [his] co-defendant." *Bordeaux*, 84 F.3d at 1547. "[A] defense is irreconcilable when the jury, to believe the core of one defense, must necessarily disbelieve the core of another." *United States* v. *Johnson*, 944 F.2d 396, 403 (8th Cir.), cert. denied, 502 U.S. 1008 (1991). In such a situation, this Court has held that severance is required only when "there is a danger that the jury will unjustifiably infer that *this conflict alone demonstrates that both are guilty*." *Delpit*, 94 F.3d at 1143 (quoting *DeLuna*, 763 F.2d at 921).

Even when a defendant establishes that severance was warranted, he does not prevail on appeal unless he also establishes that he was prejudiced by the failure to sever. See Fed. R. Crim. P. 14; *United States* v. *Bostic*, 713 F.2d 401, 403 (8th Cir. 1983). The Supreme Court has held that "[m]utually antagonistic defenses are not prejudicial *per se*." *Zafiro* v. *United States*, 506 U.S. 534, 538 (1993). To demonstrate prejudice, a defendant must show an "appreciable chance

that [he] would not have been convicted had [a] * * * separate trial[] * * * been granted." *Bostic*, 713 F.2d at 403; *Flores*, 362 F.3d at 1040 (explaining that a defendant must show a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence" (citation omitted)). Both defendants have failed to meet this demanding standard.

As an initial matter, it is not clear that Sandstrom's and Eye's defenses were irreconcilable. Sandstrom claims in his *brief* (Sandstrom Br. 16) that Eye shot at McCay at two different locations, but that Sandstrom was unaware of what Eye was going to do and was thus uninvolved. During his *closing argument*, however, counsel for Sandstrom initially argued that McCay was *not* the victim of the first shooting, R. 529 at 2047-2049, 2066-2067, and only offered as an alternative defense that if McCay was the victim of the first shooting, Sandstrom was not involved, R. 529 at 2049-2061. Counsel for Sandstrom also argued that the government failed to prove that Sandstrom aided and abetted the shooting at 9th and Brighton, R. 529 at 2062-2065, and failed to prove that McCay was killed to prevent him from communicating with law enforcement. R. 529 at 2066-2068. Eye argues in his brief (Eye Br. 34), and his counsel argued at trial, R. 529 at 2010-2019, that the first shooting never took place, and that someone else – either

Sandstrom[4] *or Rios* – shot McCay at the second location, R. 529 at 2019-2040. At trial, through their counsels' opening statements, R. 522 at 64-65, 67-68, 71, 75, 85-87, cross-examination of witnesses, see, *e.g.*, R. 523 at 347-350, 426, 453-454, 585-590, 608; R. 524 at 738-740; R. 526 at 1355-1357; R. 527 at 1504-1505, 1651, direct examination of defense witnesses, see, *e.g.*, R. 527 at 1743, 1756-1758, 1768-1770, R. 528 at 1887-1891, 1898-1901, 1912-1915, 1921-1928, and closing arguments, R. 529 at 2020, 2024, 2033-2034, 2053, 2061-2065, 2072-2073, 2075-2077, both defendants contended that they were not racists and that the shootings were not racially motivated.

The "core[s]" of these defenses are not irreconcilable. *United States* v. *Lewis*, 557 F.3d 601, 610 (8th Cir. 2009). The core of Sandstrom's defense was that he is not a racist and, regardless of how many shootings occurred or who the victim was, he was unaware that shootings were going to occur. The core of Eye's defense was that he is not a racist and, regardless of how many shootings occurred, he was not the shooter. Thus, Sandstrom was denying prior knowledge of the shootings, Eye was denying participation in the shootings, and both were denying

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[4] Although Eye's brief states that the core of his defense was "the first shooting was a fabrication and *Eye* or Rios shot the victim at the second location," Eye Br. 34 (emphasis added), we assume this was a simple typographical error based on Eye's defense at trial and the rest of Eye's brief.

a motivation based on race. Neither the core of Sandstrom's defense nor the core of Eye's defense was that the *other* defendant was the shooter or that the *other* defendant was motivated by race. A jury could believe that Sandstrom did not have prior knowledge of the shootings without necessarily having to find Eye guilty. *Ibid.* A jury could also believe that Eye was not the shooter without necessarily having to find Sandstrom guilty. *Ibid.* Indeed, the jury could have believed the core of *both* defenses and found both defendants not guilty if they either believed the shootings were not motivated by race or concluded that Rios was the shooter.

But even assuming the defenses were irreconcilable, defendants have failed to show that severance was warranted because they have not shown that any conflict between their defenses stood "alone" as the basis for the jury's verdict. *Delpit*, 94 F.3d at 1143 (citation omitted). The basis for the jury's verdict was not a conflict between the defendants' respective defenses, but rather a conflict between their defenses and the evidence presented by the government.

Conflicting with Sandstrom's theory of defense that he did not know a shooting was going to take place, the government presented evidence that: Sandstrom held up a gun and told Jonnie Renee Chrisp she was about to witness a homicide, R. 527 at 1613, 1615-1616; Sandstrom told Deleon he could "kill a

nigger quick," R. 522 at 261; Eye told Sandstrom "if you get to do one I get to do one," R. 525 at 939; Eye told Sandstrom that when he saw an African-American it would be "on site," R. 525 at 945; Sandstrom gave Eye the gun without hesitating after Eye and Rios spotted McCay walking alone, R. 525 at 952, 955; it was obvious what Eye was going to do with it, R. 525 at 954, 991; after the first shooting they discussed finding McCay and finishing what they had started, R. 525 at 953-954; Sandstrom drove around looking for McCay after the first shooting, R. 525 at 954; and, Sandstrom pulled over to let Eye out after they tracked down McCay, R. 525 at 954-956.

Conflicting with Eye's theory of defense that only one shooting occurred and he was not the shooter, the government presented testimony from Rios that: Eye shot McCay at the intersection of 9th and Spruce, R. 525 at 951-952; and, Eye shot and killed McCay at 9th and Brighton, R. 525 at 957-959. This evidence was corroborated by other government witnesses who testified that Eye, in fact, admitted shooting McCay, see, *e.g.*, R. 522 at 283-284; R. 523 at 536-540, 611; R. 524 at 657-658, and that Sandstrom confirmed it, see, *e.g.*, R. 522 at 285, 290. It was thus the government's evidence, and not any perceived conflict between defendants' theories of defenses, that was the basis for the jury's verdicts. *DeLuna*, 763 F.2d at 921.

Defendants' claims (Sandstrom Br. 18-28; Eye Br. 33-36) that severance was warranted because their respective defenses implicated each other are simply unavailing. While it may be true that a defendant who tries to minimize his role in a crime while emphasizing the participation of his co-defendant "may have a better chance of acquittal in [a] separate trial[,]" this does not entitle the defendant to severance. *Zafiro*, 506 U.S. at 540. Moreover, even though the government's theory of the case was that Eye was the shooter at both locations, the jury was not required to decide who, in fact, shot McCay to find both defendants guilty of the crimes charged. The indictment charged defendants with aiding and abetting each other in the shootings. R. 124 at 3-6. In such a situation, severance is not warranted because the jurors were not required to choose a particular defendant as the shooter.[5] *United States* v. *Ortiz*, 315 F.3d 873, 898 (8th Cir. 2002), cert. denied, 538 U.S. 1042 (2003).

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[5] For this reason, the cases defendants rely upon to support their claim that their defenses were mutually antagonistic, see, *e.g.*, *United States* v. *Tootick*, 952 F.2d 1078 (9th Cir. 1991); *United States* v. *Crawford*, 581 F.2d 489 (5th Cir. 1978), are readily distinguishable. These cases involved facts – and crimes – in which the identity of the criminal actor was essential in proving the crime charged. See, *e.g.*, *Tootick*, 952 F.2d at 1081, 1085 (identity of the assailant was dispositive on the issue of guilt in assault case, and prosecutor relied on inconsistency in defendants' theories of defense as evidence of defendants' guilt); *Crawford*, 581 F.2d at 490-492 (identity of defendant was dispositive on the issue of possession of unregistered firearm).

But even assuming severance *was* warranted, defendants cannot show that they would have fared better in separate proceedings, and therefore they cannot show they were prejudiced as a result of the joint trial. *Bostic*, 713 F.2d at 403 (holding that a reversal was not warranted because the joint trial "did not affect the jury verdict against [the defendants]" because of the "overwhelming strength of the government's evidence"); see also *United States* v. *Mason*, 982 F.2d 325, 328 (8th Cir. 1993) (finding no prejudice because there was no evidence that the denial of severance "affected the jury verdict against [the defendant] in light of the overwhelming evidence of his guilt," including that from an eyewitness). Here, the evidence against the defendants was overwhelming: an eyewitness testified about the events that took place at both intersections, and numerous witnesses testified about defendants' post-shooting statements that implicated them in the shootings. Even in separate trials, the government's theory of the case, and the resulting witnesses' testimony, would remain unchanged. Thus, "the same verdict would have been returned had the district court agreed" to try the defendants separately. *Ibid.* Given defendants' failure to demonstrate that the jury's verdict would have been different in separate trials, defendants have failed to show that they were prejudiced by the joint trial.

Finally, the Supreme Court has made clear that even where prejudice exists,

the tailoring of relief to be granted, if any, is left to the sound discretion of the trial court. *Zafiro*, 506 U.S. at 538-539. And this Court has previously explained that "the risk of prejudice posed by joint trials is best cured by careful and thorough jury instructions." *Delpit*, 94 F.3d at 1144; see *Flores*, 362 F.3d at 1042.

Here, the district court instructed the jury before trial that it was "to decide from the evidence whether *each defendant* is guilty or not guilty of the crimes charged." R. 449 at 2 (emphasis added); R. 522 at 35. The district court also instructed the jury that it was to consider certain evidence "only in the case against [Sandstrom], and not in the case against" Eye. R. 449 at 14; R. 523 at 477. And before deliberations, the district court reminded the jury that it must "[k]eep in mind that [it] must give separate consideration to the evidence about each individual defendant," R. 449 at 23; R. 528 at 1968-1969, and that "[e]ach defendant is entitled to be treated separately, and [it] must return a separate verdict for each defendant," R. 449 at 23-24; R. 528 at 1968-1969. The district court also instructed the jury that counsels' statements and arguments (in which the defendants' "defenses" were mainly presented) were not evidence. R. 449 at 3, 10; R. 522 at 35; see *United States* v. *Applewhite*, 72 F.3d 140, 145 (D.C. Cir. 1995) (explaining that the district court acted to limit the prejudice against the defendant by instructing the jury that statements by counsel are not evidence), cert.

denied, 517 U.S. 1227 (1996).

This Court presumes "that juries can and do follow instructions conscientiously, evaluate evidence carefully, and judge defendants individually." *Delpit*, 94 F.3d at 1144. Indeed, the jury's acquittal of Sandstrom on Counts 1 and 2, R. 530 at 2145-2146, shows that it was able to weigh the evidence against each defendant separately. See *United States* v. *Blaylock*, 421 F.3d 758, 767 (8th Cir. 2005) (explaining that the jury's acquittal of the defendant on some charges demonstrates that the jury is "quite capable of compartmentalizing the evidence" with respect to multiple defendants), cert. denied, 546 U.S. 1126 (2006).

### *C. The District Court Did Not Abuse Its Discretion In Denying Eye's Motion To Sever Based On An Alleged* Bruton *Violation*

The district court did not abuse its discretion in denying Eye's motion to sever his trial from Sandstrom's based on an alleged *Bruton* violation. Sandstrom met with investigators on two occasions after the shootings. In their own words, each detective summarized his conversation in a separate document. R. 523 at 476-477; R. 527 at 1561. At trial, the district court permitted the detectives to read to the jury redacted versions of the documents – replacing references to Eye with neutral words and phrases such as "somebody," R. 523 at 479, "someone," R. 527 at 1563, "that person," R. 523 at 479, "the guy," R. 523 at 479, "the person,"

R. 523 at 479, and "the other person," R. 523 at 479; R. 527 at 1564.

In *Bruton*, 391 U.S. at 126, the Supreme Court held that a defendant is deprived of his Sixth Amendment right to confront witnesses against him when a nontestifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the co-defendant. The Supreme Court refined the *Bruton* rule in *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987), however, holding that a defendant's Sixth Amendment rights are *not* implicated by introduction of such a confession provided the confession is redacted to eliminate any reference to the defendant. *Ibid.* The Court explained that, provided the confession is not facially incriminating, no Sixth Amendment violation occurs even where the defendant is linked to the confession by *other* evidence properly admitted against him at trial. *Id.* at 208-211.[6]

The Supreme Court again addressed the *Bruton* rule in *Gray* v. *Maryland*, where a co-defendant's confession was redacted by replacing the defendant's

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[6] The holding in *Richardson* was limited to a situation where the co-defendant's confession was "redacted to eliminate not only the defendant's name, but any reference to his or her existence." 481 U.S. at 211. The Court specifically left open the question of "the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5.

name with either a blank space or the word "deleted." 523 U.S. 185 (1998). Recognizing that it would likely be obvious to a jury that the blank space in the co-defendant's confession referred to the defendant, even without looking to any other evidence in the case, the Court determined that admitting the confession violated the Confrontation Clause and therefore reversed the conviction. *Id.* at 192-195. In reaching its decision, the Court reaffirmed that *Richardson* placed outside the scope of the *Bruton* rule those statements that incriminate inferentially and only when linked with evidence introduced later at trial. *Id.* at 195-196. The difference in *Gray*, the Court explained, was that the confession, which was obviously redacted and included several "blanks," was *facially* incriminating. *Id.* at 196.

This Court has explained that the admissibility of a statement under *Bruton* "is to be determined by viewing the redacted confession in isolation from the other evidence admitted at trial." *United States* v. *Logan*, 210 F.3d 820, 822 (8th Cir.), cert. denied, 531 U.S. 1053 (2000); see also *United States* v. *Jones*, 101 F.3d 1263, 1270 (8th Cir. 1996) (explaining that the inquiry following the Supreme Court's decision in *Richardson* is "whether the co-defendant's redacted confession *itself* implicates the defendant" (emphasis added)), cert. denied, 520 U.S. 1160 (1997). If the co-defendant's statement implicates the defendant only when linked

to other evidence, there is no Confrontation Clause violation. *Logan*, 210 F.3d at 821-822; see also *United States* v. *Chapman*, 345 F.3d 630, 634 (8th Cir. 2003) (explaining that the Confrontation Clause is not violated "if the statement is sanitized to eliminate all *direct references* to the co-defendant and if the jury is instructed to consider the statement only against the declarant" (emphasis added)).

Applying this approach, the redacted statements introduced at defendants' trial – considered in isolation – did not facially implicate Eye. *Logan*, 210 F.3d at 822; *Jones*, 101 F.3d at 1270. The statements included references to "that person," "they," "the other person," etc., which are neutral references similar to those that this Court has previously upheld as not violating the Confrontation Clause because they do not facially incriminate the defendant or lead the jury directly to the speaker's co-defendant. See *Edwards*, 159 F.3d at 1124-1126 (redacted statement that referred to defendant with neutral pronouns such as "we," "they," "someone," and "others" was properly admitted); see also *Jones*, 101 F.3d at 1270 & n.5 (same); *United States* v. *Garcia*, 836 F.2d 385, 390-391 (8th Cir. 1987) (same).

Moreover, the district court properly instructed the jury, before and after the statements were introduced, that it could consider them only in the case against Sandstrom. *Richardson*, 481 U.S. at 211; see R. 523 at 477. The district court

gave the jury a similar instruction at the close of all the evidence, see R. 528 at 1962, and again before it began its deliberations, R. 528 at 1968-1969; R. 449 at 23-24.

Eye nonetheless argues (Eye Br. 40-47) that the sheer number of redactions rendered the use of neutral pronouns meaningless in this situation. He relies in part on this Court's decision in *United States* v. *Williams*, 429 F.3d 767, 774 (8th Cir. 2005), where this Court explained that the nature of the redaction in that case (*i.e.*, repeated uses of the word "someone") "made it obvious that a name had been redacted" and that it may have been clear to the jury that the "someone" referred to in the statement was the defendant. But the statements here were generated by *the detectives* to memorialize their conversations with Sandstrom, R. 523 at 476; R. 527 at 1561, and Sandstrom made it clear to one of the detectives that he was withholding a name:

> I told [Sandstrom] that I could sense he was withholding information from me and asked him to tell me what it was.
>
> [Sandstrom] stated that he could not. He stated that *he owes the other person* from way back *and he would not rat him out*.

R. 523 at 482 (emphasis added). This situation is therefore more akin to that in *Logan*, where this Court reasoned that, "[f]or all the jury knew, these were [the declarant's] actual words, not a modified version of them." 210 F.3d at 823.

Eye also argues (Eye Br. 47-49) that Kristina Chirino's testimony removed any "lingering doubt" that the redacted portions of Sandstrom's statement referred to Eye.[7] This Court and the Supreme Court, however, have previously held that a statement that does not facially incriminate the defendant is properly admitted even if the identity of the defendant referred to in the redacted statement becomes clear through other testimony. *Logan*, 210 F.3d at 822; *Richardson*, 481 U.S. at 208.

Finally, even if it was error to admit Sandstrom's redacted statement, a new trial would not be warranted because the error was harmless beyond a reasonable doubt. The Supreme Court has made clear that "[i]n some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Schneble* v. *Florida*, 405 U.S. 427, 430 (1972); see also *United States* v. *Coleman*,

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[7] Contrary to Eye's assertions in his brief (Eye Br. 49), the district court did, in fact, sustain defense counsel's objection on the basis of hearsay and instructed the jury to disregard Chirino's statement, R. 523 at 543-544; the district court correctly overruled Eye's objection based on *Bruton* because Sandstrom's statement to Chirino was not testimonial in nature, and therefore does not implicate the Confrontation Clause. *United States* v. *Honken*, 541 F.3d 1146, 1159-1160 (8th Cir. 2008), petition for cert. pending, No. 08-10252 (filed May 7, 2009).

349 F.3d 1077, 1086 (8th Cir. 2003) (the admission of an improperly redacted statement is harmless when the erroneously admitted statement is "merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury" (citation omitted)), cert. denied, 541 U.S. 1055 (2004); see also *Chapman*, 345 F.3d at 635 (this Court must consider whether the guilty verdict actually rendered in the present trial was unattributable to the error). Such is the case here.

The record evidence of Eye's guilt is overwhelming. Rios, who was present at both shootings, provided testimony that *directly implicated* Eye "and it [did] so without reference to any information gained from" Sandstrom's statements. *Garcia*, 836 F.2d at 391. Moreover, other witnesses testified about Eye's motive in shooting McCay and corroborated Rios's testimony. R. 523 at 536, 611; R. 524 at 657-659; R. 525 at 939, 944-945, 974; R. 527 at 1613, 1615-1616. Thus, Eye's conviction "can very easily be attributed entirely to evidence unrelated to" Sandstrom's statement. *Chapman*, 345 F.3d at 635. Given the "overwhelming and largely uncontroverted" evidence against Eye, *Coleman*, 349 F.3d at 1086 (citation omitted), any error in admitting Sandstrom's redacted statements was harmless. *Garcia*, 836 F.2d at 391; *Coleman*, 349 F.3d at 1087.

## II

## THE DISTRICT COURT CORRECTLY DETERMINED THAT THE INDICTMENT DID NOT PRESENT MULTIPLICITOUS COUNTS AGAINST THE DEFENDANTS

### *A. Standard Of Review*

This Court reviews *de novo* a district court's determination whether an indictment presents multiplicitous counts. *United States* v. *Keeney*, 241 F.3d 1040, 1042-1043 (8th Cir.), cert. denied, 534 U.S. 890 (2001).

### *B. The District Court Correctly Concluded That Counts 1 (18 U.S.C. 245) And 3 (18 U.S.C. 245) Were Not Multiplicitous*

An indictment is multiplicitous if it charges a single offense in multiple counts. *United States* v. *Worthon*, 315 F.3d 980, 983 (8th Cir. 2003). The danger associated with a multiplicitous indictment is that the defendant may be subjected to multiple punishments for the same crime, in violation of the Fifth Amendment, if the jury convicts the defendant on the multiplicitous counts.[8] *United States* v. *Chipps*, 410 F.3d 438, 447 (8th Cir. 2005). Moreover, a multiplicitous indictment

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[8] Both defendants were subjected to concurrent sentences on the Counts they allege are multiplicitous (*i.e.*, Sandstrom was sentenced to concurrent sentences on Counts 3, 5, 7 and 9, and on Counts 4 and 6; Eye was sentenced to concurrent sentences on Counts 1, 3, 5 and 7, and on Counts 4 and 6). In addition to the concurrent sentences, however, the district court charged each defendant with a special assessment for each Count of conviction. *United States* v. *Christner*, 66 F.3d 922, 927 (8th Cir. 1995).

may improperly suggest to the jury that the defendant committed additional crimes. *United States* v. *Christner*, 66 F.3d 922, 927 (8th Cir. 1995). Sandstrom, however, was acquitted on Counts 1 and 2, so he could not be subjected to multiple punishments for Counts 1 and 3.

Defendants were charged in Counts 1 and 3 with violating 18 U.S.C. 245(b)(2)(B), which prohibits a defendant from using force to willfully injure, intimidate or interfere with any person because of his race and because that person is or has been using a public facility (*e.g.*, a public street).[9] Using a public facility is one of several federally protected activities covered from interference by 18 U.S.C. 245(b)(2).[10] When a violation of the same statutory provision is charged twice, as it was here in Counts 1 and 3, a court must determine whether Congress intended "the facts underlying each count to make up a separate unit of

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[9] Section 245(b)(2)(B) of Title 18, United States Code, provides in relevant part: "Whoever * * * by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with * * * any person because of his race * * * and because he is or has been * * * participating in or enjoying any * * * facility * * * provided or administered by any State or subdivision thereof" shall be punished according to the statute. 18 U.S.C. 245(b)(2)(B). Section 245(b)(5) of the statute provides that "if death results from the acts committed in violation of [Section 245,]" a defendant shall be "imprisoned for any term of years or for life," "or may be sentenced to death." 18 U.S.C. 245(b)(5).

[10] The others include public education, public programs, employment, court service, and travel in interstate commerce. 18 U.S.C. 245(b)(2).

prosecution." *Chipps*, 410 F.3d at 447; see also *Bell* v. *United States*, 349 U.S. 81, 83-84 (1955).

Defendants argue (Sandstrom Br. 30-36; Eye Br. 58) that because the *federally protected activities* included in the statute are "ongoing activities," Sandstrom Br. 32, Congress intended to treat interference with federally protected activities as an ongoing course-of-conduct offense, rather than to target for prosecution each act in a defendant's criminal episode. The plain language of the statute, however, punishes any person who "willfully *injures*, *intimidates* or *interferes* with" a victim's participation in or enjoyment of a federally protected activity because of that victim's race (or other protected characteristic). 18 U.S.C. 245(b)(2)(B) (emphasis added). Thus, the statute unambiguously targets for prosecution the act of *injury*, *intimidation* or *interference*. See *Bell*, 349 U.S. at 83-84 (explaining that when Congress has the will to define what it desires to make the unit of prosecution, "it has no difficulty in expressing it"). If, as here, a defendant engages in more than one act of injury, intimidation, or interference, then multiple prosecutions are permitted under the plain language of the statute. Because the statute unambiguously targets for prosecution the act of injury, intimidation, or interference, the rule of lenity does not apply. See *Dean* v. *United States*, 129 S. Ct. 1849, 1856 (2009) (explaining that a court "must conclude that

there is a *grievous ambiguity or uncertainty* in the statute" before invoking the rule of lenity (emphasis added)) (citation omitted).

Defendants argue (Sandstrom Br. 34-35) that it would be "unwieldly" to "break down an ongoing protected activity into discrete units" for prosecution. That argument misses the point. The relevant focus is on the actions Congress intended to prohibit. Each instance of injury, intimidation and interference violates the statute.

Even if Congress intended for 18 U.S.C. 245(b)(2)(B) to be prosecuted as a course-of-conduct offense, the district court did not err in refusing to dismiss Counts 1 and 3 as multiplicitous. This is because a "course-of-conduct" offense may be charged in more than one count if each act arises from a separate "thought, purpose or action," or "impulse." *Chipps*, 410 F.3d at 449 (citing *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224 (1952)); see also *Blockburger* v. *United States*, 284 U.S. 299, 302 (1932).

In *Chipps*, this Court determined (after applying the rule of lenity) that the crime of simple assault was a course-of-conduct offense. 410 F.3d at 449. The defendant in *Chipps* was convicted of two counts of simple assault, one for an attack that occurred inside the defendant's home, and one for an attack that occurred when the victim "stumbled out of the front door," but took place "no

more than a few seconds" after the first attack. *Id.* at 447. This Court determined that the defendant's "uninterrupted" attack on his victim resulted from a "single impulse," and therefore the defendant should only have been charged with one count of simple assault. *Id.* at 449. In this case, the defendants engaged in two separate and distinct attacks against McCay. These attacks were not "uninterrupted" *ibid.*; rather, they were separated by both time and location. The first attack took place at the intersection of 9th and Spruce around 6 a.m. R. 525 at 948-951, 1223-1224. The second attack took place approximately ten minutes later, R. 522 at 107, and nearly half a mile away, R. 527 at 1678.

Moreover, a separate and distinct impulse preceded each attack. Defendants initially targeted McCay after bragging that they would "kill a nigger quick," R. 522 at 261, 263, and after seeing him for the first time near 9th and Spruce, R. 525 at 949-950. Eye's intention in shooting McCay was to kill him. R. 525 at 939, 945, 949, 953. After the first attack, defendants drove around the block and returned to the alley to confirm that McCay was dead. R. 525 at 953. Eye "started freaking out" when they could not find McCay. R. 525 at 953. In fact, Eye was incredulous that he had not killed McCay. See R. 525 at 953 (Rios testifying that, after squaring the block, Eye asked "[H]ow is [McCay] not there? * * * It's not possible."). The defendants and Rios then *discussed what they should do next*. R.

525 at 953-954. Eye remained incredulous that McCay was not still at the intersection of 9th and Spruce, R. 525 at 953, and Rios informed the defendants that they could be prosecuted for the first shooting if they did not locate McCay, R. 525 at 954, 1041, 1103. The trio *then* drove around looking for McCay so that they could "finish him off since [Eye] already shot him." R. 524 at 659.

While the defendants' *intent* to kill McCay may have been "uninterrupted," the attacks themselves were not. *Chipps*, 410 F.3d at 449; cf. *United States* v. *Luskin*, 926 F.2d 372, 376-378 (4th Cir.) (holding that three separate attempts to kill victim could constitute three separate predicate offenses for related firearms charges because even though defendant commissioned the execution of the victim only once, three attempts were made), cert. denied, 502 U.S. 815 (1991). The facts surrounding the two attacks demonstrate that they were separated by time and location, and were born of separate impulses: the first because McCay, an African-American, was in "[Eye's] hood on [Eye's] time," see, *e.g.*, R. 523 at 536; the second because defendants (1) again wanted to prevent McCay from using the public streets; and, (2) wanted to avoid prosecution, see R. 525 at 953-954. "Where successive impulses are present, [a defendant] may be properly charged with multiple offenses." *United States* v. *Eisenberg*, 469 F.2d 156, 162 (8th Cir. 1972), cert. denied, 410 U.S. 992 (1973); see also *Blockburger*, 284 U.S. at 302-

303 (two separate impulses, even when driven by the same motivating factor, do not turn separate and distinct criminal offenses into a single offense). For this reason, Counts 1 and 3 were not multiplicitous, and the district court did not err in refusing to dismiss either Count.[11]

*C. The District Court Correctly Concluded That Counts 3 (18 U.S.C. 245) And 5 (18 U.S.C. 1512) Were Not Multiplicitous*

The district court correctly concluded that Counts 3 and 5 were not multiplicitous even though both Counts arose from the second attack on McCay. It is well-settled that a single act may give rise to two, separate charges. *Blockburger*, 284 U.S. at 304 ("A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."). When applying the *Blockburger* test, this Court must focus "on the statutory elements of the offenses, rather than the evidence presented at trial." *Flittie* v. *Solem*, 775 F.2d

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[11] The outcome in this case remains unchanged whether the unit of prosecution for crimes committed under 18 U.S.C. 245(b)(2)(B) is considered to be each separate act or a course-of-conduct; therefore, this Court need not expressly decide that issue to affirm the district court's decision. Moreover, defendants (Sandstrom Br. 36-39; Eye Br. 58) attack the district court's reasoning for upholding Counts 1 and 3 of the indictment. This Court need not reach that issue because this Court may affirm for reasons provided in this brief. *United States* v. *Petty*, 62 F.3d 265, 268 (8th Cir. 1995).

933, 937 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986).

Here, the district court correctly applied the *Blockburger* test to determine that Counts 3 and 5 were not multiplicitous because each count required proof of an element that was not required to prove the other. See R. 176; R. 189; see also *Blockburger*, 284 U.S. at 304; *United States* v. *Gamboa*, 439 F.3d 796, 809 (8th Cir.), cert. denied, 549 U.S. 1042 (2006). Defendants were charged in Count 3 with interfering with McCay's enjoyment of a federally protected activity, with death resulting, in violation of 18 U.S.C. 245(b)(2)(B). Section 245(b)(2)(B) requires the government to prove that the defendants: (1) acted willfully; (2) used force or threats of force; (3) intended to injure or interfere with McCay; (4) acted because of McCay's race; and, (5) acted because McCay was enjoying a publicly provided facility. *United States* v. *Nelson*, 277 F.3d 164, 185-186 (2d Cir.), cert. denied, 537 U.S. 835 (2002). The government must also prove that McCay's death resulted from the defendants' actions. See 18 U.S.C. 245(b)(5).

In Count 5, defendants were charged with witness tampering, in violation of 18 U.S.C. 1512(a)(1)(C) and (a)(3)(A).[12] To secure a conviction under this statute,

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[12] 18 U.S.C. 1512(a)(1)(C) provides in relevant part: "Whoever kills or attempts to kill another person, with intent to * * * prevent the communication by any person to a law enforcement officer * * * of the United States of information relating to the commission or possible commission of a Federal offense * * * shall

(continued...)

the government must prove that: (1) the defendants killed or attempted to kill a person; (2) with the intent to prevent the communication between that person and law enforcement authorities concerning the commission or possible commission of an offense; and, (3) the offense was actually a federal offense. See *United States* v. *Rodriguez Marrero*, 390 F.3d 1, 13 (1st Cir. 2004), cert. denied, 544 U.S. 912 (2005).

Applying the *Blockburger* test, Count 3 plainly requires the government to prove elements that it is not required to prove under Count 5: (1) that the defendants acted because of McCay's race; and, (2) because he was enjoying a federally protected activity. 18 U.S.C. 245(b)(2)(B). Moreover, Count 5 requires the government to prove an element that it is not required to prove under Count 3: that the defendants acted to prevent McCay from communicating with law enforcement authorities about the possible commission of a federal offense. 18 U.S.C. 1512(a)(1)(C). Because each count requires the government to prove an element that is not included in the other count, this ends the inquiry. *Blockburger*, 284 U.S. at 304.

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[12](...continued)
be punished" as set forth in the statute. Section 1512(a)(3) provides that punishment for a violation of 18 U.S.C. 1512(a)(1)(C) shall be, in the case of first degree murder, the death penalty or life imprisonment. 18 U.S.C. 1512(a)(3).

Defendants argue (Sandstrom Br. 39-41; Eye Br. 58), however, that because Count 5 requires the government to prove that defendants intended to prevent McCay from communicating to law enforcement about a "federal offense," the government is not required to prove any fact in Count 3 that is not included in Count 5. This argument fails legally and factually.

Defendants are in effect arguing that interference with federally protected activities is a lesser included offense of witness tampering. See Sandstrom Br. 40 (citing *Rutledge* v. *United States*, 517 U.S. 292 (1996)). There is no support for such an argument. The inquiry is whether interference with federally protected activities and witness tampering are "the same offense," *Rutledge*, 517 U.S. at 297, or two separate offenses. Clearly, Congress intended to establish two offenses: (1) to prohibit interference with federally protected activities on the basis of race, and (2) to prohibit witness tampering by preventing reporting of federal crimes – all federal crimes. The fact that the government must prove a federal crime was committed to establish witness tampering does not make the commission of that federal crime a lesser included offense of witness tampering. Indeed, the defendants can cite no case in which any court has held that interference with federally protected activities is a lesser included offense of witness tampering. Cf. *id.* at 300 (conspiracy is considered a lesser included offense of conducting a

continuing criminal enterprise). In fact, under defendants' construction of 18 U.S.C. 1512, a defendant could *never* be charged with both an underlying federal offense and certain obstruction charges associated with the underlying offense. Congress cannot have intended that result when it enacted these statutes.

Finally, defendants' theory fails under the facts of this case. Count 1 charged the defendants with violating 18 U.S.C. 245(b)(2)(B) for the shooting that occurred at the intersection of 9th and Spruce, R. 124 at 3; Count 3 charged defendants with violating 18 U.S.C. 245(b)(2)(B) for the shooting that occurred at the intersection of 9th and Brighton, R. 124 at 4. Count 5 relates to the "federal offense" charged in Count 1, *not* Count 3. That is, the government had to establish in Count 5 that defendants shot and killed McCay at *9th and Brighton* to prevent him from communicating to law enforcement officials about the shooting that occurred at *9th and Spruce*. Thus, the "federal offense" that must be proven in Count 5 (*i.e.*, Count 1 – the shooting at 9th and Spruce) is not the same "federal offense" charged in Count 3 (*i.e.*, the shooting at 9th and Brighton). The district court did not err in refusing to dismiss Counts 3 and 5 as multiplicitous.

### *D. The District Court Correctly Concluded That Counts 2, 4 And 6 Were Not Multiplicitous*

The district court correctly concluded that the firearms violations charged in

Counts 2, 4 and 6 were not multiplicitous. Defendants were charged in Count 2 with using a firearm during the commission of a violent crime (*i.e.*, the first shooting charged as a civil rights violation in Count 1) in violation of 18 U.S.C. 924(c)(1)(A)(iii). R. 124 at 3-4. Defendants were charged in Counts 4 and 6 with using a firearm during the commission of a violent crime causing McCay's death by murder (*i.e.*, the second shooting charged as a civil rights violation in Count 3 and as witness tampering in Count 5) in violation of 18 U.S.C. 924(c)(1)(A)(iii) and (j)(1). R. 124 at 4-7. Defendants argue (Sandstrom Br. 42; Eye Br. 58) that, because Counts 1 and 3 are multiplicitous, and because Counts 3 and 5 are multiplicitous, the firearms charges corresponding to those underlying counts are multiplicitous as well.

It is well-settled that multiple firearms offenses may be charged in the same indictment if they are based on different predicate crimes of violence, even if the predicate crimes of violence were part of a single criminal transaction, provided the predicate crimes of violence are not themselves multiplicitous. See, *e.g.*, *United States* v. *Allee*, 299 F.3d 996, 1003-1004 (8th Cir. 2002) (upholding consecutive sentences for two firearms violations based on two separate predicate crimes of violence because even though "for some purposes the incidents might be viewed as a single criminal transaction * * * , they do not constitute a single

underlying offense"); *United States* v. *Rahim*, 431 F.3d 753, 757 (11th Cir.) ("[the statute] has no language limiting its reach to offenses occurring in a separate 'criminal transaction' or 'course of conduct'"), cert. denied, 547 U.S. 1090 (2006); *United States* v. *Casiano*, 113 F.3d 420, 426 (3d Cir.) (same), cert. denied, 522 U.S. 887 (1997); *United States* v. *Andrews*, 75 F.3d 552, 557-558 (9th Cir.) (same), cert. denied, 517 U.S. 1239 (1996); *United States* v. *Floyd*, 81 F.3d 1517, 1527 (10th Cir.) (upholding sentences for two firearms offenses because "[s]eparate crimes do not become a single offense merely because they 'arise out of the same criminal episode' or because 'the same gun is paired with each underlying offense'") (citation omitted), cert. denied, 519 U.S. 851 (1996); *United States* v. *Nabors*, 901 F.2d 1351, 1357-1358 (6th Cir.) (same), cert. denied, 498 U.S. 871 (1990). As explained in Sections II.B. & C, *supra*, Counts 1 and 3, and Counts 3 and 5, are not multiplicitous, and can therefore serve as separate predicate offenses supporting separate firearms offenses.

Defendants also argue (Sandstrom Br. 43-47; Eye Br. 58) that, because Counts 3 and 5 resulted from a single use of a firearm, Counts 3 and 5 cannot support more than one firearms charge. Defendants rely on a case from the Fifth Circuit, *United States* v. *Phipps*, 319 F.3d 177, 184 (5th Cir. 2003), which held that a single use of a firearm could not give rise to two convictions under 18

U.S.C. 924 even though the single use of a firearm resulted in two separate crimes of violence. In *Phipps*, the court of appeals concluded that the "unit of prosecution" for crimes charged under 18 U.S.C. 924(c)(1) was "the use, carriage, or possession of a firearm during and in relation to a predicate offense," and that that unit of prosecution did not authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses. *Id.* at 186, 189.

The ruling in *Phipps* is not binding on this Court and, we submit, was wrongly decided. The statute under which defendants were convicted unambiguously punishes any person who *uses* a firearm "during and in relation to *any* crime of violence." 18 U.S.C. 924(c)(1) (emphasis added). Regardless of how the unit of prosecution is defined, the defendants here used a firearm during the crime of violence charged in Count 3, and used a firearm during the crime of violence charged in Count 5. The plain language of the statute supports convictions for two separate firearms offenses. 18 U.S.C. 924(c)(1).

Moreover, *Phipps* is contrary to this Court's reasoning in *United States* v. *Lucas*, 932 F.2d 1210 (8th Cir.), cert. denied, 502 U.S. 869 (1991). In *Lucas*, the defendant simultaneously possessed weapons at two separate locations to protect aspects of his drug activities. *Id.* at 1221. On appeal, the defendant challenged his sentences for convictions on two counts of using firearms in relation to a single

drug trafficking charge. *Ibid.* This Court rejected the defendant's argument that "simultaneous possession of more than one firearm can give rise to only one" firearms offense. *Ibid.* This Court explained that offenses charged under 18 U.S.C. 924 "are defined in terms of using or carrying firearms in relation to a * * * crime of violence, *not in terms of when the firearms were possessed*." *Ibid.* (emphasis added).

Here, defendants used a firearm during the commission of the crime of violence charged in Count 3 (giving rise to Count 4) and also used a firearm during the commission of the crime of violence charged in Count 5 (giving rise to Count 6). That the use of the firearm for each underlying offense was "simultaneous" is of little consequence. *Id.* at 1221. Defendants were charged with two distinct predicate crimes of violence and defendants used a firearm during the commission of both crimes of violence. 18 U.S.C. 924(c)(1). The district court did not err in refusing to dismiss either Count 4 or Count 6 as multiplicitous.[13] *Lucas*, 932 F.2d at 1221; see also *United States* v. *Torres*, 862 F.2d 1025, 1030-1032 (3d Cir. 1988) (upholding two firearms convictions

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[13] If this Court concludes that defendants were convicted on multiplicitous counts, the proper remedy is to remand the case to the district court for resentencing after allowing the government to elect which multiplicitous count to dismiss. *United States* v. *Graham*, 60 F.3d 463, 469 (8th Cir. 1995).

resulting from a single use of a firearm that gave rise to two separate predicate crimes); cf. *United States* v. *Callwood*, 66 F.3d 1110, 1114 (10th Cir. 1995) (one use of a firearm supported three firearms charges based on three predicate offenses).

## III

## SECTION 245(b)(2)(B) IS A VALID EXERCISE OF CONGRESS'S POWER

The district court properly rejected defendants' challenges to the constitutionality of 18 U.S.C. 245(b)(2)(B). R. 177 (adopting R. 121). Congress acted well within its authority under both Section 2 of the Thirteenth Amendment and the Commerce Clause in enacting 18 U.S.C. 245(b)(2)(B).[14]

### *A. Standard Of Review*

This Court reviews *de novo* a challenge to the constitutionality of a federal statute. *United States* v. *Betcher*, 534 F.3d 820, 823 (8th Cir. 2008), cert. denied, 129 S. Ct. 962 (2009).

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[14] Because Congress's authority to enact 18 U.S.C. 245(b)(2)(B) is well-established under the Thirteenth Amendment and the Commerce Clause, the government has not addressed, and this Court need not consider, whether Congress had authority to enact 18 U.S.C. 245(b)(2)(B) under Section 5 of the Fourteenth Amendment.

*B. Section 245(b)(2)(B) Is A Valid Exercise Of Congress's Power Under Section 2 Of The Thirteenth Amendment*

Congress acted well within its authority under Section 2 of the Thirteenth Amendment when it enacted 18 U.S.C. 245(b)(2)(B). In a case strikingly similar to the present one, this Court explained that 18 U.S.C. 245 "is constitutional as applied under the thirteenth amendment" and therefore "*h[e]ld* that 18 U.S.C. 245(b) does not exceed the scope of power granted to Congress by the Constitution." *United States* v. *Bledsoe*, 728 F.2d 1094, 1097 (8th Cir.) (emphasis added), cert. denied, 469 U.S. 838 (1984). Defendants (Sandstrom Br. 58-61; Eye Br. 59-60) nonetheless argue that *Bledsoe* is not controlling because: (1) that part of *Bledsoe* was dictum; (2) "it is not entirely clear that the Thirteenth Amendment reaches private conduct"; and (3) the statute, as applied to defendants, reaches conduct that is not a badge or incident of slavery. These arguments fail.

First, this Court expressly held in *Bledsoe* that Section 245(b) "is constitutional as applied under the thirteenth amendment." 728 F.2d at 1097. In *Bledsoe*, the defendant was charged with violating 18 U.S.C. 245(b)(2)(B) for killing an African-American man because of his race and because he was enjoying a public park. *Id.* at 1095-1096. After concluding that the statute was a valid exercise of Congress's authority under the Fourteenth Amendment, this Court

provided an alternative holding: "that 18 U.S.C. 245(b) does not exceed the scope of power granted to Congress by the Constitution" because there can be no doubt "that interfering with a person's use of a public park because he is black is a badge of slavery." *Id.* at 1097. This rationale provides an alternative holding for this Court's decision, and this Court is bound by that holding. See *Owsley* v. *Luebbers*, 281 F.3d 687, 690 (8th Cir.) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel."), cert. denied, 534 U.S. 1121 (2002).

Second, contrary to defendants' assertions, it is well-settled that the Thirteenth Amendment reaches private conduct. Section 1 of the Thirteenth Amendment states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. Amend. XIII, § 1. Section 2 of the Thirteenth Amendment grants Congress the "power to enforce this article by appropriate legislation." *Id.* § 2. And this Court – and the Supreme Court – has recognized that Congress has the power under the Thirteenth Amendment to regulate private conduct. See, *e.g.*, *Bledsoe*, 728 F.2d at 1097 ("It is abundantly clear under [the thirteenth] amendment Congress can reach purely private action."); *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976) (noting

that it "has never been doubted" that the power granted Congress by the Thirteenth Amendment "includes the power to enact laws * * * operating upon the acts of individuals"); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 438-439 (1968) ("If Congress has power under the Thirteenth Amendment to eradicate conditions[,] then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals.").

Third, Congress had ample authority under the Thirteenth Amendment to criminalize defendants' actions at issue here – violence against a person on account of (1) his race, and (2) his use or enjoyment of a public facility (specifically, a public street). The Supreme Court has interpreted the Thirteenth Amendment's enforcement provision broadly, "[f]or that clause clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*.'" *Jones*, 392 U.S. at 439 (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (emphasis added)). Thus, the Court has stated that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440.

Under Section 2, therefore, Congress may reach conduct that is not directly

prohibited by Section 1. For example, in *Griffin* v. *Breckenridge*, 403 U.S. 88, 90-92 (1971), African-American plaintiffs sued for damages under 42 U.S.C. 1985(3) after they were forced from their car and attacked when the defendants thought the driver of the car was a civil rights worker. The Court upheld the constitutionality of 42 U.S.C. 1985(3) on the ground that "Congress was wholly within its powers under [Section] 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Id.* at 105; see also, *e.g.*, *Jones*, 392 U.S. at 439 (upholding the constitutionality of 42 U.S.C. 1982 on the ground that Congress's Section 2 power "include[d] the power to eliminate all racial barriers to the acquisition of real and personal property"); *Runyon*, 427 U.S. at 179 (concluding that 42 U.S.C. 1981's prohibition of racial discrimination in the making and enforcement of contracts for private educational services and private employment is "appropriate legislation" for enforcing the Thirteenth Amendment); cf. *Palmer* v. *Thompson*, 403 U.S. 217, 227 (1971) (declining to hold that the City of Jackson's decision to close rather than desegregate a municipal swimming pool violated Section 1 of the Thirteenth Amendment, but explaining in dicta that Congress might have the authority to regulate such action under Section 2); *City of*

*Memphis* v. *Greene*, 451 U.S. 100, 128 (1981) (declining to hold that the closing of a city street which traversed predominantly black and white neighborhoods violated the Thirteenth Amendment but suggesting that this activity "does not disclose a violation of any of the enabling legislation enacted by Congress pursuant to [Section] 2").

The prohibitions of Section 245(b)(2)(B) clearly fall within this enforcement power. The statute makes it a federal crime to "willfully injure[], intimidate[], or interfere[] with, or attempt[] to injure, intimidate or interfere with * * * any person *because* of his race, color, religion, or national origin and *because* he is or has been * * * participating in or enjoying any [public] benefit, service, privilege, program, facility or activity," 18 U.S.C. 245(b)(2)(B) (emphasis added). As the Ninth Circuit has explained, "[t]he language of [Section] 245(b)(2)(B) leaves little doubt that a defendant will be convicted * * * only where he has the specific intent to interfere with a victim's enjoyment of a federally protected right on the basis of the victim's race." *United States* v. *Makowski*, 120 F.3d 1078, 1081 (9th Cir.), cert. denied, 522 U.S. 1019 (1997).

The legislative history of Section 245(b)(2)(B) reveals that the statute was focused on violent crime which interfered with racial minorities' participation in federally protected activities. The first use of the word "because" in Section

245(b)(2)(B), the Senate Judiciary Committee Report explained, was intended to limit the statute's scope to acts "*motivated* by the race, color, religion, or national origin of the victim." S. Rep. No. 721, 90th Cong., 1st Sess. 8 (1967) (emphasis added). The second "because" was intended to further limit the statute's scope to two types of situations: "[1] interference intended to prevent present or future participation in a described activity by the victim, and [2] interference intended as a reprisal against the victim for having participated in a described activity." *Ibid.* Requiring that the victim be harmed because of his race and because of his use of a public facility brings 18 U.S.C. 245(b)(2)(B) under the same constitutional authority as 42 U.S.C. 1985(3). See *Griffin*, 403 U.S. at 102 ("The constitutional shoals that would lie in the path of interpreting [] 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose – by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of [a] limiting amendment [and included in the statute]."). Section 245 thus stops well short of the irrational step of creating a "general, undifferentiated federal law of criminal assault." See, *e.g.*, *United States* v. *Nelson*, 277 F.3d 164, 189 (2d Cir.), cert. denied, 537 U.S. 835 (2002).

Congress's determination that this sort of intentional interference with a

person based on the person's race and use of a public facility imposed a "badge of slavery" was not irrational.[15] Indeed, in 1968, the same year in which Congress enacted Section 245(b)(2)(B), the Supreme Court held that the prohibition of racial discrimination in the sale and acquisition of real and personal property constituted a valid exercise of Congress's power to enforce the Thirteenth Amendment. *Jones*, 392 U.S. at 439. The Court explained:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

*Id.* at 441-443. In his concurrence, Justice Douglas further observed:

> Some badges of slavery remain today. * * * Cases which have come to this Court depict a spectacle of *slavery unwilling to die*. * * * Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, public parks, restaurants, public beaches, municipal golf courses, amusement parks, buses, public libraries, [etc.].

*Id.* at 445-446 (Douglas, J., concurring) (citations omitted & emphasis added). If

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[15] The fact that Congress did not expressly invoke its Thirteenth Amendment enforcement authority in enacting Section 245(b)(2)(B) is irrelevant. See, *e.g.*, *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983) (constitutionality of congressional action "does not depend on recitals of the power which it undertakes to exercise" (citation omitted)); *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) (same).

Congress could have rationally concluded that segregation and non-violent discrimination constituted badges and incidents of slavery in 1968, then Congress could have also rationally concluded that violent interference with a person's use of a public facility constituted a badge of slavery. See, *e.g.*, *Bledsoe*, 728 F.2d at 1097 ("Nor can there be doubt that interfering with a person's use of a public park because he is black is a badge of slavery."). Moreover, the Supreme Court has already held that Congress's conclusion that violent assault of African-American men on a public highway constituted a badge or incident of slavery prohibited by the Thirteenth Amendment was not irrational. *Griffin*, 403 U.S. at 105.

Indeed, acts of violence or force committed against racial minorities "with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions." *Nelson*, 277 F.3d at 189. Slavery itself is "preeminently a relationship of power and dominion originating in and sustained by violence. * * * Significantly, this practice of race-based violence both continued beyond [emancipation] and was closely connected to the prevention of former slaves' exercise of their newly obtained civil and other rights." *Id.* at 189-190 (citations omitted).

Congress was well aware of the association of private violence with slavery

when it enacted Section 245(b)(2)(B). For example, the House Committee found that "[v]iolence and threats of violence have been resorted to in order to punish or discourage Negroes from voting, *from using places of public accommodation and public facilities*, from attending desegregated schools, and from engaging in other activities protected by Federal law." H.R. Rep. No. 473, 90th Cong., 1st Sess. 3-4 (1967) (emphasis added & citation omitted). Similarly, the Senate Committee stated that Section 245 was enacted specifically "to strengthen the capability of the Federal Government to meet the problem of violent interference, for racial or other discriminatory reasons, with a person's free exercise of civil rights." S. Rep. No. 721, 90th Cong., 1st Sess. 3 (1967).

Finally, every court of appeals to have entertained a constitutional challenge to Section 245(b)(2)(B) has upheld it as a valid exercise of Congress's authority under the Thirteenth Amendment. *Bledsoe*, 728 F.2d at 1097; *Nelson*, 277 F.3d at 191 (finding that Section 245(b)(2)(B) "is a constitutional exercise of Congress's power under the Thirteenth Amendment"); *United States* v. *Allen*, 341 F.3d 870, 884 (9th Cir. 2003) (agreeing with this Court and the Second Circuit that Section 245(b)(2)(B) is "a constitutional exercise of Congress's authority under the Thirteenth Amendment"), cert. denied, 541 U.S. 975 (2004).

### *C. Section 245(b)(2)(B) Is A Valid Exercise Of Congress's Power Under The Commerce Clause*

Congress acted within its authority under the Commerce Clause when it enacted 18 U.S.C. 245(b)(2)(B). The Commerce Clause of the United States provides that Congress shall have the power to "regulate Commerce * * * among the several States." U.S. Const. Art. I, § 8, Cl. 3. The Supreme Court has identified three broad categories of activity that Congress may regulate under this power: (1) "the use of the channels of interstate commerce"; (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995) (citations omitted).

With respect to the third category, the Supreme Court considers a number of factors when determining whether a particular activity which Congress wishes to regulate "substantially affects" commerce, including whether: (1) the activity is economic in nature; (2) the activity is proved to affect interstate commerce on a case-by-case basis by means of an express jurisdictional element in the statute; (3) legislative findings exist demonstrating the effect of the activity on interstate

commerce; and (4) the link between the activity and a substantial effect on interstate commerce is not attenuated. See *United States* v. *Morrison*, 529 U.S. 598, 609-613 (2000).

While these factors serve "as reference points" for analyzing the constitutionality of a statute under the Commerce Clause, *Morrison*, 529 U.S. at 613, the Supreme Court has never required that all four factors be present. For example, with respect to the first factor, the Court has declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity." *Ibid.* Instead, it has emphasized that Congress, in regulating "noneconomic, violent criminal conduct," must be mindful of the Constitution's "distinction between what is truly national and what is truly local." *Id.* at 617-618. Similarly, with respect to the second factor, the Court has observed that use of a jurisdictional element may "lend support" to a statute's constitutionality under the Commerce Clause, *id.* at 613; however, it has not required one where the prohibited conduct falls within a "class of activities" that have a substantial effect on interstate commerce. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (upholding a federal loansharking statute on the ground that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce"). Finally, so long as the legislative history of a statute

indicates that Congress was aware of a regulated activity's effects on interstate commerce at the time it acted, the Court has never required, with respect to the third factor, that Congress "make particularized findings in order to legislate." *Id.* at 156; accord *Morrison*, 529 U.S. at 612.

With these principles as a guide, Section 245(b)(2)(B) is a valid exercise of Congress's power under the Commerce Clause. Section 245 is the criminal counterpart to the Civil Rights Act of 1964, and is based on the same findings about the effect of racial discrimination on interstate commerce. Accord *United States* v. *Lane*, 883 F.2d 1484, 1492 (10th Cir. 1989) (finding proper Congress's reliance on evidence supporting the 1964 Act to enact Section 245(b)(2)(C)), cert. denied, 493 U.S. 1059 (1990). And Congress has twice upheld under the Commerce Clause the Civil Rights Act's prohibition of discrimination in places of public accommodation. *Katzenbach* v. *McClung*, 379 U.S. 294, 304-305 (1964) ("The Civil Rights Act of 1964, as applied [to racial discrimination in restaurants serving 'interstate travelers' or 'food, a substantial portion of which has moved in interstate commerce'], we find to be plainly appropriate in the resolution of what the Congress found to be a *national commercial problem of the first magnitude*." (emphasis added)); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257 (1964) (reasoning that, in light of the "overwhelming evidence of the

disruptive effect that racial discrimination has had on commercial intercourse," Congress operated well within its Commerce Clause powers in enacting Title II of the Civil Rights Act). Thus, unsurprisingly, Congress expressly invoked its commerce power when it passed Section 245. See S. Rep. 721, 90th Cong., 1st Sess. 6-7 (1967). The absence of new evidence or findings in the legislative history of Section 245 is of no consequence. *Lane*, 883 F.2d at 1492 ("Congress is not required to make 'particularized findings in order to legislate.'" (quoting *Perez*, 402 U.S. at 156)).

In *Allen*, 341 F.3d at 883, the Ninth Circuit expressly held that Section 245(b)(2)(B) was a valid exercise of Congress's power under the Commerce Clause. There, defendants were charged with assaulting minority victims who were enjoying a public park. *Id.* at 873. The Ninth Circuit reasoned that "[v]iolence that interferes with the exercise of federal civil rights must be prohibited in order to protect these rights and give them meaning." *Id.* at 882. After discussing the Supreme Court's decisions in *McClung* and *Heart of Atlanta*, the Ninth Circuit concluded that "[i]f civil interference with these federal rights affects interstate commerce, then criminal interference with them does so as well." *Id.* at 883; see also *United States* v. *Furrow*, 125 F. Supp. 2d 1178 (C.D. Cal. 2000) (upholding Section 245(b)(2)(F) (public accommodations) and (b)(4)(a)

(federal employment) as a valid exercise of Congress's power under the Commerce Clause).

Significantly, *Allen* was decided after *Lopez* and *Morrison*, the cases defendants rely upon most heavily (Sandstrom Br. 51-53) in arguing that Congress acted outside its authority in enacting Section 245. In *Lopez*, the Court struck down the Gun-Free School Zones Act (GFSZA), which made it a federal offense to knowingly possess a firearm in a known school zone, see *Lopez*, 514 U.S. at 551; in *Morrison*, the Court invalidated a section of the Violence Against Women Act (VAWA) that provided a federal civil remedy for victims of gender-motivated violence, see *Morrison*, 529 U.S. at 601-602. In both of those cases, the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based *solely* on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617; accord *Lopez*, 514 U.S. at 567. Instead, it emphasized that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-618; accord *Lopez*, 514 U.S. at 567-568; see also *Heart of Atlanta*, 379 U.S. at 255 ("In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' *and* has a real and substantial relation to the national

interest." (emphasis added)). The Court found no such national interest in the GFSZA and the challenged provision of VAWA, which applied to "areas of traditional state regulation." *Morrison*, 529 U.S. at 615; accord *Lopez*, 514 U.S. at 567.

Section 245 is easily distinguishable from the statutes at issue in *Morrison* and *Lopez*, because Section 245 "regulates only offenses that occur within recognized areas of federal concern, such as civil rights." *Furrow*, 125 F. Supp. 2d at 1185 (citing *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972)). Thus, unlike the GFSZA and VAWA, "Section 245(b)(2)(B) regulates only a specific type of violence; namely, violence that interferes with federal civil rights on the basis of 'race, color, religion or national origin.'" *Allen*, 341 F.2d at 881. This type of violence "is not merely intrastate violence, but rather, violence that affects civil rights, which are traditionally of federal concern." *Ibid.* Indeed, the Second Circuit has noted that "an important connection exists between the Thirteenth Amendment argument on which [it has upheld] the constitutionality of [Section] 245(b)(2)(B) and the suggestion that the statute is a constitutional exercise of Congress's powers under the Commerce Clause." *Nelson*, 277 F.3d at 191 n.28. The *Nelson* Court explained:

[P]rivate violence motivated by a discriminatory animus against members of

> a race or religion, etc., who use public facilities, etc., is anything but intrinsically a matter of purely local concern. Instead, such violence has long been intimately connected to a system of slavery and involuntary servitude that the Thirteenth Amendment made centrally a matter of national concern. And for this reason, congressional action taken to regulate such activity is not likely to infringe impermissibly on local affairs. It follows that laws such as [Section] 245(b)(2)(B) (if the activity regulated also involves substantial effects on interstate commerce) may well be constitutional directly under the Commerce Clause, even after *Lopez* and *Morrison*, and even without any independent resort to the Thirteenth Amendment.

*Ibid.*; see also *Furrow*, 125 F. Supp. 2d at 1185 ("Far from intruding into a matter of purely local concern, [Section 245] regulates matters that Congress and the courts have recognized as 'truly national.'"). Section 245(b)(2)(B) is thus a valid exercise of Congress's powers under the Commerce Clause.

## IV

## THE EVIDENCE WAS SUFFICIENT TO SUPPORT EYE'S CONVICTIONS ON COUNTS 1 AND 2

### *A. Standard Of Review*

When reviewing the denial of a motion for judgment of acquittal based upon insufficient evidence, this Court "must view the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict." *United States* v. *Abfalter*, 340 F.3d 646, 654-655 (8th

Cir. 2003) (citations & internal quotation marks omitted), cert. denied, 540 U.S. 1134 (2004). "Th[is] standard of review is * * * a strict one, and a jury's verdict will not be lightly overturned." *United States* v. *Parker*, 364 F.3d 934, 943 (8th Cir. 2004). This Court will reverse a conviction "only if *no reasonable jury* could have found the defendant guilty beyond a reasonable doubt." *United States* v. *Vazquez Garcia*, 340 F.3d 632, 636 (8th Cir. 2003) (emphasis added), cert. denied, 540 U.S. 1168 (2004).

*B. Sufficient Evidence Supports Eye's Convictions Arising From The First Shooting At 9th And Spruce*

Defendant Eye argues (Eye Br. 20-31) that there was insufficient evidence presented to the jury that a shooting occurred at 9th and Spruce, or, in the alternative, that if there was a shooting at 9th and Spruce, the victim was not McCay.[16] The evidence was more than sufficient to support the jury's verdict that Eye shot at McCay at the intersection of 9th and Spruce, and, in doing so, violated 18 U.S.C. 245(b)(2)(B) and 18 U.S.C. 924(c)(1).

Regennia Rios – *who was with defendants at all times during the commission of the crimes charged* – testified that they drove down the alley between 8th and 9th Streets, R. 525 at 949-950, and that when they reached the

[16] Eye does not challenge the sufficiency of the evidence supporting his convictions resulting from the shooting at 9th and Brighton. Eye Br. 22 n.2.

end of the alley, Eye fired at McCay with Sandstrom's gun, R. 525 at 951-952. Rios further testified that the *second* shooting occurred because they could not find McCay at the 9th and Spruce intersection after Eye shot at him earlier. See generally R. 525 at 953-958, 1041, 1103.

A witness testified that he heard gunshots as he was entering a restaurant around 6 a.m., which was located no more than 80 feet from the intersection of 9th and Spruce. R. 525 at 1223-1224, 1233. In addition, Eye discussed the shootings with a group of friends afterwards and said that he could not understand how McCay was not still at the intersection of 9th and Spruce *after he shot at him the first time*. R. 525 at 974; see also R. 524 at 659 (Sandstrom's sister testifying that Rios said, in a conversation between the witness, defendants and Rios, that they needed to "finish [McCay] off" after Eye shot at him the first time). This evidence was sufficient for the jury to conclude that Eye shot at McCay at 9th and Spruce.

Eye's counsel vigorously challenged Rios's credibility on cross-examination. See generally R. 525 at 1016-1027, 1047-1086. Eye's counsel also challenged Rios's version of events through both cross-examination, see generally R. 525 at 1028-1044, and by calling witnesses in an attempt to counter her testimony, see, *e.g.*, R. 527 at 1777-1783, 1795; R. 528 at 1825-1856, 1878-1880 (witnesses for Eye testified that, while sitting inside a restaurant located near 9th

and Spruce and engaging in small talk with another person, one witness could not hear test shots fired by another witness in the alley connecting 8th and 9th Streets). Defense counsel also repeatedly argued to the jury that a shooting at 9th and Spruce did not occur. See, *e.g.*, R. 522 at 63-64, 68-70 (opening statement by Eye's counsel); R. 529 at 2011-2019 (closing argument by Eye's counsel). The jury, however, credited Rios and the other government witnesses. And it is the jury's responsibility to assess the credibility of witnesses and to resolve conflicts in testimony, *United States* v. *Thompson*, 560 F.3d 745, 748-749 (8th Cir. 2009), and its conclusions on these issues are "virtually unreviewable on appeal." *United States* v. *Morris*, 327 F.3d 760, 761 (8th Cir.), cert. denied, 540 U.S. 908 (2003).

Eye argues in the alternative (Eye Br. 30-31) that, even if a shooting occurred at 9th and Spruce, the victim was not McCay. This argument depends on a factfinder concluding that McCay could not have been the victim of both the Spruce shooting and the Brighton shooting because the distance between the two shootings (*i.e.*, less than half a mile), R. 527 at 1678, was too great for McCay to travel in the time it took for the defendants to travel from one intersection to the other. See, *e.g.*, R. 525 at 1040 (Rios testifying that both events took just "a couple minutes"). This essentially factual argument was considered by the jury and rejected.

Although couched in terms of "legal impossibility," see Eye Br. 30, which refers to "those situations in which the intended acts, even if successfully carried out, would not amount to a crime," *United States* v. *Frazier*, 560 F.2d 884, 888 (8th Cir. 1977), cert. denied, 435 U.S. 968 (1978), Eye's argument is best described as attacking Rios's testimony as incredible as a matter of law. *United States* v. *Baker*, 367 F.3d 790, 798 (8th Cir. 2004); see also *United States* v. *Saulter*, 60 F.3d 270, 275 (7th Cir. 1995) (explaining that court will overturn a conviction based on a credibility determination "only when a witness's testimony was incredible as a matter of law, meaning it would have been physically impossible for the witness to observe that which he claims occurred, or impossible under the laws of nature for the occurrence to have taken place at all" (citation & internal quotation marks omitted)).

Rios's testimony was not incredible as a matter of law. Rios testified that she saw McCay's *face* immediately before the 9th and Spruce shooting, R. 525 at 952-953, 1036, and that she saw him again at the intersection of 9th and Brighton, R. 525 at 1037. In addition, the jury heard testimony that McCay often walked to his place of work, which was located about 6-8 blocks from the corner of 9th and Brighton, and that he usually arrived at work between 6 and 6:30 a.m. R. 527 at 1728-1729.

Although Eye's counsel argued to the jury that the shootings took place "*[two] minutes*" apart, R. 529 at 2018, Rios's actual testimony, in response to a leading question, was that the shootings took "a couple minutes" to conclude. See R. 525 at 1040 ("Q: All this occurred then from the initial incident back up at the 9th and Spruce location, just a matter of less than a couple minutes, didn't it? A: That's correct."). At no time did Rios herself place the estimate specifically at *two* minutes.

Moreover, the jury also heard testimony that shots were fired near the intersection of 9th and Spruce around 6 a.m. R. 525 at 1223-1224. The 911 call following the shooting at 9th and Brighton came in at 6:12 a.m. R. 522 at 107. Thus, the jury heard testimony that the shootings could have been more than two and perhaps as many as ten minutes apart. The jury may well have concluded that Rios's testimony on timing was not accurate. That would not preclude crediting her testimony in other respects.

## V

## THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTIONS FOR A MISTRIAL BASED ON THE PROSECUTOR'S COMMENT DURING CLOSING ARGUMENTS

### *A. Standard Of Review*

This Court reviews *de novo* whether a prosecutor has unconstitutionally

commented on a defendant's failure to testify. *United States* v. *Gardner*, 396 F.3d 987, 988 (8th Cir.), cert. denied, 546 U.S. 866 (2005). This Court reviews a district court's decision to grant or deny a new trial for abuse of discretion. *Id.* at 989.

*B. The District Court Did Not Abuse Its Discretion In Denying Defendants' Motions For A Mistrial Because The Prosecutor's Comment Was Neither Improper Nor Prejudicial*

It is well-settled that "the Fifth Amendment * * * forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin* v. *California*, 380 U.S. 609, 615 (1965). Where, as here, a prosecutor does not directly comment on a defendant's failure to testify, this Court considers whether a prosecutor's indirect comments either: (1) demonstrate an intent by the prosecutor to draw attention to a defendant's silence; or, (2) whether "the jury would *naturally and necessarily* understand the comments as highlighting the defendant's failure to testify." *Gardner*, 396 F.3d at 989 (citation omitted). With respect to the first possibility, a prosecutor's remark is not intended to draw attention to a defendant's silence if there is some other, equally plausible explanation for the remark. *United States* v. *Grosz*, 76 F.3d 1318, 1326 (5th Cir.), cert. denied, 519 U.S. 862 (1996). As for the second, the question for a reviewing court "is not whether the jury possibly or even probably

would view the challenged remark in this manner, but whether the jury *necessarily* would have done so." *Gardner*, 396 F.3d at 992 (citation omitted). A reviewing court must consider the prosecutor's comments in the context of the argument itself and of all the evidence introduced at trial. *United States* v. *Emmert*, 9 F.3d 699, 702 (8th Cir. 1993), cert. denied, 513 U.S. 829 (1994). For a prosecutor's comments to warrant a new trial, the defendant bears the burden of showing that the prosecutor's comments were both improper and prejudicial to the defendant's substantial rights. *Gardner*, 396 F.3d at 988. As explained below, the prosecutor's indirect comment was neither improper nor prejudicial.

*1. The Prosecutor's Comment Was Not Improper*

The prosecutor's closing argument was not improper. The contested comment arose during the prosecutor's discussion of the jury instructions that explained what the government must prove beyond a reasonable doubt to establish a violation of 18 U.S.C. 245(b)(2)(B). See generally R. 529 at 1978-1979. The prosecutor argued to the jury:

> Nowhere in that instruction does it require the government to demonstrate or satisfy to anyone that these two individuals are racists. But, ladies and gentlemen, if not race, why? There is not a shred of evidence that either of these two individuals knew William McCay before they laid eyes on him on March 9th of 2005. Not a shred of evidence. No relationship, no grudge, no dispute, no exchange of words of any kind or any prior relationship whatsoever. If not race, why?

> Well, the defendant's own words. Gary Eye. You do one, I do one.
>
> Gary Eye. I smoked that nigger.
>
> Gary Eye. Nigger was in my hood on my time. My hood on my time. So I smoked his ass.
>
> Steven Sandstrom was in the car with Vincent Deleon as they drive past the crime scene the same day of the murder, that's where Gary shot that nigger.
>
> Circumstantial evidence of intent, corroboration is reflected in the words and the deeds and the vocabulary. And, ladies and gentlemen, I, again, submit to you, if not race, why? Not a single alternative motive has been supplied.

R. 529 at 1978-1979. Defense counsel objected, R. 529 at 1979, and argued to the district court that the government had improperly shifted the burden of proof to the defendants to supply an alternative motive. The district court overruled the objection. R. 529 at 1980.

The district court's decision was correct. The prosecutor's rhetorical questions to the jury (*i.e.*, "If not race, why?," R. 529 at 1978, 1979) cannot, in any context, be construed as a comment on the defendants' decisions not to testify. See Sandstrom Br. 64 (acknowledging it was "fair argument" for the prosecutor to argue that defendants' words and actions established that the crimes were racially motivated). These statements were made as the prosecutor explained the government's burden of proof with respect to Counts 1 and 3. The prosecutor

correctly informed the jury that the government need not establish that the defendants are racists to prove a violation of 18 U.S.C. 245(b)(2)(B). The jury can infer from all of the evidence – including the defendants' "intent," "words," "deeds" and "vocabulary" – that they selected their victim based on his race – an essential element of a Section 245(b)(2)(B) violation. R. 529 at 1979.

The prosecutor then stated that "[n]ot a single alternative motive has been supplied." R. 529 at 1979. This statement was not improper. A prosecutor may comment "on the failure of the defense, as opposed to the defendant, to counter or explain the evidence [unless] the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Gardner*, 396 F.3d at 991.

Here, the government introduced testimony from which a jury could reasonably infer that the defendants selected McCay because of his race. See, *e.g.*, R. 525 at 935, 939 (Rios testifying that, after Sandstrom said he "shot at a nigger at 7-Eleven," Eye replied that "if you get to do one, I get to do one"); R. 525 at 945 (Rios testifying that after Sandstrom asked Eye if Eye thought Sandstrom "hit the nigger at 7-Eleven," Eye responded that when he saw one "it's on site"); R. 522 at 261, 263 (Deleon testifying that Sandstrom and Eye said they would "kill a nigger quick"); R. 525 at 950-952 (Rios testifying that after they spotted McCay at the intersection of 9th and Spruce, Eye told Sandstrom to drive down the alley and

asked for the gun; Rios testifying that Sandstrom did not hesitate in giving Eye the gun); R. 525 at 954 (Rios testifying that it was obvious what was going to happen after Sandstrom gave Eye the gun); R. 525 at 974 (Rios testifying that Eye said he shot McCay because "he was a nigger in my hood"); R. 524 at 657-658 (Sandstrom's sister providing similar testimony); R. 522 at 295 (Deleon testifying that Eye said he and Sandstrom had been playing "nigger, nigger, nigger" when they shot McCay).

Eye's counsel stated to the jury at the beginning of trial that Eye was not a racist, R. 522 at 75, and that the incident with McCay was a "chance encounter." R. 522 at 71. Moreover, Eye's counsel attempted to show through cross-examination of the government's witnesses that Eye was not motivated by race, see, *e.g.*, R. 523 at 347-350, 585-590. Eye's counsel then called several witnesses, including his former counselor at a juvenile detention facility, R. 527 at 1739-1754; his sister's best friend, R. 527 at 1754-1766; and, his sister, R. 527 at 1766-1774, who testified that Eye got along with African-Americans and did not, to their knowledge, use racial slurs. Sandstrom's counsel stated to the jury that Sandstrom's actions were not motivated by race, R. 522 at 85, and, like Eye's counsel, attempted to demonstrate that point through cross-examination of government witnesses, see, *e.g.*, R. 523 at 426-427, 453-454, 608; R. 524 at 738-

740; R. 526 at 1355-1357; R. 527 at 1504-1505, 1651. Sandstrom's own defense witnesses, including family friends, R. 528 at 1886-1893, 1918-1935, 1939-1960; a juvenile detention center employee, R. 528 at 1904-1918; and, Sandstrom's former probation officer, R. 528 at 1894-1904, testified that Sandstrom got along with African-Americans and did not, to their knowledge, use racial slurs. At the end of the trial, both counsels argued to the jury that the crimes were not racially motivated. R. 529 at 2020, 2024, 2033-2034, 2053, 2061-2065, 2072-2073, 2075-2077. While defendants' trial strategies showed an effort to deny that the defendants acted on the basis of McCay's race, their trial strategies did not provide an *alternative* motive for the shootings other than the one presented by the government.

Given the context in which the prosecutor's statement was made, no jury would "naturally and necessarily" interpret the statement as calling attention to the defendants' failure to testify.[17] *United States* v. *Smith*, 266 F.3d 902, 906 (8th Cir. 2001). Rather, the statement naturally and necessarily called attention to "the

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[17] Contrary to Eye's assertions (Eye Br. 54-55), the jury would not *naturally* and *necessarily* interpret the prosecutor's comment regarding the failure to provide an alternative motivation as a basis for questioning why the defendants did not testify to resolve the alleged inconsistencies *in their defenses*, especially when the comment is viewed in context; that is, when discussing the elements of a Section 245(b)(2)(B) violation.

failure of the defense, as opposed to the defendant, to counter or explain the evidence" of defendants' motivation that the government presented. *Gardner*, 396 F.3d at 991 (citation omitted).

Defendants rely on *Williams* v. *Lane*, 826 F.2d 654, 665-666 (7th Cir. 1987), to argue that the jury would interpret the prosecutor's comment as highlighting their failure to testify because they were the only witnesses who could testify about their intent. In *Williams*, the defendant was the only person besides the complaining witness who could rebut the witness's version of events giving rise to the criminal charges (*i.e.*, rape). The Seventh Circuit held that, in such a situation, the prosecutor's indirect references to the defendant's failure to testify were improper. *Id.* at 665-666; see also *United States* v. *Triplett*, 195 F.3d 990, 995, 998 (8th Cir. 1999) (government presented evidence that defendant acted alone; therefore, only defendant could have rebutted government's evidence – but finding error was harmless), cert. denied, 529 U.S. 1094 (2000) .

In the present case, the defendants were *not* the only individuals who could testify as to their motivation in shooting McCay. Eye and Sandstrom did *not* act alone in shooting McCay – *Rios was there, too*. See *Triplett*, 195 F.3d at 995. In fact, Rios was an active participant in the events before, during and immediately after the shootings, and she testified at length about those events, as well as the

motivation behind them. Other witnesses provided additional testimony about defendants' motivation. The prosecutor's statement was therefore not improper; rather, it was "in reference to the strength and clarity of the government's evidence presented at trial." *United States* v. *Moore*, 129 F.3d 989, 993 (8th Cir. 1997), cert. denied, 523 U.S. 1067 (1998); cf. *United States* v. *Burns*, 432 F.3d 856, 861 (8th Cir. 2005) (holding that when defense counsel offers a theory of defense, "the government may respond by noting the absence of evidence to support that defense").

*2. The Prosecutor's Comment Was Not Prejudicial*

Even assuming that the prosecutor's comment was improper, the district court did not abuse its discretion in denying defendants' motions for a new trial because the comment was not prejudicial. This Court has held that a new trial is not warranted if the error is harmless. *Williams*, 826 F.2d at 666. An error is harmless where the government "can prove beyond a reasonable doubt that the jury would have returned a verdict of guilty even absent the prosecutor's unconstitutional remarks." *Ibid.*; see also *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Specifically, in determining what, if any, prejudicial effect a prosecutor's comments may have had, this Court considers: "(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's

guilt; and (3) the curative actions taken by the trial court." *Triplett*, 195 F.3d at 997 (citation omitted).

When viewed in the context of the entire trial, the prosecutor's comment had little effect on the jury's ability to judge the evidence fairly. *Burns*, 432 F.3d at 861. First, defendants cite to one allegedly improper comment by the prosecutor that occurred during a two-hour closing argument. R. 529 at 1975. The statement ("Not a single alternative motive has been supplied." R. 529 at 1979) was made once and not repeated during the closing argument, and defendants make no claim that any other statements or arguments made during the government's closing argument were problematic. Thus the prejudicial effect from this comment, if any, was minimal. *Triplett*, 195 F.3d at 997.

Second, the evidence of Sandstrom's and Eye's guilt was overwhelming. As already explained, the testimony of Rios and other witnesses established beyond a reasonable doubt that the defendants were guilty of the crimes for which they were convicted. It is highly unlikely that the prosecutor's isolated comment during a two-hour closing argument played any role in the jury's verdict.

Finally, although the district court did not provide any curative instructions at the time of the prosecutor's statement (because, as explained in Section. V.B.1., *supra*, the comment was not improper), the district court did explain to the jury at

the start of the trial that the defendants were presumed innocent until proven guilty beyond a reasonable doubt, and that the defendants did not have to present evidence, testify, or call other witnesses. R. 449 at 1, 10; R. 522 at 35; *Burns*, 432 F.3d at 861. The district court reiterated these instructions after closing arguments and before the jury began its deliberations. R. 449 at 23-24 ("[E]ach defendant is presumed to be innocent."; "There is no burden upon a defendant to prove that he is innocent. Accordingly, the fact that a defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict."), 72 ("[T]he burden is upon the Government to prove beyond a reasonable doubt every essential element of the crimes charged."); R. 528 at 1968-1969; *Burns*, 432 F.3d at 861. The district court also notified the jury that the argument of counsel was not evidence. R. 449 at 3, 10; *Burns*, 432 F.3d at 861. Defense counsel also emphasized in closing that the government has the burden to prove its case and that the defense was not obligated to produce any evidence. R. 529 at 2031-2032; *Burns*, 432 F.3d at 862.

Because the effect, if any, of the prosecutor's isolated comment was minimal, the evidence of defendants' guilt was overwhelming, and, in this context, the district court's instructions were sufficient, defendants have not shown that they were deprived of a fair trial. *Burns*, 432 F.3d at 862.

## CONCLUSION

The appellants' convictions should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect X4 software, the brief contains 19,580 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

A Motion To File An Oversize Brief As Appellee has been submitted with this brief.

I also certify that an electronic version of this brief, which has been sent to the Court by overnight delivery on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

/s/ Angela M. Miller
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Date: June 12, 2009

## CERTIFICATE OF SERVICE

I certify that on June 12, 2009, the original and 10 copies of the Brief for the United States as Appellee, along with a disc containing an electronic copy of the same brief, were sent by overnight Federal Express delivery to the Clerk of the United States Court of Appeals for the Eighth Circuit.

I further certify that two copies of the foregoing, along with a disc containing an electronic copy of the same, were sent by overnight Federal Express delivery to the following counsel of record:

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