Nos. 11-2497; 11-2559

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIAM MOYER &
MATTHEW NESTOR,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CONSOLIDATED BRIEF FOR THE UNITED STATES AS APPELLEE

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II	Whether the district court abused its discretion by denying in relevant part Nestor's motion for a bill of particulars, where the indictment sufficiently alleged a violation of 18 U.S.C. 1519.	Nestor Br. 27-35
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal is taken from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on June 1, 2011 (2843a, 2851a), and both defendants timely appealed. (2849a, 2857a). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support Moyer's conviction for making false statements to a federal officer in a matter within the jurisdiction of the FBI.

2. Whether the district court abused its discretion by denying in relevant part Nestor's motion for a bill of particulars, where the indictment sufficiently alleged a violation of 18 U.S.C. 1519.

3. Whether the evidence was sufficient to support Nestor's conviction for falsifying police reports.

4. Whether 18 U.S.C. 1519 is unconstitutionally void for vagueness.

STATEMENT OF THE CASE

On December 10, 2009, a federal grand jury returned a five-count indictment against Matthew Nestor, Jason Hayes, and William Moyer, charging each with conspiring to falsify documents with the intent to obstruct an investigation of a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 371 (Count 1), and with the substantive offense of falsifying documents, in violation of 18 U.S.C. 1519 (Count 2). (45a-53a). The indictment additionally charged Moyer with two counts of obstruction of justice, in violation of 18 U.S.C. 1512 (Counts 3 and 4) (53a-55a), and one count of making false statements, in violation of 18 U.S.C. 1001 (Count 5) (55a).

Nestor moved to dismiss Counts 1 and 2 of the indictment, arguing that (1) the statute was void for vagueness; and (2) the indictment did not specify the matter or agency at issue, and did not establish a nexus between the alleged obstructive conduct and the matter within a federal agency's jurisdiction. (57a). Nestor also moved for a bill of particulars seeking, among other information (1) the agency and matter within the federal government's jurisdiction; and (2) the reports and/or statements alleged to be false in Count 2. (170a-174a).

The court denied Nestor's motion to dismiss the indictment. (265a-291a). The court held that while Section 1519 requires a nexus between the alleged act of obstruction and a federal investigation (276a-279a), the specific nexus need not be alleged in the indictment (280a-281a). The court nonetheless found that the indictment here set forth the required nexus. (282a-283a). The court further held that the indictment sufficiently alleged a violation of Section 1519 and was not unconstitutionally vague. (281a-285a).

The Court granted Nestor's motion for a bill of particulars with respect to the "federal investigation or matter under the jurisdiction of a United States agency [Nestor] is alleged to have contemplated at the time of the alleged obstructive acts."[1] (287a). The court denied Nestor's motion with respect to reports and/or

[1] In response, the government informed Nestor that the matter within the FBI's jurisdiction was the racially-motivated killing of Ramirez. (301a-302a).

(continued…)

statements pertaining to Count 2, concluding that the indictment specifically identified the reports at issue, the investigation to which they pertained, their subject matter, authors, and dates of creation and review. (287a-288a).

Defendants pleaded not guilty and proceeded to trial. At the close of the government's case-in-chief, counsel moved for judgments of acquittal on sufficiency grounds. (1727a-1772a). The court denied the motions. (1773a-1776a).

On January 27, 2011, after a two-week trial, the jury convicted Moyer of making false statements (Count 5) and Nestor of falsifying documents (Count 2). (2706a, 2711a). Defendants were acquitted on all other counts.

After the verdict, defendants moved for judgments of acquittal and new trials, see Fed. R. Crim. P. 29(c)(1) (2727a-2737a); the court denied the motions (2833a-2842a).

Moyer was sentenced to three months' imprisonment on Count 5, followed by one year of supervised release (2851a-2853); Nestor was sentenced to thirteen months' imprisonment on Count 2, followed by two years' supervised release (2843a-2845a).

(…continued)
Nestor filed a supplemental brief for particulars seeking the specific federal criminal statute applicable to the case. (292a-315a). The court did not rule on Nestor's renewed motion.

Defendants timely appealed. (2849a, 2857a).

STATEMENT OF FACTS

In the late evening of July 12, 2008, in Shenandoah, Pennsylvania, teenagers Brandon Piekarsky, Derrick Donchak, Brian Scully, Colin Walsh, Ben Lawson and Josh Redmond encountered Luis Ramirez, a Hispanic, in a local park. (543a-544a, 763a). Some of the teenagers yelled racially-derogatory comments at Ramirez and told him to "go back to Mexico." (764a-765a). A violent fight ensued and ended with Ramirez lying unconscious near Lloyd and Vine Streets: Walsh knocked Ramirez to the ground with a punch to the head and, while Ramirez was on the ground, Piekarsky kicked him in the side of the head. (547a, 767a, 980a).

Arielle Garcia and her husband, Victor, saw part of the incident. (670a-675a). Arielle saw teenagers she recognized from school, and heard Scully yelling "[v]ulgar" things to Ramirez about his race. (669a-672a, 767a). She saw Scully and Ramirez "interlock[]" (673a), and she later saw "some[one]" kick Ramirez in the head "really hard" after he fell to the ground (675a). All of the teenagers eventually fled the scene toward the park (Scully remained briefly before fleeing). (768a). Arielle called 911. (677a).

Around the same time, Francis Ney was driving near Lloyd and Vine streets when he saw approximately four "younger individuals" run in front of his car. (976a-977a). He heard a female yelling and saw Ramirez in the street. (977a).

Ney called 911 and reported the suspects were in the park. (977a-979a). Ney tried to revive Ramirez, but eventually ran to the park with "Mexican Jesse." (981a-982a). Jesse confronted Piekarsky, Donchak, Walsh, Lawson and Redmond in the park and, according to some, brandished a gun;[2] Ney recognized the teenagers as those who had run in front of his car. (549a-550a, 982a). All the teenagers ran up the hill to Donchak's house except Donchak, who remained in the park and called 911. (550a, 554a, 768a-769a, 986a-987a, 1226a).

Officer Robert Senape (West Mahanoy PD) arrived at Lloyd and Vine and requested an ambulance. (1813a-1817a). Lieutenant William Moyer and Officer Jason Hayes (Shenandoah PD), defendants below, arrived next. (1817a). Shortly thereafter, the police dispatch system reported a man chasing people with a gun. (1817a). Moyer and Hayes left to respond. (1817a).

Around this same time, Ney called 911 again to report "the boys that beat [Ramirez] up" were near the baseball field, and urged the dispatcher to send police

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[2] Lawson testified he did not see a weapon. (1225a-1226a). Ney acknowledged at trial that Jesse could have had a weapon, but explained he currently did not remember Jesse having a gun (1021a-1022a). He testified he knew Jesse had a BB gun he kept at the bar where he worked (1002a), and he saw Jesse touch his waistband when he confronted the teenagers (1014a). The recordings of Ney's 911 calls played to the jury and admitted into evidence do not reference a gun. (GX 6.6; GX 6.7). Ney, however, included in his police statement that Jesse had a gun (1021a), and testified before the grand jury that Jesse had a gun that evening (1023a-1024a).

to the area.[3] (GX 6.6). Ney was speaking with the dispatcher when Moyer and Hayes arrived in the park. (984a-985a). Ney told the officers "they're running up through the back of the school now. There's five of them." (GX 6.7 (1:05-1:06); 985a). One of the officers asked, "Who are they?" (GX 6.7 (1:08)). Ney responded, "They're a bunch of, like, 16-17-year old kids." (GX 6.7 (1:09-1:11)). Ney told the officers he saw the kids that were "beating [Ramirez] up," and that "they started running" when Ney "stopped them and asked them what they were doing." (GX 6.7 (1:14-1:17)). Ney told the police "there's one here" and "the others [were] running" away. (GX 6.7 (1:19-1:22); 986a). Throughout this conversation, the dispatcher repeatedly asked if Ney was talking with the police. (GX 6.7 (1:12-1:14; 1:18-1:19; 1:23-1:24)). After the third inquiry, Ney responded "yea" and the dispatcher terminated the call. (GX 6.7 (1:23-1:28)).

Ney and Donchak got into the police vehicle. (986a). Moyer drove around the park, stopping at Stadium and Coal streets near Donchak's house where the teenagers had gathered. (551a, 554a, 769a, 987a-988a). After speaking to the teenagers (989a), the officers looked "shocked" and "confused," and released Ney and Donchak. (989a).

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[3] Ney's calls to 911 were not transcribed, but were played for the jury multiple times. (984a-985a, 1675a). The quotations are a reasonable interpretation of the content of the recordings. Ney's second phone call to 911 was separated into two audio files: GX 6.6 and GX 6.7. (983a).

Ney ran down Coal to his car. (989a-990a). Meanwhile, Piekarsky got into the police car. (555a). Barry Boyer, a friend of the teenagers who was parked nearby, followed the police car down Coal. (1048a). When Moyer and Hayes saw Ney again, they arrested him because Piekarsky said Ney had the gun. (990a-991a, 998a, 1048a).

Officer Charles Kovalewski (Mahanoy City PD) arrived while Moyer was handcuffing Ney. (954a-957a). Ney kept saying "it wasn't him." (957a). Moyer told Ney to "shut up," and placed him in the back of the police car. (958a). Kovalewski also got into the car. (958a). At no point did Kovalewski hear Ney say anything about a man with a gun. (970a-971a). Upon Moyer's direction, Piekarsky got into Boyer's car and Boyer followed the police back to the scene. (1050a-1051a).

Once there, Hayes took Piekarsky toward the park and spoke with him for a few minutes. (682a, 687a-688a, 1051a). According to Hayes, he then walked Piekarsky to a nearby bar where Piekarsky's mother – Hayes's girlfriend, Tammy Piekarsky – worked. (1107a, 2299a-2300a). Moyer came to Boyer's car and told Boyer that Ramirez "was in pretty bad shape." (1053a).

The police eventually let Ney go after Arielle explained that Ney was not involved. (683a, 1000a). Kovalewski heard multiple witnesses yelling, in Moyer's presence, that they "saw what happened" and that "a group of kids" and the

"football team" were involved. (960a-961a). Joseph Palubinsky, Shenandoah's Borough Manager, also heard witnesses implicating Piekarsky, Donchak, Scully and Walsh while Moyer and Hayes were present. (1101a-1102a, 1106a, 1140a-1141a).

Other officers remained to look for a gun (912a), and eventually found a BB gun nearby (1784a). Arielle, Victor and Ney went to the police station to provide statements. (679a-680a, 1001a). Arielle's statement did not identify who kicked Ramirez.[4] (681a). Hayes interviewed Ney at the station about the gun, but did not ask what Ney knew about the assault. (1001a-1002a).

Meanwhile, at Donchak's house, Walsh spoke with Piekarsky on the phone and learned that Piekarsky had given a statement to the police and that Walsh and the others needed to match their story to Piekarsky's. (558a, 1276a). Piekarsky and his mother came to Donchak's later that evening. (1230a, 1275a-1276a). Moyer had called Matthew Nestor, the Chief of Police, who was off-duty at a bar, and briefed him on the incident; Nestor then called Ms. Piekarsky.[5] (1541a, 1965a, 1970a-1971a). Based on what Ms. Piekarsky told the teenagers, the group at

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[4] Arielle testified that if she knew who had kicked Ramirez, she would have told the police. (741a).

[5] Ms. Piekarsky and Nestor were friends, having vacationed together in the past. (2021a).

Donchak's knew the situation was serious and that they would get in trouble if they did not "leave things out" of their story.[6] (772a-773a). She told the group that if Ramirez died, "it's homicide." (1276a). Piekarsky said they were "screwed" because he had been "back to the scene" and the situation did not "look good." (1229a). The kids therefore agreed to base their cover story on Piekarsky's statement to the police: the fight was "one on one" and did not involve drinking, kicking, or racial language. (560a, 648a).

Sometime between 1:00 a.m. and 1:30 a.m., Palubinsky spoke to Nestor and recommended turning the investigation over to the District Attorney's office or the State Police, given a potential "conflict of interest" based upon Hayes's relationship with Ms. Piekarsky. (1106a-1108a). Nestor told Palubinsky he would if it became necessary, but was not presently inclined to do so. (1108a).

Nestor arrived at the station around 2:30 a.m. (1972a). Moyer informed him that local teenagers, including Piekarsky, were considered suspects in the assault. (1973a-1974a). Nestor had Moyer contact the DA's office (1975a) and, around 3:00 a.m., spoke with Anthony Carroll, the Chief County Detective for the Schuylkill County DA's Office (2386a-2387a). Carroll learned there was a fight involving local football players, but no suspects were in custody and three

[6] Nestor testified that he simply returned Ms. Piekarsky's call and invited her to the bar for a drink. (1971a, 2022a).

eyewitnesses had been sent home after providing statements. (2387a). Because there were no suspects or witnesses at the station, Carroll told Nestor he would come the next morning to assist with interviews. (2388a-2389a).

Carroll and Detective Heckman, also from the DA's Office, arrived at the station early the next morning. (2389a-2390a). They, along with Moyer, interviewed Scully. (2389a-2390a). Scully relayed "the cover story [they] made up" the night before. (774a). Later that day, Carroll briefed James Goodman, the District Attorney, about the assault. (1356a). Goodman instructed Carroll to continue to assist Shenandoah PD with its investigation. (1357a).

Scully went to Piekarsky's house after his interview. (773a). Gathered there were the teenagers from the night before, as well as several of their parents. (562a-563a, 773a-774a, 1231a). Ms. Piekarsky told the teenagers someone had given a statement to the detectives but the story they were concocting did not match the statement given. (1277a-1278a). The teenagers went into the backyard to "get the[ir] stories straight." (563a, 774a). The teenagers then agreed again to leave out the kick, the alcohol, and the racial slurs. (1232a). While Walsh was at Piekarsky's house, he saw Hayes, who had been upstairs, come down in his uniform and tell Ms. Piekarsky that he was going into work. (567a-568a).

Later that day, Moyer came to Walsh's house. (568a). He told Walsh Ramirez was "pretty beat up," and that Walsh did not have to give a statement until

his father returned home. (568a). He then asked if Walsh had spoken with his friends, and asked, "You know what I mean?" (568a-569a). Walsh understood Moyer to be asking whether he had talked with his friends "to get a story." (569a). When Walsh told Moyer he had done so, Moyer told Walsh, "Good luck." (569a). A few days later, Moyer called Scully's mother and told her that if Scully owned a certain pair of sneakers, he should dispose of them. (1321a).

Ramirez died on July 14. (1358a). That same day, Nestor interviewed Roxanne Rector. (1981a-1984a). Rector identified Scully as being at the scene, but said he was not the kicker. (1985a). Nestor attended Ramirez's autopsy on July 15 (1998a), learned that the cause of death was homicide (2008a), and then called Ms. Piekarsky multiple times on his way back (1999a-2000a).[7]

Moyer led the investigation for the next several days. (1357a, 2388a). By July 18, however, Goodman had concerns about the investigation (1454a) because (1) there were no reports of Shenandoah PD's contact with the suspects on the night of the assault (1362a), and (2) the police "had all of these perpetrators in their custody and chose to let them all go home" (1442a). Goodman therefore decided

[7] Phone records indicate that Nestor placed six calls to Ms. Piekarsky on the afternoon of July 15. (1535a-1538a). Nestor testified that he tried multiple times to reach Ms. Piekarsky, but only spoke with her twice. (1999a-2001a). He testified that he called only to see "how she was holding up" (2007a), and answered her questions regarding a juvenile being charged as an adult (2008a).

to take over the investigation given (1) the relationship between Ms. Piekarsky and Hayes, and (2) the fact that some of the suspects were trying to protect the kicker.[8] (1365a). Thus, on July 21, after Nestor interviewed Arielle Garcia, Goodman told Nestor that his office would take over the investigation. (1365a-1366a, 1454a). According to Goodman, "this was probably the first case and maybe the only case [where he] had to take that extreme action." (1457a).

On July 23, after learning about the July 13 meeting at Piekarsky's house, Goodman contacted the State Police and the State Attorney General's Office about a possible cover up involving the Shenandoah police. (1433a, 1454a-1455a, 1461a). That night, Moyer came to Scully's house. (1295a-1296a). He parked down the street and told Scully's stepfather he could not risk being seen. (1296a). He then said numerous witnesses claimed Scully kicked Ramirez, and urged them to "[d]o the right thing" and get Scully "to confess." (1296a). Two days after that, on July 25, the DA's office filed criminal complaints against the teenagers involved in the Ramirez assault. (1464a).

The FBI got involved a few days later. (1464a, 1670a). The local newspapers, which were delivered to the station daily (1109a), had been reporting

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[8] Goodman learned through interviews that the suspects, "for some reason, * * * were willing to say that Colin Walsh threw the punch but they were trying to protect the kicker." (1362a). Lawson, however, had identified Piekarsky as the kicker. (1362a).

that the assault may have been racially motivated and that civil rights groups had requested a federal investigation (1110a, 1118a-1120a, 1122a, 1504a-1505a). In fact, another officer testified he learned from the newspaper shortly after the assault that the federal government would be investigating the incident. (1505a). This fact was consistent with local officers' training: every certified officer in Pennsylvania is taught that the FBI has jurisdiction over civil rights violations such as ethnic intimidation and bias crimes, and that hate crimes are covered by a variety of federal statutes. (1572a-1574a, 1577a-1580a, 1607a-1610a).

On July 28, Carroll contacted Nestor because Goodman had not yet received any investigative reports from Hayes. (1367a-1368a). In fact, the only reports Goodman had from the Shenandoah PD were a July 20 report from Nestor regarding his investigative steps, and a one-page report from Moyer about "an individual who brought a BB gun to the scene after the assault" on Ramirez, but nothing on the assault itself. (1367a). On August 1, Goodman sent a formal memorandum to Nestor, Moyer and Hayes requesting, by August 5, additional information from Nestor, and reports from Moyer and Hayes on their involvement in the assault investigation. (1368a).

Moyer, Nestor and Hayes provided reports to Goodman's office by the requested deadline. (1372a). Moyer's report indicated that Arielle Garcia told Moyer at the scene that Scully had kicked Ramirez in the head. (1374a, 2699a-

2700a). Hayes's report, which Nestor reviewed and incorporated into his August 1 report, also indicated that Arielle identified Scully as the kicker. (1378a, 2694a-2696a). Although Goodman's office had received an earlier report from Officer Senape indicating Arielle had identified Scully as the kicker (1379a),[9] this was the first time his office heard from the Shenandoah police that Arielle had identified Scully as the kicker, even though Moyer briefed Carroll and Heckman about the incident on the morning of July 13. (2389a). In fact, Moyer participated in interviews of both Arielle and Scully, but never questioned them about the kick, and never told the DA's investigators the information he claimed to have received from Arielle at the scene. (1378a-1379a). Goodman testified:

> Obviously our investigation was to determine who the kicker was, part of our investigation. And if we would have had that information, obviously we would have questioned the individuals. And we did question Arielle Garcia, and Arielle Garcia has stated all along that she didn't see who the kicker was.

(1379a).

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[9] Senape also testified that Arielle grabbed *Walsh* as he fled the scene. (1819a-1820a). Both Arielle and Scully, however, testified that Arielle stopped *Scully* as he was fleeing (676a, 768a). Because Senape's report differed from other information the DA's office had received, Goodman requested notes Senape may have taken that night. (1423a-1424a). Senape did not have any. (1424a). Michelle Ashman (Frackville PD) (1778a-1779a) testified at a previous trial (as well as the current trial) that she heard Arielle at the scene identify Scully as the kicker (1379a, 1787a-1788a), but Ashman did not include this in her report, nor did she tell this to the DA investigators when they questioned her before the state trial (1379a).

Special Agent Adam Aichele (FBI) was assigned "in July of 2008" to investigate the beating death of Ramirez. (1668a-1670a). He interviewed Moyer on June 2, 2009, and they discussed both the Ramirez assault and the allegation that someone had a BB gun that night. (1671a-1672a). Moyer told Aichele that after he encountered Ney in the park, Ney said someone had a gun. (1672a). Moyer told Aichele that after hearing this information, he instructed Ney to get into the police car. (1672a). When Aichele interviewed Moyer on June 11, 2009, Moyer again told Aichele that Ney said a person with a gun was chasing kids. (1673a). Aichele questioned Moyer's account, and played Ney's 911 call for Moyer. (1674a). After hearing the recording, Moyer told Aichele, "That's not what he told me." (1674a). Aichele played the recording several more times for Moyer; Moyer denied Ney was speaking to him when Ney said, "There they go," and suggested Ney was speaking with the dispatcher. (1675a-1676a). Moyer then changed his statement and told Aichele that Ney told him about the gun *after* he put Ney in the police cruiser. (1676a-1677a).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Defendants were tried together in the United States District Court for the Middle District of Pennsylvania. Upon the government's motion, this Court consolidated their appeals for briefing.

Brandon Piekarsky and Derrick Donchak were tried together in the United States District Court for the Middle District of Pennsylvania. Both were charged with violating 42 U.S.C. 3631; Donchak was also charged with conspiracy, in violation of 18 U.S.C. 371, and obstruction, in violation of 18 U.S.C. 1519.[10] A jury convicted them and their appeals are pending before this Court. See *United States* v. *Piekarsky & Donchak*, Nos. 11-1567; 11-1568.

Colin Walsh pleaded guilty on April 9, 2009, to one count of 42 U.S.C. 3631. *United States* v. *C.W.*, No. 3:09-cr-117 (M.D. Pa.).

STATEMENT OF THE STANDARDS OF REVIEW

Issues I & III: Sufficiency of the Evidence

When reviewing a challenge to the sufficiency of the evidence, this Court reviews "the evidence in the light most favorable to the Government," affords "deference to a jury's findings," and "draw[s] all reasonable inferences in favor of the jury verdict." *United States* v. *Riley*, 621 F.3d 312, 329 (3d Cir. 2010) (citations omitted). This Court will overturn the verdict "only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt." *Ibid.* (citation omitted). A defendant

[10] The government dismissed an additional obstruction count against Donchak before the case went to the jury.

challenging the sufficiency of the evidence faces an "extremely high" burden. *United States* v. *Lore*, 430 F.3d 190, 203-204 (3d Cir. 2005).

Issue II: Sufficiency of the Indictment / Bill of Particulars

A district court's denial of a motion for a bill of particulars is reviewed for an abuse of discretion. *United States* v. *Urban*, 404 F.3d 754, 771 (3d Cir. 2005). The sufficiency of an indictment is a question of law over which this Court has plenary review. *United States* v. *Hodge*, 211 F.3d 74, 76 (3d Cir. 2000).

Issue IV: Constitutionality

This Court reviews *de novo* a challenge to the constitutionality of a statute. *United States* v. *Weatherly*, 525 F.3d 265, 273 (3d Cir. 2008).

SUMMARY OF ARGUMENT

1. The evidence was more than sufficient to support Moyer's conviction for making false statements to a federal officer. The evidence supported the jury's conclusion that Moyer's statements were false, material, and made knowingly. For example, the jury heard evidence that Ney's conversation with Moyer and Hayes was recorded and heard Ney in the recording identify the teenagers who had attacked Ramirez, but did not mention a man with a gun. The jury also heard testimony that Ney did not mention a gun after getting into the police car. The jury could reasonably conclude from this evidence that Moyer's statements to Agent Aichele about his conversation with Ney in the park were false. The jury also

heard sufficient evidence to conclude that Moyer's false statements were material because they were of that type that, if believed, would have re-focused the investigation away from Moyer's own actions. Finally, the evidence was sufficient to support the jury's finding that Moyer's false statements were made knowingly. After Agent Aichele confronted Moyer with a recording of his conversation with Ney, Moyer changed his story in an attempt to conform his statements to the recording. Moreover, as a law enforcement officer, Moyer would know that it is unlawful to provide false information to a law enforcement officer during an investigation.

2. The district court did not abuse its discretion in denying in relevant part defendant Nestor's motion for a bill of particulars because the indictment sufficiently informed Nestor of the charges against him. The indictment, which identified in Count 1 the dates, subject matter, and author of the reports at issue in Count 2, provided more information than necessary to satisfy Federal Rule of Criminal Procedure 7(c). This information was sufficient to apprise Nestor of what he must be prepared to meet at trial, and to allow him to invoke the protections against double jeopardy.

The fact that Count 2 referenced more than one official police report does not render that count duplicitous. Reading the indictment with a common sense construction, Count 2 charged Nestor with a continuous course of conduct to

obstruct a single federal investigation, and identified multiple official reports that were created to that end.

The district court acted within its discretion in determining whether the government had complied with its order to identify for Nestor the matter within a federal agency's jurisdiction. The government informed Nestor that the matter at issue was the racially-motivated killing of Ramirez. Nothing more was required. There is simply no question that the FBI has jurisdiction – under multiple statutes – to investigate racially-motivated killings, and no court has required the government to identify, either in an indictment or a bill of particulars, a particular criminal statute over which the FBI has investigative authority to set forth an alleged violation of Section 1519.

3. The evidence was more than sufficient to support Nestor's conviction on Count 2. The jury heard evidence that both Nestor and Hayes had a personal relationship with Ms. Piekarsky. The jury also heard evidence that Brandon Piekarsky kicked Ramirez. The jury learned that Nestor interviewed Arielle Garcia, but that Arielle never identified the kicker. The jury also heard evidence that, after the DA's office took over the investigation and after the FBI got involved, Nestor's subordinates' created reports that mischaracterized Arielle's eyewitness account of the assault such that Scully was directly implicated as the kicker. The jury also heard evidence that Nestor reviewed one of these reports

before submitting it to the DA's office. This evidence was more than sufficient to support a finding that Nestor aided and abetted his subordinates in falsifying official police reports.

The jury also heard evidence that Nestor falsified his own reports by omitting information crucial to the investigation. In particular, Nestor omitted the identities of the suspects in his initial report, his contacts with Ms. Piekarsky on the night of the assault and immediately following Ramirez's autopsy, and his conversation with Palubinsky in which Palubinsky recommended the case be transferred to the DA's Office. The jury also heard that Nestor's second report falsely indicated that transferring the investigation to the DA's Office was *Nestor's* idea. This evidence was more than sufficient to support a finding that Nestor himself falsified official reports.

Finally, the government was not required to prove that Nestor knew the investigation was within the jurisdiction of the FBI, although the jury was charged as such. The Supreme Court has held that the language "within the jurisdiction of any department or agency of the United States" is a jurisdictional requirement, rather than a fact of which a defendant must be aware. In any event, the evidence was sufficient to establish that Nestor knew the investigation could be federal in nature.

4. Section 1519 of Title 18 is not unconstitutionally vague. The statute plainly prohibits any person from knowingly writing a false report with the intent to impede an ongoing, or to thwart a future, investigation into a matter within the jurisdiction of a federal agency. Each court to have considered a constitutional challenge similar to Nestor's has rejected it.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT MOYER'S CONVICTION

The evidence was more than sufficient to support Moyer's conviction for making false statements. To establish a violation of 18 U.S.C. 1001,[11] the government must prove that a defendant: (1) knowingly and willfully (2) made a statement (3) which was false (4) and material, (5) in a matter within the jurisdiction of an agency of the United States. See *United States* v. *Barr*, 963 F.2d 641, 645 (3d Cir. 1992).

The indictment, in Count 5, charged Moyer with knowingly making a false, material statement in a matter within the jurisdiction of the FBI. Specifically, the

[11] Section 1001 of Title 18 prohibits, in pertinent part, any person, "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States," from "knowingly and willfully * * * mak[ing] any materially false, fictitious, or fraudulent statement or representation." 18 U.S.C. 1001(a)(2).

indictment alleged that in conversations with the FBI on June 2 and June 11, 2009, Moyer falsely stated that Ney reported to him that there was a man with a gun, and that Ney never identified anyone involved in the assault on Ramirez. (55a-56a). Moyer argues that the evidence failed to establish that these statements were false, material, and made knowingly or willfully. These arguments fail.

First, the evidence more than established that Moyer's statements were false. The jury heard from Ney that he was providing the 911 dispatcher with the location of the teenagers who had previously run in front of his car when officers Moyer and Hayes arrived in their police cruiser. (983a-984a). Ney spoke with the officers and, because he had not disconnected the call with the dispatcher, his conversation with Moyer and Hayes was recorded. (983a-985a). A reasonable interpretation of this recording indicates that after being asked who "they" were (GX 6.7 (1:08)), Ney told the officers that "a bunch of * * * 16-, 17-year old kids" (GX 6.7 (1:09-1:11)) who had been "beating [Ramirez] up" (GX 6.7 (1:14-1:15)) began "running" (GX 6.7 (1:15)) after Ney asked them what they were doing, and that one of the kids remained "here" (GX 6.7 (1:19)) while "the others [were] running" away (GX 6.7 (1:19-1:22)). The jury heard the audio of this call at least three times. (984a-985a, 1675a).

Moyer asserts (Moyer Br. 16) that the recorded conversation was strictly between Ney and the dispatcher, except for the questions: "Who are they? Do you

know?" The recording belies this assertion. The recording indicates that while Ney was discussing the kids who had been "beating [Ramirez] up" and were running away (GX 6.7 (1:09-1:22)), the dispatcher asked Ney *three times* if he was speaking to the police. (GX 6.7 (1:12-1:14; 1:18-1:19; 1:23-1:24)). Only after the third inquiry did Ney answer the dispatcher (by saying "Yea"). (GX 6.7 (1:24)). A juror could reasonably infer that Ney was speaking directly to the police during this portion of the call and ignoring the dispatcher's questions. A reasonable juror could also infer that Ney told the officers he had confronted the teenagers who had assaulted Ramirez, and that one of them (*i.e.*, Donchak) remained on the scene while the others ran away. This evidence more than supports the jury's finding that Moyer falsely stated that Ney did not identify the individuals who were responsible for assaulting Ramirez. *United States* v. *McKanry*, 628 F.3d 1010, 1018 (8th Cir. 2011) (defendant's false statement conviction upheld where defendant's statement was "directly contradicted by [trial] evidence").

The jury's finding that Moyer falsely stated that Ney reported seeing a man with a gun is equally well-supported. The recording of Ney's call does not mention a gun, and Moyer does not suggest otherwise. Moyer instead suggests (Moyer Br. 16) that "[i]t is likely that Ney's statements to [the officers] about the man with the gun were made immediately after [Ney] hung up the 911 call." Hayes's written report, however, does not mention Ney informing the officers

about a man with a gun. (2178a, 2694a-2696a). Moreover, Ney testified that after the call ended, he got into the police cruiser with Donchak. (986a). Ney further testified that he did not remember having a conversation with anyone while in the police car (1027a), and Moyer confirmed that neither Donchak nor Ney said anything to him while in the back of the car (2074a). In addition, Ney testified that it was only *after* Piekarsky yelled at him in the street and immediately before the police arrested him that he realized the police were concerned about a man with a gun. (1031a-1032a). From this evidence, a reasonable juror could easily conclude that Ney never informed the police – either during the 911 call or immediately after – that there was a man in the park with a gun. Although Moyer testified that Ney did, in fact, mention a man with a gun (2071a-2072a), it was for the jury to "weigh evidence [and] determine the credibility of witnesses in making" a determination of sufficiency of the evidence. *United States* v. *Beckett*, 208 F.3d 140, 151 (3d Cir. 2000). Thus, based on the recording, Hayes's report, and Ney's testimony, the evidence was sufficient to support a finding that Moyer's statement was false. *McKanry*, 628 F.3d at 1018.

The evidence also supported a finding that the statements were material. A statement is material if it has "a natural tendency to influence, or [is] capable of influencing, the decisionmaking body to which it is addressed." *United States* v. *Gaudin*, 515 U.S. 506, 512 (1995) (citation omitted). "[A] statement may be

material," moreover, "even if no agency actually relied on the statement in making a decision." *United States* v. *McBane*, 433 F.3d 344, 350 (3d Cir. 2005). Rather, a statement is material if it is "*of a type* capable of influencing a reasonable decisionmaker." *Id.* at 351 (emphasis added). Thus, this Court concluded that a statement's "natural tendency to influence" focuses on the "qualities of the statement in question that transcend the immediate circumstances in which it is offered and inhere in the statement itself." *Ibid.*; see also *United States* v. *Edgar*, 82 F.3d 499, 510 (1st Cir. 1995) (the question is not whether there is actual influence, but whether the statement is of the type that would have a tendency to influence, generally).

Here, the charges against Moyer focused on his efforts to obstruct the investigation into the racially-motivated killing of Ramirez. The government's theory was that the Shenandoah officers acted in the immediate aftermath of the assault and in the days that followed to focus attention away from Piekarsky, specifically, and to minimize the teenagers' exposure to criminal liability, generally. For example, the government alleged (*inter alia*) that Moyer failed to detain the suspects involved in Ramirez's assault after Ney identified them, and wrote false reports detailing his actions that night. (48a, 51a-53a).

In response to questioning, Moyer told Agent Aichele that Ney mentioned a man with a gun but did not identify Ramirez's assailants. Moyer made these

statements after he wrote reports indicating that Ney told officers there was someone in the park with a gun and explaining the actions he took to protect the teenagers from the reported gunman. If true, Moyer's statements could have explained his actions on the night of the assault with respect to the teenaged suspects. In addition, they would have provided support to the narrative set forth in his reports. If believed and acted upon, Moyer's false statements could have refocused the federal investigation away from his own actions. For this reason, Moyer's statements must be considered material.

Courts have recognized "that a frequent aim" of false statements "is to cast suspicion away from the declarant." *United States* v. *Lupton*, 620 F.3d 790, 806 (7th Cir. 2010); see also *McBane*, 433 F.3d at 352. "When statements are aimed at misdirecting agents and their investigation, even if they miss spectacularly or stand absolutely no chance of succeeding, they satisfy the materiality requirement of 18 U.S.C. § 1001." *Lupton*, 620 F.3d at 806-807. Because Moyer's statements were aimed at directing the FBI's attention away from him and his actions on the night of, and immediately following, the assault, they satisfy Section 1001's materiality requirement. *McBane*, 433 F.3d at 352 (false statements that could cause FBI "to re-direct their investigation," "question their informant differently or more fully, or perhaps close the investigation altogether" were material).

Finally, the evidence was more than sufficient to prove that Moyer acted knowingly and willfully; that is, "deliberately and with knowledge" that his representations were false and that he was aware "at least in a general sense, that his conduct was unlawful." *United States* v. *Starnes*, 583 F.3d 196, 211 (3d Cir. 2009). The evidence established that when questioned on June 2 and June 11, Moyer told Aichele that Ney had told him there was someone in the park with a gun. (1672a-1673a). However, after Aichele played the recording of Ney's call, Moyer changed his statement so as not to contradict the recording. (1676a). Specifically, after hearing the recording several times, Moyer told Aichele that Ney's comment about the gunman was made *after* he was placed in the police car. (1676a-1677a). Moyer also denied that Ney was speaking to him about the teenagers who assaulted Ramirez, and told Aichele that Ney must have been speaking with the *dispatcher* when he said, "There they go." (1675a-1676a).

This evidence, "viewed in the light most favorable to the government and in the context of the totality of the evidence in the record," would permit a rational juror to conclude that Moyer acted deliberately and with knowledge that his representations to Aichele were false and his conduct was unlawful. *Starnes*, 583 F.3d at 212. The jury heard testimony that, when confronted with evidence of the recording, in which Ney did not mention a gun and did identify the participants, Moyer *changed* his statement so it would no longer conflict with the recording.

Moyer's efforts to conform his statement to the recording are sufficient to support the jury's finding that Moyer deliberately changed his statement and knew that his changed statement was false. *Starnes*, 583 F.3d at 212.

The jury also heard sufficient evidence to conclude that Moyer knew his actions were unlawful. As a certified law enforcement officer, Moyer received basic, as well as specific in-service training each year. (1623a). A reasonable juror, however, would not need to review an officer's training records to conclude that the officer is aware, "at least in a general sense," that obstructing a criminal investigation by providing false statements to a federal law enforcement officer is unlawful. *Starnes*, 583 F.3d at 211.

II

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN DENYING A BILL OF PARTICULARS BECAUSE THE INDICTMENT WAS SUFFICIENT

The district court did not abuse its discretion in denying in part Nestor's request for a bill of particulars because the indictment set forth sufficiently detailed information to apprise Nestor of the nature of the charges against him and to defend against those charges. His suggestion on appeal that the indictment was defective is without merit.

"The purpose of the bill of particulars is to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to

avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." *United States* v. *Addonizio*, 451 F.2d 49, 63-64 (3d Cir. 1972) (quoting *United States* v. *Tucker*, 262 F. Supp. 305, 308 (S.D.N.Y. 1966)). A bill of particulars is warranted "when the indictment itself is too vague and indefinite for such purposes." *Ibid.* (quoting *United States* v. *Haskins*, 345 F.2d 111, 114 (6th Cir. 1965)). The decision to grant a bill of particulars is "a discretionary matter with the trial court," and a court does not abuse its discretion when it denies such a motion "unless the deprivation of the information sought leads to the defendant's inability to adequately prepare his case, to avoid surprise at trial, or to avoid the later risk of double jeopardy." *Ibid.*

The indictment here was sufficiently detailed such that a bill of particulars was not necessary. Rule 7(c) of the Federal Rules of Criminal Procedure requires an indictment to include "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). In reviewing an indictment, this Court considers: "(1) whether the indictment contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet, and (2) enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States* v. *Hodge*, 211 F.3d 74, 76 (3d Cir. 2000) (internal quotation and citation omitted). The indictment here meets those requirements.

Tracking the language of the statute, Count 2 charged Nestor with aiding and abetting others in falsifying documents while acting in relation to and in contemplation of a matter within federal jurisdiction, and doing so with the intent to impede, obstruct, and influence that matter. (53a). Generally, "an indictment charging a statutory crime is sufficient if it substantially follows the language of the criminal statute, provided that its generality does not prejudice a defendant in preparing his defense nor endanger his constitutional guarantee against double jeopardy." *United States* v. *Eufrasio*, 935 F.2d 553, 575 (3d Cir. 1991).

The indictment here, however, did more than just set forth the offense in the words of the statute. Count 2 explained that the falsified documents were "official police reports" created between July 12, 2008, and March 30, 2009. (53a). Nestor also knew from Count 1, which was incorporated by reference into Count 2,[12] that the specific "official police reports" were:

- Hayes's and Moyer's August 1 reports, reviewed by Nestor, that "mischaracterized the [eye]witness's account" of the assault on Ramirez;
- Hayes's July 29 report "regarding the investigation into the assault on" Ramirez;
- Nestor's July 20 report "regarding the investigation into the assault on" Ramirez;

[12] See Fed. R. Crim. P. 7(c)(1) ("A count may incorporate by reference an allegation made in another count.").

- Nestor's August 1 report "regarding the investigation into the assault on" Ramirez;

- Moyer's report entitled "Lt. William Moyer's Incident Report regarding Case # 125-424" "regarding the investigation into the assault on" Ramirez; and

- Moyer's August 1 report captioned "Investigation of Kids Running from Homicide Scene," "regarding the investigation into the assault on" Ramirez.

(51a-52a). Nestor also knew from Count 1 that the federal matter at issue was the investigation into the racially-motivated assault of Ramirez. (48a).

Far from simply referencing ambiguous documents alleged to have been falsified, the indictment identified the "official police reports" at issue by author, date, and even subject matter (*e.g.*, mischaracterizing an eyewitness's account; the investigation into the assault). The indictment also explained in Count 1 that part of the manner or means of the conspiracy involved Nestor and the other defendants writing "false and misleading official reports that memorialized false statements by the persons involved in the racially motivated assault on L.R., and that intentionally omitted information about the true nature of the assault and the investigation." (48a). The indictment further identified Nestor's alleged role in creating those falsified documents (*e.g.*, author or reviewer). (51a-52a).

Reviewing the indictment "using a common sense construction," *Hodge*, 211 F.3d at 76, the detailed information in the indictment "sufficiently apprise[d] [Nestor] of what he must be prepared to meet" at trial, and would easily allow him

to invoke the protections against double jeopardy in any future trial. *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962) (citation omitted); see, *e.g.*, *United States* v. *Ionia Mgmt.*, 498 F. Supp. 2d 477, 491 (D. Conn. 2007) (indictment charging Section 1519 violation was sufficient where separate conspiracy and substantive counts set forth "specific dates, locations and actors" to apprise defendant of what he must be prepared to meet and protect against double jeopardy). While the government did not identify every omission or inclusion that rendered false the documents identified in the indictment, and thus "did not, at the pre-trial stage, weave the information at its command into the warp of a fully integrated trial theory for the benefit of the defendant[]," the government was not required to do so. *Addonizio*, 451 F.2d at 64. Rule 7(c) requires an indictment to be "concise" and contain "essential facts"; it does not require the indictment to include *every* fact alleged by the government. The specificity with which the government identified the reports at issue made it "highly unlikely that [Nestor would] be unfairly surprised with an unfamiliar police report at trial." (288a). See also *United States* v. *Kernell*, No. 3:08-cr-142, 2010 WL 1543846, at *9 (E.D. Tenn. Mar. 30, 2010) (indictment need not identify every record defendant allegedly destroyed or removed, where indictment informs defendant of statute he is alleged to have violated, the dates of the alleged violations, the elements of the offense, and the conduct defendant is alleged to have engaged in).

Count 2's reference to more than one report does not render the count duplicitous. (Nestor Br. 31-32). An indictment is duplicitous if it "join[s] in a single count * * * two or more distinct and separate offenses." *United States* v. *Starks*, 515 F.2d 112, 116 (3d Cir. 1975). This Court therefore held in *Starks* that where a single count charged defendant with both conspiracy to extort and attempt to extort, either the indictment should have been dismissed or the government should have been required to elect under which charge it would proceed. *Id*. at 116-117. The indictment here, however, did not charge two distinct and separate offenses in a single count.

Reading the indictment with a "common sense construction," *Hodge*, 211 F.3d at 76, it charged Nestor and his co-defendants, in Count 2, with "aiding and abetting one another" in a *continuing course of conduct*. (53a). The indictment identified the discrete time period during which defendants' obstructive conduct was alleged to have occurred (*i.e.*, between July 12, 2008, and March 30, 2009), and identified the course of conduct as "knowingly falsif[ying]" a series of "official police reports" pertaining to the investigation into the racially-motivated killing of Ramirez. (53a).

Nestor's reliance on cases like *United States* v. *Hinton*, 127 F. Supp. 2d 548 (D.N.J. 2000), for example, to argue that the district court should have either dismissed Count 2 or required the government to elect under which offense (*i.e.*,

which false report) it would proceed is misplaced. The *Hinton* defendant was charged with one count of bank fraud, and the indictment set forth different means by which the scheme was alleged to have been executed. *Id.* at 553. The district court ruled that the indictment was duplicitous because the statute was written in terms of a scheme targeting a *single* financial institution, and the indictment, by contrast, specified a scheme involving *six* financial institutions. *Id.* at 556. The court, however, ruled that the government *would* be permitted to set forth *multiple transactions* alleged to have occurred in a single count of bank fraud against a single financial institution. *Ibid.* That is what the government did here: Count 2 alleged a continuing course of conduct to obstruct a single federal investigation, and identified multiple reports that were created to that end. Doing so did not render the indictment duplicitous.

An argument similar to Nestor's was considered – and rejected – by the Seventh Circuit in *United States* v. *Berardi*, 675 F.2d 894 (7th Cir. 1982). The *Berardi* defendant was charged with one count of obstruction, in violation of 18 U.S.C. 1503. *Id.* at 896-897. The indictment specified that, on three separate occasions over several months, the defendant attempted to influence a witness's testimony. *Id.* at 897. The defendant argued (unsuccessfully) before the district court that the court should dismiss the count as duplicitous or require the government to elect which of the three occasions it would rely upon at trial. *Ibid.*

The Seventh Circuit upheld the district court's decision, explaining an indictment is not duplicitous "if it simply charges the commission of a single offense by different means." *Ibid.* The Court recognized the three acts of obstruction *could* have been charged in separate counts, but also recognized the government's discretion to draw "[t]he line between multiple offenses and multiple means to the commission of a single continuing offense." *Id.* at 898. The Court concluded that the indictment, "fairly interpreted," set forth a "continuing course of conduct, during a discrete period of time, to [obstruct justice,]" *ibid.*, and that the facts of the case supported such a theory. In particular, the Court noted the obstructive acts took place "within a relatively short period of time" and were solely focused on influencing a witness's testimony on a particular matter. *Ibid.*; cf. *United States* v. *Brimberry*, 744 F.2d 580, 583 (7th Cir. 1984) (defendant's actions on three different dates were "in furtherance of the sole object of destroying" records pertaining to a particular matter, and thus constituted a continuing course of conduct).

The reasoning of *Berardi* applies here. "[F]airly interpreted," Count 2 alleged that Nestor and his co-defendants engaged in a singular type of obstructive conduct (*i.e.*, falsifying official police reports) over a discrete period of time, and did so with a singular purpose: to impede the investigation into Ramirez's racially-motivated killing. *Berardi*, 675 F.2d at 898. While the statute *would* permit a

separate charge for each act of obstruction (*e.g.*, each falsified document), the statute *also* contemplates a continuing course of obstructive conduct to obstruct an investigation of any matter within a federal agency's jurisdiction. 18 U.S.C. 1519; see also *Berardi*, 675 F.2d at 898. For example, the statute would certainly permit the government to bring ten separate charges against a defendant who shredded ten separate documents on ten consecutive days, provided the defendant knowingly destroyed the documents with the intent to obstruct a federal agency's investigation into a single matter to which those documents pertained. But, under those same facts, the statute would also permit the government to exercise its prosecutorial discretion to charge the defendant with a single count of obstruction. *Berardi*, 675 F.2d at 898; *Brimberry*, 744 F.2d at 583. In that situation, the indictment must allege facts to make clear that the obstructive acts were similar in nature, took place over a relatively short period of time, and were made with the singular object of obstructing a single investigation. *Berardi*, 675 F.2d at 898; *Brimberry*, 744 F.2d at 583. The indictment here did so, and is therefore not duplicitous.

Because the indictment "alleges the specific dates on which each of the false police reports was created[,]" "alleges the approximate date on which [Nestor] reviewed and approved [the] false reports[,]" and "further alleges the subject matter of the reports and the investigation to which the reports pertained" (288a),

the district court did not abuse its discretion in denying in part Nestor's request for a bill of particulars.

Nor did the court abuse its discretion with respect to the particular it did order. In response to the court's order, the government informed Nestor that "the matter within the jurisdiction of the [FBI was] the racially motivated killing of" Ramirez. (302a). Nestor asserts (Nestor Br. 33-34) that this response was not jurisdictionally adequate. (290a). In particular, Nestor argues (Nestor Br. 34) that the government had previously identified the Fair Housing Act as the underlying violation, that a violation of the Act "appeared to be the only jurisdictional basis for an FBI investigation" under the facts, and that borough police officers would not be aware "of the intricacies of" that Act. Nestor also argues (Nestor Br. 35) that the FBI did not have jurisdiction over a racially-motivated killing, and allowing the government to identify that as the jurisdictional element "stretched the vagueness of the statute beyond its breaking point." Nestor's arguments fail.

First, the FBI has jurisdiction to investigate racially-motivated killings under several statutes, including 18 U.S.C. 241,[13] 18 U.S.C. 245,[14] and 42 U.S.C. 3631.[15] Thus, Nestor's suggestion that the FBI did not have jurisdiction to investigate the racially-motivated killing that underlies this case should be flatly rejected.

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[13] This statute makes it a crime for two or more persons to "conspire to injure * * * any person * * * in the free exercise or enjoyment of any [federal]

(continued…)

Second, the fact that the government did not identity a specific criminal statute over which the FBI had jurisdiction is of no consequence. Nestor does not cite to any authority requiring the government to identify a particular criminal statute as the jurisdictional basis for Section 1519 prosecutions, nor could he. The plain language of Section 1519 criminalizes a defendant's efforts to obstruct "the *investigation or proper administration* of *any matter* within the jurisdiction of any * * * agency of the United States[,] * * * or in relation to or contemplation of any such matter." 18 U.S.C. 1519 (emphasis added). As is normally the case, investigations precede the filing of criminal charges. Here, the government informed Nestor that the FBI was investigating the racially-motivated killing of Ramirez – a matter over which it clearly had jurisdiction. The purpose of the investigation was obviously to determine whether federal charges could and should

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(…continued)
right or privilege," and sets forth increased punishment "if death results." 18 U.S.C. 241. See, *e.g.*, *United States* v. *Sharma*, 394 F. App'x 591 (11th Cir. 2010).

[14] This statute makes it a crime to forcefully "injure[] * * * any person because of his race * * * and because he is * * * enjoying" a benefit administered by any State, such as a public park or street, and sets forth increased punishment "if death results." 18 U.S.C. 245(b)(2)(B). See, *e.g.*, *United States* v. *Sandstrom*, 594 F.3d 634 (8th Cir. 2010).

[15] This statute makes it a crime to forcefully "intimidate[] * * * any person because of his race * * * and because he is * * * occupying * * * any dwelling," and sets forth increased punishment "if death results." 42 U.S.C. 3631. See *United States* v. *Piekarsky & Donchak*, Nos. 11-1567; 11-1568.

be brought and, if so, what charges should be filed (*e.g.*, 18 U.S.C. 241, 18 U.S.C. 245, or 42 U.S.C. 3631) given the facts and circumstances uncovered during the investigation. Here, the facts and circumstances ultimately supported charges (and convictions) under 42 U.S.C. 3631.[16] See *Piekarsky & Donchak*, Nos. 11-1567; 11-1568.

Moreover, there can be no credible dispute that Section 1519 covers efforts to obstruct investigations that never result in criminal charges being filed. This is so because courts have routinely held that the statute covers efforts to obstruct *potential* federal investigations *that never materialize*. See *United States* v. *Gray*, 642 F.3d 371, 379 (2d Cir. 2011) ("[Section] 1519 does not require the existence or likelihood of a federal investigation."); see also *United States* v. *Jho*, 465 F. Supp. 2d 618, 636 (E.D. Tex. 2006) ("[I]mposing a requirement that the matter develop into a formal investigation ignores the plain meaning of [Section 1519] and the legislative history."). Thus, if the statute does not require the existence of a federal *investigation* before criminal liability may attach, it certainly cannot require the government to identify a specific federal *statute* that is the focus of the investigation. All that is required is that the obstruction be done in anticipation of

[16] Nestor's argument (Nestor Br. 34) that borough police officers would not be aware "of the intricacies of the Fair Housing Act" and therefore would not have contemplated such an investigation is an argument suited to whether the *evidence* was sufficient to support a conviction, not whether the *indictment* was sufficient.

a matter that is ultimately *proven* "to be within the jurisdiction of any federal agency."[17] *Ibid.* Because the FBI unquestionably has jurisdiction to investigate racially-motivated killings, and because Nestor was informed that the racially-motivated killing was the federal matter at issue in Count 2, the district court did not abuse its discretion in denying additional information in response to Nestor's motion for a bill of particulars.

III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT NESTOR'S CONVICTION FOR FALSIFYING POLICE REPORTS

The evidence was more than sufficient to support Nestor's conviction. To establish a violation of 18 U.S.C. 1519, the government must prove that the defendant knowingly falsified a document with the intent to impede or influence a federal investigation (including a future or anticipated federal investigation). See, *e.g.*, *United States* v. *Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). The evidence against Nestor, while largely circumstantial, was nonetheless sufficient for a reasonable juror to conclude he violated the statute.

The jury heard evidence that Nestor was briefed after the assault that the suspects were local teenagers – including Brandon Piekarsky. (1973a-1974a). The

[17] Because the government must establish that the matter falls within the FBI's jurisdiction, Nestor's argument (Nestor Br. 35 n.34) that the statute permits the government to prosecute a defendant for obstructing "anything the FBI investigates whether they legitimately have jurisdiction or not" is without merit.

jury learned that one of Nestor's subordinates – Hayes – was dating Piekarsky's mother. (1107a). The jury also heard that Nestor was friends with, and had vacationed with, Ms. Piekarsky. (2021a). The jury learned that Nestor spoke with Ms. Piekarsky on the night of the assault (1541a), and that at some point after the conversation, Ms. Piekarsky instructed the teenagers assembled at Donchak's garage to get their stories straight before talking to the police (772a-773a). This story omitted, among other things, the final kick to Ramirez and the use of racial slurs. (560a, 648a). The jury also heard evidence that Ms. Piekarsky was the first person Nestor called after learning that Ramirez's death was ruled a homicide. (1999a-2000a). Thus, the government presented evidence from which a reasonable juror could conclude that Nestor had a motive to falsify, or aid and abet others in falsifying, a report that downplayed Brandon Piekarsky's criminal liability.

The evidence demonstrated that a week into the investigation, Nestor learned the DA's office was taking over the investigation and excluding the Shenandoah PD from further involvement. (1365a-1366a). The FBI became involved in late July. (1670a). On July 28, Goodman had Carroll contact Nestor to inform him that he had not yet received a report from Hayes. (1367a-1368a). The jury learned that on August 1, the DA formally directed Nestor, Moyer and Hayes to prepare either supplemental or initial reports of their investigative efforts. (1368a). The jury learned that Hayes's report, which Nestor reviewed and incorporated into his

August 1, 2008, report, indicated that Arielle Garcia identified Scully as the kicker. (1377a-1378a). The jury also learned that Moyer's report indicated that Arielle identified Scully as the kicker. (1374a). And the jury heard evidence from which it could reasonably infer that Nestor, who had interviewed Arielle, knew the information in Moyer's and Hayes's reports about Arielle identifying the kicker was false. (1379a). Moreover, none of the reports – neither Nestor's, Moyer's nor Hayes's – included the racial motivation for the assault. From this evidence alone, a reasonable juror could conclude that Nestor knowingly aided and abetted the falsifying of official police reports.[18]

The jury also considered evidence from which it could reasonably conclude that Nestor falsified his *own* reports. For example, Nestor's July 20 report did not identify the teenaged suspects, did not include any of his contacts with Ms. Piekarsky (either on the night of the assault or immediately after the autopsy), and did not include his conversation with Palubinsky in which Palubinsky recommended the case be turned over to another investigating agency given the potential conflict between a suspect and an investigating officer. (2689a-2693a). Moreover, Nestor's August 1 report falsely identified the basis for the DA's

[18] Although the court denied Nestor's Rule 29 motion on the basis of his *own* report, this Court is not precluded from upholding Nestor's conviction under an aiding and abetting theory. Rather, this Court must affirm if the evidence, viewed in the light most favorable to the government, supports the jury's verdict.

involvement in the investigation by suggesting that *he* recommended the DA's office take over the investigation. (2688a).

Nestor argues (Nestor Br. 39-44) that these omissions could not support his conviction absent a duty to include such information, and that neither the omissions nor the affirmative falsities were material. These arguments fail. First, Nestor cannot credibly argue that the omissions from his report were immaterial, and therefore not expected to be included in his investigative report.[19] Nestor omitted from his July 20 report *the names of the suspects involved in the assault*. If the point of the investigation was to identify the suspects and bring them to justice, one would obviously expect their names – *particularly when known* – to be included in an investigative report. The fact that *Moyer* provided the names of the six suspects to the DA's office does little to explain *Nestor's* report. As explained above, information is material if it is "*of a type* capable of influencing a reasonable decisionmaker." *McBane*, 433 F.3d at 351 (emphasis added). Having the names of suspects is certainly the type of information that could influence a reasonable

[19] Although the Sixth Circuit has found material omissions to support a conviction under Section 1519, *United States* v. *Lanham*, 617 F.3d 873, 887 (6th Cir. 2010), materiality is not an express element of the statute. Thus, the cases Nestor cites (Nestor Br. 40) in support of his argument are inapposite. *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985) involved 18 U.S.C. 1001, which includes an express materiality requirement, and *United States* v. *Seitz*, 952 F. Supp. 229 (E.D. Pa. 1997) involved concealment, not falsification of documents. In any event, as explained above, Nestor's omissions were material.

decisionmaker. Moreover, Nestor did not disclose his contact with a suspect's parent. Failing to disclose that contact – *which took place on the night of the assault and immediately after learning the manner of death* – could suggest an effort to hide his preferential treatment of that suspect.[20] "Material omissions of fact can be interpreted as an attempt to 'cover up' or 'conceal' information," and "[a] reasonable fact-finder could conclude that [the defendant who did so] falsified his report." *United States* v. *Lanham*, 617 F.3d 873, 887 (6th Cir. 2010).

Second, Nestor's affirmative representation that he suggested to Goodman that the DA's office take over the investigation is hardly immaterial. Goodman testified that, for the only time in his memory, he took over a local investigation, and explained that he did so in part because he was concerned about the conflict between Hayes and the Piekarskys. (1365a, 1457a). He also explained that he contacted the State Police and the U.S. Attorney's Office because he was concerned that the local police were involved in a cover up. (1433a). Certainly if Nestor was attempting to hide his contacts with the prime suspect's mother because the DA was concerned about the obvious conflict of interest between Nestor's prime suspect and an investigating officer, it would be important for

[20] Nestor's other omission is equally material: failing to include his conversation with Palubinsky suggests an initial disregard of an obvious conflict of interest – one involving a prime suspect, a personal friend, and an investigating officer.

Nestor's report to reflect that *he* – and not the DA – suggested taking over the investigation because of that conflict. Otherwise, reporting that the DA originated the takeover would give credibility to the conflict, and raise questions about the police department's actions during the investigation.

Third, Nestor makes too much of his acquittal on the conspiracy count. (Nestor Br. 35-38). That the jury acquitted the defendants of conspiracy has little – if any – effect on this Court's analysis of whether the evidence was sufficient to support Nestor's conviction for obstruction. *Dunn* v. *United States*, 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."); *United States* v. *Apodaca*, 188 F.2d 932, 940 (10th Cir. 1951) ("An acquittal on one or more counts does not invalidate a finding of guilt on others, even though the same evidence was offered in support of all."). Nestor's conspiracy acquittal could easily have been the result of the government's failure to prove that the parties agreed with each other to obstruct the investigation. A juror could reasonably conclude that Nestor, as a close friend of Ms. Piekarsky's, had a reason, independent of Hayes's relationship with her, to cast suspicion away from Brandon Piekarsky.

Similarly, Moyer's and Hayes's acquittals on Count 2 cannot be a basis for rejecting the jury's finding with respect to Nestor's guilt on that count. As the Supreme Court explained in *Dunn*:

> The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.

284 U.S. at 393 (citation omitted); see also *United States* v. *Bergdoll*, 272 F. 498, 505 (E.D. Pa. 1921) ("Mere formal logical consistency is not one of the crown jewels of juries, and happily so. * * * The relenting toward some of the defendants, and the refusal to so relent toward others, may show a logical inconsistency, but it does not impair the legal value of the finding.").

Finally, Nestor argues (Nestor Br. 44-45) that the FBI's jurisdiction was based upon the Fair Housing Act, and that the government's proof failed to establish that Nestor knew about the Act and that he acted in contemplation of an investigation into a violation of the Act. Although the jury was, in fact, instructed that it needed to find that Nestor "acted with knowledge of a federal investigation, or at least contemplated that such federal investigation would occur" (2596a), a specific nexus between the obstructive conduct and the *federal* investigation is not required to prove a violation of the statute. Nestor's "nexus" argument thus fails as a matter of law.

The plain language of 18 U.S.C. 1519 does not require the government to prove the defendant intended to obstruct a federal investigation; rather, the statute requires the government to prove that the defendant intended to impede "*any*

matter" that *happens* to be within the federal government's jurisdiction. 18 U.S.C. 1519 (emphasis added).

The Supreme Court has interpreted the phrase "within the jurisdiction of any department or agency of the United States" as a jurisdictional requirement, rather than a fact of which a defendant must be aware. In *United States* v. *Yermian*, 468 U.S. 63, 68 (1984), the Court addressed whether knowledge of federal-agency jurisdiction was required for conviction under 18 U.S.C. 1001, which at the time provided that "[w]hoever, *in any matter within the jurisdiction of any department or agency of the United States* knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined." *Ibid.* (emphasis added). The Court concluded that the emphasized phrase was "a jurisdictional requirement," whose "primary purpose" was "to identify the factor that makes the false statement an appropriate subject for federal concern," and that the statute "unambiguously dispenses with any requirement" that the government prove that false statements "were made with actual knowledge of federal agency jurisdiction." *Id.* at 68-70.

The Court explained that this conclusion would be "equally clear" if – as is the case with Section 1519 – the "jurisdictional language . . . appeared as a separate phrase at the end of the description of the prohibited conduct." *Yermian*, 468 U.S. at 69 n.6. The predecessor to Section 1001, which prohibited "knowingly

and willfully" making "any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States," *ibid.*, was worded nearly identically to the present Section 1519. The Court stated that the "most natural reading of this version of [Section 1001] also establishes that 'knowingly and willfully' applies only to the making of false or fraudulent statements and not to the predicate facts for federal jurisdiction." *Ibid.*; cf. *United States* v. *Feola*, 420 U.S. 671, 676-686 (1975) (knowledge that victim is a federal officer is not required for conviction of assaulting federal officer in violation of 18 U.S.C. 111).

Section 1519 should be given the same reading. Section 1519 was enacted nearly 20 years after *Yermian*. Congress's adoption in Section 1519 of language and structure similar to that of Section 1001 (and its predecessor) demonstrates that Congress intended a similar interpretation. "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents and that it expect[ed] its enactment[s] to be interpreted in conformity with them." *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995) (alterations and citation omitted).

The legislative history confirms this interpretation. The Senate Report accompanying the relevant legislation indicates that the intent requirement is independent of the federal jurisdiction requirement. The report explained that,

under Section 1519, "[d]estroying or falsifying documents to obstruct any of [various] types of matters or investigations, *which in fact are proved to be within the jurisdiction of any federal agency* are covered by this statute." S. Rep. No. 146, 107th Cong., 2d Sess. 15 (2002) (emphasis added); see *id.* at 14 ("Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, *and such matter is within the jurisdiction of an agency of the United States*.") (emphasis added).

Senator Patrick Leahy, who authored the legislation, explained Congress's intent. 148 Cong. Rec. S7418-S7419 (daily ed. July 26, 2002). "The fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant." *Id.* at S7419. "Rather, the intent required is the intent to obstruct, not some level of knowledge about the agency processes [or] the precise nature of the agency [or] court's jurisdiction." *Ibid.*; see *id.* at S7418 ("[T]his section would create a new 20-year felony which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is, *as a factual matter*, within the jurisdiction of any federal agency or any bankruptcy.") (emphasis added).

The only court of appeals to have expressly addressed this issue agrees that Section 1519 does *not* require the government to prove a defendant's knowledge of a federal proceeding. Relying upon the plain language of the statute and its legislative history, the Second Circuit recently "decline[d] to read any such nexus requirement into the text of § 1519." *United States* v. *Gray*, 642 F.3d 371, 378 (2d Cir. 2011); see also *ibid.* ("By the plain terms of § 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime."). The Eleventh Circuit, moreover, has upheld under plain error review a jury instruction that the government was not required to prove that the defendant knew his conduct would obstruct a federal investigation, provided the government proved that the investigation the defendant intended to obstruct did, in fact, concern a matter within the jurisdiction of an agency of the United States. *United States* v. *Fontenot*, 611 F.3d 734, 736-738 (11th Cir. 2010).

Even if it was necessary to show that Nestor knew the investigation was federal in nature, the government proved that here. The evidence demonstrated that local police officers were trained that the FBI investigates racially-motivated crimes. (1572a-1574a, 1577a-1580a, 1607a-1610a). The evidence also demonstrated that the FBI became involved in the investigation in late July – just a few weeks after the assault (1670a) and before Nestor wrote his second report. Moreover, the evidence strongly suggested that the entire community, not just the

police, understood the crime at issue was one that fell within the jurisdiction of the FBI, given the numerous newspaper articles in the days following the assault. (1110a, 1118a-1120a, 1122a, 1504a-1505a). This evidence thus supports the jury's finding, as instructed, that Nestor "acted with knowledge of [a] federal investigation or at least contemplated that such a federal investigation would occur." (2596a).

From all of this evidence, a jury could reasonably conclude that Nestor sanctioned false information contained in his subordinate's report, and knowingly omitted material information from his own report, with the intent to impede a federal investigation into the assault on Ramirez.

IV

SECTION 1519 OF TITLE 18 IS CONSTITUTIONAL

Section 1519 of Title 18 is not unconstitutionally vague. A statute is unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or "authorizes or even encourages arbitrary and discriminatory enforcement." *United States* v. *Amirnazmi*, 645 F.3d 564, 588 (3d Cir. 2011) (citation omitted). In criminal cases, because "vagueness attacks are based on lack of notice, they may be overcome in any specific case where reasonable persons would know their conduct puts [them] at risk of punishment under the statute." *San Filippo* v. *Bongiovanni*, 961 F.2d

1125, 1136 (3d Cir. 1992) (citation omitted). Criminal statutes therefore need only give "fair warning that certain conduct is prohibited" to defend against a constitutional challenge. *Ibid.*

The indictment here alleged that Nestor, while aiding and abetting others and "acting in relation to and in contemplation" of a matter within the FBI's jurisdiction, knowingly falsified police reports with the intent to obstruct the investigation and proper administration of that matter. (53a). This alleged conduct falls plainly within the prohibitions of the statute. *United States* v. *Russell*, 639 F. Supp. 2d 226, 240 (D. Conn. 2007). As a law enforcement officer, Nestor cannot credibly argue that the statute was unconstitutionally vague as applied to him. Any person of ordinary intelligence would comprehend that the statute prohibits a police officer from knowingly writing a false report with the intent to impede an ongoing, or thwart a future, investigation.[21] Indeed, each court to have considered the issue has rejected a challenge to the statute's constitutionality.

In *United States* v. *Hunt*, 526 F.3d 739, 741-742 (11th Cir. 2008), the defendant police officer was convicted after he falsified a use of force report

[21] Whether the government can *prove* that Nestor acted knowingly and with the intent to impede an ongoing or future federal investigation is a question concerning the sufficiency of the evidence, not the constitutionality of the statute. Nestor's arguments (Nestor Br. 52-56) that the facts adduced at trial could not support a conviction under Section 1519 are therefore unrelated to the constitutional inquiry.

concerning his arrest of a suspect. The defendant challenged his conviction on the ground the statute did not provide "fair warning" that Congress intended the statute to cover his conduct. *Id.* at 743. The Eleventh Circuit rejected this argument, holding the statute "unambiguously describes the precise conduct the jury found [the defendant] engaged in when he made a false statement in his police report." *Ibid.* Noting that a person of ordinary intelligence would understand the terms "record," "document," and "false," and would understand that "any matter within the jurisdiction of [a] department . . . of the United States" would include an FBI investigation, the Court held that the statute's "plain text" put the defendant "on notice his conduct was unlawful." *Ibid.*

Here, Nestor argues (Nestor Br. 46-56) that the statute's reference to a defendant's intentional actions "*in contemplation of*" an investigation renders the statute unconstitutionally vague. 18 U.S.C. 1519 (emphasis added). His argument is without merit. Nestor was directed to prepare a report to give to Goodman, who was investigating the incident; he cannot reasonably argue that an investigation was not "contemplated."[22] Any police officer would understand that *knowingly* falsifying a police report *with the intent to obstruct* an anticipated investigation (that the government proves would have been federal) is prohibited under the act.

[22] As explained in Arg. III, the statute does not require Nestor to have known that the investigation was federal in nature.

Russell, 639 F. Supp. 2d at 240; see also *Kernell*, 2010 WL 1543846, at *12-13; *United States* v. *Ionia Mgmt.*, 526 F. Supp. 2d 319, 329 (D. Conn. 2007) (explaining that statute was meant to apply broadly to intentional acts to obstruct "an investigation or matter within U.S. jurisdiction, or in anticipation of such a matter").

Finally, the Supreme Court has explained "that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is prescribed." *Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 499 (1982); see also *Gonzales* v. *Carhart*, 550 U.S. 124, 149 (2007) (holding that scienter requirements in criminal statutes "alleviate vagueness concerns," because a *mens rea* element makes it less likely that a defendant will be convicted for an action committed by mistake). Section 1519's scienter requirement, which the government must establish regardless of whether the defendant acted to obstruct an ongoing or contemplated investigation, eliminates any residual vagueness concerns. *United States* v. *Stevens*, 771 F. Supp. 2d 556, 562 (D. Md. 2011) (Section 1519 "provides sufficient notice of what conduct is prohibited, and is not subject to arbitrary or discriminatory enforcement."); *United States* v. *Fumo*, 628 F. Supp. 2d 573, 598 (E.D. Pa. 2007) (Section 1519 is not unconstitutionally vague, and scienter requirement would mitigate any vagueness that did exist.); *Russell*, 639 F. Supp. 2d at 240 (Section

1519's scienter requirement "eliminates any statutory vagueness concerns."); *United States* v. *Velasco*, No. 8:05-cr-496, 2006 WL 1679586, at *5 (M.D. Fla. June 14, 2006) (rejecting vagueness challenge to Section 1519 because, given scienter requirement, any vagueness "will be cured by the Government's proof or resolved by a successful defense"). Because a defendant will be convicted for violating Section 1519 "only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Screws* v. *United States*, 325 U.S. 91, 102 (1945).

CONCLUSION

For the reasons stated, this Court should affirm defendants' convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached CONSOLIDATED BRIEF FOR THE UNITED STATES AS APPELLEE:

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Dated: September 15, 2011

s/Angela M. Miller
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CERTIFICATE OF EXEMPTION FROM BAR MEMBERSHIP

I certify that, as an attorney representing the United States, I am not required to be a member of the bar of this Court. See L.A.R. 28.3(d) and Committee Comments.

Date: September 15, 2011

s/Angela M. Miller
ANGELA M. MILLER
Attorney

CERTIFICATE OF SERVICE

I certify that on September 15, 2011, I electronically filed the foregoing CONSOLIDATED BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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