

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 09-10461-AA

UNITED STATES OF AMERICA,

Appellee,

vs.

ROY M. BELFAST, JR.,
a.k.a. Chuckie Taylor, a.k.a. Charles McArther Emmanuel,
a.k.a. Charles Taylor, Jr., a.k.a. Charles Taylor, II,

Defendant-Appellant.

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

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United States v. Roy M. Belfast, Jr., Case No. 09-10461-AA

Certificate of Interested Persons and Corporate Disclosure Statement

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1 and 26.1-3, the undersigned hereby certifies that, in addition to those individuals and entities listed in the appellant's brief, the following persons and/or entities have an interest in the outcome of this case:

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STATEMENT REGARDING ORAL ARGUMENT

Because this case is the first prosecution under the criminal torture statute, 18 U.S.C. §§ 2340-2340A, and because no court of appeals has previously construed the criminal torture statute, the government respectfully submits that oral argument may assist the Court in resolving the claims raised by defendant-appellant.

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JURISDICTION

Defendant Roy M. Belfast, Jr. (“defendant”) appeals from the judgment of conviction entered by the district court (Altonaga, J.) on January 9, 2009.

DE:618.¹ The district court had jurisdiction under 18 U.S.C. § 3231. Defendant timely filed a notice of appeal from the judgment on January 23, 2009. DE:619.

This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

¹ “DE:___” refers to district court docket entries, followed by relevant page numbers (*e.g.*, DE:618:1-2). “GX:___” refers to government trial exhibits.

STATEMENT OF THE ISSUES

I. Whether Congress exceeded its constitutional authority in enacting the torture statute, 18 U.S.C. §§ 2340-2340A.

II. Whether Congress's decision to criminalize torture conspiracies violates international law.

III. Whether 18 U.S.C. § 924(c) applies extraterritorially.

IV. Whether alleged evidentiary, instructional, and discovery errors constitute reversible cumulative error.

V. Whether the district court erred in applying the kidnapping and first-degree murder guidelines at sentencing.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

A Second Superseding Indictment charged defendant with conspiring to commit torture, in violation of 18 U.S.C. §§ 2340A(c), 2340A(a) (Count One); conspiring to use and carry a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c), (o) (Count Two); torture, in violation of 18 U.S.C. §§ 2340A, 2340(1) (Counts Three through Seven); and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Eight). DE:257.

Defendant moved to dismiss the indictment on grounds including that Congress lacked constitutional authority to enact § 2340A. DE:38. The district court denied that motion. DE:148; DE:328. Following a one-month trial, a jury convicted defendant on all counts. DE:581.

The district court sentenced defendant to 97 years of imprisonment, to be followed by five years of supervised release. DE:618.

II. Statement of Facts

Defendant Belfast, also known as “Chuckie Taylor,” is a U.S. citizen. DE:591:45. His biological father, Charles Taylor (“Taylor”), was President of Liberia from 1997 to 2003. DE:585:68; DE:595:173. Between 1999 and 2003, defendant conspired with Taylor and others to commit, and did commit, torture in Liberia.

A. Background

1. Born And Raised In The United States, Defendant Moves To Liberia In The Mid-1990s.

Defendant was born in Massachusetts in 1977. DE:587:66, 78; GX:CE5 (birth certificate). Defendant was raised by his mother, who moved the family to Florida due to concern that Taylor might try to take him away. DE:587:64-67, 71.

In 1992, defendant traveled to Liberia, where his father led an armed insurgent group, the National Patriotic Front of Liberia (“NPFL”). DE:585:66-67;

DE:587:76, DE:595:177. Two years later, defendant returned to West Africa and ultimately remained in Liberia. DE:587:76-77; DE:595:181-84.

2. Defendant Establishes And Leads Liberia's Anti-Terrorist Unit.

After Taylor became Liberia's President in 1997, defendant oversaw the creation of the Anti-Terrorist Unit ("ATU"). DE:591:157-58. Originally known as the "Demon Forces," the ATU's mission was to guard the President, his immediate family, and the Executive Mansion. DE:586:189-90; DE:591:157-60. In defendant's words, the ATU was his "pet project," and was composed of Liberia's "toughest fighters." DE:595:190-92. ATU soldiers wore black uniforms and, eventually, tiger-striped uniforms with a badge depicting a cobra and scorpion. DE:586:189; DE:591:212-14.

Referred to as "Chief," defendant commanded the ATU from 1997-2000; his license plate said "Demon." DE:594:46-48. Even after others led the ATU, defendant maintained authority over ATU soldiers and was referred to as Chief. DE:592:59-61; DE:595:15.

The ATU trained recruits at a base in Gbatata ("Gbatata Base"), northeast of Monrovia, Liberia's capital. DE:585:44-45, 96; DE:591:172-75; GX:4. David Compari was the base commander. DE:591:174. Initial recruits were required to dig grave-sized pits in a swampy area of Gbatata Base; the pits were covered with open bars and served as a prison. DE:585:224-25; DE:591:206-08.

B. The Acts Of Torture

1. Defendant Directs And Participates In The Torture Of Sierra Leonean Refugees In April 1999.

In the late 1990s, Sierra Leoneans fled civil war in their country and crossed into Liberia, where they registered with the United Nations as refugees. Such refugees included Momoh Turay and Sulaiman Solo Jusu, who temporarily resettled in or around Voinjama, in northern Liberia, in 1998. *See* DE:587:84-89; DE:588:126-30; GX:4. On April 21, 1999, armed forces attacked Voinjama. DE:587:90-94. Turay, Jusu, and other refugees fled toward Monrovia aboard trucks operated by the World Food Program. DE:587:94-96; DE:588:139-42.

The trucks stopped at a government checkpoint after crossing the St. Paul River Bridge. DE:587:97; DE:588:142-43. ATU soldiers ordered passengers off the trucks, segregating male refugees. DE:587:97-98; DE:588:142-43. Turay and Jusu were in a group that included Albert Williams, Foday Conteh, and Abdul Cole. DE:587:104-05. Defendant arrived at the checkpoint, shouting and holding a pistol as he angrily tried to get the women cleared away. DE:588:145-46.

Defendant confronted the male refugees, asking if they were the rebels who had attacked Voinjama or “Kamajors.” DE:587:107.² When none answered, defendant selected several refugees, including Williams, and made them kneel

² Kamajors were a civil militia supporting the government in Sierra Leone; Taylor backed the insurgent Revolutionary United Front. DE:587:83; DE:588:113.

before him. DE:587:107-08; DE:588:148-49. He shot at least three in the head, killing them; defendant turned to the remaining group members and said their turn would be next. DE:587:108-09; DE:588:149. Defendant ordered the bodies removed; Jusu and Turay later saw the bodies' severed heads around the checkpoint. DE:587:111; DE:588:151.

Jusu, Turay, Conteh, and Cole were subsequently beaten with guns, kicked, and blindfolded by ATU soldiers. DE:587:112. At defendant's direction, the men were bound "tabie" style, whereby the elbows are tied tightly behind the back until they touch. DE:588:151. Tabie causes excruciating pain, as the prisoner feels as if "[his] chest [is] going to open." DE:587:112; *see also* DE:588:153. The four were transferred to the Gbarnga police station, while tabied and in only their underwear, where ATU soldiers and defendant beat them again; these beatings were so severe that Turay defecated on himself. DE:587:114-15; DE:588:18, 152, 156-58. Within two days, they were taken to Gbatala Base. DE:587:115.

At the base, defendant ordered ATU soldiers to put Jusu, Turay, Conteh, and Cole in the prison pits. DE:588:162-63. The pits were about two-and-a-half feet deep, covered with iron bars and barbed wire, lined with cement, and partially filled with water; Jusu's pit contained a rotting corpse and chin-high water. DE:587:116-18; DE:588:162-64. ATU soldiers standing guard continually abused the prisoners, stabbing at Jusu and Turay with guns, forcing Jusu to eat hot

cassava stems that had been roasting in a fire, stepping on Turay's hands (which were tied above his head), and dripping hot molten plastic onto Turay's naked body. DE:587:120-25; DE:588:165-67.

Jusu and Cole escaped from their pits on the second night, but were recaptured. DE:588:167-68. ATU soldiers brought Jusu and Cole back to the base after beating them with guns. DE:588:169-70. Defendant was "very, very angry"; he crushed a lit cigarette on Turay's wrist, beat Jusu and Cole, and ordered the prisoners brought out from the pits. DE:587:132-35; DE:588:170-171. Defendant told the prisoners that no one escapes from Gbatala, and ordered his men to kill Cole. DE:588:172. When an ATU soldier reached for his gun, defendant stopped him and said that they should behead Cole, whereupon a soldier took out a three-foot knife and decapitated Cole, sawing from back to front, as Cole screamed. DE:587:137-38; DE:588:172-74.

After more beatings, Jusu and Turay were placed in a pit and tied together, by one hand, to the pit cover. DE:587:140-41; DE:588:175. Guards beat them the next day and melted plastic onto them. DE:588:176-77. That night, Jusu and Turay managed to escape after learning from another prisoner (whose toes had been chopped off) that the ATU planned to kill the Sierra Leoneans, but the two were recaptured and brought before defendant. DE:587:141-44; DE:588:179-84. Defendant and his men beat and kicked Jusu and Turay feverishly; soldiers burned

them with dripping candles; and defendant stabbed their legs and Turay's head with a bayonet. DE:587:144-46, 180; DE:588:183-86; DE:590:94. Defendant also burned plastic over Jusu's body, including his genitals. DE:588:186. The abuse was most severe after a message arrived that "Papay" – a common name for Taylor – wanted to see the prisoners who had escaped; the message enraged defendant and the soldiers. DE:587:147; DE:588:185-86; DE:590:94.

Jusu, Turay, and Conteh were tabied and driven to Taylor's Monrovia compound. DE:588:186-88. Taylor and Daniel Chea, Liberia's defense minister, emerged; defendant and Compari were present. DE:587:150-51; DE:588:188-89. Taylor asked the prisoners if they were rebels who had attacked Voinjama or Kamajors sent to fight his government. DE:587:151; DE:588:189. Taylor said that, if they did not talk, they would be taken to the beach, their heads cut off, and buried in the sand. DE:587:152; DE:588:189-90. Chea interjected that it would have been better if they had already been killed elsewhere and proposed that they be interrogated at Barclay Training Center ("Barclay"), a Monrovia military garrison. Taylor turned and walked away. DE:587:152; DE:588:190-92.

Defendant and ATU soldiers took Jusu, Turay, and Conteh to Barclay, where they were held with other prisoners. DE:587:153; DE:588:190-92. The three men could barely walk or move their hands; their faces and bodies were severely swollen. DE:587:157; DE:588:192. The stench from their untreated

wounds grew so strong that their cellmates demanded that guards remove them. DE:587:156; *see also* DE:588:191 (military police initially refused to accept custody of three men “because [they] [were] almost dead people”). Ultimately, the United Nations High Commission for Refugees secured their release on approximately May 20, 1999. DE:587:159-61; DE:591:7.

Upon being released, Jusu, Turay, and Conteh were taken by ambulance to a Monrovia clinic, and received medical treatment. DE:587:161-62; DE:588:199. They received further treatment at a United Nations refugee camp in Monrovia, and were resettled with their families in March 2000 in Sweden. DE:587:163-66; DE:588:200-06.

2. Defendant Directs And Participates In The Torture Of Rufus Kpadeh In August-October 1999.

Rufus Kpadeh, a Liberian, was living and working in Voinjama in 1999. DE:585:191-93. Following an August 19, 1999 attack on Voinjama by Liberians United for Reconciliation and Democracy, Kpadeh and his family fled on a truck operated by a non-governmental organization. DE:585:193-98. The ATU stopped the truck at the St. Paul River Bridge checkpoint, and ordered the male passengers down. DE:585:199-202. Soldiers arrested Kpadeh after finding a membership card for the Unity Party, a non-violent political party, in his belongings. DE:585:204-07.

Kpadeh was taken inside an adjacent building to a room labeled “Office of the Commander,” where defendant confronted him. DE:585:207-11. Dressed in an ATU uniform and with a pistol at his side, defendant asked Kpadeh if he was a rebel; Kpadeh said no. Defendant asked if Kpadeh would fight for him; Kpadeh declined because he did not believe in war. DE:585:211-12. On defendant’s orders, soldiers tabied Kpadeh, and took him by truck to Gbatala Base; defendant followed. DE:585:213-18.

At the base, defendant told Compari to torture Kpadeh until he told the truth. DE:585:219-20. Compari plunged Kpadeh, still tied, in a creek four times, holding his head underwater. DE:585:220-21. Defendant then directed Compari to “cut under his nuts,” whereupon Compari cut Kpadeh’s penis with a knife. DE:585:221-22. Defendant ordered that Kpadeh be taken to the “Vietnam prison.” DE:585:219, 222. Bleeding, Kpadeh was placed in a water-filled pit. His elbows were finally untied; by then, his arms and hands were numb. DE:585:222-26.

Kpadeh was kept in pits at Gbatala, naked, and repeatedly abused for about two months. DE:585:232. The abuse was worse on Wednesdays and Saturdays, when defendant visited. DE:586:13. Defendant once ordered Kpadeh to “run the rim” for 45 minutes – a practice in which the prisoner must run in a large circle around posts while toting a heavy log (about six feet long in Kpadeh’s case) on his shoulder; soldiers would strike the log with a heavy rod, causing severe pain to

shoot through the prisoner's body. DE:586:8-12. Another time, defendant forced Kpadeh and other prisoners to play soccer with a large stone, barefoot; defendant watched and laughed. DE:586:15-17. On another occasion, defendant had the prisoners separated in groups of two and ordered them to sodomize each other, which was particularly painful for Kpadeh after the knife wound to his penis; defendant again watched and laughed. DE:586:17-19. The abuse continued when defendant was not present: soldiers dripped burning plastic on Kpadeh, forced him to eat cigarette butts and drink his own urine, stabbed him with an iron rod used to clean gun barrels, and shoveled stinging ants onto him. DE:586:25-29.

In October 1999, Kpadeh was transferred to the Gbarnga police station and released from detention; he was never charged with a crime or brought before a court. DE:586:31-36. The release of Kpadeh and other prisoners at this time coincided with media reports about Gbatata Base and pressure from human-rights groups. DE:586:174, 193; DE:597:13-15.³

Kpadeh received medical treatment at a Monrovia hospital for three months. DE:586:41-43. He still lives in Liberia. DE:586:149-50. The abuse he endured left numerous scars on his body and, to this day, causes pain and limits functioning of one hand. DE:586:36-38, 86.

³ The ATU continued to use Gbatata Base for training. As punishment, soldiers were placed in the pits and abused, including by being forced to run the rim. DE:591:217-229; DE:594:48-52, 56.

3. Defendant And Benjamin Yeaten Torture Varmuyan Dulleh In July 2002.

Varmuyan Dulleh, a Liberian, was living and working in Monrovia in 2002. DE:592:142, 146. He attended the University of Liberia and joined the Student Unification Party (“SUP”), which advocated social justice and peace. DE:592:147.

On July 24, 2002, armed gunmen, including ATU soldiers, arrested Dulleh at home. DE:592:149-57. The soldiers said Dulleh wanted to overthrow “Papay,” *i.e.*, Taylor. DE:592:154-56. After Dulleh was interrogated, the Liberian Police Director, Paul Mulbah, took Dulleh to Whiteflower – Taylor’s personal residence. DE:592:157-63.

Taylor was with defendant and others when Dulleh arrived. DE:592:166-68. Taylor asked how many rebel soldiers Dulleh had smuggled into the U.S. embassy; where Dulleh kept arm deposits for overthrowing Taylor’s government; and whether Dulleh had spoken to Alhaji Kromah, Dulleh’s uncle and a former commander of the United Liberation Movement of Liberia for Democracy (“ULIMO”). DE:585:85-86; DE:592:169-70. Dulleh denied knowing about those matters. DE:592:170. Pointing, Taylor said: “[T]hat’s General Benjamin Yeaten. I’m going to turn you over to General Benjamin Yeaten and he’s going to beat you

to tell the truth.” DE:592:172.⁴ Dulleh begged for his life; Taylor responded, “No, your life is not in my hands. Your life is in God’s hands.” DE:592:173.

Armed men and Yeaten took Dulleh to Yeaten’s house behind Whiteflower, where defendant later joined them. DE:592:173-74, 180. When Dulleh again denied knowing anything, Yeaten took Dulleh to his garage, ordered soldiers to put a dirty rag in his mouth, and burned him with a heated clothes iron on his arm, back, stomach, and foot. DE:592:174-75, 178-82. Defendant had arrived by then, and observed Yeaten branding Dulleh. DE:592:182.

After Dulleh continued to deny involvement in rebel activities, Yeaten poured scalding water, from a pot with visibly rising steam, onto Dulleh’s head and back and into his cupped hands. DE:592:183-84; DE:597:15-16. Defendant and Yeaten both held guns to Dulleh’s head, telling him not to drop the water. DE:592:183-84. Defendant said that, while his father may have had a Bible in his hands, defendant did not; Dulleh understood this to mean that defendant was “extremely wicked.” DE:592:184. Defendant and Yeaten each threatened to kill Dulleh. DE:593:36.

⁴ Yeaten was head of Liberia’s Special Security Service, DE:594:42-43, and had a reputation for being dangerous and diabolical, DE:592:172; DE:595:21. Yeaten, like Gbatala Base commander Compari, was a coconspirator in defendant’s torture conspiracy. DE:636:131.

Defendant touched Dulleh's neck, back, and penis with an electrified stick, causing extreme pain. DE:592:185-86. Defendant said, "Do you know I can kill you and nothing can happen?" DE:592:185. Defendant then forced Dulleh to telephone Kromah, his uncle, to get Kromah to talk about a presumed rebel operation. DE:592:186-87. Defendant and Yeaten pointed guns at Dulleh's head while coaching him on what to say. DE:592:187-88. Kromah said that it seemed Dulleh was in a controlled environment and to leave Dulleh alone. DE:592:187-89. After the call, soldiers rubbed salt on Dulleh's wounds and body. DE:592:189. Dulleh was experiencing extreme and unbearable pain, and heard soldiers discussing what he understood to be his imminent execution. DE:592:189-91.

Dulleh was driven to Klay Junction, and detained with other prisoners in an underground hole previously used to undergird a truck weigh scale. DE:592:198-200. A steel plate covered the hole, which, like the Gbatala pits, was shallow and flooded with filthy water. DE:592:205; DE:593:159. Dulleh was in great distress – crying, in pain, and frightened – when he arrived four to five hours after the events in Yeaten's garage. DE:592:208. Crying, Dulleh told the other prisoners that he had just been tortured by Benjamin Yeaten and Chuckie Taylor. DE:592:209, 213.

Prisoners in the hole included Hassan Bility, Varsay Layee, and Edmond Wilson. DE:592:206. Each testified at trial that Dulleh said that Chuckie Taylor had tortured him. DE:593:192; DE:594:70; DE:595:35. They saw burns and/or fresh wounds on Dulleh's body; some of Dulleh's wounds began to smell while they were in the hole. DE:593:192-93; DE:594:71; DE:595:34-35.⁵

About two weeks later, Dulleh and Bility were taken by helicopter to another location in Liberia, and confined in a "little abandoned toilet house" for a month. DE:592:217-18. Dulleh was then held at the National Bureau of Investigation ("NBI") in Monrovia for ten months, DE:592:218-20, and released on July 11, 2003, following pressure from the U.S. ambassador, the Catholic Church, and human-rights groups. DE:592:221; DE:593:41-42; DE:597:96-97. He was never charged with a crime or brought before a court. DE:592:221.

Dulleh fled Liberia within a week of release. DE:592:226. In 2005, he was granted asylum in the United States. DE:592:228.

4. Defendant Participates In The Torture Of Mulbah Kamara In September 2002.

Mulbah Kamara, a Liberian, ran several Monrovia businesses. DE:598:6, 15. In September 2002, his house and store were ransacked and burglarized. DE:598:16-17, 53. Kamara reported the incidents, but was arrested after coming

⁵ Bility testified that defendant visited Klay and that the guards' beatings of prisoners would increase after these visits. DE:593:194.

to the police station to follow up. DE:598:18-19. Kamara's clothes were taken and he was interviewed by the police director, who asked for Kamara's name and the name of his parents. DE:598:19-20. No reason was given for his arrest. DE:598:20.⁶

Armed men put Kamara in a jeep and drove him to the beach, where Kamara saw people prone; some were dead. DE:598:24-25. Kamara then heard "Whiteflower" spoken over the radio, and was driven to Whiteflower and brought to Taylor's office. DE:598:25, 28. Taylor repeatedly asked Kamara if he knew why he was there; Kamara replied that he did not. DE:598:28. Eventually, defendant entered the office. DE:598:29. On Taylor's orders, Yeaten took Kamara away. DE:598:29.

Armed men drove Kamara to Yeaten's house and "danc[ed]" (*i.e.*, stepped) on him. DE:598:29-30. The men brought Kamara to Yeaten's garage, stripped him, and made him lie down. DE:598:31. On Yeaten's orders, the men placed a hot, bright light close to Kamara's face and told him not to close or move his eyes. DE:598:31, 88. Kamara was forced to stay in that position for hours, and was beaten if he blinked. DE:598:32, 90. The light, which caused Kamara great pain,

⁶ Kamara and Dulleh are of Mandingo ethnicity. DE:598:20; DE:592:143. ULIMO, an opponent of Taylor's NPFL during the civil war, was largely composed of Mandingo and Krahn people. DE:594:16.

was shone continually in his face over his three-day confinement at Yeaten's house. DE:598:62.

Yeaten asked if Kamara knew why he was there. DE:598:33-35. When Kamara replied that he did not, Yeaten inserted an electric prod in his anus, sending a shock through his entire body, including his brain. DE:598:35. Yeaten shocked Kamara a second time on his penis. DE:598:35. Kamara was kicked and beaten with a gun-butt. DE:598:36-37.

Defendant arrived at Yeaten's house with bodyguards and armed, uniformed men. DE:598:38. Defendant asked Kamara if he was ready to talk; when Kamara replied that he did not know what to say, defendant laughed and wondered why, after all that had happened, Kamara still refused to talk. DE:598:39. Defendant told his entourage to take care of Kamara, at which point they beat and kicked Kamara to the ground, where they further kicked him and beat on his stomach and genitals. DE:598:39-40. Watching, defendant laughed, then departed. DE:598:40-41. Later that night, Yeaten burned Kamara with a hot clothes iron on his stomach, knee, and penis. DE:598:41-44.

Kamara was taken to Klay, where he was kept for 13 days in an underground hole filled with dirty water. DE:598:43-47. After being transferred to another location in Liberia, Kamara was imprisoned in the NBI, where he saw Dulleh (whom he knew). DE:598:49-52.

Kamara was released from prison in late December 2002, but was ordered to report to the Executive Mansion everyday. DE:598:53-54. He was never charged with a crime or brought before a court. DE:598:63-64. Kamara's former boss, a European Union official, helped Kamara and his family flee Liberia. DE:598:55-56. In February 2003, Kamara was admitted to the United States, where he now lives. DE:598:60-62, 64. Kamara has lingering medical issues, including vision problems and visibly disfigured genitals. DE:598:62-63, 179-81.

Defendant's substantive torture convictions correspond to specific abuses inflicted on Jusu (Count Three), Turay (Count Four), Kpadeh (Count Five), Dulleh (Count Six), and Kamara (Count Seven). DE:257:12-16.⁷ At trial, the Miami-Dade medical examiner testified that examination of each victim's body reflected scars consistent with the described acts. DE:596:76, 81-84, 88-92, 103, 112, 118-27, 148-49, 153-55, 162; DE:597:17-25; DE:598:168-69, 175, 179-81; *see also* GX:Hyma 1-192 (victim medical photos, including of torture scars). A Liberian attorney who both prosecutes and defends criminal cases testified that those acts were not lawful sanctions in Liberia during the period in question. DE:597:103, 107, 115-17.

⁷ The indictment, included in defendant's Record Excerpts, marshals specific tortures (beatings, burnings, cutting, electric shock, etc.) to particular victims, dates, and places. DE:257:3-16.

C. Defendant's Post-Offense Statements And Arrest.

In 2003, Liberia's civil war ended. Taylor resigned and left the country.
DE:597:101-02.

Defendant left Liberia in July 2003. DE:595:212. Between 2004 and 2005, defendant called the U.S. Defense Attaché in Liberia from Trinidad several times. DE:591:32, 37-38. In one call, defendant said he was American, asked about the United Nations travel ban on certain persons, and asked about joining the U.S. Marines. DE:591:35-37. In June 2004, the Attaché received an email from defendant stating "Legally I have all the right to go back home when I want to," and "I will say again I am an American first before anything else." DE:591:45; GX:CE10.

On March 30, 2006, a warrant for defendant's arrest was executed when he arrived at Miami International Airport from Trinidad. DE:595:112-17, 156. Defendant was traveling on a U.S. passport (GX:CE1). DE:595:116-17. Defendant's luggage contained a book on guerilla tactics and a notebook with rap lyrics, some referencing the ATU. DE:595:121. Defendant knowingly waived his rights, DE:595:161-67, and made numerous incriminating statements, including that: (1) his father was Charles Taylor, even though he had listed "Daniel Smith" as his father on a recent U.S. passport application; (2) the ATU was his "pet project" before 2000, and he was considered to be its commander;

and (3) he was present when a “press guy” arrested by Yeaten was beaten, hit, and burned with an iron (but denied participating in the “torture”). DE:595:173-75, 190-92, 205.⁸

III. Standards of Review

This Court reviews a preserved challenge to a statute’s constitutionality *de novo*. *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007). Where the challenge is based on a ground not asserted below, review is for plain error.

United States v. Williams, 121 F.3d 615, 618 (11th Cir. 1997). A district court’s interpretation of a statute is reviewed *de novo*. *United States v. Kloess*, 251 F.3d 941, 944 (11th Cir. 2001).

The Court reviews a preserved objection to an evidentiary ruling for abuse of discretion and an unpreserved claim for plain error. *United States v. Baker*, 432 F.3d 1189, 1202 (11th Cir. 2005). The Court reviews discovery rulings for abuse of discretion. *United States v. Campa*, 529 F.3d 980, 992 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 2790 (2009).

The Court reviews a sentencing court’s finding of facts for clear error and its application of the Sentencing Guidelines *de novo*. *United States v. Sarras*, 575 F.3d 1191, 1220 n.38 (11th Cir. 2009).

⁸ Dulleh served as the SUP’s Chairman of Information, Propaganda, Research and Guidance. DE:592:147

SUMMARY OF THE ARGUMENT

I. The torture statute, 18 U.S.C. §§ 2340-2340A, is a valid exercise of Congress's power to implement U.S. treaty obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. None of defendant's challenges to Congress's implementation of the CAT has merit. The Necessary and Proper Clause vests Congress with substantial authority when implementing treaty obligations, and, here, Congress's definition of torture was rationally related to the CAT and not unduly broad; Congress could apply the statute in situations of armed conflict; the statute's application to pre-2004 acts in Liberia does not present an *ex post facto* problem; and the CAT mandates the statute's establishment of "present-in" jurisdiction.

Congress's enactment of the torture statute was an independently proper exercise of its constitutional powers to define and punish offenses against the law of nations and to regulate the extraterritorial acts of U.S. citizens.

II. Defendant's conviction for conspiring to commit torture is consistent with international law. The CAT supplies the relevant international law, and Article 4(1) obligates each State Party to criminalize, *inter alia*, an act which constitutes "complicity" in torture. In view of that provision and the dangers

flowing from concerted criminal action, Congress had ample authority to criminalize torture conspiracies.

III. Congress's intent to apply 18 U.S.C. § 924(c) extraterritorially is plain from the statute's language and legislative history, which make clear that the firearm prohibition applies to any federal crime of violence; defendant does not dispute that torture and conspiring to torture are crimes of violence. Congress had constitutional authority to punish defendant's firearm violations, because it had authority to punish the predicate crimes of violence.

IV. The court did not abuse its discretion, err, or commit plain error in the various instances claimed by defendant to constitute cumulative error. To the extent the Court concludes otherwise, reversal is not warranted because any errors were minor and the evidence against defendant was strong.

V. The district court correctly applied the kidnapping and first-degree murder guidelines, U.S.S.G. §§ 2A1.1, 2A4.1, in calculating defendant's advisory Sentencing Guidelines range. Defendant's sentence violates neither the Constitution nor the CAT.

ARGUMENT

I. THE TORTURE STATUTE IS A PROPER EXERCISE OF CONGRESS'S CONSTITUTIONAL AUTHORITY.

Defendant's contention (Br. 32-42) that Congress exceeded its constitutional authority in enacting the torture statute lacks merit. The statute is a valid exercise of Congress's powers to implement U.S. treaty obligations, define and punish offenses against the law of nations, and regulate the extraterritorial conduct of U.S. citizens.

A. Background

1. Congress Enacted The Torture Statute To Implement U.S. Obligations Under The CAT.

The United Nations General Assembly unanimously adopted the CAT on December 10, 1984. The CAT's purpose is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." CAT, Preamble. The CAT defines torture, *see* art. 1(1), and requires each State Party to, *inter alia*, prevent acts of torture within its territory, art. 2(1); "ensure that all acts of torture are offences under its criminal law," art. 4(1); and establish jurisdiction over acts of torture committed either in its territory or by its own national, or committed by an offender who is later present in its territory where the State Party does not extradite him, art. 5(1), (2).

Over 145 countries, including the United States, are parties to the CAT. *See* <<<http://www2.ohchr.org/english/law/cat.htm>>> (last visited on Sept. 15, 2009) (providing link to list of parties). President Reagan signed the CAT in 1988, and the Senate gave its advice and consent to ratification in 1990, subject to reservations, understandings and declarations. The United States's ratification became effective on November 20, 1994. *Cadet v. Bulger*, 377 F.3d 1173, 1179 (11th Cir. 2004); *see generally Auguste v. Ridge*, 395 F.3d 123, 130-32 (3d Cir. 2005).

Most of the United States's obligations under the CAT “[were] already covered by existing law,” and “additional implementing legislation w[as] [] needed only with respect to article 5, dealing with areas of criminal jurisdiction.” S. Exec. Rep. 101-30, at 10 (Aug. 30, 1990). Accordingly, in 1994, Congress enacted, and the President signed into law, the torture statute, 18 U.S.C. §§ 2340, *et seq.* *See* Pub. L. No. 103-236, § 506 (Apr. 30, 1994).

The statute makes it a crime for anyone “outside the United States [to] commit[] or attempt[] to commit torture,” 18 U.S.C. § 2340A(a), and establishes federal jurisdiction over such an offense where “the alleged offender is a national of the United States,” or where “the alleged offender is present in the United States, irrespective of the nationality of the victim,” *id.* § 2340A(b). The statute defines torture as:

an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control[.]

Id. § 2340(1). In 2001, Congress added an express conspiracy provision, 18 U.S.C. § 2340A(c). *See* Pub. L. No. 107-56, § 811(g) (Oct. 26, 2001).

2. The District Court Upheld The Constitutionality Of The Torture Statute.

In denying defendant’s pretrial motion to dismiss the indictment, the district court concluded that the torture statute was a proper exercise of Congress’s power “under the Necessary and Proper Clause of Article I, as an adjunct to the Executive’s authority under Article II to enter into treaties.” DE:148:10 (attached in defendant’s Record Excerpts). The court rejected defendant’s argument that the statute had to mirror the language of the CAT, citing Congress’s need for “flexibility” in performing its “delegated responsibilities” and finding that the statute “plainly bears a rational relationship” to the CAT. *Id.* at 15. The court also found Congress’s power to define and punish “offences against the Law of Nations,” Art. I, § 8, cl. 10, a separate source of authority for the statute. DE:148:15-17.

Defendant moved to reconsider, contending that the CAT does not apply to armed conflicts and that Liberia was in a state of armed conflict when the charged conduct occurred. DE:176. The court denied that motion. DE:328:2-3.

B. The Torture Statute Is A Proper Exercise Of Congress's Treaty-Implementing Authority.

Article I of the Constitution provides that “Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States” U.S. const., art. I, § 8, cl. 18. That provision empowers Congress to enact legislation implementing a treaty duly made by the President pursuant to Article II, whether or not the law comes within the scope of Congress’s enumerated powers. *See Missouri v. Holland*, 252 U.S. 416, 432-34, 40 S. Ct. 382, 383-84 (1920); *United States v. Ferreira*, 275 F.3d 1020, 1027 (11th Cir. 2001); *United States v. Lue*, 134 F.3d 79, 82 (2d Cir. 1998). That is precisely the power that Congress exercised here: the torture statute implements U.S. obligations under the CAT to criminalize and establish jurisdiction over torture committed abroad.

Defendant does not dispute that the CAT is a valid exercise of the treaty power, but contends that Congress exceeded its treaty-implementing authority in four respects. Br. 32-38. As a general matter, defendant’s arguments reflect an impermissibly narrow view of the Necessary and Proper Clause, which vests Congress with “broad powers.” *Katzenbach v. Morgan*, 384 U.S. 641, 650, 86 S.

Ct. 1717, 1723 (1966). Former Chief Justice Marshall explained the scope of the clause as follows:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

M’Culloch v. Maryland, 17 U.S. 316, 421 (1819). Contrary to defendant’s suggestion (Br. 40), *M’Culloch* dictates “an expansive, not constricted, view of the necessary and proper clause, one that would facilitate, not hamper, the activities of federal sovereignty.” *Corpus v. Estelle*, 605 F.2d 175, 178 n.3 (5th Cir. 1979).

That understanding is particularly appropriate when Congress implements a multilateral treaty, which necessarily must account for the varying legal systems of multiple state parties.

This Court and the Second Circuit have upheld Congress’s implementation of a multilateral treaty which, like the CAT, required the government to criminalize certain extraterritorial offenses. *See Ferreira*, 275 F.3d at 1027-28; *Lue*, 134 F.3d at 84; *see also United States v. Shi*, 525 F.3d 709, 720-21 (9th Cir. 2008) (upholding codification in 18 U.S.C. § 2280 of U.S. obligation under Maritime Safety Convention to “extradite or prosecute” offenders found within its territory); *cf. United States v. Yousef*, 327 F.3d 56, 89-90 (2d Cir. 2003) (noting that aircraft-destruction statute was adopted pursuant to treaty obligation to

extradite or prosecute offenders). In *Lue*, the defendant contended that the Hostage Taking Act, 18 U.S.C. § 1203, exceeded Congress’s power to implement the International Convention Against the Taking of Hostages, Dec. 18, 1979, T.I.A.S. No. 11,081 (“Hostage Taking Convention”), because the Act “swe[pt] too broadly.” 134 F.3d at 84. The Second Circuit started from the premise that “[i]f the Hostage Taking Convention is a valid exercise of the Executive’s treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause.” *Id.* The court concluded that *M’Culloch*’s “plainly adapted” standard requires only “that the effectuating legislation bear a rational relationship to a permissible constitutional end,” and found the standard satisfied in that case. *Id.*

This Court agreed with *Lue* in *Ferreira*, rejecting the same challenge to Congress’s authority to enact the Hostage Taking Act. 275 F.3d at 1027-28. Defendant contends (Br. 39) that *Ferreira* applied “rational basis” review only in the context of analyzing the defendant’s equal protection challenge to the statute, but *Ferreira* plainly endorsed *Lue*’s understanding of the Necessary and Proper Clause. 275 F.3d at 1027-28.

Nor is defendant’s challenge (Br. 39-40) to *Lue*’s application of a rational relationship standard sound. The *Lue* court adopted that standard based on a legal analysis of the Necessary and Proper Clause, and found that the Hostage Taking

Act “plainly b[ore] a rational relationship to the Convention.” 134 F.3d at 84. The court’s application of that standard was not rendered dictum, *i.e.*, unnecessary to the result, *see United States v. Eggersdorf*, 126 F.3d 1318, 1322 n.4 (11th Cir. 1997), by its conclusion that the Act “tracks the language of the Convention in all material respects.” 134 F.3d at 84. The court did not find that the language of the statute was *identical* to that of the Convention. Indeed, the district court in *Lue* had earlier noted that “[t]here are a number of differences between the Act and the Convention,” including that “the Act’s definition of a ‘third party’ is broader than Article I of the Convention.” *United States v. Yian*, 905 F. Supp. 160, 165 n.16 (S.D.N.Y. 1995). Such differences did not undermine the constitutionality of the statute in light of the flexibility owed Congress when implementing treaties. *See Lue*, 134 F.3d at 84.⁹

Defendant has not cited a single case invalidating Congress’s implementation of a treaty as beyond the scope of its constitutional authority. For the particular reasons that follow, his challenges to the torture statute fail.

⁹ Congress often uses language different from a treaty when implementing its provisions. *See, e.g., United States v. Tsui*, 531 F.3d 977, 980-81 (9th Cir. 2008) (juxtaposing language of Convention on the Transfer of Sentenced Persons with that of 18 U.S.C. § 4106A); *cf. United States v. Frank*, 486 F. Supp. 2d 1353, 1357-59 (S.D. Fla. 2007) (holding that Congress permissibly defined minor as under the age of 18, *see* 18 U.S.C. § 2423(c), (f)(2), when implementing optional protocol to U.N. convention on child prostitution and child pornography).

1. The Statutory Definition Of Torture Is Not Unduly Broad.

Defendant contends (Br. 34-35) that the statutory definition of torture is impermissibly broader than the CAT's definition because it does not require that: (1) the torture be undertaken for a particular purpose; (2) severe physical or mental pain or suffering actually be inflicted; or (3) the torturer acted in an "official capacity."

Defendant here purports to challenge the statute "both on its face and as applied." Br. 35. But a facial challenge to a statute is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987). And, defendant has not explained how the statute's alleged deviations from the CAT apply to him.¹⁰

Regardless how it is framed, defendant's challenge lacks merit. The CAT does not preclude a State Party from defining torture more broadly under domestic law, *see* CAT, art. 1(2), and, to the extent Congress's definition diverges at all from the CAT, it furthers the CAT's purpose. First, the CAT's list of prohibited purposes is not exhaustive and, in any event, is quite broad. *See* CAT, art. 1(1).

¹⁰ The evidence appears to foreclose any claim that they do. Extensive evidence established that tortures occurred to extract information, punish, and intimidate; caused severe physical pain and suffering; and were inflicted by military and ATU officials and personnel.

The illustrative motives are those that typically underlie acts of torture, and serve to emphasize torture’s deliberate nature – an emphasis already supplied by § 2340(1)’s specific-intent requirement. *See* S. Exec. Rep. 101-30, at 13-14. Given the CAT’s broad list of prohibited purposes, and the criminal statute’s specific-intent requirement, Congress reasonably concluded that the crime of torture under federal law – which generally does not treat motive as an offense element, *cf.* 1 LaFare, *Substantive Criminal Law*, § 5.3(a) at 358-60 (2d ed. 2003) – did not require a motive element.

Second, § 2340(1) need not require the actual infliction of severe pain or suffering. The CAT requires each State Party to criminalize, *inter alia*, “attempt[s] to commit torture.” CAT, art. 4(1). The statute’s requirement that the “act [be] committed by a person acting under the color of law” with the specific intent “to inflict severe physical or mental pain or suffering” invariably qualifies as an attempt to commit torture under the CAT definition, whether or not the act succeeds in causing the intended pain or suffering. *See United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007) (attempt requires specific intent to commit crime and substantial step toward its commission). Congress’s decision to focus on, and require, specific intent rather than the fortuity of actual infliction does not broaden the statute beyond the CAT’s scope.

Finally, defendant's argument that § 2340(1)'s "under the color of law" standard transgresses the CAT because it does not require that the torturer act in an "official capacity" is flawed. The CAT prohibits torture "inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." CAT, art. 1(1). In its technical analysis, the Executive Branch interpreted that standard as co-extensive with the "color of law" standard in U.S. law. *See* S. Exec. Rep. 101-30 at 14. The Executive Branch's reasonable construction of a treaty is entitled to deference. *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168, 119 S. Ct. 662, 671 (1999).

The Executive's interpretation here was reasonable. *Cf. Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (looking to § 1983's color-of-law jurisprudence for guidance on whether a defendant engaged in official action for purposes of Alien Tort Act). "Under color of law" applies, *inter alia*, to acts by an official in his or her official capacity, *see, e.g., Screws v. United States*, 325 U.S. 91, 107-08, 65 S. Ct. 1031, 1038 (1945), or by a third person at the direction of an official, *see, e.g., United States v. Haimowitz*, 725 F.2d 1561, 1582 (11th Cir. 1984) – situations covered by the CAT. If defendant's complaint is that the statutory standard impermissibly allows conviction where an official misuses his authority, *see, e.g., United States v. Jones*, 207 F.2d 785, 786-87 (5th Cir. 1953), thus acting only under the pretense of authority, the complaint is off the mark. Such a

standard conforms with the CAT; a contrary rule would give torturers an easy defense that their conduct was not authorized by domestic law. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (noting that “all [states] that engage in torture deny it, and no state claims a sovereign right to torture its own citizens”). Like the rest of § 2340(1), the color-of-law standard furthers, and is rationally related to, the CAT’s goal of combating torture.¹¹

2. Congress Permissibly Proscribed Torture Without Regard To Whether Armed Conflict Existed.

Quoting a statement by the former Legal Adviser of the U.S. State Department, defendant contends (Br. 35) that the CAT does not apply in armed conflicts and that the acts in this case took place during such a conflict. *See* DE:83:App. 1 at 2 (statement). But while several of defendant’s civilian victims were fleeing conflict when they were arbitrarily detained, at least two (Dulleh and Kamara) were not seized in connection with hostilities. Defendant has not explained how his armed-conflict argument applies to the actual victims.

Regardless, even assuming that the CAT does not apply to armed conflicts, defendant’s challenge is fundamentally flawed. First, Congress could rationally

¹¹ Defendant’s suggestion (Br. 34) that the jury instructions allowed conviction with no nexus to anyone acting in an official capacity failed to address the color-of-law instruction as a whole, which provided the official-capacity feature defendant claims is lacking. *See* DE:580:6-7. Defendant did not object to this instruction. DE:600:110, 113.

conclude that, to give full effect to the CAT's objective of eradicating torture, the U.S. implementing legislation should prohibit acts of torture without regard to whether they were committed in situations of armed conflict. *See M'Culloch*, 17 U.S. at 420.

Second, as the former Legal Adviser's statement indicates, torture is already prohibited during armed conflict by treaties predating the CAT. Indeed, the Geneva Conventions – to which virtually every nation, including the United States and Liberia, is a party – prohibit torture during armed conflicts, including civil wars wholly internal to the territory of one nation. *See, e.g.*, Arts. 2-3, 13, Convention Relative to the Treatment of Prisoners of War, dated at Geneva August 12, 1949, 6 UST 3316; TIAS 3365 (“Geneva Convention III”); Arts. 2-3, 32, Convention Relative to the Protection of Civilian Persons in Time of War, dated at Geneva August 12, 1949, 6 UST 3516; TIAS 3365 (“Geneva Convention IV”). Independent of the CAT, Congress had authority to give effect to those provisions by applying the torture ban to situations of armed conflict. *See* Geneva Convention III, arts. 1, 129; Geneva Convention IV, arts. 1, 146. And, because the Geneva Conventions “generally reflect customary international law,” S. Exec. Rep. 101-30 at 15, Congress could likewise rely on its authority to define and punish offenses against the law of nations. *See* pp. 37-39, *infra*.

3. Liberia's Accession To The CAT After The Conspiracy Ended Does Not Preclude The Torture Statute's Application.

Defendant contends (Br. 36) that his prosecution was invalid because Liberia did not accede to the CAT until 2004, and Congress did not expressly indicate that the torture statute should “have retroactive effect.” Those arguments are unsound.

Congress's intent to apply the torture statute to acts occurring in countries regardless whether party to the CAT is clear. The statute applies broadly to “[w]hoever *outside the United States* commits . . . torture.” 18 U.S.C. § 2340A(a) (emphasis added). If Congress intended a narrower scope, it would have said so.

Nor was the law applied retroactively. The principal case cited by defendant, *INS v. St. Cyr*, 533 U.S. 289, 299-300, 315, 121 S. Ct. 2271, 2279, 2287-88 (2001), concerns the retroactive effect of a statute. The relevant statute here was enacted in 1994 – well before the charged conduct occurred. Defendant, an American citizen, had fair notice of the torture prohibition under U.S. law. *See Marks v. United States*, 430 U.S. 188, 191, 97 S. Ct. 990, 992-93 (1977).¹² This prosecution, therefore, does not violate *ex post facto* or due process principles.

Finally, defendant's bald assertion (Br. 36) that this prosecution raises

¹² In his post-arrest statement, defendant said that he had been taught about the Geneva Conventions and about what torture was. DE:595:213.

sovereignty and international law concerns lacks traction. The CAT does not limit each State Party's obligation to criminalize and establish jurisdiction over torture to those acts occurring in the territory of another State Party. CAT, arts. 4 & 5; *see Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 194, 113 S. Ct. 2549, 2571 (1993) (noting principle that treaty's plain language controls absent extraordinary evidence to the contrary). Indeed, "[t]he United States strongly supported the [CAT] provision for universal jurisdiction, on the grounds that torture . . . is an offense of special international concern, and should have . . . broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences." S. Exec. Rep. 101-30 at 19; *see also id.* (noting "that the government of the country where official torture actually occurs may seldom be relied upon to take action"). The torture statute's application to acts in Liberia between 1999 and 2003 is fully consistent with the CAT, which supplies the relevant international law here.

4. The CAT Mandates Present-In Jurisdiction.

Defendant's contention (Br. 37-38) that the CAT does not authorize a party's jurisdiction over an alleged offender based solely on his presence in its territory is belied by the CAT. Article 5(2) obligates a State Party to assert jurisdiction over an "alleged offender" who is "present in any territory under its jurisdiction" and whom it does not extradite; the provision is not limited to "such"

offenders previously described in Article 5(1), as defendant appears to maintain. Moreover, as discussed above, the Executive Branch reasonably interpreted Article 5(2) to authorize present-in jurisdiction, and that interpretation is entitled to deference.

Defendant's claim is ultimately moot, because jurisdiction in this case was also independently based on § 2340A(b)(1). At trial, defendant did not (and does not now) contest the substantial evidence of his U.S. citizenship. *See, e.g.*, DE:591:36, 45; GX:CE1, CE5; *see generally* U.S. Const. amend. XIV, § 1.

In summary, the torture statute fits comfortably within Congress's treaty-implementing power.

C. The Torture Statute Is A Proper Exercise Of Congress's Authority To Define And Punish Offenses Against The Law Of Nations.

The torture statute also is a proper exercise of Congress's power "[t]o define and punish . . . Offences against the Law of Nations." U.S. const., art. I, § 8, cl. 10 (the "Offences Clause").

In *United States v. Arjona*, 120 U.S. 479, 7 S. Ct. 628 (1887), the Supreme Court upheld a law criminalizing the counterfeiting of foreign government securities under the Offences Clause, and stated that "[i]f the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of

nations.” *Id.* at 488, 7 S. Ct. at 632. A century later, the Court reaffirmed that it is through the Offences Clause that the Constitution attempts to further the “vital national interest” of the United States “in complying with international law.” *Boos v. Barry*, 485 U.S. 312, 323, 108 S. Ct. 1157, 1164 (1988).

Official acts of torture are prohibited by numerous treaties and instruments that are virtually universally accepted by the international community, including the CAT, Geneva Conventions, Universal Declaration of Human Rights (Article 5), U.N. General Assembly Res. 217A (III) (1948), and the International Covenant on Civil and Political Rights (Article 7), U.N. General Assembly Res. 2200A (XXI) (1966). The district court concluded (DE:148:16) that the torture prohibition is also a norm of customary international law that has attained the status of *jus cogens* – it is accepted by the international community as a norm from which no derogation is permitted. *See Siderman de Blake*, 965 F.2d at 714-17; *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941-42 (D.C. Cir. 1988); *Restatement (Third) of Foreign Relations Law* § 702(d) & Comment n. Applying *Arjona*, because it is uncontroverted that torture is an offense under international law, Congress was well within its authority to criminalize torture pursuant to the Offences Clause.

Citing *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1251 (11th Cir. 2005), defendant contends (Br. 38) that the torture statute cannot be

justified under the Offences Clause because it is the CAT that defines torture for purposes of international law and Congress's definition exceeded the scope of the CAT. But Congress's articulation of torture is entitled to deference in light of its power to *define* – not merely punish – offenses against the law of nations. *See Finzer v. Barry*, 798 F.2d 1450, 1455 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom.*, 485 U.S. 312 (1988); *cf. United States v. Smith*, 18 U.S. 153, 159 (1820). And, as already discussed, to the extent Congress elaborated upon the CAT definition of torture, it had authority to do so under the Necessary and Proper Clause, because any differences were minor and furthered the goal of combating torture. The Offences Clause, therefore, provides an independent basis for the torture statute.

D. Congress Has The Power To Regulate The Extraterritorial Conduct Of U.S. Citizens.

As applied to defendant, the torture statute also is a permissible exercise of Congress's power to regulate the extraterritorial conduct of U.S. citizens. *See Blackmer v. United States*, 284 U.S. 421, 433-38 (1932); *Nieman v. Dryclean U.S.A. Franchise Co., Inc.*, 178 F.3d 1126, 1129 (11th Cir. 1999); *see also United States v. Plummer*, 221 F.3d 1298, 1307 (11th Cir. 2000) (nationality principle of international law authorizes state to exercise extraterritorial criminal jurisdiction over its citizens). Defendant contends (Br. 42) that Congress's authority to do so

is limited to matters within the scope of its enumerated powers. But the Supreme Court has indicated otherwise. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16, 57 S. Ct. 216, 219 (1936). In *Curtiss-Wright*, the Court stated that “the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution”; such powers, “if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.” *Id.* at 318, 57 S. Ct. at 220; *accord United States v. Lara*, 541 U.S. 193, 201, 124 S. Ct. 1628, 1634 (2004).

Acts of torture committed abroad by U.S. citizens potentially affect the foreign relations of the United States, particularly given international law’s clear prohibition of torture. Because defendant is a U.S. citizen, Congress had the inherent power to criminalize and establish jurisdiction over acts of torture that he committed in Liberia.

II. DEFENDANT’S TORTURE CONSPIRACY CONVICTION IS NOT PROHIBITED BY INTERNATIONAL LAW.

Defendant contends (Br. 42-45) that his conviction for conspiring to commit torture was impermissible because “neither international law nor CAT authorize the prosecution of an extraterritorial conspiracy.”

The CAT’s plain terms undermine defendant’s argument. *See Sale*, 509

U.S. at 194, 113 S. Ct. at 2571. Article 4(1) requires “[e]ach State Party [to] ensure that all acts of torture are offences under its criminal laws,” and provides that “[t]he same shall apply . . . to an act by any person which constitutes complicity or participation in torture.” “Complicity” means “[a]ssociation or participation in a criminal act.” *Black’s Law Dictionary* (8th ed. 2004); *accord* <<<http://www.merriam-webster.com/dictionary/complicity>>> (last visited Sept. 17, 2009). Given the ordinary meaning of “complicity,” and the familiar criminalization of conspiracies under U.S. law, *see* 18 U.S.C. § 371, Congress rationally concluded that one who conspires to commit torture is “complicit[]” in torture (and, as here, frequently “participat[es]” in torture, directly or vicariously), and deserves punishment. Defendant’s contention (Br. 43) that the CAT authorizes liability only for “joint substantive action” effectively reads “complicity” out of Article 4(1).

Criminalizing torture conspiracy is rationally related to the CAT’s objective of combating torture, given the harms generally arising from concerted criminal activity. *See* 2 LaFare, *Substantive Criminal Law* § 12.1(c) at 264 (2d ed. 2003). As recognized by cases holding that a conspiracy to commit a crime of violence is itself a crime of violence, “[t]he existence of a criminal grouping increases the chances that the planned crime will be committed beyond that of a mere possibility. Because the conspiracy itself provides a focal point for collective

criminal action, attainment of the conspirators' objectives becomes instead a significant *probability*." *United States v. Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985) (emphasis in original); accord *United States v. Mitchell*, 23 F.3d 1, 3 (1st Cir. 1994); see also *United States v. Cruz*, 805 F.2d 1464, 1474 n.11 (11th Cir. 1986) (agreeing with *Chimurenga* in dicta). Given that significant probability, Congress appropriately criminalized conspiracies when implementing the CAT.¹³

Defendant's international-law arguments (Br. 42-43) are misplaced.

Whether customary international law itself recognizes the crime of conspiracy does not affect Congress's authority to criminalize a torture conspiracy as a matter of U.S. law. In doing so, Congress permissibly relied upon Article 4(1) of the CAT. Even if the criminalization of conspiracies under domestic law somehow contravened customary international law, statutes and treaties override conflicting rules of customary international law. See *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299 (1900); *Yousef*, 327 F.3d at 92; *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986).

Defendant's international-law argument is effectively foreclosed by *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005). The Court there held that a

¹³ Congress made conspiracy a crime under the Hostage Taking Act, 18 U.S.C. § 1203(a), yet the Hostage Taking Convention (see art. 1(2)) does not contain "complicity" language like the CAT's.

conspiracy to kill or torture was actionable under the Alien Tort Statute, 28 U.S.C. § 1350, which allows an alien to bring suit for torts committed “in violation of the law of nations.” 402 F.3d at 1157-59. The sole case cited by defendant, *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749 (2006), does not advance his argument that international law does not recognize conspiracy crimes. In *Hamdan*, a plurality concluded that conspiracy to violate the laws of war was not an offense against the law of war punishable by a military commission. 548 U.S. at 601-12, 126 S. Ct. at 2779-85. But three justices concluded otherwise, *Hamdan*, 548 U.S. at 697-704, 126 S. Ct. at 2834-38, and even the plurality conceded that some conspiracies – to commit genocide and to wage aggressive war – have been punished under international law, *id.* at 610, 126 S. Ct. at 2784. Significantly, the plurality considered only whether the conspiracy was triable before a commission, and recognized that Congress could make conspiracy punishable in a federal court. *Id.* at 602, 612 n.41, 126 S. Ct. at 2780, 2785 n.41.

Defendant’s final contention is that the torture statute cannot criminalize the conspiracy *in this case* because “[n]either CAT nor international law authorizes the extraterritorial prosecution of governmental self-preservation tactics.” Br. 44-45. But the indictment alleged, and the evidence proved, that the goal of the conspiracy was to protect Taylor’s presidency, not the Liberian government as a whole. *See* DE:257:4; DE:597:108-09 (testimony that Liberian courts were

operating between 1999 and 2003 and that writ of habeas corpus in effect). In any event, official torture is most likely to occur precisely when a regime perceives a threat to its survival. Recognizing that, the CAT provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” CAT, art. 2(2). The CAT plainly anticipated prosecution where torture is undertaken for governmental self-preservation tactics, and the conspiracy prosecution here was fully consistent with international law.

III. SECTION 924(c) APPLIES EXTRATERRITORIALLY.

Defendant challenges his firearm convictions on the grounds that § 924(c) does not, and cannot constitutionally, apply extraterritorially. Br. 45-49.

Defendant’s constitutional claim is subject to plain-error review because he raised only a statutory-interpretation claim below, DE:38:12, which the district court denied, DE:148:20-22. Neither claim is correct.

A. Congress Clearly Intended § 924(c) To Apply Extraterritorially.

“Generally, courts will give extraterritorial effect to penal statutes where congressional intent is clear.” *United States v. MacAllister*, 160 F.3d 1304, 1307 (11th Cir. 1998).

Section 924(c)(1)(A) punishes “any person who, during and in relation to *any* crime of violence or drug trafficking crime . . . for which the person *may be*

prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of *any* such crime, possesses a firearm” (emphasis added). By its plain terms, the statute applies extraterritorially where the predicate crime occurred extraterritorially; had Congress intended otherwise, it would have limited the predicate crimes to those committed in the United States, rather than those “for which the person may be prosecuted in a court of the United States.” Defendant does not dispute either that torture and torture conspiracy are “crimes of violence” or that the torture statute applies extraterritorially. Therefore, § 924(c) applied to his use and conspiracy to use a firearm during and in relation to those crimes.¹⁴

Section 924(c)’s legislative history underscores that Congress intended to apply the statute to any federal crime of violence. In 1984, Congress amended § 924(c) in partial response to decisions limiting its application. *See generally United States v. Singleton*, 16 F.3d 1419, 1425-27 (5th Cir. 1994). The Senate report stated that “subsection 924(c) should be completely revised to ensure that all persons who commit Federal crimes of violence . . . receive a mandatory sentence” S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3490-91.

At least two other district courts have concluded that § 924(c) applies extraterritorially where the predicate crime of violence occurred extraterritorially.

¹⁴ The absence of statutory ambiguity precludes resort to the rule of lenity. *See United States v. Maturin*, 499 F.3d 1243, 1246 (11th Cir. 2007).

See United States v. Reumayr, 530 F. Supp. 2d 1210, 1219 (D.N.M. 2008); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 200-01 (S.D.N.Y. 2000). Similarly, courts have applied the conspiracy and accessory-after-the-fact statutes extraterritorially when underlying substantive crimes reach extraterritorial conduct. *See Yousef*, 327 F.3d at 87-88; *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204-05 (9th Cir. 1991); *Chua Han Maw v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984).

Citing *United States v. Bowman*, 260 U.S. 94, 97-98, 43 S. Ct. 39, 41 (1922), and other cases, defendant contends (Br. 46-47) that a criminal statute may not be applied extraterritorially where the foreign conduct does not cause or threaten domestic harm. But *Bowman* discussed statutes that target foreign conduct threatening domestic harm in the context of inferring extraterritoriality from the nature of the crime. 260 U.S. at 98-99; 43 S. Ct. at 41. *Bowman* does not preclude extraterritorial application where, as here, Congress’s intent to apply the statute extraterritorially is clear. *See MacAllister*, 160 F.3d at 1307-08.¹⁵

Nor is defendant correct (Br. 47) that § 924(c) proscribes a “classically domestic” crime. Using or carrying a firearm during and in relation to a crime of

¹⁵ Under defendant’s interpretation, § 924(c) would not apply to extraterritorial drug trafficking crimes; as the district court found, that result would “substantially diminish[.]” the statute’s effectiveness. DE:148:22 n.7.

violence does not depend on a particular locality, and the predicate crime here – torture – is one that the United States is under an international obligation to punish. Applying § 924(c) to the extraterritorial acts of defendant, a U.S. citizen, is also consistent with the nationality principle of international law. *See Plummer*, 221 F.3d at 1307.

Defendant finds it “absurd” that “Congress intended § 924(c) to criminalize the carrying of a firearm by a military actor during a foreign conflict.” Br. 47. But the jury found defendant’s predicate conduct to be a crime under federal law. Defendant’s torture victims were all civilians. Some were not even fleeing conflict when they were arbitrarily detained, including Dulleh, whose torture is the predicate for Count Eight. Moreover, defendant did not just “carry” a firearm; he personally held a gun to Dulleh’s head while forcing him to hold scalding water. *See* p. 13, *supra*. Defendant’s § 924(c) convictions were far from some “absurd” scenario of a soldier merely being armed, and were manifestly deserved.

B. Section 924(c)’s Application Is Constitutional.

Congress’s authority to criminalize defendant’s firearm violations was derivative of its authority to criminalize torture. In *United States v. Brown*, 72 F.3d 96, 96-97 (8th Cir. 1995), the court rejected a challenge to Congress’s power to enact § 924(c), concluding that jurisdiction over the firearm conduct was proper because Congress had authority under the Commerce Clause to punish the

predicate drug trafficking offense. Citing *Brown*, this Court rejected a constitutional challenge to § 924(c) in *United States v. DePace*, 120 F.3d 233, 235 n.2 (11th Cir. 1997). Accord *United States v. Staples*, 85 F.3d 461, 463 (9th Cir. 1996); see also *United States v. McAuliffe*, 490 F.3d 526, 536 (6th Cir. 2007) (Congress’s authority to enact similarly-worded § 844(h) derived from its unchallenged power to proscribe the predicate offense); *United States v. Creech*, 408 F.3d 264, 267 (5th Cir. 2005) (same); *United States v. Goodwin*, 141 F.3d 394, 399 (2d Cir. 1997) (similar reasoning as to money-laundering statute).

Likewise, because Congress had authority to punish torture and conspiracy to torture, it had derivative authority to punish defendant’s firearm conduct during and in relation to those crimes. That Congress’s power to punish the predicate torture offenses derived from constitutional sources other than the Commerce Clause does not change the analysis. Nor is Congress engaging in “bootstrapping” (Def. Br. 48); indeed, the facts of this case vividly illustrate how the use of firearms “during and in relation to” the predicate crime of violence facilitates and enhances the predicate crime. Applying § 924(c) to defendant produced no error, let alone reversible plain error.

IV. THE CUMULATIVE EFFECT OF ANY ERRORS DOES NOT WARRANT REVERSAL.

Defendant contends (Br. 49-62) that the cumulative effect of at least 18

alleged errors warrants a new trial. Defendant raises several issues summarily, with little or no explanation of why he believes an error occurred. *See, e.g.*, Br. 58. The Court should decline to consider such passing arguments, given the “settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990); *see also United v. Gupta*, 463 F.3d 1182, 1195 (11th Cir. 2006). In any event, the district court neither abused its discretion nor committed plain error in these instances; even if it did, reversal is not warranted.

A. Alleged Evidentiary Errors

1. Prior Consistent Statements

Defendant erroneously challenges (Br. 50-52) the admission of consistent statements by Kpadeh and Dulleh that defendant tortured them.

Under Fed. R. Evid. 801(d)(1)(B), a witness’s out-of-court statement is not hearsay if it is consistent with the witness’s testimony and is “offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” The statement must have been made before the supposed motive to fabricate arose. *Tome v. United States*, 513 U.S. 150, 157-58, 115 S. Ct. 696, 701 (1995). Fed. R. Evid. 104 authorizes a district court to make findings of fact on preliminary questions concerning the admissibility of evidence. *See Equity*

Lifestyle Properties, Inc. v. Florida Mowing and Landscape Servs., Inc., 556 F.3d 1232, 1244 n.19 (11th Cir. 2009). A court’s finding on whether a motive to fabricate existed at the time of a prior consistent statement is “a factual question properly decided by the district court and subject to reversal only for a clear abuse of discretion.” *United States v. Drury*, 396 F.3d 1303, 1317 (11th Cir. 2005) (quoting *United States v. Prieto*, 232 F.3d 816, 822 (11th Cir. 2000)).

In opening statement, defendant told the jury that victim-witnesses had a pecuniary interest in convicting defendant due to the prospect of getting money from lawsuits and from Liberia’s post-war Truth and Reconciliation Commission. DE:585:28-29. Defendant began Kpadeh’s cross-examination by testing Kpadeh’s inclination to sue defendant or seek redress from the Truth and Reconciliation Commission, linking those prospects with Kpadeh’s having legal representation. DE:586:101-103. Kpadeh first retained counsel in 2007. DE:586:44, 182. Cross-examination also implied that Kpadeh could have but did not complain to the U.S. Embassy in 1999 of torture. DE:586:171-172. Over defendant’s objection, the government rebutted the express and implied charges of recent fabrication with testimony by Kpadeh’s half-brother, Henry Marwolo, that Kpadeh told him in October 1999 that he had been arrested, taken to Gbatala Base, and tortured by ATU soldiers on Chuckie Taylor’s orders. DE:586:207.

The district court properly admitted the testimony, noting that both in

opening statement and cross-examination defendant had implied that Kpadeh was seeking money from a lawsuit, reflected by Kpadeh retaining counsel in 2007, thus raising a charge of recent fabrication which could be refuted by the 1999 prior consistent statement. DE:586:200-205. The defense argued that they had intended to imply a motive to fabricate going back much further in time, arising from poor living conditions in Liberia that would impel victim-witnesses to lie to establish grounds for refugee resettlement in another country, but the district court was correct that it need not accept defendant's characterization of the record, especially in light of specific references to Kpadeh's recent retention of counsel. "A district court is granted broad discretion in determining the admissibility of a prior consistent statement under Fed.R.Evid. 801(d)(1)(B)." *Prieto*, 232 F.3d at 819. This determination should be an objective assessment of whether the trial record reflects tactics that a reasonable jury could take as implying recent fabrication or improper influence, not, as defendant wrongly proposed, a subjective determination of whether impeaching counsel intended to imply such fabrication. *See United States v. Frazier*, 469 F.3d. 85, 89 & n.2 (3rd Cir. 2006).

Defendant's general theme of "desperate and disgruntled" Africans seeking to flee troubled homelands, DE:585:23, lacked evidentiary foundation as to Kpadeh, who continues to live in Liberia and considers that home best for him. DE:586:43, 177-178. A broad, unsupported allegation of an early motive to

fabricate cannot be used strategically to block admission of a relevant prior consistent statement that refutes a claim of recent fabrication that was pointedly raised by the defense.¹⁶ Further, a prior consistent statement need not rebut all motives to fabricate, just the specific motive alleged at trial. *United States v. Wilson*, 355 F.3d 358, 361 (5th Cir. 2003).

Given the defense's implication that Kpadeh had a recent motive to falsely accuse defendant, the district court properly admitted the testimony. Kpadeh's statement preceded his alleged financial motive to fabricate; there was no evidence that Kpadeh believed he could sue Taylor or defendant in 1999, and Kpadeh did not obtain a lawyer until 2007. DE:586:44. Kpadeh's prior consistent statement to Marwolo was properly admitted.

Dulleh's statements were also properly admitted. Defendant appears to challenge Bility's, Layee's, and Wilson's testimony that, after arriving at the pit in Klay Junction, Dulleh described how Chuckie Taylor had tortured him. DE:593:192; DE:594:70; DE:595:35. Defendant did not object to Bility's testimony and only generally objected to Layee's testimony. DE:593:192;

¹⁶ In closing, defendant mentioned a possible lawsuit by Kpadeh against defendant, and argued that when Kpadeh was contacted about this case – *i.e.*, after the 2006 prosecution began – he “jumps very easily on the bandwagon” to accuse defendant, making the claim of recent fabrication even more explicit. DE:636:46, 82.

DE:594:70. Whichever standard of review applies, the admitted statements were not error because they rebutted an implied charge that Dulleh had a motive to falsely accuse defendant. In its opening, the defense alleged that some witnesses had a motive to lie because they had “serious medical conditions” that “left untreated will probably mean their death in Liberia.” DE:585:28. On cross-examination, the defense elicited from Dulleh that he is HIV-positive and suggested that Dulleh had wanted to leave West Africa because of HIV’s stigma there and because of superior U.S. medical treatment. DE:593:50-52. In closing, the defense argued that Dulleh is “prospering” in the United States “thanks to medicine he’s able to obtain to combat his life-threatening illness.” DE:636:46. Yet Dulleh learned that he was HIV-positive in 2005. DE:593:95-96. Therefore, his statements in Klay in 2002 predated the alleged motive to fabricate and were admissible.

Bility’s and Layee’s testimony – as well as Dulleh’s own testimony about his prior statements (DE:592:209-12) – was separately admissible under Rule 803(2)’s exception for excited utterances. All three testified that Dulleh was distressed when he made the statements upon arriving at Klay, DE:592:208; DE:593:191-92; DE:594:69-70, which defendant concedes (Br. 52) was only four to five hours after Dulleh left Yeaten’s house. The length of time between the startling event and the utterance is not dispositive of admissibility. Rather, “the

character of the . . . event will largely determine the significance of the time factor,” Fed. R. Evid. 803(2), Advisory Committee Notes, and a delay of several hours is permissible, *see, e.g., United States v. Cruz*, 156 F.3d 22, 30 (1st Cir. 1998) (four hours); *United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990) (five to six hours). Given Dulleh’s severe torture and fear of death just hours earlier, the district court correctly found that Dulleh was still under the stress of excitement when he made the statements. DE:592:210-12.

2. Medical Records.

Defendant contends (Br. 53) that the district court erred in admitting portions of victims’ medical records identifying defendant as their abuser, because his identity was not, under Fed. R. Evid. 803(4), reasonably pertinent to diagnosis or treatment. But the sole record identified by defendant (GX:RK28; DE:587:37) reports Kpadeh’s statement that he was imprisoned and tortured for two months by the ATU, not defendant specifically, and was independently admissible as a prior consistent statement because it was made in October 1999.

Defendant challenges (Br. 53) Dr. Hyma’s testimony that Dulleh said defendant had threatened to kill him. But Dr. Hyma testified as an expert witness; his testimony was governed by Rule 703. DE:597:8. Even if defendant’s identity should not have been disclosed, any prejudice was negligible in light of Dulleh’s own testimony that defendant had threatened to kill him, DE:593:36, and his

properly admitted prior statements at Klay.

Defendant's challenge (Br. 53-54) to statements in Jusu's and Turay's medical records of being "tortured" or "abused" is likewise meritless. The district court overruled defendant's objection based on *United States v. Darden*, 186 Fed. Appx. 887 (11th Cir. 2006). DE:591:72-74. Applying Rule 803(4), *Darden* held that a medical record's statement that a person was "beaten" was admissible because it went to the cause of the injuries, whereas the statement beaten "by the cops" was inadmissible because it assigned fault. 186 Fed. Appx. at 889-90. Much like the term "beaten," the statements here that a victim was "tortured" or "abused" addressed the cause of the victim's injuries and were usually followed by details of the act; the challenged statements did not assign fault by identifying perpetrators. DE:591:105-07; see *United States v. Iron Thunder*, 714 F.2d 765, 772-73 (8th Cir. 1983) (doctor's testimony about victim's statement to the effect she had been raped was admissible under Rule 803(4)). Nor did the statements purport to conclude that the acts were torture under § 2340(1). The judge instructed the jury that it was to "follow the law as I explain it to you," DE:636:149, including the properly stated definition of torture; the jury is presumed to have followed that instruction, *United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir. 1996). The statements were admissible.

3. Rap Lyrics

The district court properly admitted rap lyrics found in defendant's possession when he was arrested. DE:595:109-11; GX:CE4A-J.

First, the lyrics were adequately authenticated under Fed. R. Evid. 901. Defendant concedes (Br. 55) that Rule 901(b)'s list of authentication-means is non-exclusive. Authentication "merely involves the process of presenting sufficient evidence to make out a *prima facie* case that the proffered evidence is what it purports to be," whereupon the evidence should be admitted and the question of authenticity decided by the jury. *United States v. Caldwell*, 776 F.2d 989, 1001 (11th Cir. 1985). The government made a *prima facie* showing that the rap lyrics were attributable to defendant: they were found in his possession, bore the signatures "Charles McArther Emmanuel" and "Charles Taylor, II," and referred to defendant's being originally from Massachusetts and later Florida ("From the north, but I ride wit Floridian tacts"). DE:595:109-11; GX:CE4C,D,I; *see United States v. Higuez-Ibarra*, 954 F.2d 546, 552-53 (9th Cir. 1992) (notebooks authenticated from contents and from being found in defendants' home with documents bearing defendants' names). Moreover, a customs officer testified that the "Emmanuel" signature on the lyrics matched that on defendant's passport. DE:595:130. Even if the officer's familiarity with defendant's signature was acquired in the course of prosecution, *see* Def. Br. 55, his comparison supported

the other indicia of authenticity, and the jury could make its own comparison.

Second, the rap lyrics were probative, and their relevance was not substantially outweighed by any risk of prejudice. By referring to the ATU, the lyrics provided evidence of defendant's association, and continued psychological identification, with that unit. DE:595:131-37. That evidence was relevant. The indictment alleged defendant's association with the ATU, DE:257:3; as the district court found (DE:595:111), the defense continually challenged the credibility of witnesses who testified that defendant had control of the ATU. *See* DE:592:109-10; DE:636:77, 84-87. Moreover, the lyrics's references to ATU violence (*e.g.*, DE:595:131) belied defendant's post-arrest statements that he had never seen ATU soldiers beat or kill anyone (DE:595:203-04), evidencing consciousness of guilt. *See United States v. Brown*, 604 F.2d 347, 351 n.2 (5th Cir. 1979). The district court did not abuse its discretion.

4. Punishment Of ATU Recruits

Defendant's two-sentence challenge (Br. 56) to Wesley Sieh's testimony about ATU recruits being punished at Gbatala Base, DE:591:218-27, lacks merit. The district court correctly found that the evidence of punitive control measures provided background to the conspiracy by explaining "how you get these men at the Gbatala Base to commit all of these acts of torture." DE:591:241; *see also* DE:592:32-35 (punished soldiers thought to be members of groups opposing

Taylor). Moreover, Sieh's testimony that Compari (a co-conspirator, *see* n. 4, *supra*) was following defendant's orders, DE:591:226, showed defendant's control of the ATU, and Sieh's testimony about a recruit running the rim, DE:591:219-24, corroborated Kpadeh's testimony on that method of torture, DE:586:8-12.

5. Other Hearsay Claims

Defendant challenges (Br. 57) Sieh's testimony that his former NPFL commander, Siafa Normah, said that Taylor had ordered defendant to form the Demon Forces. Defendant told Normah to recommend former NPFL soldiers for the unit; Normah wanted Sieh to join. DE:591:157-59. Defendant challenges the final link in the chain of statements: Normah's conveyance of defendant's and Taylor's statements to Sieh.

Normah's statements to Sieh were admissible under Rule 801(d)(2)(C) and Rule 801(d)(2)(D), because they concerned the same matter for which defendant was employing Normah – recommending men for the ATU. Sieh testified that, as a former front-line NPFL soldier, he saw Taylor, its head, when Sieh accompanied Normah to Gbarnga. DE:591:129-31. That testimony established Normah's prior service to Taylor, and, along with defendant's statements, showed that Normah was being used to recruit soldiers for the ATU.

Defendant's one-sentence challenge (Br. 57) to Pete Davis's background testimony on Liberia (DE:585:55-61) lacks merit. The testimony was admissible

under Rule 803(20) as “reputation as to events of general history.” *See generally* 5 Weinstein’s *Federal Evidence* § 803.22(2) (2d ed. 2009). Regardless, defendant suffered no prejudice; defendant does not allege that the testimony was erroneous, and it did not affect his criminal liability for torture.

Finally, in bullet-point format, defendant summarily contests (Br. 58) the admission of six alleged hearsay statements. The court should find those claims waived. *See* pp. 48-49, *supra*. Nevertheless, the testimony was admissible as follows. Bullets 1, 2: Normah’s additional statements were admissible under Rules 801(d)(2)(C) and (d)(2)(D) for reasons discussed *supra*. Bullet 3: The admission of Compari’s statements – subject only to plain-error review, *see* DE:591:210, 233 – was not error because the statements concerned Compari’s employment as base commander and furthered the conspiracy. *See* Fed. R. Evid. 801(d)(2)(D), (d)(2)(E). Bullet 4: Dumbaya’s statement was not hearsay because it explained Turay’s and Jusu’s subsequent escape from Gbatala Base. *See United States v. Tokars*, 95 F.3d 1520, 1535-36 (11th Cir. 1996). Bullet 5: Jusu’s out-of-court statement that defendant was his torturer is subject to plain-error review, *see* DE:596:9, and was properly admitted because Jusu made it while identifying defendant from a photograph. Fed. R. Evid. 801(d)(1)(C). In any event, Jusu identified defendant in court after testifying that defendant tortured him. DE:588:223-24. Bullet 6: The statement by ATU soldiers to Kpadeh was

admissible under Rules 801(d)(2)(C) and (d)(2)(D).

B. Interpreter

During trial, an interpreter provided assistance with translating dialects and clarifying the heavily-accented English testimony of certain Liberian witnesses.

DE:586:4-6. On the eighteenth day, the interpreter began to lose his voice.

DE:599:5. Before lunch, the defense asked for a recess due to this problem.

DE:599:130. The court denied the request, but instructed counsel to speak slowly and defense counsel to tell its witnesses to speak up if they did not understand a question, adding: “I am paying very close attention and you know I interrupt if I don’t understand.” DE:599:130. When trial resumed at 2 p.m., the court advised the jurors that the interpreter had laryngitis and instructed them to raise their hands if they did not understand any testimony. DE:599:131. The interpreter continued to serve. DE:599:156

The denial of the request for a recess was not an abuse of discretion. *See United States v. Edouard*, 485 F.3d 1324, 1337 (11th Cir. 2007). The court closely monitored the afternoon testimony, interjecting several times to ask a witness to speak more slowly or clearly. DE:599:141-42, 146, 193.

Notwithstanding voice problems, the interpreter repeatedly assisted with the afternoon testimony. DE:599:146, 164-65, 188-89, 192, 198. When the defense renewed its request for a recess, the court found that the testimony was

progressing without problems. DE:599:157. Trial concluded for the day at 4 p.m. DE:599:202. On the next (and final) day of testimony, the interpreter provided assistance without complaint from the defense. *See, e.g.*, DE:600:28-34, 42.

The district court's handling of the interpreter's brief and mild case of laryngitis was appropriate and did not render defendant's trial "fundamentally unfair." *Edouard*, 485 F.3d at 1340. Defendant's contrary claim (Br. 58-59) simply is not supported by the record.

C. Jury Instruction

Defendant contends (59-60) that the district court erred in not instructing the jury that an element of torture is that it not be done incidental to lawful sanctions. Although the defense objected during the charge conference to the government's proposed instruction, DE:600:106, it did not object to the court's instructions as actually given, despite the opportunity to do so, DE:636:169-70. Accordingly, this Court's review is for plain error. *See* Fed. R. Crim. P. 30(d); *Jones v. United States*, 527 U.S. 373, 388, 119 S. Ct. 2090, 2101-02 (1999).

The district court instructed the jury that:

Torture means an act committed by a person, acting under the color of law, specifically intended to inflict severe physical pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and the purpose of the law

prohibiting torture.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

- First: That the Defendant committed an act with the specific intent to inflict severe physical pain or suffering;
- Second: That the Defendant was acting under the color of law;
- Third: That the act of torture was against another person who was within the Defendant's custody or physical control; and
- Fourth: That the act of torture occurred outside the United States.

DE:580:6; *accord* DE:636:158-59.

This instruction was not error, let alone plain error. The court instructed the jury as to all the elements of the offense of torture, and defined torture as limited to acts specifically intended to inflict severe physical pain or suffering *other than pain or suffering incidental to lawful sanctions*, the very language defendant claims was not sufficiently charged. Defendant fails to articulate how having this language in the immediately contiguous definition of torture, rather than as a fifth numbered element, is error.

The lawful-sanctions clause of § 2340(1) is an affirmative defense, not an offense element; it appears in a parenthetical, is drafted as an exception to the

general offense, and relates to facts of statutory exception which a defendant is better positioned to prove. *See Kloess*, 251 F.3d at 946; *United States v. McArthur*, 108 F.3d 1350, 1355 (11th Cir. 1997). Nonetheless, the court acceded to defendant's request not to label "lawful sanctions" as an affirmative defense, DE:600:113, and placed the lawful-sanctions discussion in the instruction as part of torture's definition, in tight connection with the offense elements. In so doing, the instructions effectively treated the lawful-sanctions clause as an offense element that the government had to prove beyond a reasonable doubt. *See United States v. Smith*, 520 F.3d 1097, 1101-04 (9th Cir. 2008) (jury instruction's tight connection between definition and elements list ensured government held to burden of proof beyond reasonable doubt of definitional component); *United States v. Klein*, 543 F.3d 206, 211-212 (5th Cir. 2008) (affecting-commerce requirement included in instructions through definition provision).

Even if the court's instruction somehow constituted plain error, defendant was not prejudiced because the government presented uncontested evidence that defendant's conduct was not incidental to lawful sanctions, DE:597:115-17, and defendant's trial theory, all along, was that the victims were falsely accusing him of torture, not that he had been implementing lawful sanctions, DE:585:27; DE:636:45-47.

D. The “Torture Memos”

Pretrial, defendant moved for production of classified Executive Branch memoranda that allegedly authorized interrogation techniques similar to acts charged in the indictment. DE:68, 269, 428. Defendant also moved to dismiss the indictment on the ground that he was being selectively prosecuted, DE:67, 267, and moved to exclude evidence at trial of conduct supposedly similar to the authorized techniques, DE:428:3-7. The district court denied those motions. DE:141, 208:30, 328, 486.

Contrary to defendant’s argument (Br. 60-61), those rulings were not an abuse of discretion. Defendant notes his argument below that discovery was “necessary for the court to make an appropriate ruling on what constitutes ‘torture,’” but fails to explain why that is so. To the contrary, courts routinely apply the ordinary meaning of torture under the Torture Victim Protection Act (28 U.S.C. § 1350 note), *see, e.g., Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 93-94 (D.C. Cir. 2002), and in immigration cases when applying the CAT, *see, e.g., Cadet*, 377 F.3d at 1192-96, and do so without regard to internal Executive-Branch material. Significantly, defendant does not contend on appeal that the court’s jury instructions or rulings on the meaning of “severe physical pain or suffering” were erroneous, either in light of Executive-Branch memoranda he had by the time of trial, *see* DE:269:Ex.2, or of previously classified memoranda

that he acknowledges (Br. 60) are now available to him.

Defendant's main argument is one of estoppel – that the government was precluded from prosecuting him for acts similar to acts allegedly authorized by internal government memoranda. Br. 61. That argument lacks foundation or authority. The purported policies and practices of the United States have no factual nexus to this case; defendant does not, and cannot, claim that he relied on any internal U.S. government document in committing the acts of torture for which the jury convicted him. *See United States v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003) (party claiming estoppel in criminal forfeiture context must show, *inter alia*, detrimental reliance). Defendant's claim lacks merit.

E. Cumulative Effect

Because the district court committed no errors below, or at most an isolated error, there can be no cumulative error. *See United States v. Waldron*, 363 F.3d 1103, 1110 (11th Cir. 2004).

Even if the Court were to find multiple errors, reversal is not warranted. *See generally Baker*, 432 F.3d at 1223. Defendant's claim implicitly concedes that any individual error was harmless, and indeed many of the alleged errors produced no prejudice whatsoever. Defendant also concedes (Br. 62) that the evidence against him was substantial. Nevertheless, he points to alleged inconsistencies in the testimony of victims, but without identifying the inconsistencies or explaining

how they relate to the alleged errors. As the government explained during summation, certain variations in two victims' accounts (Jusu's and Turay's) concerned only details, such as the number of men each saw defendant shoot at the checkpoint; their accounts of torture were consistent overall. DE:636:19-21; *see* pp. 5-9, *supra* (citing testimony of Jusu and Turay). Victims' varying recollection of certain details is easily attributed to the trauma experienced at the time, DE:636:19-20, and the jury plainly credited their testimony. The Court should reject defendant's theory of cumulative prejudice.

V. THE DISTRICT COURT'S APPLICATION OF THE SENTENCING GUIDELINES WAS CORRECT AND CONSTITUTIONAL.

Defendant contends (Br. 62-68) that the district court erred by applying the kidnapping and murder guidelines in calculating his advisory Sentencing Guidelines range, and that the application of those guidelines violated the Constitution. Those arguments fail.

A. Background

Using the 2002 Guidelines, the Presentence Report ("PSR") divided the Guidelines calculations for defendant's Count One conspiracy conviction into ten groups corresponding to ten victims, and then grouped his convictions on Counts Two through Seven with the Count 1 groups, as appropriate. PSR ¶¶ 85-161. The substantive § 924(c) conviction was not grouped because it carried a mandatory

consecutive seven-year term. PSR ¶ 87. For each group, the PSR applied the guideline for kidnapping, abduction, and unlawful restraint, U.S.S.G. § 2A4.1, and, as to Cole and the three refugees shot at the checkpoint, applied § 2A4.1's cross-reference to the first-degree murder guideline, U.S.S.G. § 2A1.1, resulting in a base offense level of 43. PSR ¶¶ 89, 95, 101, 115. After applying enhancements and multiple-count adjustments, the PSR recommended a total offense level of 51, yielding a Guidelines range of life imprisonment. *Id.* ¶ 175.

At sentencing, the district court applied the kidnapping and first-degree murder guidelines over defense objection, finding a base offense level of 43. DE:623:40, 45-46. The court did not adopt multiple-count adjustments, as defendant's advisory Guidelines range of life would not have changed. DE:623:47-51. The court sentenced defendant to 1,167 months' imprisonment. DE:623:85-87.

B. Argument

1. The Court Correctly Applied The Kidnapping Guideline.

The Statutory Index (Appendix A) lists § 2A4.1 as one of several guidelines applicable to a torture offense. Where the index lists more than one guideline, the court must determine the “guideline most appropriate for the offense conduct charged in the count for which the defendant was convicted.” U.S.S.G., App. A, intro. That determination is based on the conduct alleged in the indictment.

U.S.S.G. § 1B1.2(a); *United States v. Saavedra*, 148 F.3d 1311, 1314 (11th Cir. 1998).

The district court correctly applied the kidnapping guideline. Count 1 charged defendant with conspiring to commit torture. Torture requires, as an element, that the defendant have custody or physical control over the victim. 18 U.S.C. § 2340(1). Count 1 alleged that the manner and means of the conspiracy included “seiz[ing], imprison[ing] at various locations, and interrogat[ing] persons” about their alleged opposition to Taylor’s presidency. DE:257:4. It also alleged that, in furtherance of the conspiracy, victims were seized, transported to detention locations (often while bound), and tortured at those locations, one (Kpadeh) for a period of months. *Id.* at 5-11. That the charged seizure and detention of victims enabled and facilitated the acts of torture supports applying the kidnapping guideline, which recognizes that kidnapping can “occur[] as part of or to facilitate the commission of another offense.” U.S.S.G. § 2A4.1, Background. As relevant here, the kidnapping guideline takes into account, *inter alia*, the gravity of victim injuries, whether a dangerous weapon was used, the length of detention, and whether a victim was sexually exploited or killed. *Id.* §§ 2A4.1(b), (c). By contrast, the aggravated assault guideline advocated by defendant below, U.S.S.G. § 2A2.2, does not provide for all of those factors. Because the kidnapping guideline covers more circumstances relevant to these

charges, the district court correctly used it. *See United States v. Kuku*, 129 F.3d 1435, 1439-40 (11th Cir. 1997).

Defendant contends (Br. 63) that “the facts simply did not establish kidnapping as defined by criminal law,” because victims supposedly were seized on the belief that “they posed a threat to the security of the nation.” But § 2A4.1 covers more than kidnapping, and the Guidelines do not require that the offense of conviction align perfectly with the guideline being applied. *See* U.S.S.G., ch. 2, intro. (noting that a guideline section “may cover one statute or many”). There is no evidence that the seizure of the victims in this case was lawful. To the contrary, Jusu, Turay, and other refugees were seized because they were from Sierra Leone; Kpadeh was seized because he carried a Unity Party card and refused to fight for defendant; Dulleh was arrested at home, in the middle of the night; and Kamara was never told the reason for his arrest. *See* pp. 5-18, *supra*. None of the victims was brought before a court, given access to a lawyer, or charged with a crime, although Liberian courts were operating between 1999 and 2003. DE:597:108-09. Victims were transported to secret or remote locations (*e.g.*, the swampy pits of Gbatala, the underground pit at Klay, Yeaten’s garage, an abandoned toilet house), evidencing the illegality of their detention. *See also* DE:586:34 (Compari instructed Kpadeh not to reveal having been detained at Gbatala). And as the district court found, apart from whether the initial seizures

were lawful, the victims’ “continued detention and what occurred during and throughout the period of detention . . . was without lawful justification.”

DE:623:40. Finally, the CAT expressly excludes claims of official justification as a defense to torture. Art. 2(2). The district court properly rejected defendant’s claim of lawful detention.

2. The Murder Cross-Reference Did Not Affect Defendant’s Guideline Range But Was Correct In Any Event.

The district court’s cross-reference to the murder guideline is ultimately irrelevant because it did not affect defendant’s Guidelines range of life imprisonment based on an offense level of 43. Without the cross-reference, the highest offense level for a group would have been 39. PSR ¶¶ 145, 161.¹⁷ Multiple-count adjustments would have increased that offense level to 44, U.S.S.G. § 3D1.4; PSR ¶¶ 165, 168-71, yielding the same range of life imprisonment.

Nevertheless, the cross-reference was plainly warranted. The killings satisfied § 2A4.1(c) and constituted relevant conduct, U.S.S.G. § 1B1.3(a),

¹⁷ The district court likely would have applied all of the enhancements producing offense level 39. *Cf.* DE:623:11-17 (court telling defense that, even using aggravated-assault guideline, it would calculate offense level 41). The court already found a leader enhancement (§ 3B1.1(a)) appropriate, DE:623:46, and the evidence amply supported the other enhancements (*e.g.*, use of dangerous weapon). *See* PSR ¶¶ 138-41, 154-57.

because they occurred in the course and in furtherance of the conspiracy. The checkpoint shootings initiated the terrorization, control, and subjugation of Jusu, Turay and other torture victims, while Cole's beheading served both to punish him for escaping from Gbatala – where he was being tortured, DE:588:164-65 – and to further subjugate other prisoners.

3. Defendant's Constitutional Claim Lacks Merit.

The district court treated the Guidelines as advisory in accordance with *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). DE:623:4. Under an advisory Guidelines regime, judicial fact-finding that supports a sentence within the statutory maximum set forth in the U.S. Code does not violate the Sixth Amendment. *Booker*, 543 U.S. at 233, 125 S. Ct. at 750; *United States v. Chau*, 426 F.3d 1318, 1324 (11th Cir. 2005). Defendant was sentenced at or below the statutory maximum on each count, and 50 years below his cumulative statutory maximum (147 years). DE:618:3. Any facts found by the district court resulted in no constitutional violation.

Because a sentencing court's legal discretion extends to the maximum established by the U.S. Code, defendant's reliance (Br. 66) on Justice Scalia's concurrence in *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456 (2007), to make an "as applied" Sixth Amendment claim is unavailing. But even if an as-applied challenge were theoretically available, it would fail. Defendant could

succeed only by demonstrating that his sentence would be unreasonable absent a judge-found fact. *See Rita*, 551 U.S. at 375, 127 S. Ct. at 2478 (Scalia, J., concurring); *Gall v. United States*, 128 S. Ct. 586, 602-03 (2007) (Scalia, J., concurring). The district court aptly noted that “it is hard to conceive of any more serious offenses against the dignity and the lives of human beings” than defendant’s torture crimes. DE:623:85. Even defendant admits (Br. 31) that the facts adduced were “gruesome.” The heinous and depraved nature of defendant’s conduct was similar to that of child sex crimes, for which courts have repeatedly upheld long sentences. *See Sarras*, 575 F.3d at 1220 (collecting cases); *see also United States v. Thompson*, 523 F.3d 806, 812-14 (7th Cir. 2008) (upholding 190-year mail fraud sentence where district court found defendant committed premeditated murder). Defendant’s constitutional claim is meritless.

4. The CAT Does Not Limit Sentencing.

The Court can quickly dispose of defendant’s final claim (Br. 67-68) that his sentence violated the CAT.

Defendant was sentenced for torture; the abductions, murders, and other characteristics of his crimes were simply factors that the district court considered in fashioning an appropriate punishment. Nothing in the CAT precluded this. Article 4(2) only requires each State Party to make torture offenses “punishable by appropriate penalties which take into account their grave nature.” Moreover,

federal law provides that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. § 3661. When implementing the CAT, Congress certainly had the ability to apply generally applicable sentencing rules to violations of the torture statute.

Defendant’s strained analogy to the rule of specialty does not rescue his argument. Defendant was not extradited, so the rule has no application to him. Moreover, the rule of specialty does not restrict the scope of proof of other crimes that may be considered in the sentencing process. *See United States v. Garcia*, 208 F.3d 1258, 1261 (11th Cir. 2000), *vacated on other grounds*, 531 U.S. 1062 (2001); *United States v. Garrido-Santana*, 360 F.3d 565, 578 (6th Cir. 2004); *United States v. Lazarevitch*, 147 F.3d 1061, 1064 (9th Cir. 1998). Defendant’s claim fails.

CONCLUSION

For the foregoing reasons, defendant's convictions and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with this Court's order dated August 26, 2009, which authorized the government to file an answering brief of up to 16,000 words, because the brief contains 15,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced font using WordPerfect 12 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I, John-Alex Romano, do hereby certify that on September 18, 2009, I caused to be sent via Federal Express, for delivery on the next business day, two copies of the foregoing Brief for the United States to counsel for Defendant-Appellant:

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