No. 05-10642

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

CHARLES JACKSON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

WAN J. KIM
Assistant Attorney General

JESSICA DUNSAY SILVER
NATHANIEL S. POLLOCK
Attorneys
Department of Justice
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-0333

TABLE OF CONTENTS

PAGE

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES: **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-10642

UNITED STATES OF AMERICA,

Appellee

v.

CHARLES JACKSON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742. Defendant was sentenced on September 13, 2005, ASER 463,[1] and final judgment was entered on September 16, 2005, App. 269. The notice of appeal was filed on September 26, 2005, App. 269, and is timely under Rule 4(a) of the Federal Rules of Appellate Procedure.

---

[1] This brief uses the following abbreviations: "ASER __" for the page number of the Appellee United States' Supplemental Excerpts of Record; "App. __" for the page number of Appellant's Appendix; and "Br. __" for the page number of Appellant's opening brief.

STATEMENT OF THE ISSUES

1. Whether there is sufficient evidence in the record to sustain Jackson's conviction.
2. Whether the district court abused its discretion by failing to grant Jackson's motion for a new trial.
3. Whether the prosecutor's questioning and impeachment of defense witness Loerzel amounted to misconduct which materially affected the fairness of the trial.
4. Whether the district court correctly instructed the jury that the statutory term "knowingly" did not require Jackson to have knowledge that his conduct was illegal.
5. Whether the district court instructed the jury that they could consider matters beyond the scope of the indictment.
6. Whether the district court correctly applied a sentencing enhancement for abuse of a position of trust.

STATEMENT OF THE CASE

This case arises from an interview report authored by defendant Charles Jackson, a criminal investigator with the Federal Protective Service (FPS). ASER 1-2. Jackson was assigned to investigate whether criminal charges should be brought against Jeffrey Petri, who was arrested by FPS officers after a high speed chase on February 15, 2003. App. 61. Although one of the arresting

officers—John Haire—admitted that he and another officer had lied about the events leading up to the chase, Jackson did not include that admission in his report. App. 62.

On November 23, 2004, a one-count indictment was returned charging defendant Charles Jackson under 18 U.S.C. 1519 with falsification of a record in a federal investigation. App. 1-5. The indictment charged that defendant knowingly failed to disclose in his report information he obtained in an interview with John Haire which "contradicted evidence that [he] knew had been presented to the FPS, the United States Attorney's Office for the Northern District of California, and a Federal Magistrate-Judge in connection with Petri's arrest and detention." App. 3-4.

Jackson was tried in May 2005 in the United States District Court for the Northern District of California. App. 72-262; ASER 3-375. On May 26, 2005, the jury convicted Jackson. ASER 366-367. On September 13, 2005, the district court sentenced Jackson to 24 months in prison. ASER 463. On October 26, 2003, the court denied Jackson's motion for a judgment of acquittal or, in the alternative, a new trial. App. 61-68.

STATEMENT OF FACTS

1. The defendant, Charles Jackson, worked as a Special Agent Criminal Investigator with the FPS. ASER 14. The FPS is responsible for "the protection of property owned or occupied by the Federal Government and persons on the

property, including duty in areas outside the property to the extent necessary to protect the property and persons on the property." 40 U.S.C. 1315.[2] At the time of the incident, Jackson was stationed at the federal building in San Francisco, California. ASER 15.

Jackson was hired as a patrol officer for the FPS in 1990 and received approximately eight weeks of basic training at the Federal Law Enforcement Training Center in Glynco, Georgia. ASER 19, 112. He was promoted to the position of Special Agent Criminal Investigator in 1993, ASER 18, and attended a nine-week criminal investigator training program also at the Federal Law Enforcement Training Center in Glynco, Georgia. ASER 112. He attended additional training programs in Glynco in 2001. ASER 113-114. Jackson also received a copy of the Operational Guidelines For FPS Criminal Investigators, which details the policies and procedures which are to be followed by FPS Criminal Investigators. ASER 114.

During his training, Jackson was taught about report writing and what must be included in a report. ASER 117. He was instructed that all material, or relevant facts related to an investigation must be included in a report, ASER 118, 128, and that "[p]artially stated facts are as misleading as lies, particularly if the omissions

---

[2] In 2003 the FPS was transferred from the General Services Administration (GSA) into the newly created Department of Homeland Security. Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*; ASER 107-108. Before this transfer occurred, FPS jurisdiction was governed by 40 U.S.C. 318, which provided the same jurisdictional limitations. ASER 108.

are intentional," ASER 120 (quoting Exhibit 5); ASER 129. He was taught that he is required to take notes on any interview that he conducts. ASER 125. He was also instructed "that admissions, confessions, [and] statements against self-interest should always be included" in an interview report. ASER 126.

2. On February 15, 2003, at approximately 2:50 AM, FPS patrol officers Peter Taoy and John Haire were in a patrol car outside the San Francisco Federal Building. ASER 140-141. They observed a Mercedes run a red light a couple of blocks away from the building and pursued the vehicle. ASER 140-141. The ensuing high speed chase produced two collisions. ASER 2A. When the chase came to a stop, officer Taoy, the driver of the FPS patrol car, positioned the car so that its "front bumper [was] against the Mercedes driver's side door pinning the vehicle in." App. 116. Officers from the San Francisco police department were also on the scene. App. 117. The driver of the Mercedes did not comply with police commands and instead attempted to get away. App. 117-118; ASER 5. When the driver of the Mercedes failed to comply with his commands, officer Taoy moved to the side of the Mercedes and fired his weapon at the vehicle to prevent it from getting away. ASER 5. In the opinion of his partner John Haire, Taoy was not in danger when he fired his gun. App. 118. Neither Haire nor any of the San Francisco Police Department Officers on the scene fired their guns. App. 118. The Mercedes did get away but was apprehended shortly thereafter. App. 118. When apprehended, the driver of the Mercedes, Jeffrey Petri, was charged

under federal law with assault on a federal officer using a deadly weapon. App. 119. These charges were based on allegations by Taoy that Petri had tried to run Taoy down with his car. ASER 34.

Some time after this incident, Jackson arrived on the scene. App. 120. Jackson spoke with Officer Taoy who told Jackson that he shot at the car as it was coming toward him. App. 120. Haire was present during Taoy's description of the events but did not contradict it. App. 121.

On February 18, 2005, there was a meeting at the United States Attorney's Office at which the two patrol officers, Taoy and Haire, the prosecutor, Sue Knight, the Field Training Officer, Sergeant Timothy McHugh, and Jackson were present. App. 122. At the meeting, Taoy said that he first noticed the Mercedes because it was traveling slowly around the federal building and that he thought the driver might be a terrorist casing the building. ASER 149. Haire did not contradict this account. ASER 149.

Later that day[3], Sergeant McHugh and Jackson reviewed surveillance video of the outside of the Federal Building for the early morning hours of February 15. ASER 190. Upon viewing the videotape, McHugh and Jackson realized that it was not consistent with the description of events that Taoy had given to the prosecutor earlier in the day. App. 143. The videotape showed the Mercedes passing by the

---

[3] McHugh testified that they viewed the videotape on February 18, ASER 190, while FBI agent Atkinson testified that Jackson had been unclear on the dates but recalled that he had watched the videotape on February 19, App. 80.

federal building at a normal speed and the FPS patrol car passing by 19 seconds later. ASER 151. Jackson reacted to the video evidence by rubbing his face with his hands in frustration. ASER 192.

On February 20, 2003, Jackson interviewed officer Haire, ASER 149, and another FPS criminal investigator, Agent Skultety, interviewed Taoy and surreptitiously videotaped the interview. App. 82. Jackson did not videotape his interview with Haire because he thought that Haire was just a follower and less culpable than Taoy. ASER 43. In the interview, Jackson showed Haire the videotape and discussed the inconsistencies between the videotape and the account that he and Taoy had given of events. ASER 43-44. Haire then confessed that the story they had told "was all a lie," that "they didn't see the car driving slowly on Larkin," and that they didn't begin the chase because they suspected terrorism. App. 83. Haire also told Jackson during this interview that in his view the driver of the Mercedes was not trying to run over Taoy but was just trying to get away. App. 84.

Jackson wrote a report of his interview with Haire which did not include Haire's admission that he and Taoy had lied about how their pursuit of the Mercedes began or his observation that the Mercedes was not attempting to run Taoy over at the time Taoy fired his weapon. App. 84B; ASER 50. The report stated "I explained that this videotape showed a possible discrepancy of what Taoy

related in his report," but does not give any indication of how Haire responded. ASER 1-2, 50.

In April 2003, Jackson met with Bruce Ellison, the leader of the Shooting Review Board set up to investigate the events surrounding the February 15 shooting and how they might have an impact on the FPS training program. ASER 202-203, 206. Jackson described confronting Haire with the videotape which contradicted the previous account of events. ASER 207. However, Jackson did not report that Haire recanted his earlier story. ASER 207-208. Instead, Jackson told Ellison that Haire stuck to the earlier story even after he was confronted with the videotape. ASER 207-208. The Shooting Review Board conducted interviews with Haire, ASER 157-158, and concluded that he recanted his earlier statement. ASER 182.

Sometime after Donald Meyerhoff became the chief of the threat management branch in the San Francisco region in May 2003, he reviewed the Shooting Review Board report and learned that Haire had recanted. ASER 182. Meyerhoff then reported the information to the U.S. Attorney's Office, ASER 183, and the information was referred to OIG on August 15, 2003, ASER 196-197.

On March 23, 2004, Jackson was interviewed by FBI Agent Brenda Atkinson who was assisting in an internal investigation of Haire and Taoy's conduct in the February 15 pursuit and shooting. ASER 12-15. At the time of the interview, Jackson was not a suspect in the investigation and was told he was free

to leave at any time. ASER 16. Jackson told Atkinson and the rest of the investigation team that "the report he wrote on February 20th of his interview with John Haire was written in a deliberately vague manner to protect Haire." ASER 17. Jackson also said that he wanted "to protect Haire from administrative, disciplinary, or other criminal proceedings." ASER 51. Jackson explained to the investigation team that he did not include Haire's confession in his report because "he thought Haire was generally a decent guy and a good officer" who "really shouldn't be held accountable" but rather "Taoy should take the fall." ASER 51. He said that he wrote the report in the way he did because "he did not like internal affairs investigations." ASER 51. Jackson also said that "it might have crossed his mind that" his decision not to take notes during the interview "was a way to protect Haire." ASER 51-52. Finally, Jackson admitted to the investigation team "that it was wrong for him to leave out [Haire's] confession" from his interview report. ASER 51.

3. At the trial, Special Agent Bruce Ellison testified that "[t]he investigator is supposed to include all pertinent data within the report of investigation. We are not supposed to omit anything." ASER 212-213. Ellison also testified that national FPS policy requires investigators to document and report wrongdoing by fellow employees when they come across it. ASER 215-216. Gary Beard, FPS Training Director, testified that all FPS investigators are taught not to omit material facts from reports. ASER 118-120. Michael Dunlow, an instructor for the FPS

training center, testified that Jackson's report appeared to improperly omit Haire's response to being confronted with the videotape and that if Haire had confessed it would have been improper to omit that. ASER 132-133, 137-138.

The defense called as its only witness Joseph Loerzel, the regional director of the FPS responsible for California. ASER 224. Loerzel testified that his criminal investigators were not allowed, pursuant to FPS guidelines, to conduct investigations of wrongdoing by fellow employees. App. 161. Loerzel said that when an investigator confronts a situation "where they believe that their case involves a fellow * * * employee" they should stop the investigation and report to their supervisor. App. 165. He testified that he emphasized these rules at a meeting of all his criminal investigators in February of 2002. App. 169. He said that if a confession of wrongdoing was made to an FPS criminal investigator by a fellow employee the investigator should not include it in a written report. App. 170. Loerzel asserted that it would not be appropriate for an FPS investigator to share a confession of wrongdoing by a fellow employee with a shooting review board. ASER 225A. On cross examination, Loerzel affirmed that he had not authorized anyone under his command to write a false or deliberately vague report. ASER 228. Loerzel also stated that Haire's confession was never reported to him. ASER 254.

Special Agent Liza Shovar, the Agent in charge of the Office of the Inspector General for the region that includes San Francisco, testified that an

interviewer would be obligated to include the incriminating admission by a fellow employee in the interview report. ASER 269. She said that the regional director does not have the authority to change this rule. ASER 269-270. Agent Shovar also testified that she was aware of one incident where FPS, under the direction of Loerzel, investigated allegations of misconduct involving its own employees and did not report the allegations to OIG. ASER 272.

SUMMARY OF ARGUMENT

This Court should affirm Jackson's conviction and sentence.

1. The government introduced evidence which is more than sufficient to sustain the jury's verdict. Jackson was trained that a report that intentionally omits a material fact is as misleading as a report that contains an affirmative lie. Jackson admitted that he wrote a deliberately vague report which failed to include Haire's confession in order to protect Haire from administrative, disciplinary or criminal proceedings, that he does not like internal investigations, and that he knew that omitting Haire's confession from his report was wrong. Jackson's report gave the false impression that Haire was sticking by his earlier account of events, even though Haire had confessed that it was a lie. Jackson's argument that Loerzel's testimony about local policy was unrebutted is simply not relevant to the question of sufficiency.

2. Similarly, Jackson's claim that because Loerzel's testimony about local FPS policy was not rebutted, or not persuasively rebutted, the district court abused

its discretion in denying his motion for a new trial is unpersuasive in light of overwhelming evidence to support the jury's verdict.

3. The district court correctly instructed the jury that they could find that Jackson acted knowingly even if Jackson was not aware that his conduct was illegal. Jackson's position that knowledge of the law was required is unsupported by the legal authority he cites. This Court has held in numerous other contexts that the word "knowingly" in a criminal statute does not require that a defendant know his conduct is illegal.

4. Jackson was not prejudiced by the prosecution asking Loerzel whether he was under investigation by OIG because Loerzel denied that he was under investigation and that denial was never rebutted. Further, the district court gave a specific limiting instruction that the question had been stricken and was not to be considered by the jury in any way. Finally, even if the question itself is considered prejudicial, it would not have affected the outcome in light of the overwhelming evidence that Jackson acted knowingly. Jackson provides no legal support for his arguments that impeachment of Loerzel by Agent Shovar and the prosecutor's statement in closing that no one had corroborated Loerzel's claims about local policy were improper.

5. The district court correctly instructed the jury that the charge against Jackson for violation of 18 U.S.C. 1519 included any federal matter or investigation and was not limited to the Petri case. Jackson's argument that the

court allowed the jury to go outside the scope of the indictment is based on a misreading of the indictment.

6. The district court correctly applied an enhancement for abuse of a position of trust to Jackson's sentence. Jackson's argument that the Presentence Report was incorrect is based on a misreading of the report and the Guidelines. Application of the enhancement was not double counting because abuse of a position of authority is not contained in any of the elements of 18 U.S.C. 1519.

ARGUMENT

I

EVIDENCE WAS SUFFICIENT TO SUPPORT JACKSON'S CONVICTION

This Court has said that "[i]n reviewing the sufficiency of evidence after a conviction, we ask whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *United States* v. *Matsumaru*, 244 F.3d 1092, 1103 (9th Cir. 2001).

Section 1519 of title 18 provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

As the court explained in its instructions to the jury, the elements of the crime are:

> One, that the defendant concealed, covered up, falsified or made false entry in a record or document of the Federal Protective Service.
>
> Two, that the defendant did so knowingly.
>
> And, three, that the defendant did so intending to impede, obstruct or influence an investigation or proper administration of a matter within the jurisdiction of an agency of the United States or in relation to or contemplation of any such matter or case.

App. 768.

The government presented evidence that Jackson had been instructed during his training that all material or relevant facts related to an investigation must be included in a report, ASER 118, 128. Jim Beard, the director of the Federal Law Enforcement Training Center, where Jackson had his training, testified Jackson had been taught that "[p]artially stated facts are as misleading as lies, particularly if the omissions are intentional," ASER 120 (quoting Exhibit 5); ASER 129. Michael Dunlow, an instructor at the Federal Law Enforcement Training Center, testified that Jackson was taught that he is required to take notes on any interview that he conducts, ASER 125, and that he was instructed "that admissions, confessions, [and] statements against self-interest should always be included" in an interview report. ASER 126.

The evidence showed that during Jackson's February 20, 2003 interview, Officer Haire confessed that he and Taoy lied about the events that led to the high

speed chase on February 15 and about the shooting that occurred at the end of the chase. ASER 17-52. Jackson's report stated "I explained [to Haire] that this videotape showed a possible discrepancy of what Taoy related in his [earlier] report." ASER 2. The report omits that Haire responded to Jackson's statement by confessing that they had lied about the events. By including the statement but omitting the response, the report creates the false impression that Haire did not dispute the earlier account of events by Taoy. That Jackson intended to create that impression was confirmed by his statement to Ellison that Haire stuck to his story. ASER 208. In fact, the coverup worked until six months after the incident, when Donald Meyerhoff read the shooting review board report which noted that Haire confessed, ASER 182, and reported this to the U.S. Attorney's Office, ASER 183. If the Shooting Review Board had not determined that Haire recanted his earlier story, Meyerhoff would not have known about the discrepancy and may not have reported the incident to OIG.

Jackson subsequently admitted to Agent Atkinson that he wrote a "deliberately vague" report, ASER 17, which omitted Haire's confession, and that he wrote his report in this way in order "to protect Haire from administrative, disciplinary, or other criminal proceedings," ASER 51, and because "he did not like internal affairs investigations," ASER 51. Further, Jackson admitted to Agent Atkinson and the other members of the internal investigation team "that it was

wrong for him to leave out [Haire's] confession" from his interview report. ASER 51.

Jackson does not identify any deficiency in the government's evidence but nonetheless argues that there was insufficient evidence to sustain his conviction because "[t]he Government did not contradict * * * Regional Director Loerzel's testimony regarding [local] policies and procedures." Br. 12. But, as the district court noted, the government's evidence was sufficient to support conviction whether or not the jury believed Loerzel's testimony. App. 67. Jackson offers no reason for this Court to conclude that the government failed to present sufficient evidence of the elements of 18 U.S.C. 1519.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING JACKSON'S MOTION FOR A NEW TRIAL

Jackson also argues that he is entitled to a new trial because the verdict "is clearly against the weight of the evidence." Br. 13. This Court reviews the district court's denial of Jackson's motion for a new trial for abuse of discretion. *United States* v. *Mack*, 362 F.3d 597, 600 (9th Cir. 2004). The district court may grant a new trial when "the interest of justice so requires." *Ibid*; Fed. R. Crim. P. 33(a). However, a motion for a new trial "should be granted 'only in exceptional cases in which the evidence preponderates heavily against the verdict.'" *United States* v. *Rush*, 749 F.2d 1369, 1371 (9th Cir. 1984) (quoting *United States* v. *Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981)).

In support of his contention that the district court erred in denying his motion for a new trial, Jackson again argues that Loerzel's testimony about local policy was unrebutted and, to the extent that it was rebutted, the rebuttal was unconvincing. Br. 13-14. The jury was not obligated to believe Loerzel and may have doubted that he would have put in place a local policy so out of step with the national policy described by several other witnesses. Even if the jury believed that the local policy described by Loerzel existed, they could have found based on Jackson's own admission to Agent Atkinson and testimony about the training he received that he knew he was acting improperly and did so in order to protect Haire. Jackson's admission, that while he and another criminal investigator decided to surreptitiously videotape the interview confronting Taoy, they did not tape the interview of Haire because they thought Haire was less culpable, further illustrates that he was not acting pursuant to a policy prohibiting any involvement in investigation of fellow FPS employees. Indeed, the interviews of Taoy and Haire were done primarily for the internal investigation purpose of confronting the officers with evidence inconsistent with their earlier statements, and Jackson and the other investigator had already begun apportioning blame between the two officers and deciding who should "take the fall." ASER 51. The weight of the evidence preponderates heavily in favor of the verdict.

III

QUESTIONING AND IMPEACHMENT OF DEFENSE WITNESS LOERZEL WAS NOT PROSECUTORIAL MISCONDUCT THAT MATERIALLY AFFECTED THE FAIRNESS OF THE TRIAL

This Court has held "[a] claim of prosecutorial misconduct is viewed in the entire context of the trial, and '[r]eversal on this basis is justified only if it appears more probable than not that prosecutorial misconduct materially affected the fairness of the trial.'" *United States* v. *Younger*, 398 F.3d 1179, 1190 (9th Cir. 2005) (quoting *United States* v. *Cabrera*, 201 F.3d 1243, 1246 (9th Cir. 2000).

A. The Prosecutor's Question Was Not Prejudicial

Jackson argues that the prosecution "improperly attack[ed] Regional Director Loerzel's credibility." Br. 17. On cross-examination by the prosecutor of defense witness Loerzel, the following exchange occurred:

> Q. You are currently under investigation by the Office of the Inspector General, aren't you?
>
> A. No, sir.

(662); App. 180. Defense counsel objected, and the court instructed the prosecutor to move to a different line of questioning. ASER 226-227. The court later ruled that the question should not have been posed without first giving the court the opportunity to consider its propriety, App. 188-189, and the court instructed the jury that the question was "not relevant to these proceedings and, therefore, you may not consider it in any respect," App. 238.

The prosecutor's question does not warrant reversal because Jackson was not prejudiced by it. In order to constitute reversible error the defendant must demonstrate "prejudice" resulting from the misconduct by showing that "it is more probable than not that the [prosecutorial] misconduct materially affected the verdict." *United States* v. *Hinton*, 31 F.3d 817, 824 (9th Cir. 1994) (quoting *United States* v. *Christophe*, 833 F.2d 1296, 1301 (9th Cir. 1987)), cert. denied, 513 U.S. 1100 (1995). Whatever prejudicial impact the question had was neutralized by the witness's uncontradicted response that he was not the subject of an investigation.

In *Hinton*, the prosecutor asked the defendant whether her visits to a fortune teller give her an excuse for her violent behavior, and the defendant answered "no" before defense counsel objected. 31 F.3d at 825. This Court held that "no prejudice arose because the prosecutor's questions and comments at issue did not elicit a prejudicial response." *Id.* at 824. Because there was no prejudicial response to the questions which the prosecutor posed to the defendant, "[t]he jury did not have to attempt to disregard an admission," and therefore the classic problem of trying to unring the bell was not present. *Id.* at 825. Similarly here, Loerzel was asked whether he was under investigation and he answered no. App. 180. The prosecutor was not allowed to ask any further questions on the subject.

Moreover, the district court gave a curative instruction specifically referring to the prosecutor's question.

> [Y]ou have heard reference made during the testimony of Mr. Loerzel about an investigation. You are to totally disregard that question and anything that Mr. Loerzel may have said immediately in response to it. That's being stricken and it is not relevant to these proceedings and, therefore, you may not consider it in any respect, whether it be as to his credibility or whether it be as to anything related to the facts of this case. It's not to be considered by you at all.

App. 238.

Even if the question itself could be considered prejudicial, it would not have affected the outcome of the trial in light of the evidence supporting conviction, including Jackson's admission to Agent Atkinson that he did not include Haire's confession in his report because he wanted to protect Haire, didn't think Haire should be held responsible, didn't like internal affairs investigations, and that he knew not including the confession in his report was wrong. ASER 17, 51. None of this evidence was refuted by Loerzel's testimony.

B. Impeachment Of Loerzel By Agent Shovar And The Prosecutor's Reference To That Testimony In Closing Argument Were Not Improper

Jackson alleges that "the prosecution used Special Agent Shovar to again improperly attack Loerzel's character and credibility." Br. 20. Special Agent Shovar was called by the government as a rebuttal witness. She testified that she was aware of an incident where the FPS office under the direction of Loerzel investigated allegations of misconduct by one of its own employees but did not report those allegations to the OIG. App. 202. There was no objection to this testimony and therefore this Court's review is only for plain error. See *United States* v. *Rodriguez-Preciado*, 399 F.3d 1118, 1132 (9th Cir. 2005). Jackson's

brief provides no explanation of his contention that the testimony was "improper." Jackson also found it "improper" for the prosecutor to point to this testimony in his closing argument and characterize it as conflicting with the testimony of Loerzel. Br. 21. Again, Jackson makes no legal argument in defense of this conclusion.

C. Prosecutor Did Not Improperly Impeach Loerzel In Closing Argument

Jackson also alleges that the government argued that "no one could" corroborate Loerzel's claim that he had a policy of forbiding FPS criminal investigators from including admissions of wrongdoing by FPS employees in their reports. Br. 22. The government did not, however, argue that no one *could* corroborate Loerzel's claim. Instead the government asked the jury to consider the fact that no witness *had* corroborated Loerzel's claim during the trial. App. 213-214. This was unquestionably true. Jackson alleges that there were witnesses who were not called who could have corroborated Loerzel. Br. 23-25. Even if this were true it was not improper for the prosecution to point out that Loerzel's claim was, in fact, uncorroborated at trial. Jackson has not cited any legal authority in support of the proposition that this amounted to prosecutorial misconduct.

IV

THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY THAT THE STATUTORY TERM "KNOWINGLY" DID NOT REQUIRE JACKSON TO HAVE KNOWLEDGE THAT HIS CONDUCT WAS ILLEGAL

This Court reviews "the district court's formulation of jury instructions for abuse of discretion." *United States* v. *Garcia-Rivera*, 353 F.3d 788, 791 (9th Cir.

2003). Under this standard the Court must consider "whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation." *Id.* at 792 (quoting *United States* v. *Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999)).

Jackson argues that the term "knowingly" in the statute requires knowledge that one's conduct is illegal. The district court's jury instructions in this case followed this Court's Pattern Jury Instruction and defined knowingly to mean "that [Jackson] was conscious and aware of his action or omission and did not act because of ignorance, mistake or accident." App. 236; See Ninth Circuit Model Criminal Jury Instruction 5.6 (defining "knowingly"). The court stated that "[t]he Government is not required to prove that the defendant knew that his acts or omissions were unlawful." App. 236; See Ninth Circuit Model Criminal Jury Instruction 5.6 (defining "knowingly").

Jackson's reliance on the Supreme Court's decision in *Arthur Andersen* v. *United States*, 125 S. Ct. 2129 (2005), Br. 30-32, is misplaced. *Arthur Andersen* interpreted 18 U.S.C. 1512(b). That statute made "it a crime to 'knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person ... with intent to ... cause' that person to 'withhold' documents from, or 'alter' documents for use in, an 'official proceeding.'" *Arthur Andersen*, 125 S. Ct. at 2131. As the Court construed the statute, the term "knowingly," modifies the phrase "corruptly persuades." *Id.* at 2135. The Court held that the word "corruptly" is "normally associated with wrongful, immoral, depraved, or evil" and

therefore, "[o]nly persons conscious of wrongdoing can be said to 'knowingly ... corruptly persuad[e].'" *Id.* at 2136.

The conclusion that to knowingly corruptly persuade under 18 U.S.C. 1512(b) requires awareness of wrongdoing in no way supports defendant's argument. To the contrary, that the Court depended on the term "corruptly" to determine the type of knowledge required (in that case knowledge of wrongdoing) demonstrates that the term "knowingly" alone does not have that meaning.

Jackson is similarly mistaken in his reliance on courts of appeals cases which have interpreted 18 U.S.C. 1503. Section 1503 prohibits "corruptly" obstructing or impeding the administration of justice. The word "knowingly" does not appear in the statute.

Jackson is correct that no case has yet considered the meaning of "knowingly" for purposes of 18 U.S.C. 1519, but this Court has consistently held, in cases involving other statutes, that the term "knowingly" does not require knowledge of illegality. See *e.g.*, *United States* v. *Wiseman*, 274 F.3d 1235, 1240 (9th Cir. 2001) ("While the defendant must [for purposes of 18 U.S.C. 664] 'knowingly act [ ] wrongfully to deprive another of property,' there is no requirement that the defendant also know his conduct was illegal." (quoting *United States* v. *Ford*, 632 F.2d 1354, 1362 (9th Cir. 1980))), cert. denied, 536 U.S. 961 (2002); *United States* v. *de Cruz*, 82 F.3d 856, 867 (9th Cir. 1996) ("Defendant was convicted of 'knowingly receiving and accepting forged documents' in

violation of 18 U.S.C. § 1546. Defendant sought to introduce facts which established that she did not know that her conduct violated federal law. This is a classic mistake or ignorance of law argument, and as such, it is not a valid defense."); *United States* v. *Moncini*, 882 F.2d 401, 404-405 (9th Cir. 1989) (concluding that the "knowingly" requirement of 18 U.S.C. 2252(a) did not require knowledge that the conduct was illegal, and making clear that when "knowingly" modifies the elements of a crime it requires knowledge of illegality only when that knowledge is expressly required as an element of the crime, giving as an example of this "7 U.S.C. § 2024(b), which makes it a crime to 'knowingly ... acquire [ ] [food stamps] ... in any manner not authorized by [law].'"); *United States* v. *Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988) ("[T]here are few exceptions to the rule that ignorance of the law is no excuse."); *ibid.* ("[W]e have often held that 'knowingly' does not include knowledge of the law"); *ibid.* (citing as examples *United States* v. *Flores*, 753 F.2d 1499, 1505 (9th Cir. 1985) and *United States* v. *Fierros*, 692 F.2d 1291, 1293-1295 (9th Cir. 1982)). The district court's jury instructions were proper.

In any event, this is not a case where a defendant is convicted for purely innocent actions. The testimony of Agent Atkinson establishes that Jackson knew that his conduct was wrongful and that he intended to protect Haire and thwart any internal affairs investigation. ASER 51.

V

THE DISTRICT COURT DID NOT INSTRUCT THE JURY THAT IT COULD CONSIDER MATTERS BEYOND THE SCOPE OF THE INDICTMENT

The indictment, in count I, charged:

> On or about February 20, 2003, and continuing until a date unknown, in San Francisco County, within the Northern District of California, defendant CHARLES JACKSON, in a matter or case within the jurisdiction of a department or agency of the United States, namely the Federal Protective Service and the United States Attorney's Office for the Northern District of California, or in relation to or contemplation of any such matter or case, knowingly concealed, covered up, and falsified and made false entry in a record and document with the intent to impede, obstruct, and influence the investigation or proper administration of such matter or case. Specifically, defendant CHARLES JACKSON wrote a report about his interview with Haire in which defendant CHARLES JACKSON did not disclose that Haire told him that Haire had not seen Petri's car drive by the Federal Building immediately before Haire and Taoy began to pursue Petri's car. The information that defendant CHARLES JACKSON failed to disclose contradicted evidence that defendant CHARLES JACKSON knew had been presented to the FPS, the United States Attorney's Office of the Northern District of California, and a Federal Magistrate-Judge in connection with Petri's arrest and detention.

App. 3-4.

During deliberations, the jury sent out a question asking the court whether the "proper administration of a matter within the jurisdiction of an agency of the United States or in relation to or contemplation of such matter or case" referred only to the Petri case or included matters outside that case. App. 214. After hearing from counsel, the district court told the jury that the charge against Jackson is not limited to "the Petri case" and it could include "any other matters that are

under the jurisdiction of [FPS] or any department of the United States." ASER 363. Jackson argues that the court permitted the jury to consider matters beyond the scope of the indictment because the conduct charged in the indictment was limited by the words "in connection with Petri's arrest and detention," and Jackson's failure to include Haire's confession in his report did not affect Petri's arrest or detention. Br. 34-35.

Jackson has simply taken a phrase from the indictment out of context. The jury asked about the meaning of "proper administration of a matter within the jurisdiction of an agency of the United States." ASER 355. The first sentence of count one in the indictment does not restrict the charge to a particular matter. The second sentence identifies the information that defendant failed to disclose and the report in which he failed to disclose it.

Thus, the indictment charges that the defendant failed to disclose particular information with the intent to impede the investigation or proper administration of a matter within federal jurisdiction. The information is specified, the matter is not.

The third sentence, which contains the language "in connection with Petri's arrest and detention" does not modify the matter or case within federal jurisdiction. That sentence simply states that the undisclosed information contradicted evidence that had already been presented to government officials and that it had been presented in connection with Petri.

By taking the passage out of context Jackson makes it appear that he was charged with failing to disclose evidence "in connection with Petri's arrest and detention." App. 3-4. Read in context, Jackson was charged with failing to disclose Haire's confession, with the intent to obstruct the investigation or proper administration of a matter or case to which that information was relevant. App. 3-4. The district court's response to the jury question was correct and did not expand the scope of the indictment.

VI

THE DISTRICT COURT CORRECTLY APPLIED AN ENHANCEMENT FOR ABUSE OF A POSITION OF TRUST TO JACKSON'S SENTENCE

This Court reviews "the district court's interpretation of the Sentencing Guidelines de novo, the district court's application of the Sentencing Guidelines to the facts of [a] case for abuse of discretion, and the district court's factual findings for clear error." *United States* v. *Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006).

The base offense level for violation of 18 U.S.C. 1519 is 14. See USSG § 2J1.2. The district court adjusted Jackson's sentence upward two levels for abuse of a position of trust, pursuant to USSG § 3B1.3, resulting in an adjusted offense level of 16 with a range of 21 to 27 months. ASER 461. The district court sentenced Jackson to a term of 24 months imprisonment and two years supervised release. ASER 463.

Jackson argues that the two-level enhancement pursuant to USSG § 3B1.3 for abuse of a position of trust was improperly applied to him. Br. 37-40. Jackson

first argues that the Presentence Investigation Report incorrectly concluded that "defendant's omission violated the public trust and his position of authority made the offense difficult to detect." Br. 37; App. 18. He seems to argue that his failure to include Haire's confession in his report did not affect the Petri investigation or make the offenses of Taoy or Haire more difficult to detect. Br. 38-39. This argument reflects a misunderstanding of the Presentence Report which, correctly interpreted, concluded that "[Jackson's] position of authority made [Jackson's] offense difficult to detect." App. 18. The Presentence Report simply quotes the language of the guideline and commentary.

It is clear from the language of the guideline and the commentary that the enhancement applies when a position of trust facilitates the commission or concealment of the defendant's criminal activity. See USSG § 3B1.3. The Guideline applies when "the defendant abused a position of trust * * * in a manner that significantly facilitated the commission or concealment of the offense." USSG § 3B1.3, comment. (n.1). The reference to "the offense" clearly means the offense for which the defendant is being sentenced.

Next, Jackson argues that the USSG § 3B1.3 enhancement for abuse of trust should not have been applied because it is an element of the charged offense and is therefore included in the base offense level. Br. 39. Specifically, he claims that his "criminal liability, if any, arises only from his official capacity as an FPS criminal investigator." Br. 39.

This Court has held that "impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *United States* v. *Smith*, 196 F.3d 1034, 1036 (9th Cir. 1999) (quoting *United States* v. *Alexander*, 48 F.3d 1477, 1492 (9th Cir. 1995)). If a position of trust is already an element of the crime of conviction it can not be counted again by the § 3B1.3 enhancement. See *Id.* at 1037 (determining that "double counting would have occurred only if abuse of position of trust were an element [the base offense] of money laundering").

Occupying a position of trust is not an element of 18 U.S.C. 1519. The statute punishes anyone who engages in the prohibited conduct. See 18 U.S.C. 1519. Anyone with access to a document relevant to a matter within the jurisdiction of an agency of the United States could violate the statute. The statute's application is not limited to law enforcement officers and official reports. It is the harm arising from an *increased* level of access to sensitive documents and ability to conceal wrongdoing that the § 3B1.3 enhancement is designed to capture. See USSG § 3B1.3, comment. (n.1), (giving as an example "embezzlement of a client's funds by an attorney serving as a guardian"). That harm was present here, and therefore the district court's application of USSG § 3B1.3 was not an abuse of discretion.

CONCLUSION

This Court should affirm Jackson's conviction and sentence.

Respectfully submitted,

WAN J. KIM
Assistant Attorney General

_____
JESSICA DUNSAY SILVER
NATHANIEL S. POLLOCK
Attorneys
Department of Justice
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-0333

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that I am not aware of any related cases pending in this Court.

_____
NATHANIEL S. POLLOCK
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 7,064 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____
NATHANIEL S. POLLOCK
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2006, two copies of the foregoing BRIEF FOR THE APPELLEE were served by first-class mail, postage prepaid, on the following counsel of record:

Stephen Turano, Esq.
Law Offices of Stephen Turano
410 Greenwich Street, Suite 500
New York, NY 10013
(973) 236-0119
(Counsel for Defendant-Appellant)

_____
NATHANIEL S. POLLOCK
Attorney