No. 05-60419

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant

v.

MACEO SIMMONS,

Defendant-Appellant/
Cross-Appellee

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

BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose defendant's request for oral argument.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on May 27, 2005. 1.R.262; Doc. 61.[1] Defendant filed a timely notice of appeal on April 28, 2005. 1.R.229; Doc. 54; see Fed. R. App. P. 4(b)(2). The United States filed a timely notice of appeal on June 22, 2005. 1.R.281; see

[1] The number before the "R." is the volume number of the Record on Appeal. Numbers after the "R." are pages in that volume. "Doc. __" is the number of the entry on the district court docket sheet. "Br. __" indicates the page number of defendant's opening brief. "GX __" refers by number to the government's trial exhibits. "PSR __" indicates the page number of the Presentence Report.

Fed. R. App. P. 4(b)(1)(B). This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUES

SIMMONS' APPEAL:

1. Whether the evidence was sufficient to prove that Simmons sexually assaulted the victim and that his offense involved "aggravated sexual abuse."

2. Whether the district court abused its discretion by admitting the expert testimony of Dr. Louise Fitzgerald.

3. Whether the prosecutor's reference to kidnapping during closing argument constructively amended the indictment or violated Federal Rule of Evidence 404(b), and whether the remark affected Simmons' substantial rights.

4. Whether the district court abused its discretion in admitting evidence that Simmons failed to log in or otherwise turn over to the police department the marijuana he seized from the victim the night of the rape.

5. Whether the district court abused its discretion by admitting into evidence an excerpt of Simmons' state trial testimony.

6. Whether, after the prosecutor referred to "the state trial" in questioning a witness, the district court abused its discretion by refusing to instruct the jury that Simmons had been acquitted in state court.

UNITED STATES' CROSS-APPEAL:

7. Whether the district court erred in refusing to impose a two-level enhancement under Sentencing Guidelines § 2A3.1(b)(3)(A), which applies if the victim was "in the custody, care, or supervisory control of the defendant."

8. Whether Simmons' sentence is reasonable under *United States* v. *Booker*, 125 S. Ct. 738 (2005).

STATEMENT OF THE CASE

In September 2004, a federal grand jury returned a two-count indictment against Maceo Simmons, alleging that he engaged in criminal conduct while working as a police officer for the City of Jackson, Mississippi. 1.R.2-3. Count 1 charged that Simmons, while acting under color of law, sexually assaulted an individual and thereby willfully deprived her of liberty without due process of law, in violation of 18 U.S.C. 242. 1.R.2. Count 1 further alleged that the sexual assault included aggravated sexual abuse and resulted in bodily injury to the victim. 1.R.2. Count 2 charged Simmons with violating 18 U.S.C. 924(c)(1)(A)(i) by possessing a firearm in furtherance of the crime of violence alleged in Count 1. 1.R.2.

On March 1, 2005, a jury found Simmons guilty on Count 1 and determined that his offense involved aggravated sexual abuse and resulted in bodily injury to the victim. 1.R.178. The jury acquitted Simmons of the firearms charge in Count

2. 1.R.178. The district court sentenced Simmons to a term of imprisonment of 240 months and a five-year term of supervised release, and ordered him to pay an assessment of $100. 1.R.263-266.

STATEMENT OF FACTS

As explained below, the government's evidence showed that Simmons, while on duty as a Jackson police officer, took 19-year-old Syreeta Robinson into custody, drove her to an isolated wooded area in the middle of the night, and then raped her anally, vaginally, and orally while police officer Thomas Catchings served as a lookout. Both Robinson and Catchings testified as government witnesses at trial.

1. Offense Conduct

Don Knotts, a Jackson police officer, pulled over a car for a traffic violation shortly after midnight on September 19, 1999. 4.R.236-239; 5.R.329, 377; 7.R.761-762. Syreeta Robinson (then age 19), and her boyfriend, Towaski Bell, were passengers in that car. 4.R.238; 5.R.375, 377, 390. Simmons and Catchings arrived on the scene to assist Knotts. 4.R.239; 5.R.380-381.

While questioning Robinson, Simmons discovered that she had marijuana in her possession. Br. 4; 5.R.382. Robinson turned the marijuana over to Simmons and told him that it belonged to her. 5.R.382, 384, 434. Simmons arrested Robinson, handcuffed her, and placed her in the back of his patrol car. 5.R.385.

He then told her, "Ain't no way in hell I'm going to let somebody pretty as you go down for this nothing ass nigga" (apparently referring to her boyfriend). 5.R.386, 511-514.

Bell was arrested for allegedly possessing marijuana and making false statements to a police officer. GX 60(a) & 60(c); 4.R.240-242; 5.R.329, 383; 6.R.677-678. He was handcuffed and placed in the back of Catchings' patrol car. 4.R.241-244.

Catchings testified that, before leaving the scene of the traffic stop, Simmons told him that Robinson "wanted to have sex" with Simmons. 4.R.244-246. Catchings explained, however, that he had not seen Robinson flirt or do anything sexually suggestive and that he had no reason to believe that she wanted to have sex with Simmons. 4.R.245.

Catchings then drove to the city jail, and Simmons followed in his own patrol car, with Robinson in the back seat. 4.R.251-252; 5.R.323, 387. When they arrived at the jail, Catchings took Bell inside to book him while Simmons waited in the car with Robinson. 4.R.251-254; 5.R.350, 387; 6.R.684-685. While he was in the jail, Catchings provided the court clerk with paperwork about Bell's arrest so that she could prepare the charging affidavits. 6.R.684-685. Catchings told the clerk that Simmons would come in later to sign the affidavits. 6.R.685. Bell's booking occurred at 1:57 a.m. 4.R.255; 6.R.676; GX 55.

When Catchings emerged from the jail at about 2 a.m., Simmons was in his patrol car with Robinson. 4.R.262; 5.R.350. Simmons radioed Catchings and said "[f]ollow me." 4.R.263; 5.R.388. After driving for awhile, Simmons stopped his car, uncuffed Robinson, and put her in the front seat. 5.R.388-389. At first, Robinson thought Simmons was taking her home. 5.R.388-389. But when Simmons drove past Robinson's neighborhood without stopping, she became nervous. 5.R.390-391.

As he was driving, Simmons asked Robinson: "Have you ever sucked a dick before?" 5.R.391. When she said "no," Simmons told her: "Stop lying. You look like a little freak anyway." 5.R.391.

Simmons pulled off the road into a dark, wooded area sometime between 2 and 2:30 a.m. It was an isolated area, without any homes, businesses, streetlights, or traffic nearby. 4.R.265-269; 5.R.283-284, 292-297, 397-403, 490; GX 9(a). Catchings testified that he backed his car in behind Simmons' vehicle, facing the road in order to act as a lookout. 5.R.285, 297-299; see 5.R.403. Catchings did so to prevent anyone from interfering with Simmons while he had sex with Robinson. 5.R.300-301, 357. Catchings testified that he acted as a lookout until about 3:10 a.m. 5.R.312.

Once they were in the dark, wooded location, Simmons unzipped his pants and exposed his penis to Robinson. 5.R.403-405. Simmons then grabbed her

head, put pressure on her neck, forced his penis into her mouth, and made her perform oral sex on him. 5.R.404-405. Robinson started crying. 5.R.405. Simmons told Robinson that she "wasn't doing it right," and made her get out of the car. 5.R.405. He physically forced her to perform oral sex on him again. 5.R.405-406, 442.

Simmons then made Robinson stand up, bent her over the trunk of his patrol car, and forced his penis into her from behind, raping her both anally and vaginally as he pinned her against the vehicle. 5.R.405, 407-409, 446, 493-494, 530. Robinson was crying as Simmons raped her. 5.R.409. She suffered pain, especially from the anal rape. 5.R.408-409, 412.

Robinson testified that the sexual contact with Simmons was against her will. 5.R.405-407, 534-535. She explained that she feared for her life during the ordeal, believing that she might be shot so that she would not report what happened. 5.R.407-408, 410-411. Simmons was wearing his firearm when he raped her. 5.R.301-302, 391, 407, 410. Catchings also was armed. 5.R.412.

When Simmons finished raping Robinson, he took her to Catchings and asked him if he wanted "to do it" too. 5.R.304-306. Catchings understood that Simmons was asking him whether he wanted to have sex with Robinson. 5.R.308-310, 368. Catchings testified that when Simmons brought Robinson to him, she was sobbing and asking to be taken home. 5.R.309-310, 368. Robinson testified

that when Simmons offered her to Catchings, she feared that she was about to be raped "all over again." 5.R.410.

Catchings declined Simmons' invitation to sexually assault Robinson and instead drove her home. 5.R.310, 411-412. On the way there, Catchings warned Robinson not to tell anybody what had occurred or else "something was going to happen." 5.R.411. Robinson interpreted Catchings' warning to mean that "they w[ere] going to have [her] killed" if she reported the rape. 5.R.411.

2. Robinson's Reporting Of The Rape

Shortly after arriving home, Robinson called Lynn Bell, her boyfriend's mother, and told her about the rape. 5.R.412-413. Bell testified at trial that she was awakened in the middle of the night by a telephone call from Robinson, who was crying and distraught. 4.R.194-200. During the conversation, Robinson told Bell that "the police" had forced her to perform oral sex and had anally raped her. 4.R.197-199, 226.

Robinson's close friend, Erica Anderson, also testified that Robinson reported the rape to her in a telephone call during the early morning hours of September 19, 1999. 6.R.553-556. Anderson testified that Robinson told her that a police officer raped her while another officer was nearby. 6.R.555-556, 559-561. According to Anderson, Robinson was crying during the phone call and could barely talk. 6.R.553, 556.

Two other witnesses testified that Robinson visited a rape crisis center on September 23, 1999. 6.R.539-542, 545, 550-551. The director of the rape crisis center testified that Robinson appeared to be "traumatized" and "distressed" during the visit. 6.R.549-551.

Robinson did not report the rape to the authorities until October 2000. 5.R.424-425. She explained at trial that she was reluctant to call the police "because they [were] the ones that did it," and because "they had already threatened me [that] if I [did] tell it, that something was going to happen to me." 5.R.413. After receiving information from Robinson's mother, internal affairs investigators from the Jackson Police Department interviewed Robinson about the rape in October 2000. 6.R.563-564; 5.R.415-417. Robinson testified that she did not initially disclose the anal rape to the male investigators because she considered it "disgusting and embarrassing" and felt uncomfortable talking about it with men. 5.R.417, 533-534.

3. Simmons' State Court Prosecution

Simmons and Catchings were jointly tried in Mississippi state court for sexual battery and conspiracy to commit sexual battery, based on their roles in Robinson's rape. 1.R.27, 60, 84, 87. Simmons testified at his state trial, but Catchings did not. GX 48(c); 1.R.27; 2.R.18, 28. During his testimony, Simmons

denied having sex with Robinson. GX 48(c) at 355, 372. Both men were acquitted in November 2001. 1.R.27; PSR 6.

4. Simmons' Firing

The Jackson Police Department fired Simmons in 2002 because of the incident with Robinson. 6.R.603, 607; 7.R.727-729, 734-737, 752; 2.R.11. He later took a job as a police officer in Fort Hood, Texas. 7.R.725-726, 741-742.

5. Simmons' Statements About His Conduct

Simmons did not testify at the federal trial. However, the district court admitted into evidence a number of statements that Simmons had previously made about his conduct on September 19, 1999, including an excerpt from his state court testimony. GX 48(c); 6.R.615; 8.R.986-987.

In his state court testimony, Simmons described what he supposedly did on September 19, 1999. Simmons testified that when he arrived on the scene of the traffic stop, he found marijuana in the pocket of Towaski Bell, who was arrested and placed in Catchings' patrol car. GX 48(c) at 339, 341. Simmons testified that when he returned to his own car, he found Robinson sitting in the back seat. GX 48(c) at 340-341. Simmons claimed that Robinson asked him for a ride to the police station so that she could get Bell out of jail. GX 48(c) at 341.

Simmons testified that he then took Robinson to the precinct station and, while there, logged in the marijuana and placed it in the station's evidence

mailbox. GX 48(c) at 344. Afterwards, according to Simmons, he drove Robinson to police headquarters, where the jail was located. GX 48(c) at 345-350. Simmons testified that while Catchings was booking Bell, he (Simmons) went inside police headquarters to submit the affidavits relating to Bell's arrest. GX 48(c) at 346-347, 350, 382. According to Simmons, he remained at headquarters for a substantial period of time because the court clerk was initially too busy to process the affidavits. GX 48(c) at 350-352.

Simmons testified that when he left police headquarters, he radioed Catchings to follow him, and then drove away with Robinson in the car. GX 48(c) at 352. Simmons claimed that Robinson wanted him to drop her off someplace, but that she gave him faulty directions and, as a result, they ended up on a dead-end road. GX 48(c) at 352-354. According to Simmons, he then told Robinson that he did not have time to continue driving her around, but that Catchings would give her a ride. GX 48(c) at 353-354. Simmons claimed that Robinson then got into Catchings' car, and Catchings drove away. GX 48(c) at 354-355.

Simmons denied during his state court testimony that he ever had sex with Robinson. GX 48(c) at 355, 372. That testimony, however, contradicted statements that Simmons made to colleagues in Fort Hood in 2004.

At the federal trial, Fort Hood police officer William Wilson testified that Simmons admitted that he had sex with a woman "on the back of his patrol car"

while another officer was present, and that the Jackson Police Department fired him because of the incident. 7.R.727-732, 736-737; GX 74(b). In his conversations with Wilson, Simmons referred to the incident as a "[b]ooty call," and appeared to be bragging about it. 7.R.730-732. Simmons indicated that he considered the incident "no big deal" and could not understand why he had been fired. 7.R.730.

Marte Martinez, a former Fort Hood police sergeant, similarly testified that Simmons told her that he had sex with a woman in his patrol car while another officer was present, and that the Jackson Police Department fired him as a result. 7.R.748-754, 757. In his discussions with Martinez, Simmons called the woman a "skank" and a "prostitute" (7.R.757) and claimed that the sex was consensual. 7.R.749, 754. Simmons later advised Martinez that he might be indicted for having sex with the woman but told her that "he had a 50/50 chance" of "beating" the charge. 7.R.751-752.

The government introduced other evidence at the federal trial contradicting Simmons' assertions about his activities on September 19, 1999. A Jackson Police Department inventory controller testified at the federal trial that an extensive search of department records and storage facilities revealed no indication that Simmons ever logged in, or otherwise turned over to the department, any marijuana seized on September 19, 1999. 7.R.713-721. In addition, the court clerk

on duty at the time of Bell's booking testified that (contrary to Simmons' state court testimony) Simmons did not complete the affidavits relating to Bell's arrest until nearly 4:15 a.m., more than two hours after Catchings had booked Bell. 6.R.684-692; GX 59(b); see 4.R.255.

6. Sentencing

The probation officer prepared a Presentence Report using the 1998 version of the Sentencing Guidelines. PSR 5. Recognizing that the applicable Guidelines provision for a violation of 18 U.S.C. 242 was § 2H1.1, the probation officer calculated the base offense level using "the offense level from the offense guideline applicable to any underlying offense." PSR 5 (quoting Guidelines § 2H1.1(a)(1)). The probation officer determined that the underlying offense was aggravated sexual abuse, and thus the relevant Guidelines provision was § 2A3.1(a), which had a base offense level of 27. PSR 5.[2] He then added four levels under § 2A3.1(b)(1) because the offense was committed by the means set forth in 18 U.S.C. 2241(a); two levels because the victim was "in the custody, care, or supervisory control of the defendant," Guidelines § 2A3.1(b)(3)(A); four levels because the victim was "abducted," *id.* § 2A3.1(b)(5); and six levels because "the offense was committed under color of law," *id.* § 2H1.1(b)(1). See PSR 5-6. That calculation produced a total offense level of 43, which triggered a Guidelines

[2] The Sentencing Commission subsequently increased the base offense level to 30. See § 2A3.1(a) (2004).

sentence of life imprisonment. PSR 6, 9. The probation officer stated that he had "no information concerning the offense or the offender which would warrant a departure from the prescribed sentencing guidelines." PSR 10.

At the sentencing hearing, the government argued that the probation officer had correctly calculated the Guidelines offense level and that, consistent with that calculation, the court should impose a sentence of life imprisonment. 10.R.18-20. The prosecutor emphasized that Simmons' crime was "unusually heinous," "constituted an outrageous abuse of his power" as a police officer, and thus warranted a life sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, ensure adequate deterrence, and protect the public. 10.R.21-22. In response, the court stated that it agreed with the prosecutor about "the egregiousness of the crime." 10.R.21. At the hearing, Robinson and her mother made statements to the court indicating that the rape had caused the victim psychological damage. 10.R.25-26.

During allocution, Simmons did not apologize or express remorse but, instead, suggested that the victim had lied about the rape: "Your Honor, I would like just to say [to the victim] for her to seek God and maybe one day come to you and tell the truth." 10.R.31.

The district court concluded that Simmons' offense level was 41. 10.R.33. Although agreeing with the probation officer that the Guidelines calculation should

include the six-level "color of law" enhancement under § 2H1.1(b)(1) and the four-level adjustment under § 2A3.1(b)(5) because the victim was abducted, the court sustained Simmons' objection to the two-level "custody" enhancement under § 2A3.1(b)(3)(A). 10.R.33. The judge reasoned that imposing that enhancement would be "double counting" in light of the four-level increase for abduction of the victim under § 2A3.1(b)(5). 10.R.33.

Noting that an offense level of 41 produced a Guidelines range of 324-405 months, the Court concluded that "the guidelines under this set of facts impose[] too harsh a sentence." 10.R.34. The court opted for a sentence of 240 months, explaining that "if it were to use the guidelines [it] would depart downward three levels to a level 38," which would produce a sentencing range of 235 to 293 months. 10.R.34. When asked to explain for the record the grounds for the sentence, the judge stated:

> The court simply feels that a term of imprisonment of 20 years for a man who is 48 years old is a sufficient sentence in this case and serves all of the reasons for incarcerating a person for a long period of time. The court does not feel that a sentence in excess of 20 years would be beneficial either to the victim, to the public or to the defendant himself.
>
> The court believes that a sentence within the guideline range without the departure would, in essence, put this man probably very close if not at the end of his life. And I think that 20 years of imprisonment is enough.

10.R.36.

SUMMARY OF ARGUMENT

Simmons is appealing his conviction and the United States is cross-appealing his sentence. This Court should affirm his conviction but vacate his sentence and remand for resentencing.

Simmons' Appeal

1. The evidence was sufficient to prove beyond a reasonable doubt that Simmons violated 18 U.S.C. 242 by sexually assaulting Robinson while acting under color of law. The victim's testimony, which other witnesses corroborated in key respects, is sufficient to prove that Simmons raped Robinson while he was on-duty as a police officer. Although Simmons attacks the victim's credibility, this Court will not second-guess the jury's credibility determinations.

In addition, the evidence was sufficient to prove that Simmons' offense involved "aggravated sexual abuse," a finding that triggers a statutory maximum penalty of life imprisonment or death. Aggravated sexual abuse includes knowingly causing another person to engage in a sexual act by using force against that individual. The victim's testimony supports a finding that Simmons used such force.

2. The district court did not abuse its discretion in admitting the expert testimony of Dr. Louise Fitzgerald concerning the behavior of rape victims and the effect that trauma can have on victims' memories. Her testimony was reliable

under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). She had vast clinical experience treating hundreds of rape victims over a 30-year period, she had personally conducted research into rape victims' behavior, and she had familiarized herself with the extensive body of social science research on rape victim behavior and memory. Her testimony did not interfere with the jury's assessment of witness credibility. Dr. Fitzgerald emphasized that she was not commenting on any witness's credibility and was not taking a position on whether Robinson had been raped.

3. The prosecutor's statement during closing argument that Simmons had "kidnapped" Robinson did not constructively amend the indictment or violate Federal Rule of Evidence 404(b). The prosecutor's remark, which related directly to the allegation of aggravated sexual abuse in Count 1 of the indictment, did not modify an essential element of the offense charged. Nor did the prosecutor's statement implicate Rule 404(b). The remark was not evidence and, at any rate, concerned a matter intrinsic to the crime charged.

4. The district court did not abuse its discretion in admitting evidence that Simmons failed to log in, or otherwise turn over to the police department, the marijuana he seized from the victim the night of the rape. Such evidence was intrinsic to the crime charged and thus did not implicate Rule 404(b).

5. The admission of excerpts from Simmons' state court testimony was not an abuse of discretion. The exculpatory testimony did not violate the hearsay rules. It was not introduced to prove the truth of the matter asserted and thus was not hearsay. Alternatively, the testimony was admissible under Federal Rules of Evidence 801(d)(2)(A) and Rule 804(b)(1). In addition, the state court testimony did not implicate Rule 404(b) because it concerned matters intrinsic to the federal charges. Finally, the admission of the testimony did not implicate the collateral estoppel doctrine and did not violate Simmons' due process rights.

6. The district court did not abuse its discretion by declining to instruct the jury that Simmons had been acquitted in state court. This Court has held that evidence of a prior acquittal is generally inadmissible. There was no basis for departing from that rule in this case. Contrary to Simmons' argument, the prosecutor's inadvertent reference to "the state trial" in questioning a witness did not prejudice Simmons.

Government's Cross-Appeal

7. This Court should remand for resentencing because the district court erred in calculating Simmons' offense level under the Sentencing Guidelines. The judge concluded that his offense level was 41, which corresponded to a sentencing range of 324-405 months. The proper offense level was 43, which triggered a Guidelines sentence of life imprisonment.

The district court refused to impose a two-level enhancement under Sentencing Guidelines § 2A3.1(b)(3)(A), which applies if the victim was "in the custody, care or supervisory control of the defendant." The court reasoned that such an enhancement would be impermissible double-counting because of the four-level adjustment that it had imposed under Guidelines § 2A3.1(b)(5), which applies if the defendant abducted the victim. The court erred as a matter of law. Double-counting is forbidden only if expressly prohibited by the relevant Guidelines provision. The Guidelines contain no such express prohibition against application of both §§ 2A3.1(b)(3)(A) and 2A3.1(b)(5). In any event, application of both sections is not double-counting because each provision accounts for a distinct harm.

8. Simmons' sentence is unreasonable under *United States* v. *Booker*, 125 S. Ct. 738 (2005). If the court had properly calculated Simmons' offense level and adhered to the advisory Guidelines range, he would have received a life sentence. Even under the district court's incorrect calculation of the offense level, the applicable Guidelines range was 324-405 months. Yet the court imposed a term of imprisonment of only 240 months.

The district court's explanation was inadequate to justify a sentence so far below the Guidelines range. In light of the egregiousness of the offense, Simmons' lack of remorse, and his perjury at the state trial, no leniency was warranted.

Moreover, the court's reliance on Simmons' age, a discouraged factor under the Guidelines, warrants close scrutiny because it could undermine Congress's goal of sentencing consistency. Yet the district court offered only a vague and conclusory explanation for the sentence imposed. That explanation does not reflect a meaningful analysis of the sentencing factors in 18 U.S.C. 3553(a) and is not sufficiently specific to justify the magnitude of the leniency granted by the court. Simmons must be resentenced.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO PROVE THAT SIMMONS SEXUALLY ASSAULTED ROBINSON AND THAT HIS CONDUCT INVOLVED "AGGRAVATED SEXUAL ABUSE"

An individual violates 18 U.S.C. 242 if, acting under color of law, he or she willfully deprives another person of a federal right. *United States* v. *Brugman*, 364 F.3d 613, 616 (5th Cir.), cert. denied, 543 U.S. 868 (2004). A Section 242 violation that results in bodily injury is a felony punishable by up to ten years in prison. 18 U.S.C. 242; *United States* v. *Williams*, 343 F.3d 423, 432-434 (5th Cir.), cert. denied, 540 U.S. 1093 (2003). Alternatively, if the Section 242 violation involves "aggravated sexual abuse," the statute authorizes a sentence of life imprisonment or death. 18 U.S.C. 242; *United States* v. *Lucas*, 157 F.3d 998, 1000 n.2 (5th Cir. 1998). In this case, the jury found Simmons guilty of violating

18 U.S.C. 242 by sexually assaulting Robinson and further determined that his offense involved aggravated sexual abuse and resulted in bodily injury to the victim. 1.R.178.

Simmons contends (Br. 8, 12-19) that the evidence was insufficient to show that he sexually assaulted Robinson or that his conduct involved aggravated sexual abuse.[3] As explained below, the evidence was more than sufficient to support the jury's verdict.[4]

A. Standard Of Review

"The standard of review for a claim of insufficient evidence is whether 'a rational trier of fact could have found that the evidence establishes the essential elements of the offense beyond a reasonable doubt.'" *Brugman*, 364 F.3d at 615 (quoting *United States* v. *Villarreal*, 324 F.3d 319, 322 (5th Cir. 2003)). "The court reviews the evidence in the light most favorable to the government with all reasonable inferences and credibility choices to be made in support of the jury's verdict." *Ibid.*

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[3] Although Simmons uses the terms "aggravated sexual assault" (Br. 8, 46) and "aggravated assault" (Br. 18), we assume he is contending that the evidence is insufficient to prove aggravated sexual abuse.

[4] Simmons does not challenge the jury's finding that his offense resulted in bodily injury to the victim under 18 U.S.C. 242. The evidence was sufficient to support that finding. See 5.R.408-409, 412.

B. The Evidence Was Sufficient To Establish That Simmons Committed Sexual Assault

Syreeta Robinson testified that Simmons, an on-duty police officer, took her into custody, drove her to an isolated, wooded area in the middle of the night, and then physically forced his penis into her mouth, anus, and vagina. She further testified that Simmons committed these acts against her will. See pp. 6-7, *supra*.

Simmons does not dispute that if, in fact, he committed the acts alleged by Robinson in her trial testimony, such conduct would constitute a sexual assault. Nor does he deny that such a sexual assault by an on-duty police officer would violate 18 U.S.C. 242.

Instead, Simmons attacks Robinson's credibility. This Court's role, however, is not "to second-guess the determinations of the jury as to the credibility" of witnesses. *United States* v. *Guidry*, 406 F.3d 314, 318 (5th Cir.), cert. denied, 126 S. Ct. 190 (2005). The jury "retains the *sole authority* to 'weigh conflicting evidence and evaluate the credibility of the witnesses.'" *United States* v. *Holmes*, 406 F.3d 337, 351 (5th Cir.) (emphasis added), cert. denied, 126 S. Ct. 375 (2005) (quoting *United States* v. *Millsaps*, 157 F.3d 989, 994 (5th Cir. 1998)).

At any rate, contrary to Simmons' assertion (Br. 12), the government's case did not depend solely on Robinson's testimony. Other witnesses corroborated her allegations. Officer Catchings testified that he served as a lookout while Simmons had sex with Robinson in the woods in the middle of the night, and that after

finishing with her, Simmons brought Robinson (who was sobbing) to Catchings and invited him to have sex with her as well. See pp. 6-8, *supra*. Two other witnesses testified that Robinson, who was distraught and crying, called them in the middle of the night on September 19, 1999, and told them she had been raped by a police officer. Other witnesses confirmed that Robinson visited a rape crisis center a few days later. See pp. 8-9, *supra*.

Simmons' own statements provided additional evidence of guilt. Two Fort Hood police officers testified that Simmons admitted to them in 2004 that he had sex with a woman in, or on the back of, his patrol car while working for the Jackson Police Department and had been fired as a result. See pp. 11-12, *supra*. Simmons also told one of his Fort Hood colleagues that although he might be indicted for having sex with the woman, he believed "he had a 50/50 chance" of "beating" the charge. 7.R.751-752.

These admissions in 2004 demonstrate that Simmons lied under oath at his state trial when he denied ever having sex with Robinson. Such a lie, in turn, is evidence from which the jury could infer guilt. "[A] defendant's exculpatory statements which are shown by other evidence to be false may give rise to an inference of consciousness of guilt." *Villarreal*, 324 F.3d at 325. In addition, "contradictory stories told by a defendant can demonstrate a consciousness of guilt." *United States* v. *Smith*, 135 F.3d 963, 972 (5th Cir. 1998). The federal jury

could thus infer that Simmons lied at his state trial because he had, in fact, raped Robinson.

In combination, this evidence is more than sufficient to prove that Simmons sexually assaulted Robinson. The Court should thus uphold Simmons' conviction under 18 U.S.C. 242.

C. The Evidence Was Sufficient To Prove That Simmons' Conduct Involved "Aggravated Sexual Abuse"

Although 18 U.S.C. 242 does not define "aggravated sexual abuse," the meaning of that term is found in 18 U.S.C. 2241, which is captioned "[a]ggravated sexual abuse." Cf. *Lucas*, 157 F.3d at 1002 (where jail warden was convicted under 18 U.S.C. 242 for sexually assaulting a detainee, his offense was "analogous to a violation of § 2241, because he used actual force against his victim"). Aggravated sexual abuse means "knowingly caus[ing] another person to engage in a sexual act" either by (1) "using force against that other person," or (2) "threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping." 18 U.S.C. 2241(a).

The evidence was sufficient to prove that Simmons committed aggravated sexual abuse by using force against Robinson to cause her to engage in sexual acts. "A defendant uses force within the meaning of § 2241 when he employs restraint sufficient to prevent the victim from escaping the sexual conduct." *Lucas*, 157 F.3d at 1002. In addition, "force can be implied from a disparity in size and

coercive power between the defendant and his victim." *Ibid.* Robinson testified that Simmons forced his penis into her mouth by grabbing her head and pulling it into his crotch and that she was unable to avoid oral contact with his penis because of "the pressure he had on [her] neck." 5.R.404-405, 457. She further testified that, when Simmons made her perform oral sex the second time, she was unable to avoid his penis because he was restraining her by her shoulders. 5.R.406, 442. Robinson also testified that when Simmons penetrated her anally and vaginally, she could not get away from him because she was pinned between his body and the car. 5.R.408-409. See *Lucas*, 157 F.3d at 1002 n.9 (defendant's "pressing the victim against a table and thereby blocking her means of egress suffices to constitute force within the meaning of § 2241"). The disparity in size[5] and coercive power between Simmons (an armed on-duty police officer) and Robinson (a frightened 19-year-old who had been taken into custody and driven into the woods in the middle of the night) further confirms that Simmons' conduct involved use of force.[6]

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[5] Robinson is 5 feet, 4 inches tall and, at the time of the rape, weighed 110 pounds. 5.R.411; 8.R.901. Simmons is 5 feet, 9 inches tall and, at the time of sentencing, weighed about 180 pounds. PSR 7.

[6] In the alternative, the United States produced evidence that Simmons committed aggravated sexual abuse by placing Robinson in fear of "death, serious bodily injury, or kidnapping." 18 U.S.C. 2241(a)(2); see 8.R.908-910.

Finally, Simmons incorrectly suggests (Br. 18) that a showing of "serious bodily injury" is necessary to support a finding of aggravated sexual abuse. No such requirement appears in the language of the statute. If a defendant causes another person to engage in a sexual act "by using force against that other person," 18 U.S.C. 2241(a)(1), such conduct qualifies as "[a]ggravated sexual abuse," 18 U.S.C. 2241, regardless of whether the victim suffers any bodily injury.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EXPERT TESTIMONY OF DR. LOUISE FITZGERALD

Simmons argues (Br. 9, 19-31) that the expert testimony of Dr. Louise Fitzgerald was inadmissible for two reasons. First, he contends that her testimony failed to satisfy the reliability requirement of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which imposes a "gatekeeping" obligation on trial judges who are considering admission of expert testimony under Federal Rule of Evidence 702. *Id.* at 589, 597. Second, Simmons argues that Dr. Fitzgerald's testimony impermissibly usurped the jury's role in assessing witness credibility. Contrary to Simmons' arguments, the district court did not abuse its discretion in admitting Dr. Fitzgerald's testimony.

A. Standard of Review

A decision to admit expert testimony is reviewed for abuse of discretion. *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 152 (1999). Under this deferential standard, a trial court's decision "will not be disturbed on appeal unless manifestly erroneous." *United States* v. *Norris*, 217 F.3d 262, 268 (5th Cir. 2000).

B. Background

Syreeta Robinson, the victim, testified at trial about the rape. 5.R.374-535. During cross-examination, defense counsel vigorously attacked Robinson's credibility on the grounds that she delayed reporting the rape to police (5.R.419-426), initially withheld details about the sexual assault (5.R.479-481), and made inconsistent statements about events that occurred the night of the rape (5.R.431-433, 438-465, 472-473, 485-497).

After Robinson testified, the government presented the expert testimony of Dr. Louise F. Fitzgerald, a licensed psychologist and professor of psychology at the University of Illinois. 9.R.3-5. The district court, noting the requirements of *Daubert* (9.R.18-19), accepted Dr. Fitzgerald as an expert on "rape victim behavior" and "trauma memory as related to rape victims." 9.R.11, 22.

Dr. Fitzgerald testified that rape victims commonly fail to report their rapes to the authorities and that those who do report the crimes often initially withhold details about the sexual assaults. 9.R.13-16, 26, 41-42. She explained that rape

victims may be reluctant to talk about "the more shameful aspects of the experience," and that female victims are less likely to divulge details about the rape if the interviewer is a man. 9.R.26. In addition, Dr. Fitzgerald explained that trauma often disrupts a victim's memory, making it difficult for her to recall details about the traumatic event. 9.R.22-26.

The court permitted Dr. Fitzgerald to "testify as to how the behavior of the victim in this case that is already in evidence compares with her studies of other rape victims." 9.R.11; accord 9.R.28. Dr. Fitzgerald testified that, in her opinion, evidence that had been admitted at trial about Robinson's behavior – such as her delay in notifying the police, her failure to go to the hospital, her reluctance to discuss the anal rape, and her professed difficulty in recounting some details of the attack – was consistent with behavior commonly observed in rape victims. 9.R.29-33. Dr. Fitzgerald emphasized, however, that she was not expressing an opinion on whether Robinson had been raped and was not commenting on the credibility of any witness. 9.R.36, 50-52.

To counter Dr. Fitzgerald's testimony, the defense called Dr. Wood Hiatt, whom the court accepted as an expert in psychiatry. 7.R.798. Although Dr. Hiatt criticized some aspects of Dr. Fitzgerald's testimony, he testified that he "agree[d] with a considerable amount that she said." 7.R.799. Dr. Hiatt did not dispute that social scientists have published studies whose findings are consistent with Dr.

Fitzgerald's conclusions. Rather, Dr. Hiatt criticized the methodology of "[m]ost of the studies in this field" because they include alleged victims whose claims have never been tested in court. 7.R.800-802, 808-811.

C. The Admission Of Dr. Fitzgerald's Testimony Was Not Manifestly Erroneous

1. Other Courts Have Approved The Admission Of Similar Testimony

Appellate courts have repeatedly upheld the admission of expert testimony analogous to that presented by Dr. Fitzgerald in this case. In *Griffin* v. *City of Opa-Locka*, 261 F.3d 1295 (11th Cir. 2001), cert. denied, 535 U.S. 1033 (2002), for example, Dr. Fitzgerald testified as "an expert in sexual harassment, assault, and rape" in a civil suit alleging that an employer had raped and sexually harassed the plaintiff. *Id.* at 1302. In her testimony, Dr. Fitzgerald opined that the plaintiff's "post-assault behavior conformed to that of other assault victims" and explained that "common responses by victims of rape or harassment" included "the failure to file or a delay in filing a formal report or charge." *Ibid.* In upholding the admission of Dr. Fitzgerald's testimony, the Eleventh Circuit rejected the argument that she had impermissibly commented on the plaintiff's "credibility, veracity, capacity for truthful testimony, or whether the events described by [plaintiff], in fact, transpired." *Ibid.*

The Sixth Circuit upheld the admission of similar testimony in *United States* v. *Smith*, 142 F.3d 438, 1998 WL 136564 (6th Cir. Mar. 19, 1998).[7] In that case, a psychologist testified that "she was familiar with reactions of women who have been victims of rape or sexual assault and that women often do not report the incidents immediately." *Id.* at *1. The court found this testimony relevant to rebut the defense argument that the alleged victims "were unreliable because they did not immediately report their rapes and assaults." *Id.* at *2.

Although neither *Griffin* nor *Smith* discussed *Daubert*, other federal courts have upheld the admission of analogous types of testimony under *Daubert*. In *United States* v. *Young*, 316 F.3d 649 (7th Cir. 2002), a nurse testified that the alleged victim's behavior, including the recanting of her accusations, was consistent with patterns of behavior commonly observed among domestic abuse victims. *Id.* at 655-659. The Seventh Circuit concluded that the nurse's work, which focused on victims of rape and domestic violence, was "generally accepted in the mental health profession" (*id.* at 658) and that her methodology was reliable under *Daubert*. *Id.* at 656-659.

Similarly, in *United States* v. *Alzanki*, 54 F.3d 994 (1st Cir. 1995), cert. denied, 516 U.S. 1111 (1996), the First Circuit held that the district court had satisfied its "gatekeeping function" under Rule 702 in admitting testimony from an

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[7] The *Smith* opinion is in the addendum to this brief.

expert who opined that the alleged victim's "behavioral response to the non-sexual abuse administered by the [defendants] was *consistent with the behavior of abuse victims generally*." 54 F.3d at 1005-1006 (citing *Daubert*). The expert in *Alzanki* based her opinion on "her general research and her personal interaction with hundreds" of abuse victims. *Ibid.* The court rejected the argument "that allowing an expert to testify to her empirical findings on the behavioral reactions of abuse victims impermissibly suggests to the jury that the putative victim's allegations of abuse should be believed." *Ibid.*

Although Simmons relies heavily on two state court decisions to attack Dr. Fitzgerald's testimony (see Br. 29-30), he neglects to mention that the highest courts of several states have upheld the admission of expert testimony about the typical behaviors of rape victims, at least where the defense has raised questions about the complaining witness's behavior. See, *e.g.*, *State* v. *Kinney*, 762 A.2d 833, 840-843 (Vt. 2000) (upholding, as reliable under *Daubert*, admission of expert testimony regarding "the behavioral patterns of victims of sexual assault," including testimony that because of the trauma they have suffered, "it is not unusual for victims to delay in reporting a rape"); *People* v. *Coffman*, 96 P.3d 30, 93 (Cal. 2004) (expert testimony about "rape trauma syndrome" "is admissible to rehabilitate the credibility of the complaining witness against a suggestion that her

behavior after the assault – such as a delay in reporting it – was inconsistent with her claim of having been raped"), cert. denied, 125 S. Ct. 2517 (2005).[8]

2. The District Court Did Not Abuse Its Discretion In Finding Dr. Fitzgerald's Testimony Reliable Under Daubert

Under *Daubert*, "the test of reliability is 'flexible,'" and a trial judge enjoys "broad latitude" in deciding "*how* to test an expert's reliability." *Kumho*, 526 U.S. at 141, 152-153. The district court did not abuse its discretion under this flexible standard in determining that Dr. Fitzgerald's testimony was reliable.

A number of factors confirm the reliability of Dr. Fitzgerald's testimony. First, her vast clinical experience working with rape victims, combined with her education and training, provided a sufficient guarantee of reliability under *Daubert*. See *Pipitone* v. *Biomatrix, Inc.*, 288 F.3d 239, 247 (5th Cir. 2002) (finding an expert's testimony reliable under *Daubert* where it was "based mainly on his personal observations, professional experience, education and training"). Dr. Fitzgerald is a professor of psychology at the University of Illinois and a licensed psychologist who has treated hundreds of rape victims over a 30-year career. 9.R.3-5, 34. Her work has allowed her to observe victim behavior first-hand and has given her insight into the effect that rape can have on victims'

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[8] Accord *State* v. *Ali*, 660 A.2d 337, 349-352 (Conn. 1995); *Simmons* v. *State*, 504 N.E.2d 575, 578-579 (Ind. 1987); *State* v. *Gettier*, 438 N.W.2d 1, 4-6 (Iowa 1989); *Commonwealth* v. *Mamay*, 553 N.E.2d 945, 951 (Mass. 1990); *State* v. *White*, 605 S.E.2d 540, 544 (S.C. 2004); *State* v. *Robinson*, 431 N.W.2d 165, 171-173 (Wis. 1988).

memory. 9.R.7, 17, 22. See *Alzanki*, 54 F.3d at 1006 (upholding admission of expert testimony from nurse who had "personal interaction with hundreds of victims").

Second, Dr. Fitzgerald has conducted extensive research on rape victim behavior, including a recent study of rape victims among several thousand women in the military. 9.R.5-6, 12-13, 16, 34, 46. She has published papers on her research (9.R.6-7, 34), another factor supporting a finding of reliability. See *Daubert*, 509 U.S. at 593. Dr. Fitzgerald has personally conducted studies of post-traumatic stress disorder and has supplemented her own studies by reviewing the extensive body of research by other social scientists into rape victim behavior and memory. 9.R.6-7, 12-13, 20-22, 41. Dr. Fitzgerald testified that she found other researchers' studies consistent with her own clinical experience in treating rape victims. 9.R.22.[9]

Third, Dr. Fitzgerald's testimony is consistent with the widely accepted views within the relevant scientific community, another factor weighing heavily in favor of a finding of reliability. See *Daubert*, 509 U.S. at 594; *Pipitone*, 288 F.3d at 246. Social scientists have documented a pattern of "emotional and

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[9] Simmons incorrectly asserts (Br. 24) that Dr. Fitzgerald was unable to cite more than two studies in support of her testimony. In fact, Dr. Fitzgerald stated that she could cite "about 15 or 20" studies to support her testimony about the underreporting of rape. 9.R.43. Moreover, she testified that social scientists had conducted large numbers of studies on victim memory, that she had reviewed most of them, and that they were consistent with her clinical experience. 9.R.20-22.

psychological responses that a person may experience before, during, or after a rape," that "include not immediately reporting the rape or telling anyone of the assault and the inability to form clear and vivid memories of the event." *Beauchamp* v. *City of Noblesville*, 320 F.3d 733, 745 (7th Cir. 2003) (citing journal articles). The court in *Beauchamp* cited such research in explaining that an alleged victim's behavior – including her "failure to immediately notify the police that she had been raped," her initial withholding of certain allegations when questioned by the authorities, and her "inability to recall the details of the crime clearly" – "could be consistent with that of a person who was raped." *Id.* at 739-740, 745. Other courts have recognized the widespread acceptance among social scientists of similar research into rape victim behavior. See, *e.g.*, *Commonwealth* v. *Mamay*, 553 N.E.2d 945, 951 (Mass. 1990); *State* v. *Ali*, 660 A.2d 337, 352 (Conn. 1995); *Kinney*, 762 A.2d at 843.

Among the social science research supporting Dr. Fitzgerald's testimony are studies by the federal Bureau of Justice Statistics. As Dr. Fitzgerald explained, the National Crime Victimization Survey, which the Bureau conducts annually, shows that a majority of rapes are not reported to police. 9.R.41-43; see, *e.g.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey, Criminal Victimization, 2003* at 10 (Sept. 2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cv03.pdf. Simmons' own expert acknowledged

that another study by the Bureau of Justice Statistics had found that 74% of sexual assault victims in the United States did not report their attacks to police. 7.R.809-810; see U.S. Dep't of Justice, Bureau of Justice Statistics, *Selected Findings, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000* at 2 (August 2002), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf.

Simmons nonetheless attacks such social science research on the ground that the studies of rape victim behavior include individuals whose allegations of rape have not been proven in court. Br. 23-25. According to Simmons, "there is no reasonably certain way to know that a rape occurred without going to court." Br. 25. Simmons never challenged the admission of Dr. Fitzgerald's testimony on this basis (see 1.R.133-135; 9.R.3-52) and raised this theory only through the testimony of his own expert after Dr. Fitzgerald had finished testifying. See 7.R.800-803. Consequently, the United States had no reason to anticipate and refute this contention when qualifying Dr. Fitzgerald as an expert.

At any rate, Simmons' attack on these studies is unconvincing. Simmons does not deny that these studies are widely accepted by social scientists. Moreover, his suggestion that studies of crime victims should be limited only to those whose allegations have been proven in court would pose an unrealistic obstacle to social science research. That is particularly true in the case of rape, which historically has been underreported because of stigma, shame, the possibility

of embarrassing publicity, and the fear of reprisal by the rapist. See 9.R.13-15, 41-42; H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 381, 386 (1994) ("Rape is an abominable and repugnant crime, and one that is severely underreported to law enforcement authorities because of its stigmatizing nature."). Because these powerful deterrents inhibit rape victims from entering the criminal justice system, a study that excluded all victims whose allegations have not been proven in court would be grossly underinclusive and, hence, potentially unrepresentative of the overall population of rape victims.

Moreover, neither Simmons nor his expert has offered any basis to believe that fabrications of rape allegations have occurred with sufficient frequency to significantly skew the results of the extensive body of social science research on rape victim behavior. See David McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 B.C. L. Rev. 1143, 1191 & n.324, 1195 & n.343, 1196 & n.347 (1985) (discounting likelihood that false rape allegations are skewing the results, given the nature of the research, the deterrents to reporting rape, and the number of studies and their sample sizes). As Dr. Fitzgerald pointed out, studies have shown that "false allegations of rape are no more common than false allegations of any other crime." 9.R.47; accord McCord, *supra*, 26 B.C. L. Rev. at 1195 n.343. In addition, the large number of studies of rape victim behavior that have occurred over the past 30 years and the consistency

of those studies' findings (see 9.R.42) provide added assurance that false allegations are not undermining the overall reliability of the social science research in this area. See McCord, *supra*, 26 B.C. L. Rev. at 1191 n.324 ("Moreover, even if some individuals who were studied were faking or had some other cause of the symptoms, the size of the groups studied and the number of studies done would make the inclusion of these few individuals statistically unimportant."); *id.* at 1146-1156 (surveying studies and discussing their methodologies); Arthur H. Garrison, *Rape Trauma Syndrome: A Review of Behavioral Science Theory and its Admissibility in Criminal Trials*, 23 Am. J. of Trial Advocacy 591, 604-627 (2000) (discussing studies).

Simmons further contends (Br. 24) that Dr. Fitzgerald's testimony fails the *Daubert* test because her conclusions cannot be empirically tested and have no ascertainable error rate. Even if true, such criticism would not render her testimony inadmissible under *Daubert*.

In *Daubert*, the Supreme Court noted that many factors may bear on the reliability of expert testimony. The Court mentioned, as illustrative examples, five such factors: (1) whether the expert's theory or technique can be or has been tested, (2) whether it has been subjected to peer review and publication, (3) the technique's potential rate of error, (4) the existence and maintenance of standards controlling the technique's operation, and (5) whether the technique or theory has

been generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593-594.

"To show that expert testimony is reliable, however, the government need not satisfy each *Daubert* factor." *United States* v. *Hicks*, 389 F.3d 514, 525 (5th Cir. 2004), cert. denied, 2006 WL 37068 (2006). Indeed, this Court has found expert testimony admissible even though it failed most of the *Daubert* factors, including the testing and error-rate criteria that Simmons highlights. See *Pipitone*, 288 F.3d at 245-246; see also *Norris*, 217 F.3d at 269-271 (testimony admissible under *Daubert* even though "no error rate was known," and "no independent validation" of the expert's test had occurred).

The factors "identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150. "Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others." Fed. R. Evid. 702, advisory committee notes (2000 amendments). For example, "there are social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies." *Jenson* v. *Eveleth Taconite Co.*, 130 F.3d 1287, 1297 (8th Cir. 1997) (holding that psychological evidence should have been admitted under *Daubert*), cert. denied, 524 U.S. 953 (1998). Consequently,

"whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Kumho*, 526 U.S. at 153.

In determining which, if any, of the *Daubert* factors apply here, it is important to recognize the limited scope of Dr. Fitzgerald's expert testimony about rape victim behavior. She did not opine that persons who exhibit certain behaviors have been raped. Simmons' arguments about testing and error rates might have more relevance if Dr. Fitzgerald had made so sweeping a pronouncement. Instead, Dr. Fitzgerald described patterns of behavior that she and other social scientists had observed in rape victims, made clear that not all rape victims exhibit the same behaviors, and emphasized that she was not taking a position on whether Robinson had been raped. 9.R.36, 41, 50-52.

Simmons also contends that Dr. Fitzgerald's testimony is unreliable because the fact that "people act in similar ways does not mean that they have experienced the same thing." Br. 22. But the logic of Simmons' argument would require exclusion of a wide variety of expert testimony that plainly satisfies the *Daubert* reliability requirement. For example, *Daubert* would not prohibit a cardiologist with years of experience in treating heart attack victims from testifying that certain symptoms, such as chest pain, are commonly observed in individuals who are suffering a heart attack. The fact that some individuals who experience chest pain

are not having a heart attack would not make the cardiologist's testimony any less reliable.

At bottom, Simmons' attacks on Dr. Fitzgerald's testimony go to the weight, not the admissibility, of the evidence. "It bears reminding that 'the trial court's role as gatekeeper [under *Daubert*] is not intended to serve as a replacement for the adversary system.'" *Pipitone*, 288 F.3d at 250. The defense took full advantage of the adversary system by vigorously cross-examining Dr. Fitzgerald and presenting testimony from its own expert. Simmons thus had ample opportunity to highlight for the jury any weaknesses he perceived in Dr. Fitzgerald's testimony. Especially under these circumstances, the district court's admission of the testimony was not an abuse of discretion.

3. Dr. Fitzgerald's Testimony Did Not Impermissibly Intrude On The Jury's Assessment Of Witness Credibility

Simmons argues that Dr. Fitzgerald's testimony was, in effect, "a direct comment upon the veracity of the accuser." Br. 26. That argument is meritless. Dr. Fitzgerald emphasized that she was not commenting on the credibility of any witness and was not taking a position on whether Robinson had been raped. 9.R.36, 50-52.

This Court's decision in *Skidmore* v. *Precision Printing & Pkg., Inc.*, 188 F.3d 606 (5th Cir. 1999), illustrates that Dr. Fitzgerald's testimony did not come close to impermissibly commenting on Robinson's credibility. In *Skidmore*, an

expert witness testified that the plaintiff suffered post-traumatic stress disorder and depression as a result of her sexual harassment by the defendant. The expert further testified that "he did not think [the plaintiff] had lied to him or fabricated her psychiatric symptoms" and "opined that her symptoms and recollections appeared genuine and that he felt he had not been 'duped' by her." *Id.* at 618. This Court rejected the argument that such testimony impermissibly commented on the plaintiff's credibility. *Ibid.* Given how restrained Dr. Fitzgerald's testimony was in comparison to that of the expert in *Skidmore*, this Court's holding in *Skidmore* necessarily compels the conclusion that Dr. Fitzgerald did not usurp the jury's responsibility for gauging witness credibility.[10]

Finally, the district court's jury instructions helped ensure that the expert testimony would not invade the province of the jurors. The court instructed jurors that they were free to accept or reject Dr. Fitzgerald's and Dr. Hiatt's testimony. 8.R.877; 9.R.12. In addition, the court instructed the jury that "[t]he testimony of a witness may be discredited * * * by evidence that at some other time the witness said or did something or failed to say or do something which is inconsistent with the testimony the witness gave at this trial." 8.R.875. It is clear from these instructions that, notwithstanding the expert testimony, the jury could consider

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[10] Simmons also suggests (Br. 26-27) that Dr. Fitzgerald's testimony was character evidence prohibited by Federal Rule of Evidence 404(a). Dr. Fitzgerald never commented on anyone's character, and thus Rule 404(a) is inapposite.

inconsistencies and omissions in Robinson's statements in assessing her credibility.

III

THE PROSECUTOR'S REMARK DURING CLOSING ARGUMENT THAT ROBINSON HAD BEEN KIDNAPPED IS NOT REVERSIBLE ERROR

Simmons contends (Br. 32-34) that the prosecutor constructively amended the indictment and violated Federal Rule of Evidence 404(b) when she asserted during closing argument that defendant had "kidnapped" Robinson by taking her to the isolated wooded area to rape her. His arguments are meritless and, in any event, do not demonstrate that reversible error occurred.

A. Standard Of Review

Attorneys are afforded "wide latitude" when presenting jury argument, *United States* v. *Holmes*, 406 F.3d 337, 356 (5th Cir.), cert. denied, 126 S. Ct. 375 (2005), and "prosecutorial remarks alone rarely are sufficient to warrant reversal." *United States* v. *Ramirez-Velasquez*, 322 F.3d 868, 874 (5th Cir.), cert. denied, 540 U.S. 840 (2003). If the defendant preserved an objection to the prosecutor's argument, this Court will determine whether the prosecutor made an improper remark and, if so, whether it affected defendant's "substantial rights." *United States* v. *Wise*, 221 F.3d 140, 152 (5th Cir. 2000), cert. denied, 532 U.S. 959 (2001). "For an error to have affected substantial rights, 'it means that the error

must have been prejudicial: [i]t must have affected the outcome of the district court proceedings.'" *United States* v. *Saldana*, 427 F.3d 298, 314-315 (5th Cir.) (quoting *United States* v. *Olano*, 507 U.S. 725, 734 (1993)), cert. denied, 126 S. Ct. 810 (2005).

Although Simmons argued below that the prosecutor's remark violated Rule 404(b), he failed to object on the ground that it constructively amended the indictment. See 8.R.909. Consequently, with regard to the constructive amendment issue, the "already narrow standard of review is further constrained by [Simmons'] failure to object; he bears the burden of demonstrating that the prosecutor's statements constitute plain error." *Holmes*, 406 F.3d at 356; see *United States* v. *Delgado*, 256 F.3d 264, 278 (5th Cir. 2001) (applying plain error review to constructive amendment claim raised for first time on appeal).

B. The Prosecutor's Remark Was Not Improper And, At Any Rate, Did Not Affect Simmons' Substantial Rights

The indictment alleged that Simmons' violation of 18 U.S.C. 242 involved "aggravated sexual abuse." 1.R.2. The district court properly instructed the jury that aggravated sexual abuse means "knowingly causing another person to engage in a sexual act" either "by using force against that other person" or "by placing that other person in fear that any person will be subjected to death, serious bodily injury or kidnapping." 8.R.885; see 18 U.S.C. 2241(a).

It was in this context that the prosecutor made the statement about kidnapping. She argued that the government had proved "aggravated sexual abuse" by demonstrating not only that Simmons had used force but also that he had placed Robinson "in fear of death, serious bodily injury or kidnapping." 8.R.908. As proof of such fear, the prosecutor asserted that the evidence supported a finding that Simmons "kidnapped" Robinson when he took her to the remote wooded area, and that, by doing so, he had "put her in a place where she very reasonably believed she might be shot or killed." 8.R.908-910. As the district court held, the assertion that Robinson had been kidnapped was a "fair inference" from the evidence presented at trial. 8.R.909.

The prosecutor's remark about kidnapping did not constructively amend the indictment. "[A] constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." *Delgado*, 256 F.3d at 278 (concluding that prosecutor's closing argument did not result in a constructive amendment) (quoting *United States* v. *Parkhill*, 775 F.2d 612, 615 (5th Cir. 1985)). Because the prosecutor's statement related directly to the indictment's allegation of aggravated sexual abuse, the remark did not modify an essential element of the offense charged.

Nor did the prosecutor's remark violate Rule 404(b). Because "the arguments of counsel are not evidence," *United States* v. *Fierro*, 38 F.3d 761, 771 (5th Cir. 1994), cert. denied, 514 U.S. 1051 (1995), the prosecutor's remark was not "*[e]vidence* of other crimes, wrongs, or acts." Fed. R. Evid. 404(b) (emphasis added). At any rate, "evidence which is intrinsic to the crime charged does not implicate Rule 404(b)." *United States* v. *Powers*, 168 F.3d 741, 749 (5th Cir.), cert. denied, 528 U.S. 945 (1999). "Evidence qualifies as intrinsic when it is 'inextricably intertwined' with evidence of the crime charged, is a 'necessary preliminary' to the crime charged, or both acts are part of a 'single criminal episode.'" *United States* v. *Walters*, 351 F.3d 159, 166 n.2 (5th Cir. 2003) (quoting *United States* v. *Williams*, 900 F.2d 823, 825 (5th Cir. 1990)). The prosecutor's statement about kidnapping involved a matter intrinsic to the crime because (1) it was relevant to whether Simmons committed aggravated sexual abuse, one of the allegations of the indictment, and (2) it explained how Robinson ended up at the remote site where she was raped. Consequently, Simmons has failed to show that the prosecutor's remark was improper.

At any rate, the prosecutor's remark did not affect Simmons' substantial rights. The judge instructed the jury that attorneys' arguments are not evidence and not binding. 8.R.872. The jurors thus should have understood that the prosecutor was simply drawing an inference from the evidence when she argued

that Robinson had been kidnapped, and that, as the factfinders, they were not required to accept that inference.

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT SIMMONS FAILED TO LOG IN THE MARIJUANA HE SEIZED FROM THE VICTIM THE NIGHT OF THE RAPE

Simmons incorrectly asserts (Br. 35-37) that the government violated Federal Rule of Evidence 404(b) by introducing evidence that he failed to log in, or otherwise turn over to the police department, the marijuana he had seized the night of the rape. The district court concluded that this evidence was "intrinsic" to the crime charged and thus did not implicate Rule 404(b). 4.R.22. That ruling was not an abuse of discretion.

A. Standard Of Review

Admission of evidence is reviewed for abuse of discretion. *United States* v. *Sudeen*, No. 04-30067, __ F.3d __, 2005 WL 3525673, at *3 (5th Cir. Dec. 23, 2005). The same standard applies in reviewing a district judge's determination that evidence is "intrinsic" and hence not covered by Rule 404(b). *Ibid.*

B. The Marijuana Evidence Was Intrinsic To The Crime Charged And Thus Did Not Implicate Rule 404(b)

As previously explained, evidence that is intrinsic to the crime charged does not implicate Rule 404(b). See p. 45, *supra*. Simmons' failure to log in the

marijuana seized from the victim the night of the rape qualifies as intrinsic evidence for several reasons.

First, this evidence was part of the narrative about Simmons' conduct between the time of the traffic stop and the time of the rape. Contrary to defendant's suggestion that the marijuana had no connection with Robinson (see Br. 37), Simmons had, in fact, seized it *from the victim* at the traffic stop. Br. 4; 5.R.382, 390. Whether Simmons stopped at the precinct station shortly after the traffic stop to log in the marijuana was relevant to explain where he was and what he was doing after he took Robinson into custody.

Second, Simmons' failure to log in the marijuana is evidence of his consciousness of guilt. At his state trial, he claimed that after the traffic stop he went to the precinct station, logged in the marijuana and deposited it in the station's evidence mailbox, and then drove to police headquarters and spent considerable time there filing affidavits while Officer Catchings booked Robinson's boyfriend. At the federal trial, the United States presented evidence that, contrary to Simmons' claims, he never logged in or otherwise turned over the marijuana to the police department and did not file the affidavits until more than two hours after he claimed to have been at police headquarters. See pp. 12-13, *supra*. The jury could reasonably infer that, by fabricating a false account of his activities after the traffic stop, Simmons was trying to manufacture an alibi to

cover up his crime. See *United States* v. *Villarreal*, 324 F.3d 319, 325 (5th Cir. 2003) (defendant's false statements "may give rise to an inference of consciousness of guilt").

Third, the evidence that Simmons did not log in the marijuana at the precinct station corroborated the victim's testimony that (contrary to Simmons' state trial testimony), he never stopped at the precinct station while she was in his custody. 4.R.19-20; 5.R.505, 515. The accuracy of the victim's account of what happened after the traffic stop could affect her credibility in the eyes of the jury.

Finally, the marijuana evidence is intrinsic to the crime charged because it suggests that Simmons was trying to deflect the Police Department's attention away from Robinson to reduce the risk that his crime would be discovered. If Simmons had logged in the marijuana seized from the victim, Robinson might have been charged with drug possession or at least questioned by the authorities. The jury could reasonably infer that Simmons feared that if Robinson were charged or interrogated, she might reveal to the authorities that he had raped her.

For these reasons, the marijuana evidence is inextricably intertwined with the sexual assault charge against Simmons and, hence, does not implicate Rule 404(b). The district court thus did not abuse its discretion in admitting this evidence.

V

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE EXCERPTS OF SIMMONS' STATE TRIAL TESTIMONY

The district judge admitted into evidence excerpts of Simmons' testimony from his state trial. 6.R.615; GX 48(c); 8.R.986-987. Simmons contends (Br. 38-41) that the admission of this testimony violated the hearsay rules, Federal Rule of Evidence 404(b), and his Fifth Amendment rights. Contrary to Simmons' arguments, the district court did not abuse its discretion in admitting this evidence.

A. Standard Of Review

Admission of evidence is reviewed for abuse of discretion. See p. 46, *supra*.

B. The Hearsay Rules Did Not Bar Admission Of Simmons' State Court Testimony

The district court ruled that Simmons' state court testimony was admissible under Federal Rule of Evidence 801(d)(2)(A). 4.R.13. Simmons contends (Br. 38-40) that the testimony did not qualify for admission under Rule 801(d)(2)(A) because it was exculpatory. Simmons is mistaken about the requirements of Rule 801(d)(2)(A), but the Court need not decide the issue because his exculpatory state court testimony was not hearsay under Rule 801(c) and, alternatively, was admissible under Rule 804(b)(1).

Simmons' exculpatory testimony was not hearsay because the United States did not introduce it "to prove the truth of the matter asserted." Fed. R. Evid.

801(c). To the contrary, the government's theory was that Simmons' exculpatory state trial testimony was false and thus evidence of his consciousness of guilt. See 8.R.902-906. Out-of-court declarations are not hearsay where "the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false." *Anderson* v. *United States*, 417 U.S. 211, 219-220 (1974) (footnote omitted); accord *United States* v. *Moore*, 748 F.2d 246, 248-249 (5th Cir. 1984).

Even if Simmons' state court testimony were hearsay, it was nonetheless admissible as "[f]ormer testimony" of an "unavailable" declarant. Fed. R. Evid. 804(b)(1). Simmons was "unavailable" to the government as a witness for purposes of Rule 804 because he exercised his Fifth Amendment right not to testify at his federal trial. See *United States* v. *Mann*, 161 F.3d 840, 860-861 & n.56 (5th Cir. 1998), cert. denied, 526 U.S. 1117 (1999); *United States* v. *Thomas*, 571 F.2d 285, 288 (5th Cir. 1978).

At any rate, the district court correctly concluded that Simmons' state court testimony was admissible under Rule 801(d)(2), which is captioned "Admission by party-opponent." That rule provides that "[a] statement is not hearsay if * * * [t]he statement is offered against a party and is * * * the party's own statement, in either an individual or a representative capacity." Fed. R. Evid. 801(d)(2)(A).

An "[a]dmission" under Rule 801(d)(2) is not limited to inculpatory statements. In *United States* v. *Meyer*, 733 F.2d 362 (5th Cir. 1984), this Court held that the government could permissibly introduce a defendant's "[f]alse *exculpatory* statements" to prove his consciousness of guilt, concluding that such statements "may be used against him as an *admission* and are *not hearsay*." *Id.* at 363 & n.1 (emphasis added); accord *United States* v. *Coppola*, 788 F.2d 303, 306 (5th Cir. 1986) (concluding that a co-defendant's "relatively innocuous statements," none of which constituted a confession or directly inculpated him, were properly admitted against him "as an admission of a party opponent under Fed. R. Evid. 801(d)(2)(A)"). *Meyer* and *Coppola* are consistent with the holdings of other circuits that statements need not be incriminating or against the declarant's interest to qualify as admissions under Rule 801(d)(2)(A). See, *e.g.*, *United States* v. *McDaniel*, 398 F.3d 540, 545 n.2 (6th Cir. 2005) (defendant's "proposed distinction between inculpatory and exculpatory statements appears to confuse Rule 801(d)(2) with Federal Rule of Evidence 804(b)(3)"); *United States* v. *McGee*, 189 F.3d 626, 631-632 (7th Cir. 1999) (surveying caselaw).

In support of his argument, Simmons relies on *United States* v. *Simmons*, 374 F.3d 313 (5th Cir. 2004), which stated that "to the extent they are *incriminatory*, the [defendant's own] statements are also admissible under Rule 801(d)(2)(A)." *Id.* at 321 (emphasis added). That passage, however, is dictum.

Although not cited by Simmons, the opinion in *United States* v. *Arce*, 997 F.2d 1123 (5th Cir. 1993), also contains language that could be read to support his position. In holding that the district judge erred in admitting testimony about a defendant's out-of-court statements, this Court stated in *Arce*: "The court's other basis for admitting [the] testimony, that the conversation amounted to a declaration against interest under Rule 801(d)(2)(A), is also unpersuasive. If true, the statements would not expose [defendant] to any further civil or criminal liability." *Id.* at 1129.[11]

Arce, however, is not binding on this Court. To the extent they conflict, this Court's decisions in *Meyer* and *Coppola* trump the later panel opinion in *Arce* and the subsequent dictum in *Simmons*. "[W]here two previous holdings or lines of precedent conflict, 'the earlier opinion controls and is the binding precedent in the circuit.'" *United States* v. *Wheeler*, 322 F.3d 823, 828 n.1 (5th Cir. 2003) (quoting *Billiot* v. *Puckett*, 135 F.3d 311, 316 (5th Cir. 1998)).

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[11] *Arce* apparently confused Rule 801(d)(2)(A) with Rule 804(b)(3) ("Statement against interest"). See *McDaniel*, 398 F.3d at 545 n.2 (noting confusion between the two rules).

C. Simmons' State Court Testimony Does Not Implicate Rule 404(b)

As previously explained, evidence that is intrinsic to the crime charged does not implicate Rule 404(b). See p. 45, *supra*. Simmons' state court testimony concerned the allegations that he had raped Robinson, the very conduct for which he was charged in federal court. That testimony was thus intrinsic evidence.

D. The Admission of Simmons' State Court Testimony Did Not Violate His Fifth Amendment Rights

Relying on *Dowling* v. *United States*, 493 U.S. 342 (1990), Simmons argues (Br. 10, 40-41) that the district court violated his Fifth Amendment rights by introducing his state court testimony without also advising the federal jury that he had been acquitted of the state charges. Simmons invokes the doctrine of collateral estoppel, as well as the due process guarantee of fundamental fairness. Admission of Simmons' state court testimony did not violate either Fifth Amendment protection.

Collateral estoppel, which is "embodied in the Double Jeopardy Clause," requires that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the *same parties* in any future lawsuit." *United States* v. *Angleton*, 314 F.3d 767, 776 (5th Cir. 2002) (quoting *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970)), cert. denied, 538 U.S. 946

(2003). That doctrine is inapplicable here because the United States and the State of Mississippi, "as separate sovereigns, are not the 'same party.'" *Ibid.*[12]

Moreover, Simmons' due process argument is foreclosed by *United States* v. *De La Rosa*, 171 F.3d 215 (5th Cir. 1999). As this Court explained, "*Dowling* does not require that the jury be told of an acquittal," even where "evidence of acquitted conduct is introduced" against the defendant. *Id.* at 220.

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO ADVISE THE JURY THAT SIMMONS HAD BEEN ACQUITTED IN STATE COURT

In ruling on a motion *in limine*, the district court directed the parties that, when the jury was present, they should refer to Simmons' state court trial as "prior proceedings." 3.R.5. During redirect examination of the victim, the prosecutor inadvertently referred to "the state trial" in one of her questions. 5.R.523; see 6.R.587; 1.R.211. Defense counsel did not object at the time. The following day, however, defense counsel argued that the prosecutor's reference to "the state trial" required either a mistrial or a jury instruction that Simmons had been acquitted in

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[12] By contrast, the defendant in *Dowling* was twice tried by the *same sovereign*. See 493 U.S. at 351. The Government of the Virgin Islands, which prosecuted Dowling at the first trial, see *United States* v. *Dowling*, 855 F.2d 114, 120 (3d Cir. 1988), is considered the same sovereign as the United States, which handled the second prosecution. See *United States* v. *Hodge*, 211 F.3d 74, 78 (3d Cir. 2000).

state court. 6.R.543-544, 587-588. Contrary to Simmons' argument (Br. 41-46), the district court did not abuse its discretion in refusing to give such an instruction.

A. Standard Of Review

This Court reviews for abuse of discretion a trial judge's refusal to give a proposed jury instruction. *United States* v. *De La Rosa*, 171 F.3d 215, 219 (5th Cir. 1999). The same standard applies in reviewing a district court's determination that a prosecutor's violation of a motion *in limine* ruling did not prejudice the defendant. *United States* v. *Morrow*, 177 F.3d 272, 298 (5th Cir.), cert. denied, 528 U.S. 932 (1999). "The district judge's assessment of the prejudicial effect [of a prosecutor's statement] carries considerable weight." *Ibid.*

B. The District Court Did Not Abuse Its Discretion

This Court has "squarely held that, as a general matter, a trial court does not abuse its discretion in excluding evidence of a prior acquittal on a related charge." *De La Rosa*, 171 F.3d at 219. "[E]vidence of a prior acquittal is not relevant because it does not prove innocence but rather merely indicates that the prior prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime." *Ibid.* In addition, "a judgment of acquittal is hearsay" and does not qualify for an exception to the hearsay rules. *Ibid.* "And, even if not for these barriers to admissibility, evidence of a prior acquittal will often be excludable under Fed. R. Evid. 403, because its probative value likely will be

'substantially outweighed by the danger of prejudice, confusion of the issues, or misleading the jury.'" *Id.* at 219-220 (quoting *United States* v. *Kerley*, 648 F.2d 299, 301 (5th Cir. 1981)).

Although Simmons concedes that evidence of a prior acquittal is generally inadmissible (Br. 44), he nonetheless argues that the doctrine of "curative admissibility" (Br. 45) required the district court to notify the jury of his acquittal in order to counteract the prosecutor's reference to "the state trial." Simmons does not identify, and we are unaware of, any case that has required such an instruction under analogous circumstances.

The prosecutor's isolated reference to "the state trial" did not prejudice Simmons. First, it is doubtful that the remark attracted much, if any, attention from the jury. Indeed, defense counsel acknowledged that she did not even notice the prosecutor's remark when it was made. See 6.R.543-544. A curative instruction thus risked focusing the jurors' attention on something that likely had gone unnoticed.

Second, the prosecutor's remark, if noticed at all, revealed little to the jurors that they did not already know from defense counsel's earlier cross-examination of the victim. Although defense counsel did not use the word "trial," her questions left little doubt that Robinson had testified about the rape at an earlier trial:

> Q. [By defense counsel:] Ms. Robinson, do you remember being *in a courtroom* at another proceeding *where you had to give testimony just like you're doing now*?
>
> A. Yes, ma'am.
>
> * * * * *
>
> Q. [By defense counsel:] That's right. And when you testified about this at this *court proceeding* in November of 2001, you were under oath *just like you are right now*, weren't you, to tell the truth?
>
> A. [By Robinson:] Yes, ma'am.
>
> Q. You raised your hand and *did everything just like you did here*.
>
> A. Yes, ma'am.

5.R.489, 493; see also 5.R.495 (defense counsel's reference to Robinson's testimony "in court in November of 2001 under oath"). By emphasizing that Robinson had testified previously "in court," "in a courtroom," "under oath," and under conditions "just like" those at the federal trial, defense counsel left little doubt that a trial had already taken place.

Third, even if the jurors noticed the prosecutor's reference to a "state trial," they would not necessarily have concluded that *Simmons* was the defendant in that trial. Jurors may have inferred that the prosecutor was referring to the state trial of Officer Catchings. That is a plausible inference because, prior to the prosecutor's remark, defense counsel had suggested that Catchings had previously stood trial:

> [Defense counsel:] And you were a defendant at one point. Correct?
>
> [Catchings:] Yes.

5.R.318.

Fourth, even if the jurors inferred that Simmons had previously been tried, they would not necessarily have concluded that he had been convicted. They may well have inferred the opposite, on the theory that the federal government would be unlikely to prosecute Simmons for sexually assaulting Robinson if he had already been convicted of that offense in state court. Simmons asserts (Br. 45-46), however, that the jurors were likely to believe he had been convicted because they knew he had been fired from the police department.[13] Jurors would not necessarily have drawn such an inference. They might have inferred, instead, that Simmons was fired because he had been indicted on the *federal* charges or because the police department had uncovered his misconduct in its own investigation. At any rate, the defense was allowed to elicit testimony that Simmons "received his back pay in full from the City of Jackson" (6.R.608), evidence designed to suggest that he had been exonerated of the accusations that prompted the firing. See 6.R.606, 608.

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[13] The government introduced evidence of Simmons' firing to provide context for the Fort Hood police officers' testimony that Simmons admitted having sex with Robinson. See 1.R.212-213; 6.R.604-606. He made those admissions to the Fort Hood officers in explaining why the Jackson Police Department had fired him. See pp. 11-12, *supra*.

But even if the prosecutor's remark had created some risk of prejudice, it was "substantially outweighed" by the dangers inherent in telling the jury about the prior acquittal. See *De La Rosa*, 171 F.3d at 219-220. News of the acquittal would likely have confused and misled the federal jury because the state jurors who found Simmons not guilty did not have the benefit of key evidence that the United States introduced at the federal trial, including the testimony of (1) Officer Catchings, who verified that Simmons took Robinson to the woods in the middle of the night and had sex with her and that the victim was sobbing immediately afterwards, (2) the Fort Hood police officers, to whom Simmons admitted having sex with Robinson; and (3) the two women to whom Robinson reported the rape shortly after it occurred. See 1.R.27-28.

Therefore, this Court should not disturb the district court's decision not to advise the jury about Simmons' acquittal. As this Court has emphasized, the trial judge "is in a far better position than an appellate court to evaluate the prejudice flowing" from a prosecutor's remark "and to determine the most effective response to ensure a fair trial." *Johnson* v. *Ford Motor Co.*, 988 F.2d 573, 582 (5th Cir. 1993) (quoting *Mills* v. *Beech Aircraft Corp.*, 886 F.2d 758, 765 (5th Cir. 1989)).

GOVERNMENT'S CROSS-APPEAL

VII

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN REFUSING TO IMPOSE A TWO-LEVEL ENHANCEMENT UNDER SENTENCING GUIDELINES § 2A3.1(B)(3)(A), WHICH APPLIES IF THE VICTIM WAS "IN THE CUSTODY, CARE, OR SUPERVISORY CONTROL OF THE DEFENDANT"

Although the Sentencing Guidelines are now advisory, *United States* v. *Booker*, 125 S. Ct. 738 (2005), a district judge must still "arrive at the proper guideline calculation before deciding which sentence to impose." *United States* v. *Angeles-Mendoza*, 407 F.3d 742, 754 (5th Cir. 2005). Similarly, in reviewing a sentence, this Court must first consider the district court's calculation of the Guidelines range before analyzing whether the sentence imposed is reasonable under *Booker*. *United States* v. *Vargas-Garcia*, No. 05-10474, __ F.3d __, 2005 WL 3489542, at *3 (5th Cir. Dec. 21, 2005). If this Court determines that "the sentence was * * * imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings." *United States* v. *Villegas*, 404 F.3d 355, 362 (5th Cir. 2005) (quoting 18 U.S.C. 3742(f)(1)).

The district court erred in calculating Simmons' offense level under the Sentencing Guidelines. The court held that imposing the two-level enhancement under Guideline § 2A3.1(b)(3)(A), which applies if the victim was "in the custody,

care, or supervisory control of the defendant," would be impermissible double-counting in light of the four-level "abduct[ion]" adjustment that the court imposed under § 2A3.1(b)(5). 10.R.33. Contrary to the district court's holding, applying both §§ 2A3.1(b)(3)(A) and 2A3.1(b)(5) in this case is not impermissible double-counting. That error in calculating Simmons' offense level requires a remand for resentencing.

A. Standard Of Review

Whether imposition of a sentencing enhancement is impermissible double-counting is a legal question reviewed *de novo*. *United States* v. *Jones*, 145 F.3d 736, 737 (5th Cir.), cert. denied, 525 U.S. 988 (1998). "Even after *Booker*, this court reviews de novo the interpretation and application of the federal sentencing guidelines." *United States* v. *Henry*, 417 F.3d 493, 494 (5th Cir.), cert. denied, 126 S. Ct. 673 (2005).

B. Imposing Both A Two-Level Enhancement Under Section 2A3.1(b)(3)(A) And A Four-Level Enhancement Under Section 2A3.1(b)(5) Is Not Impermissible Double-Counting

"[D]ouble-counting is prohibited only if it is specifically forbidden by the particular guideline at issue." *United States* v. *Calbat*, 266 F.3d 358, 364 (5th Cir. 2001). "The prohibition must be in express language." *Ibid.*

With regard to § 2A3.1(b)(3)(A), the Guidelines contain only one prohibition against double-counting: "If the adjustment in subsection (b)(3)

applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill)." Guidelines § 2A3.1 comment. (n.3) (1998). The Guidelines do not likewise prohibit application of both §§ 2A3.1(b)(3)(A) and 2A3.1(b)(5).

In any event, application of both §§ 2A3.1(b)(3) and 2A3.1(b)(5) is not double-counting because each provision accounts for a distinct harm. The enhancement for a crime committed while the victim is in the custody, care, or supervisory control of the defendant is designed to hold the defendant liable for violating a position of trust and to account for the increased risk of psychological damage that can occur when the victim is harmed by someone he or she trusts or should be able to trust. See Sentencing Guidelines § 2A3.1 comment. (backg'd) (1998) ("Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage."). By contrast, an enhancement under § 2A3.1(b)(5) is a recognition that "[a]bduction increases the gravity of sexual assault or other crimes because the perpetrator's ability to isolate the victim increases the likelihood that the victim will be harmed." *United States* v. *Hefferon*, 314 F.3d 211, 226 (5th Cir. 2002) (quoting *United States* v. *Saknikent,* 30 F.3d 1012, 1013 (8th Cir.1994)).

Consequently, the district court erred in refusing to impose the two-level enhancement under § 2A3.1(b)(3). Absent this error, Simmons' offense level

would have been 43, which translates into a Guidelines sentence of life imprisonment. See pp. 13-14, *supra*.

VIII

THE SENTENCE IMPOSED WAS UNREASONABLE IN LIGHT OF THE EGREGIOUSNESS OF THE OFFENSE, SIMMONS' PERJURY, HIS LACK OF REMORSE, AND THE INADEQUACY OF THE DISTRICT COURT'S EXPLANATION FOR CHOOSING A SENTENCE SO FAR BELOW THE GUIDELINES RANGE

Simmons would have received a life sentence had the court properly calculated his offense level under the Sentencing Guidelines and then adhered to the advisory Guidelines range. Even under the district court's incorrect calculation, the applicable Guidelines range would have been 324-405 months. 10.R.34. Instead, the court sentenced Simmons to a prison term of 240 months.

Even if the district court's calculation of the Guidelines offense level was correct, its decision to impose a sentence 84 months shorter than the bottom end of the corresponding Guidelines range was unreasonable under *United States* v. *Booker*, 125 S. Ct. 738 (2005). The sentence imposed was particularly unreasonable in light of the egregiousness of the offense, Simmons' perjury, his lack of remorse, and the court's failure to offer anything more than a vague and conclusory explanation for choosing a sentence so far below the Guidelines range. This Court should thus vacate Simmons' sentence and remand for resentencing.

A. Standard Of Review

Where, as here, the district judge sentenced defendant under the advisory scheme mandated by *Booker*, this Court will review the sentence for "reasonableness." *Booker*, 125 S. Ct. at 765, 767; *United States* v. *Smith*, 417 F.3d 483, 490 (5th Cir.), cert. denied, 126 S. Ct. 713 (2005).

B. The Sentence Is Unreasonable

The Supreme Court did not define "reasonableness," but stated that the factors listed in 18 U.S.C. 3553(a) "will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Booker*, 125 S. Ct. at 766. These factors are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;

> (4) the kinds of sentence and the sentencing range established [under the Sentencing Guidelines];
>
> (5) any pertinent policy statement [issued by the Sentencing Commission, as amended by Congress];
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. 3553(a).

After *Booker*, "a sentence within a properly calculated Guideline range is presumptively reasonable." *United States* v. *Alonzo*, No. 05-20130, __ F.3d __, 2006 WL 39119, at *3 (5th Cir. Jan. 9, 2006). Thus, "[w]hen the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required." *United States* v. *Mares*, 402 F.3d 511, 519 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005).

But this Court requires a more thorough explanation where, as here, the judge imposes a sentence outside the Guideline range. "[W]hen the judge elects to give a non-Guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant." *Mares*, 402 F.3d at 519 (footnote omitted). The judge's explanation "should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, his

criminal history, relevant conduct or other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable." *Ibid.* This requirement is consistent with the statutory mandate that a court articulate specific reasons for imposing a sentence outside the Guidelines range. 18 U.S.C. 3553(c)(2); see *Mares*, 402 F.3d at 519 n.8.

In addition, "the farther the judge's sentence departs from the guidelines sentence (in either direction – that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005). This approach is consistent with Congress's overarching goal of eliminating sentencing disparities for similarly situated defendants. See 18 U.S.C. 3553(a)(6). The greater the variance from the Guidelines, the more risk there is that the sentence will contribute to unwarranted sentencing disparities. This increased risk, in turn, justifies imposing a more stringent burden on the judge to explain why a sentence promotes the goals of Section 3553(a).

A detailed explanation is particularly important where, as here, the district judge has relied on a factor that the Sentencing Guidelines discourage courts from considering. The district judge focused on Simmons' age – 48 years old at the time of sentencing (10.R.36) – even though the Guidelines discourage reliance on age

as the basis for a downward departure. Guidelines § 5H1.1 (1998) ("Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.").

Prior to *Booker*, courts typically rejected the type of age-based rationale used here – *i.e.*, that a departure was justified because the Guidelines sentence would supposedly amount to a life sentence, given the defendant's current age and life expectancy. See, *e.g.*, *United States* v. *Fierro*, 38 F.3d 761 (5th Cir. 1994), cert. denied, 514 U.S. 1051 (1995). In *Fierro*, the defendant's offense level of 44 translated into a Guidelines sentence of life imprisonment, but the trial judge departed downward, concluding that "a 20-year sentence was long enough" because the defendant "would be 64 or 65 when he got out of prison." *Id.* at 775. The district judge in *Fierro* reasoned that for defendants in their 40s, "20 years is life as far as I'm concerned." *Ibid*. This Court reversed, holding that under § 5H1.1, "a defendant's age is an improper basis for departure unless the defendant is 'elderly and infirm' at the time of sentencing." *Ibid.* See also *United States* v. *Doe*, 921 F.2d 340, 347 (1st Cir. 1990) (rejecting argument that downward departure was warranted because 30-year prison term for the 54-year-old defendant would amount to a life sentence).

Although reliance on a discouraged factor such as age is not *per se* unreasonable after *Booker*, it does threaten to undermine Congress's goal of

"avoid[ing] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). If age (relative to life expectancy) were freely considered in sentencing defendants, evenhanded punishment would give way to a system in which older defendants would typically receive shorter sentences than those imposed on similarly situated younger offenders. Because of the threat to Congress's goal of sentencing consistency, a sentence that relies on age should be scrutinized closely to ensure that the judge has offered an adequate explanation for why the sentence nonetheless furthers the goals of Section 3553(a).

The district judge's sentence of 240 months does not withstand reasonableness review under these standards. The evidence shows, and the court agreed (10.R.21), that defendant's crime was particularly egregious. An on-duty police officer took the teenage victim into custody, drove her into the woods in the middle of the night, forced her to perform oral sex twice and then raped her anally and vaginally, and when finished, invited another officer to sexually abuse her as well. The ordeal terrified the victim, and left her both physically injured and emotionally scarred. Thus, "the seriousness of the offense" (18 U.S.C. 3553(a)(2)(A)) weighs heavily against imposing a sentence below the Guidelines range.

Simmons' lack of remorse about the rape and his perjury at the state trial also weigh heavily against the degree of leniency shown by the district judge. These factors are an important part of "the history and characteristics of the defendant," which judges must consider in deciding an appropriate sentence. 18 U.S.C. 3553(a)(1). At his state trial, Simmons lied under oath, denying that he had any sexual contact with the victim. GX 48(c) at 355, 372. Yet after his state court acquittal, Simmons bragged about having sex with the victim, referred to her disparagingly as a "skank" and a "prostitute," indicated the incident was "no big deal," and said he could not understand why he had been fired as a Jackson police officer. 7.R.730-732, 757. When he addressed the court at the sentencing hearing, Simmons did not apologize for his crime but, instead, suggested that the victim had lied about the rape. 10.R.31. Under these circumstances, no leniency is warranted, let alone leniency of the magnitude granted by the court in this case.

Especially in light of these factors, the district court's explanation was inadequate to justify a sentence so far below the applicable Guidelines range. The court explained that "20 years of imprisonment is enough" for a 48-year-old man because he would be near the end of his life when released if the Guidelines sentence were imposed, that a 20-year sentence "serves all of the reasons for incarcerating a person for a long period of time," and that a longer sentence would not be "beneficial either to the victim, to the public or to the defendant himself."

10.R.36. These vague and conclusory assertions do not reflect a meaningful analysis of the Section 3553(a) factors, and are neither sufficiently "specific" (*Mares*, 402 F.3d at 519) nor "compelling" (*Dean*, 414 F.3d at 729) to justify the magnitude of the disparity between the sentence imposed and the Guidelines range.

For these reasons, Simmons' sentence does not survive reasonableness review under *Booker*. This Court therefore should vacate the sentence and remand for resentencing in light of the factors set forth in 18 U.S.C. 3553(a).

CONCLUSION

The Court should affirm defendant's conviction, but vacate his sentence and remand for resentencing.

Respectfully submitted,

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ADDENDUM

H

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals,
Sixth Circuit.
.
United States of America, Plaintiff-Appellee,
v.
Eddie D. SMITH, Defendant-Appellant.
No. 96-5385.

March 19, 1998.

On Appeal from the United States District Court for the Eastern District of Kentucky.

Before KENNEDY and SILER, Circuit Judges; COHN, [FN*] District Judge.

FN* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM.

****1** Defendant, Eddie D. Smith, appeals his jury conviction for causing another to engage in sexual intercourse by use of force, engaging in sexual intercourse with a person in detention and with intent to abuse, and making a false statement under oath to an Administrative Law Judge ("ALJ"). He asserts that there was insufficient evidence to convict him and that the court erred by allowing an expert to testify and by denying him the right to cross-examine a witness concerning a polygraph test. For the reasons that follow, we AFFIRM his conviction.

I.

Smith was a correctional officer at the Federal Medical Center ("FMC") in Lexington, Kentucky and was charged with several sexual offenses that occurred during his employment. He was convicted of four violations of 18 U.S.C. § 2241(a)(1) for causing another to engage in sexual intercourse by use of force; one violation of 18 U.S.C. § 2243(b) for engaging in sexual acts with a person in detention; one violation of 18 U.S.C. § 2244(a)(4) for engaging in sexual contact with a person in detention with intent to abuse, humiliate, harass and degrade; and one violation of 18 U.S.C. § 1621 for making a false statement to an ALJ while under oath.

Two witnesses, Vileiby Rosado and Katherine West-Wenger, testified that Smith raped them. Two others, Diane Budesky and Venus Michels, testified that they engaged in oral sex with Smith while they were incarcerated at FMC. Michels also testified that she engaged in sexual intercourse with Smith. Deanna Ruggero, another inmate, testified that Smith attempted to force her to perform oral sex on him.

Dinah Durham testified that Smith, in the presence of another officer, Christopher Tussey, told her that if she would show her breasts they would write off extra duty assigned to her. Durham also testified that Smith fondled her breasts and vagina.

The government called Tussey as a witness. The defense moved the court for leave to question Tussey about his alleged failure of a polygraph test. The court denied Smith's motion. Tussey corroborated Durham's testimony and testified that Smith had asked him to provide an alibi to cover up his sexual relationship with Budesky.

The government called Dr. Pamela Remer, a licensed counseling psychologist and associate professor at the University of Kentucky. Dr. Remer had never personally interviewed any of the alleged victims. However, she testified that she was familiar with reactions of women who have been victims of rape or sexual assault and that women often do not report the incidents immediately.

At the close of the government's case and at the close of trial, Smith moved for acquittal under Fed.R.Crim.P. 29. The court denied that motion, and the jury returned a guilty verdict on most counts. Smith was sentenced to a prison term of 262 months.

II.

When reviewing a claim of insufficiency of the evidence, this court views the evidence in the light most favorable to the government to determine whether "any rational trier of fact could have found the elements of the offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v.. Comer*, 93 F.3d 1271, 1275 (6th Cir.1996). This court does not judge the credibility of the witnesses or weigh the evidence. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Welch*, 97 F.3d 142, 148 (6th Cir.1996). It also does not substitute its judgment for that of the jury. *United States v. Jackson*, 55 F.3d 1219, 1225 (6th Cir.1995).

****2** Smith challenges the sufficiency of the evidence on several grounds. First, none of the women who asserted that they had had sexual relations with him testified as to the distinguishing characteristics of his public area. Secondly, most of the witnesses waited weeks or months to report the incidents. Finally, the only testimony of the alleged incidents came from convicted felons who were being treated for psychological problems.

These factors go to the credibility of the witnesses and the weight to be given their testimony, areas that this court does not review. Moreover, Smith had ample opportunity to bring out these factors on cross-examination and the jury had this information to consider during its deliberations. Therefore, his claim of insufficiency of the evidence lacks merit.

III.

Smith argues that the testimony of Dr. Remer regarding rape trauma syndrome violated Federal Rules of Evidence 402 and 403. Smith does not challenge the qualification of Dr. Remer as an expert. Rather, he argues that the evidence was not relevant and that it was more prejudicial than probative.

This court reviews "the trial court's admission of testimony and other evidence under the abuse of discretion standard." *United States v. Bonds*, 12 F.3d 540, 554 (6th Cir.1994). The government called Dr. Remer as an expert witness in order to refute Smith's argument that the witnesses were unreliable because they did not immediately report their rapes and assaults. Dr. Remer's testimony was directly relevant to the question of why the victims did not report the incidents sooner and as such was helpful to the jury. Thus, the district court did not abuse its discretion in allowing her testimony.

IV.

Smith argues that the district court erred by refusing to allow him to question Tussey on his alleged failure of a polygraph test. This argument is premised on an incorrect assumption. The government claims the polygraph test in question was never administered. There is no record of a polygraph test, and Smith did not proffer evidence under Federal Rule of Evidence 103(a)(2) to show that Tussey took a polygraph.

Assuming, however, that Tussey did take the polygraph test, the court did not err in refusing to allow Smith to cross-examine Tussey about its results. "The decision to exclude from evidence the results of a polygraph examination is within the sound discretion of the trial court." *United States v. Sherlin*, 67 F.3d 1208, 1216 (6th Cir.1995) (citation omitted). As a general rule, results of a polygraph examination are inadmissible, *id.*, but may be admitted under rare circumstances. *See United States v. Weiner*, 988 F.2d 629, 633 (6th Cir.1993).

This circuit follows Federal Rule of Evidence 403 in determining whether to admit polygraph evidence and weighs its probative value against its potential for prejudice. *United States v. Harris*, 9 F.3d 493, 502 (6th Cir.1993). Under this test, this court has specifically held that a district court did not abuse its discretion in refusing to allow a defendant to cross-examine a witness regarding his failure of a polygraph test. *United States v. Scarborough*, 43 F.3d 1021, 1026 (6th Cir.1994). Therefore, the district court did not abuse its discretion.

****3** AFFIRMED.

142 F.3d 438 (Table), 1998 WL 136564 (6th Cir.(Ky.)), Unpublished Disposition

END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT, along with a computer disk containing an electronic version of the brief, were served by Federal Express, overnight delivery, on:

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(counsel for Maceo Simmons)

I further certify that, on the same date, copies of the United States' brief were sent by first-class mail, postage prepaid, to the Clerk of the United States Court of Appeals for the Fifth Circuit.

GREGORY B. FRIEL
Attorney

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i), which allows an appellee's principal and response brief in a cross-appeal to have up to 16,500 words. This brief contains 15,985 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the type-face requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6). The brief has been prepared in a proportionally spaced typeface (Times New Roman, 14-point font) using Wordperfect 9.0.

_____

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February 1, 2006