Nos. 11-1567; 11-1568

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BRANDON PIEKARSKY &
DERRICK DONCHAK,

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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CROSS REFERENCE INDEX

Pursuant to Third Circuit L.A.R. 28.2, the arguments presented in the CONSOLIDATED BRIEF FOR THE UNITED STATES AS APPELLEE respond to the arguments and questions presented by Appellants on the following pages:

ARGUMENT	QUESTION PRESENTED	PAGE NOS.
I	Whether the federal prosecution, which followed a state court trial, violated defendants' rights against double jeopardy.	Piekarsky Br. 32-41 Donchak Br. 55-64
II	Whether the district court erred in instructing the jury that the government could prove a violation of 42 U.S.C. 3631 if the defendants, in addition to being motivated by the race of their victim and because the victim was occupying a dwelling in Shenandoah, were also motivated by other concerns.	Piekarsky Br. 41-51 Donchak Br. 22-34
III	Whether the evidence was sufficient to support the jury's verdict that defendant Piekarsky was guilty of violating 42 U.S.C. 3631.	Piekarsky Br. 29-32
IV	Whether the evidence was sufficient to support the jury's verdict that defendant Donchak was guilty of conspiring with the local police and aiding and abetting them in falsifying official police reports.	Donchak Br. 34-48
V	Whether the district court abused its discretion in declining to allow defense counsel to discuss (1) the difference between race, ethnicity, and national origin for purposes of proving a violation of 42 U.S.C. 3631, and (2) the victim's immigration status.	Piekarsky Br. 20-26

CROSS REFERENCE INDEX (continued)

VI	Whether the district court abused its discretion in declining to permit defense counsel to mention the verdict in defendants' prior state trial, and directing counsel to refer to the state trial as a "prior proceeding."	Piekarsky Br. 26-28
VII	Whether the district court erred in using the Guideline associated with voluntary manslaughter to calculate defendants' offense level.	Piekarsky Br. 51-57 Donchak Br. 48-54

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal 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 against defendants on February 24, 2011 (App. Vol. I, pp. 3-8; Supp. App. Vol. I, pp. A5-A10),[1] and both defendants filed timely notices of appeal.

[1] Citations to "Donchak Br. __" refer to pages in defendant Donchak's opening brief. Citations to "Piekarsky Br. __" refer to pages in defendant

(continued…)

(App. Vol. I, pp. 1-2; Supp. App. Vol. I, pp. A1-A2). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES[2]

1. Whether the federal prosecution, which followed a state court trial, violated defendants' rights against double jeopardy. (Piekarsky & Donchak)

2. Whether the district court erred in instructing the jury that the government could prove a violation of 42 U.S.C. 3631 if the defendants, in addition to being motivated by the race of their victim and because the victim was occupying a dwelling in Shenandoah, were also motivated by other concerns. (Piekarsky & Donchak)

3. Whether the evidence was sufficient to support the jury's verdict that defendant Piekarsky was guilty of violating 42 U.S.C. 3631. (Piekarsky)

(…continued)
Piekarsky's opening brief. Citations to "App. __" refer to pages in the appendix filed with defendant Donchak's opening brief. Citations to "Supp. App. __" refer to pages in the supplemental appendix filed with defendant Piekarsky's opening brief. Citations to "Gov. Supp. App. __" refer to pages in the government's supplemental appendix filed with this brief.

[2] Defendants raise individual and joint issues on appeal. For clarity, the government identifies the defendant(s) raising the issue immediately after the statement of each issue.

4. Whether the evidence was sufficient to support the jury's verdict that defendant Donchak was guilty of conspiring with the local police and aiding and abetting them in falsifying official police reports. (Donchak)

5. Whether the district court abused its discretion in declining to allow defense counsel to (1) argue the difference between race, ethnicity and national origin for purposes of proving a violation of 42 U.S.C. 3631, and (2) discuss the victim's immigration status. (Piekarsky)

6. Whether the district court abused its discretion in declining to permit defense counsel to mention the verdict in defendants' prior state trial, and directing counsel to refer to the state trial as a "prior proceeding." (Piekarsky)

7. Whether the district court procedurally erred and abused its discretion in using the Guideline associated with voluntary manslaughter to calculate defendants' offense level. (Piekarsky & Donchak)

STATEMENT OF THE CASE

On December 10, 2010, a federal grand jury returned a four-count indictment against Brandon Piekarsky and Derrick Donchak charging both defendants with interfering with the housing rights of Luis Ramirez, because of Ramirez's race and because he was occupying a dwelling in, and in order to intimidate other Latino persons from occupying dwellings in, Shenandoah, Pennsylvania, by physically assaulting Ramirez resulting in his death, in violation

of 42 U.S.C. 3631 and 2 (Count 1). App. Vol. II, pp. 37-39. The indictment charged Donchak with conspiring to falsify, and aiding and abetting the falsification of, official police reports, in violation of 18 U.S.C. 371 (Count 2) and 18 U.S.C. 1519 and 2 (Count 3). App. Vol. II, pp. 40-45. The indictment further charged Donchak with obstruction of justice, in violation of 18 U.S.C. 1519 and 2 (Count 4). App. Vol. II, pp. 45-46.

Both defendants pleaded not guilty to the charges. See App. Vol. II, p. 35 (docket entries #19 (Donchak) and #20 (Piekarsky)). Defendants filed a joint motion seeking to dismiss the indictment for failing to state a claim and for violating the principles of double jeopardy. App. Vol. II, pp. 47-60. The district court denied the motion. App. Vol. I, pp. 9-22.

The defendants proceeded to a jury trial. At the close of the government's case-in-chief, counsel for defendant Piekarsky, on behalf of both defendants, moved for a judgment of acquittal on Count 1 on the ground of insufficient evidence. App. Vol. III, pp. 764-769. The court denied the motion. App. Vol. III, p. 770. Counsel for Donchak moved for a judgment of acquittal on Count 4, also on the ground of insufficient evidence. App. Vol. III, p. 769. The government did not object to dismissing the count; the district court therefore dismissed Count 4. App. Vol. III, pp. 769-770. At the close of all the evidence, counsel for Piekarsky renewed his earlier motion to dismiss Count 1 on behalf of both defendants; the

court denied the motion. App. Vol. IV, p. 860. The jury convicted defendants on all remaining counts. Supp. App. Vol. I, pp. A3-A4 (Piekarsky); Gov. Supp. App., pp. 1-2 (Jury Verdict, Donchak).

The district court sentenced defendant Piekarsky to 108 months' imprisonment on Count 1, to be followed by three years of supervised release. Supp. App. Vol. I, pp. A5-A10. The district court sentenced Donchak to 108 months' imprisonment each on Counts 1 and 3, and 30 months' imprisonment on Count 2, all terms to run concurrently, to be followed by three years of supervised release. App. Vol. I, pp. 3-8.

Both defendants filed timely notices of appeal. App. Vol. I, pp. 1-2; Supp. App. Vol. I, pp. A1-A2.

STATEMENT OF FACTS

In the late evening hours of July 12, 2008, the defendants, Brandon Piekarsky and Derrick Donchak, along with Brian Scully, Ben Lawson, Colin Walsh and Josh Redmond (their friends and football teammates at Shenandoah Valley High School), were hanging out together for about two hours near a creek in their town of Shenandoah, Pennsylvania.[3] App. Vol. II, pp. 138-143, 222; App. Vol. III, pp. 383-384. All but Redmond were drinking malt liquor. App. Vol. II,

[3] Redmond arrived at the creek as everyone else was leaving. App. Vol. III, p. 635.

pp. 143-144, 222; App. Vol. III, pp. 383, 635. The group eventually left the creek area and walked to a nearby Polish-American block party. App. Vol. II, pp. 144-145, 223; App. Vol. III, pp. 384, 636. The group remained at the block party for less than an hour. App. Vol. II, pp. 145-146, 224. They left when Piekarsky got into a verbal altercation with another guest and had to be physically restrained by his friends. App. Vol. II, pp. 145, 224; App. Vol. III, pp. 384-385, 636.

The group walked through Vine Street Park and encountered a young woman named Roxanne Rector. App. Vol. II, pp. 147-148, 225-226; App. Vol. III, pp. 385, 637. Scully said something to Roxanne about being out too late. App. Vol. II, pp. 147, 226; App. Vol. III, pp. 386, 637. Luis Ramirez, a Hispanic man unknown to the group who had lived in Shenandoah since 2005 and who had been sitting with Roxanne in the park, got up from a park swing (but did not approach the group) and said something to Scully in Spanish. App. Vol. II, pp. 148, 226-228; App. Vol. III, pp. 442, 484. Scully told Ramirez: "This is Shenandoah. This is America. Go back to Mexico."[4] App. Vol. II, p. 149; see also App. Vol. II, p.

[4] The group of young men would regularly talk in negative terms about the growing number of Hispanic Americans moving into Shenandoah (App. Vol. II, p. 221), to include using "racial slurs" (App. Vol. II, p. 212). In particular, Donchak, Scully and Walsh would say things like, "Why are they here?" and "Get them out of here," and refer to Hispanic individuals as "spic" or "wetback." App. Vol. II, p. 221. Donchak, in fact, "really didn't like Hispanic people" and when he saw them around town he would make "racial slurs" and refer to Hispanics as "fucking [S]pics" or "fucking Mexicans." App. Vol. II, p. 141; App. Vol. III, p. 379. The

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228; App. Vol. III, pp. 386-387, 639. Donchak called Ramirez a "Spic" (App. Vol. II, p. 228), and Walsh told Ramirez to "Get the fuck out of here" (App. Vol. III, p. 387; see also App. Vol. III, p. 639).

Ramirez started to walk backwards out of the park and he and Roxanne headed up Vine Street, away from the group. App. Vol. II, pp. 149, 228-229; App. Vol. III, pp. 387, 640. While walking away, Ramirez was yelling at the group in Spanish, and members of the group were yelling back. App. Vol. II, pp. 150, 228-229; App. Vol. III, pp. 387-388, 638-640. Ramirez took out his cell phone and called his friend, Victor Garcia, as he turned away from the group and walked up Lloyd Street.[5] App. Vol. II, p. 228; App. Vol. III, pp. 387-388, 520-521, 638, 640.

Piekarsky ran up to Ramirez at "[f]ull speed" (App. Vol. III, p. 388), with Donchak, Walsh and Scully close behind (App. Vol. II, p. 151; App. Vol. III, p. 641). Piekarsky and Ramirez began "grappling" (App. Vol. II, p. 231) and punching each other with closed fists (App. Vol. II, p. 152). Piekarsky eventually picked up Ramirez and threw him to the ground. App. Vol. II, p. 231; see also App. Vol. II, p. 298; App. Vol. III, p. 389. Piekarsky attempted to kick Ramirez,

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(…continued)
group would use the term "Mexican" "a lot" because they considered it "offensive." App. Vol. II, p. 221.

[5] At some point during the course of events, Ramirez relayed to Victor Garcia that he (Ramirez) was being beaten and asked Victor Garcia to come to the park. App. Vol. III, pp. 520-521.

but Piekarsky tripped over a knee wall and fell down. App. Vol. II, pp. 231-232; App. Vol. III, p. 642. Donchak then started punching Ramirez with closed fists (App. Vol. II, pp. 153, 232; App. Vol. III, pp. 389-390), while calling Ramirez a "fucking [S]pic" (App. Vol. III, pp. 389-390). Ramirez again fell to the ground and Donchak, Walsh and Piekarsky began kicking Ramirez's upper body. App. Vol. II, pp. 154, 232-233; App. Vol. III, pp. 390-391, 642; see also App. Vol. II, p. 122 (an eyewitness saw from her window a person lying on the street with three people surrounding him and kicking him).

The kicking stopped around the time Victor Garcia, who is Hispanic, and his wife Arielle, who is not, arrived. App. Vol. II, p. 155; App. Vol. III, pp. 391, 644. As Victor approached the scene, someone from the group walking down Lloyd Street called him a "[f]ucking Mexican."[6] App. Vol. III, pp. 545-546. Arielle and some of the members of the group knew each other from school. App. Vol. II, pp. 155, 236; App. Vol. III, pp. 391, 484, 644. Ramirez was able to stand up and he and Donchak threw a couple more punches at each other. App. Vol. II, p. 233. Walsh walked to Arielle and said: "[T]his isn't racial." App. Vol. III, p. 392. Donchak began walking toward his friends, who were returning to the park, but then turned toward Ramirez and said, "[F]uck you [S]pic." App. Vol. II, pp. 233-

[6] When Walsh was asked to describe Victor Garcia's race, he answered "Hispanic." App. Vol. III, p. 391.

234. Scully told Ramirez to "go home, you Mexican motherfucker" before turning away from Ramirez. App. Vol. II, pp. 233-234; see also App. Vol. III, p. 485. Shortly thereafter, Ramirez hit Scully in the back of the head, causing Scully to fall down. App. Vol. II, p. 234; App. Vol. III, p. 644. Scully and Ramirez then began fighting. App. Vol. III, pp. 485, 525-526, 645.

Walsh approached and, while Ramirez was looking elsewhere, hit Ramirez in the face – hard – with a closed fist. App. Vol. II, pp. 157-158, 234-235; App. Vol. III, pp. 392-393, 645-646. Ramirez fell backwards "like a brick" (App. Vol. III, p. 527) and hit his head on the ground (App. Vol. II, pp. 159, 235; App. Vol. III, pp. 393, 646). Ramirez remained on the ground, motionless. App. Vol. II, p. 159; App. Vol. III, pp. 393, 487, 527. Piekarsky then kicked Ramirez in the side of the head. App. Vol. II, pp. 159-160, 235; App. Vol. III, pp. 393, 487, 528. The kick was so hard that it made a "crack[ing]" sound and caused Ramirez's head to fly to the side. App. Vol. III, p. 488. Ramirez began "shaking" (App. Vol. II, p. 236) and making "snoring" sounds after he was kicked (App. Vol. III, p. 488).

Everyone except Scully ran away toward the park. App. Vol. II, pp. 160-161, 236; App. Vol. III, pp. 394-395, 646. Piekarsky, while running away, yelled: "Tell your f[uck]ing Mexican friends to get the f[uck] out of Shenandoah or you're going to be f[uck]ing laying next to him." App. Vol. II, p. 325; see also App. Vol.

III, p. 394[7] ("Tell your fucking Mexican friends to get out of here or you'll be laying next to him."); see also App. Vol. III, p. 529 ("Get your Mexican boyfriend out of here or you'll be laying next to him."). Roxanne began saying, "He's dead, he's dead." App. Vol. II, p. 236. Scully went to check on Ramirez and, noticing that Ramirez was breathing, told Roxanne not to worry. App. Vol. II, p. 236; App. Vol. III, p. 489. Scully began walking toward the park when Arielle asked him what happened and accused Scully and his friends of killing Ramirez. App. Vol. II, p. 236; App. Vol. III, p. 489. Scully told Arielle: "Don't say it was us. We didn't mean for this to happen." App. Vol. II, p. 236.

Soon thereafter a man approached Scully, pointed a gun at him, and asked who was responsible for injuring Ramirez. App. Vol. II, p. 237; App. Vol. III, p. 489. Scully denied any involvement, and the man with the gun ran toward the park. App. Vol. II, p. 237. Scully then ran to Donchak's house. App. Vol. II, p. 237. The man with the gun came upon the rest of the group in the park, and they also denied being involved. App. Vol. II, p. 162; App. Vol. III, p. 395. Donchak called the police, and the man with the gun ran off. App. Vol. II, p. 162; App. Vol. III, pp. 395-396.

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[7] Redmond testified that it was Scully, not Piekarsky, who made this comment. App. Vol. III, p. 645.

Officers from various jurisdictions responded to the scene. App. Vol. II, pp. 104-105; App. Vol. III, pp. 772-773. John Kaczmarczyk, a Sergeant with the Mahanoy City Police Department, received a call to assist around 11:45 p.m. App. Vol. II, p. 105. He arrived on the scene and approached Ramirez as a paramedic was treating him in the street. App. Vol. II, p. 106. Kaczmarczyk saw what appeared to be a shoe print on Ramirez's chest, and noticed that Ramirez's head "was misshapen, not symmetrical," and "swollen out on the left side." App. Vol. II, p. 107. Ramirez also had blood in his mouth, and his lips and the right side of his chest were swollen. App. Vol. II, p. 119.

Arielle reported to the police[8] that night that she had seen Ramirez get kicked in the head, but did not see who kicked him. App. Vol. III, pp. 478, 482, 493-495. She gave the Shenandoah police officers two or three names of the people she recognized who were involved.[9] App. Vol. III, p. 530. Officer Hayes and Lieutenant Moyer from the Shenandoah Police Department responded to Donchak's call regarding the man with the gun. App. Vol. II, p. 162; App. Vol.

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[8] Arielle recognized Officer Hayes from the Shenandoah Police Department and an officer from a different jurisdiction at the scene, but could not recall whether she gave Officer Hayes a statement at the scene or elsewhere. App. Vol. III, pp. 493-495.

[9] Arielle also went to the police station and provided two written statements to the police. App. Vol. III, pp. 478, 482-483.

III, p. 396. These officers picked up Donchak in the park while Piekarsky, Walsh, Lawson and Redmond continued on to Donchak's house. App. Vol. II, p. 162; App. Vol. III, pp. 395-396, 648. The group knew the officers because Hayes was dating Piekarsky's mother and the group played football with Moyer's son. App. Vol. II, p. 163; App. Vol. III, pp. 396, 648. The officers dropped Donchak off at his house. App. Vol. II, pp. 237, 296; App. Vol. III, pp. 396-397, 649.

Barry Boyer, also a football player, was driving in front of Donchak's house at that time. App. Vol. II, pp. 291-292, 296-297. Lt. Moyer told Piekarsky to get into Boyer's car, and told Boyer to follow the police car back to the scene. App. Vol. II, p. 297. During the drive, Piekarsky told Boyer that he "got in a fight with some spic" and had "slammed him to the ground." App. Vol. II, p. 298.

Once at the scene, Boyer noticed "tons" of police cars and saw the ambulance pulling away. App. Vol. II, p. 299. Ramirez was later taken by helicopter to a hospital. App. Vol. II, p. 119. Kaczmarczyk informed Lt. Moyer that it appeared Ramirez was going to die. App. Vol. II, p. 110. Officer Hayes came to Boyer's car and asked to speak to Piekarsky alone. App. Vol. II, p. 300. Piekarsky got out of the car and spoke with Hayes out of Boyer's earshot. App. Vol. II, p. 300. After a few minutes, Piekarsky shook hands with Hayes (App. Vol.

III, p. 496) and left the area[10] (App. Vol. II, p. 300). Moyer approached Boyer and told him that Ramirez – "the guy the boys beat up" – was "in pretty bad shape." App. Vol. II, p. 301.

Meanwhile, at Donchak's house, Donchak, Scully, Walsh, Lawson and Redmond were talking about the fight. App. Vol. II, pp. 164, 238; App. Vol. III, p. 397. Donchak showed the group a metal fist pack and said: "I'm glad I had this." App. Vol. II, p. 164; see also App. Vol. III, p. 398. Donchak had tried out this fist pack on some of his friends earlier, and they agreed that using it gave Donchak's punches more power and resulted in greater pain than would a normal punch. App. Vol. II, pp. 164-165, 293-294.

Piekarsky called Donchak's phone and Walsh answered. App. Vol. III, p. 398. Piekarsky told Walsh that he told the police (1) the fight was not racially motivated (see App. Vol. III, p. 398 ("[H]e left out that it was racial.")), even though, according to members of the group, the fight was, indeed, "racially motivated" (App. Vol. II, p. 284; see also App. Vol. III, p. 460), (2) it was just a fight between Walsh and Ramirez, and (3) Walsh hit Ramirez in self-defense (App. Vol. III, pp. 398-399). Piekarsky did not say anything about kicking Ramirez. App. Vol. III, p. 399. Piekarsky and Piekarsky's mother showed up at Donchak's

[10] Boyer assumed Piekarsky walked to his mother's place of work, which was nearby. App. Vol. II, pp. 300-301.

house later that evening. App. Vol. II, p. 240; App. Vol. III, pp. 399-400. Piekarsky told Walsh that he (Piekarsky) kicked Ramirez so hard that his shoe came off. App. Vol. III, p. 400. Piekarsky, however, directed the group not to say anything about him kicking Ramirez. App. Vol. II, p. 241 ("Don't tell them I kicked."). Both Piekarsky and his mother told the group that they needed to "get a story" because the situation was "bad." App. Vol. II, p. 240; see also App. Vol. III, pp. 400, 650. Piekarsky's mother, in fact, provided specific details about the situation: she informed the group that Ramirez's condition "doesn't look too good," and that Ramirez was being "life-flighted." App. Vol. III, p. 650. Piekarsky, Donchak and Walsh later joked about getting the name "Lupe" tattooed on their buttocks, given that Ramirez was a "Mexican." App. Vol. II, pp. 242, 302; App. Vol. III, p. 650.

Phone records showed that Piekarsky's mother and Officer Hayes made seven calls to each other between 11:42 p.m. that evening and 4:30 a.m. the next morning. App. Vol. III, pp. 709-711. Piekarsky's mother and Matt Nestor, the Police Chief for Shenandoah (App. Vol. III, p. 688), made two calls to each other between midnight and 1:00 a.m., App. Vol. III, p. 712. Lt. Moyer called Chief Nestor three times between midnight and 12:30 a.m., and Officer Hayes called Chief Nestor twice around 2:30 a.m. App. Vol. III, pp. 712-713.

The next morning, Scully was interviewed by Lt. Moyer, Detective Carroll, who was the chief county detective for the Schuylkill County District Attorney's Office, and Detective Heckman (also from the District Attorney's Office).[11] App. Vol. III, pp. 720, 723-724. Before the interview, Lt. Moyer informed Detective Carroll that there had been a fight involving six football players against a single individual, and that the victim had been taken by helicopter to the hospital, but Moyer did not inform Detective Carroll that Piekarsky had provided information to the Shenandoah police the night before, that Piekarsky had indicated that Walsh punched the individual, or even that the Shenandoah police had taken Piekarsky back to the scene of the incident the night before. App. Vol. III, pp. 722-723.

During his interview, Scully told the police about Piekarsky fighting with Ramirez and Walsh's punch causing Ramirez to fall, but did not mention anyone drinking, kicking Ramirez, or shouting racial epithets – even though Scully testified that he uttered "racial slurs" during the fight and that the fight was "racially motivated." App. Vol. II, pp. 272-273, 284; App. Vol. III, p. 725; see also App. Vol. II, pp. 191, 201, 242-243. Scully met up with Piekarsky, Donchak, Lawson, Redmond and Boyer at Piekarsky's house after his interview. App. Vol. II, pp. 168-169, 244-245; App. Vol. III, pp. 650-652. Piekarsky's mother, Scully's

[11] Chief Nestor had called the District Attorney's Office the night before to request assistance in interviewing people about the incident. App. Vol. III, pp. 721-722.

parents, Donchak's parents, and Lawson's parents were also there. App. Vol. II, pp. 169, 245; App. Vol. III, pp. 651-652. Piekarsky's mother said that the situation was bad, and that the group could be charged with manslaughter. App. Vol. II, p. 245. Walsh, who was the last to arrive, was sent out back by Piekarsky's mother "to get [his] stories straight"; the parents remained out front. App. Vol. III, p. 404.

Out back, Lawson asked who kicked Ramirez. App. Vol. II, p. 170. Piekarsky responded: "I did, [s]hh." App. Vol. II, p. 170; see also App. Vol. II, p. 246; App. Vol. III, p. 653. The group then perfected the story they would tell the police. App. Vol. II, pp. 171-172, 246; App. Vol. III, p. 654. Specifically, the group agreed to tell the police that nobody kicked Ramirez and that no one was drinking that evening. App. Vol. II, pp. 172, 246; App. Vol. III, pp. 404, 654. The group also agreed to tell the police that the fight was not racially motivated (App. Vol. II, p. 172 ("[T]here was no racial slurs."); App. Vol. III, pp. 404 ("[T]here was no race involved."), 654 ("[W]e agreed that we weren't going to say that anything racial was said.")), even though at trial members of the group admitted that the fight was "racially motivated" (App. Vol. II, p. 284; see also App. Vol. III, p. 460). Everyone present agreed on the story. App. Vol. II, pp. 172, 246; App. Vol. III, pp. 404, 654.

Lt. Moyer, Detective Carroll and Detective Heckman interviewed Donchak that afternoon. App. Vol. III, pp. 727-728. Donchak denied that they were

drinking the night of the incident, denied seeing anyone kick Ramirez, and claimed that Ramirez threw the first punch at Piekarsky. Donchak did not mention anyone using racial epithets. App. Vol. III, pp. 728-729; see also Gov. Supp. App., pp. 3-4 (GX 18.15).

Later that same day, Lt. Moyer, who was not a social friend of the Walsh family, came to Walsh's house. App. Vol. III, pp. 405-406. Moyer asked Walsh if he had a chance to talk to his friends, and asked Walsh, "Do you know what I mean?" App. Vol. III, p. 405. When Walsh answered affirmatively, Moyer said, "Good luck buddy." App. Vol. III, p. 405. Walsh was subsequently interviewed by Lt. Moyer and Detective Carroll. App. Vol. III, p. 405. Before Walsh entered the interview room, Moyer again wished Walsh good luck. App. Vol. III, p. 407. Moyer did not inform Detective Carroll that he had spoken with Walsh at Walsh's home. App. Vol. III, p. 726. Walsh began the interview by sticking to the story the group had agreed to; he eventually told part of the truth.[12] App. Vol. III, p. 407.

Lt. Moyer and Detective Carroll also interviewed Redmond. App. Vol. III, p. 655. Redmond, like Walsh, provided the officers with the false story the group

[12] When Walsh was re-interviewed at a later date he told the truth. App. Vol. III, p. 407.

had previously agreed to tell.[13] App. Vol. III, p. 655. Lawson was interviewed on July 14, 2008, by Lt. Moyer and Detective Carroll and relayed the false story the group had agreed to tell. App. Vol. II, pp. 173-174.[14]

About a week after the incident, the District Attorney's Office took over complete control of the investigation. App. Vol. III, p. 732. Piekarsky and Donchak had been charged in another proceeding, and the District Attorney's Office asked the Shenandoah Police Department to provide the District Attorney's Office with all of the reports it had generated during its investigation. App. Vol. III, pp. 733-734. Detective Carroll had already received the two handwritten statements Arielle Garcia had provided shortly after the incident; neither statement claimed that Arielle saw the person who kicked Ramirez. App. Vol. III, p. 735. The report Officer Hayes prepared (and which was reviewed by Chief Nestor) for the District Attorney's Office, however, indicated that Arielle identified *Scully* as the person who kicked Ramirez. App. Vol. III, pp. 734-735; see also Gov. Supp. App., pp. 5-7 (GX 19.2). This information surprised Detective Carroll, because it was not included in Arielle's written statements and no one from the Shenandoah

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[13] Redmond was re-interviewed at the District Attorney's Office and told the truth. App. Vol. III, pp. 655-656.

[14] Lawson was interviewed a week or so later at the District Attorney's Office by Detective Carroll, and two others; he continued to provide the police untruthful statements. App. Vol. II, pp. 174-175.

police department had mentioned to him previously that they had information about the identity of the person who kicked Ramirez. App. Vol. III, pp. 735-736. Moreover, Lt. Moyer did not confront Scully with this information during Scully's interview with the police. App. Vol. III, pp. 762-763. Lt. Moyer also prepared reports (which were reviewed by Chief Nestor) for the District Attorney's Office. See Gov. Supp. App., pp. 8-9 (GX 19.3), 10-11 (GX 19.3a). One of these reports indicated that when Lt. Moyer returned to the scene on the night of the incident, Arielle provided him with the names of some of the individuals involved in the fight. App. Vol. III, pp. 738-739. This also surprised Detective Carroll, as Lt. Moyer had never previously informed him that he had spoken with Arielle at the scene. App. Vol. III, pp. 739-740.

Around this same time, Lt. Moyer called Scully's mother and told her that if Scully had a pair of blue and gray sneakers, she should throw them out. App. Vol. III, p. 579. Scully's mother knew that Scully did not have a pair of sneakers that matched that description, so she did nothing. App. Vol. III, p. 579. About a week later, Lt. Moyer called Scully's house and spoke with Scully's stepfather. App. Vol. III, p. 584. Moyer explained that he was going to come over to the house, but needed to do so after dark so that no one would see him. App. Vol. III, p. 584. When he arrived, Moyer told Scully's stepfather that witnesses had come forward saying that Scully had repeatedly stomped on Ramirez's chest, and that Scully

needed to confess. App. Vol. III, p. 585. After Moyer left, Scully's stepfather felt that he had been "played," in that Moyer was "trying to get something that wasn't there." App. Vol. III, p. 586.

Ramirez died from blunt force injury to his brain. App. Vol. III, p. 558. He sustained two skull fractures; one caused by the fall to the ground, the other caused by a kick to the side of his head. App. Vol. III, 559-560. The fracture from the kick started above Ramirez's left ear, crossed his skull's midline, continued onto the right side of Ramirez's skull, and eventually connected with the fracture line caused by the fall. App. Vol. III, p. 560. According to the medical testimony, the power necessary for a kick to cause such an injury was "something like a field goal kick." App. Vol. III, p. 560.

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. See Order dated May 23, 2011.

Colin Walsh entered a guilty plea 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.).

Matthew Nestor, William Moyer and Jason Hayes were tried together on charges of conspiracy and various obstruction of justice counts. *United States* v. *Nestor, et al.*, No. 3:09-cr-397 (M.D. Pa.). Nestor was found guilty only of

obstruction, in violation of 18 U.S.C. 1519; Moyer was found guilty only of making false statements, in violation of 18 U.S.C. 1001; and Hayes was acquitted on all charged counts.

STATEMENT OF THE STANDARDS OF REVIEW

Issue I: Double Jeopardy

This Court's review of a double jeopardy claim is plenary. *United States* v. *Rice*, 109 F.3d 151, 153 (3d Cir. 1997).

Issue II: Jury Instructions

This Court's review of jury instructions is plenary where, as here, the issue is whether the instructions misstated the applicable law. *United States* v. *Dobson*, 419 F.3d 231, 236 (3d Cir. 2005). A district court's refusal to give a requested jury instruction is reversible "only if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant." *United States* v. *Urban*, 404 F.3d 754, 779 (3d Cir.), cert. denied, 546 U.S. 1030 (2005).

Issues III and IV: Sufficiency of the Evidence and Variance

Where a defendant has preserved the issue of sufficiency of the evidence by making a timely motion for judgment of acquittal at the close 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). This Court will overturn the jury's 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). This Court has recognized that a defendant challenging the sufficiency of the evidence faces an "extremely high" burden. *United States* v. *Lore*, 430 F.3d 190, 203-204 (3d Cir. 2005).

Where a defendant fails to challenge the sufficiency of the evidence at the close of the government's case, at the close of all evidence, or within seven days after the discharge of the jury, this Court reviews the sufficiency of the evidence for plain error. *United States* v. *Mornan*, 413 F.3d 372, 381 (3d Cir. 2005). Under plain error review, reversal is warranted only where an error is plain, affects substantial rights, and seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States* v. *Wolfe*, 245 F.3d 257, 260-261 (3d Cir.), cert. denied, 534 U.S. 880 (2001). Establishing insufficiency of the evidence under this standard "places a very heavy burden on the appellant." *Mornan*, 413 F.3d at 382 (internal quotation marks and citation omitted).

This Court "examine[s] alleged variances on a case-by-case basis," and will uphold the jury's verdict finding a single conspiracy "[i]f, viewing the evidence in the light most favorable to the government, a rational trier of fact could have concluded from the proof adduced at trial the existence of the single conspiracy

alleged in the indictment." *United States* v. *Greenidge*, 495 F.3d 85, 93 (3d Cir.) (internal quotation marks and citation omitted), cert. denied, 552 U.S. 1017 (2007). Where a variance does exist, this Court will overturn the jury's verdict only upon a finding of prejudice. *United States* v. *Salmon*, 944 F.2d 1106, 1116 (3d Cir. 1991), cert. denied, 502 U.S. 1110 (1992).

Issue V: Limitation on Defendant's Ability to Make a Complete Defense

This Court reviews a district court's decision to limit a defendant's presentation of evidence in his defense for abuse of discretion. *United States* v. *Leo*, 941 F.2d 181, 195 (3d Cir. 1991).

Issue VI: Limitation on Cross-Examination

This Court reviews a district court's decision to limit cross-examination for abuse of discretion. *United States* v. *Ellis (Carl)*, 156 F.3d 493, 498 (3d Cir. 1998).

Issue VII: Application of Sentencing Guidelines

This Court reviews a defendant's sentence "under a deferential abuse of discretion standard," *United States* v. *Jones*, 566 F.3d 353, 366 (3d Cir.) (internal quotation marks and citation omitted), cert. denied, 130 S. Ct. 528 (2009), and considers both the procedural and substantive reasonableness of the sentence imposed, *United States* v. *Grober*, 624 F.3d 592, 599 (3d Cir. 2010). In reviewing a sentence's procedural reasonableness, this Court ensures "that the district court

committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, * * * [or] selecting a sentence based on clearly erroneous facts." *United States* v. *Tomko*, 562 F.3d 558, 567 (3d Cir. 2009) (en banc) (citation omitted).

SUMMARY OF ARGUMENT

1. Defendants' federal trial, which followed defendants' acquittal on most state charges, did not constitute Double Jeopardy. Under the well-settled Dual Sovereignty doctrine, the federal government may prosecute a defendant for the same conduct that has been the subject of a state prosecution. To the extent an exception to the Dual Sovereignty doctrine exists for a subsequent prosecution that is a sham or cover for another sovereign's prosecution, it is not applicable here.

2. The district court's instructions to the jury on Count 1 were correct. Every court to have considered the issue agrees that, in cases charging racially-motivated crimes, the government need not prove that the victim's race and the victim's enjoyment of a federally protected right was the sole motivation for a defendant's actions. Once the government establishes that the defendant acted *because of* the victim's race and *because* the victim was enjoying a federally protected right, the presence of other motivations does not dilute or negate what the government has already established – the necessary specific intent to satisfy the motivational element of the crime charged.

3. The evidence was more than sufficient to support the jury's verdict on Count 1. Count 1 charged defendants with injuring and intimidating Ramirez because of his race and because he was occupying a dwelling in Shenandoah. The plain language of the statute makes clear that the protections of the statute extend to all persons, not just United States citizens. Moreover, defendants' actions and words made clear that they intended to injure and intimidate Ramirez because of his race and because he and other Hispanics had moved, or were contemplating moving, into Shenandoah.

4. The evidence was more than sufficient to support the jury's verdicts on Counts 2 and 3. The evidence established a single conspiracy in which Donchak conspired with, and aided and abetted, the local police in falsifying official police reports, with the intent to obstruct an investigation within the jurisdiction of the FBI. The evidence established that both defendants spent time alone with Officer Hayes and Lt. Moyer following the assault, and that Hayes spoke with Piekarsky's mother shortly after the assault. It was after these meetings and conversations that the group met at Donchak's house to concoct a story to minimize their criminal liability. The evidence also established that Lt. Moyer met privately with one of the participants before his police interview to ensure that he had the opportunity to speak with his friends about the incident, and that the participants gave false information to investigators during their interviews. The evidence further

established that the officers knew the information the participants provided was false, but the officers did not bring this to the attention of the District Attorney's Office. Finally, the evidence established that civil rights violations like the one charged here are within the jurisdiction of the FBI.

The government was not required to prove that the defendants 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 both the police and the defendants knew the investigation could be federal in nature.

5. The district court did not abuse its discretion in declining to permit defense counsel to argue the differences between race, ethnicity and national origin. First, the evidence made clear that defendants and their friends were thinking in terms of race before, during, and after the assault. Second, there is considerable overlap between the concepts of race, color, ethnicity and national origin. Finally, to the extent defendants argue that there is a distinction between race and ethnicity, the Supreme Court, as well as this Court, have treated those concepts interchangeably.

Nor did the district court abuse its discretion in declining to permit defense counsel from discussing the victim's immigration status. The Fair Housing Act's protections are not limited to citizens. Moreover, there was no evidence proffered to suggest that defendants and their friends were aware of Ramirez's immigration status. In any event, defendants' and their friends' words and actions established that they were motivated by Ramirez's race, and supported a finding that they viewed Hispanics and illegal immigration status interchangeably, such that bias against one was bias against the other. Thus, even if defendants were also motivated by Ramirez's immigration status, it does not negate the evidence supporting the jury's finding that they were also motivated by his race.

6. The district court's decision to prohibit any reference to defendants' state court acquittal was correct. This Court has recognized that evidence of state court acquittals is generally inadmissible, and even if admissible, exclusion of that evidence is usually justified because of the danger of jury confusion. The district court's decision to limit reference to the state trial as a "prior proceeding" was also correct. Doing so did not prohibit the defense from exploring witnesses' bias during cross-examination. Counsels' questions and a witness's responses strongly suggested that the defendants had been tried previously. Moreover, defense counsel was able to ask a witness directly about how she felt about the "prior proceeding." It was the witness's uncooperativeness or faulty memory, however,

and not the court's ruling, that prevented defense counsel from extracting the desired testimony from the witness.

7. The district court did not abuse its discretion in applying the Guideline for voluntary manslaughter when calculating defendants' applicable offense level for sentencing purposes. Defendants acted with the intent to inflict serious bodily injury upon their victim, and therefore the Guideline for voluntary manslaughter applies. Moreover, defendants' actions were neither lawful acts performed in an unlawful manner, nor unlawful acts not amounting to felonies. As such, the Guideline for involuntary manslaughter is inapplicable.

ARGUMENT[15]

I

DEFENDANTS' TRIAL DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT (PIEKARSKY & DONCHAK)

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. As its plain language makes clear, the Clause is violated "only if the two offenses for which the defendant is prosecuted are the 'same' for double jeopardy purpose." *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985).

[15] Although each defendant submitted a separate brief to this Court, some of the defendants' arguments overlap. For clarity, the government has grouped the defendants' common arguments and addresses them together where appropriate.

The Dual Sovereignty doctrine is a recognition that, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offenses.'" *Id.* at 88 (quoting *United States* v. *Lanza*, 260 U.S. 377, 382 (1922)). It "rests on the premise that, where both sovereigns legitimately claim a strong interest in penalizing the same behavior, they have concurrent jurisdiction to vindicate those interests and neither need yield to the other." *United States* v. *Pungitore*, 910 F.2d 1084, 1105 (3d Cir.), cert. denied, 500 U.S. 915 (1991). Thus, because the State and the federal government are separate sovereigns, a State may prosecute a defendant for the same conduct that has been the subject of a federal prosecution and the federal government may prosecute a defendant following a state prosecution for the same conduct. See *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959); see also *United States* v. *Gricco*, 277 F.3d 339, 352 (3d Cir. 2002) ("It is well settled that there is no violation of the Double Jeopardy Clause or the Due Process Clause in successive prosecutions for the same offense by the federal government and a state government.").

Defendants urge this Court to reconsider the Dual Sovereignty doctrine altogether. Although this Court has previously expressed concerns about some dual prosecutions, see *United States* v. *Grimes*, 641 F.2d 96, 100-104 (3d Cir. 1981), this Court correctly recognized that it is "[not] the proper forum to overturn

a legal directive from the Supreme Court," *id.* at 104; see also *United States* v. *Wilson*, 413 F.3d 382, 390 (3d Cir. 2005).

Defendants nonetheless argue that the state prosecution was a "sham" for the federal prosecution, and therefore an exception to the Dual Sovereignty doctrine applies. The Supreme Court has "alluded to the possibility" of an exception, but has not specifically held as such. *United States* v. *Berry*, 164 F.3d 844, 846 (3d Cir.), cert. denied, 526 U.S. 1138 (1999). In *Bartkus*, the Supreme Court suggested that dual prosecutions may be suspect where the prosecution by one sovereign is merely a "sham and a cover" for prosecution by the other sovereign. 359 U.S. at 124. The Court, however, recognized that cooperation between federal and state authorities was "conventional practice," and such cooperation did not support a finding that, by bringing its own prosecution, the state was "merely a tool of the federal authorities." *Id.* at 123.

Any "sham prosecution" exception to the Dual Sovereignty doctrine, to the extent it exists, is a narrow one, and is "limited to situations in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." *United States* v. *Guzman*, 85 F.3d 823, 827 (1st Cir.), cert. denied, 519 U.S. 1020 (1996); see *United States* v. *Angleton*, 314 F.3d 767, 774 (5th Cir. 2002) ("The key * * * is whether the separate sovereigns have made independent decisions to prosecute, or

whether, instead, 'one sovereign has essentially manipulated another sovereign into prosecuting.'") (footnote and citation omitted), cert. denied, 538 U.S. 946 (2003). In fact, the government is unaware of any federal court of appeals that has relied upon the exception to grant relief. The Seventh Circuit has expressly "questioned whether *Bartkus* truly meant to create such an exception, and [has] uniformly rejected such claims." *United States* v. *Brocksmith*, 991 F.2d 1363, 1366-1367 (7th Cir.), cert. denied, 510 U.S. 999 (1993) (recognizing that conversations and cooperative efforts between state and federal investigators are "undeniably legal" and are, in fact, "a welcome innovation" in law enforcement efforts).

As discussed below, the interactions between federal and state authorities in this case were insufficient to invoke the "sham prosecution" exception. Neither state authorities nor federal authorities acted as "tool[s]" of the other. *Bartkus*, 359 U.S. at 123. Nor did either "so thoroughly dominate[] or manipulate[] the prosecutorial machinery of another that the latter retain[ed] little to no volition in its own proceedings." *Guzman*, 85 F.3d at 827.

Local authorities charged defendants and Colin Walsh on July 25, 2008, for violating local law after local law enforcement agencies had concluded their investigation. See Donchak Br. 32-33. Nearly three weeks passed before federal authorities met with Walsh at a proffer session. See Donchak Br. 33. Defendants were not indicted in the federal case until December 10, 2010. This evidence

makes clear that "the separate sovereigns * * * made independent decisions to prosecute." *Angleton*, 314 F.3d at 774. From that point forward, the record demonstrates nothing more than local and federal authorities sharing information and resources in their efforts to vindicate the distinct interests of their respective sovereigns. Such cooperation between state and federal authorities is "commendable," *Guzman*, 85 F.3d at 828, and, without more, is insufficient to satisfy an exception to the Dual Sovereignty doctrine. *Ibid.*

Moreover, the level of cooperation between local and federal authorities here is certainly less than that in cases where courts have found *no* evidence of a sham prosecution. See *Guzman*, 85 F.3d at 825-828 (no sham prosecution where United States prosecution followed Dutch prosecution for illegal drug smuggling, even though Drug Enforcement Agent followed defendant at sea, kept his ship under surveillance, alerted local officials of the defendant's presence in St. Maartens, and testified against the defendant at his trial); see also *Angleton*, 314 F.3d at 770-774 (no sham prosecution where, following acquittal on local murder charge, joint task force of local and federal law enforcement officers investigated murder; task force received all of the evidence gathered during local investigation; district attorneys who prosecuted offense in state court assisted with the investigation; and FBI agents interviewed members of the state court jury that had acquitted the defendant).

For example, the prosecutions were not the result of a joint task force between local and federal officials; the state prosecutors did not assist with the federal prosecution; and the FBI case agents here did not interview members of the state court jury that acquitted defendants on the most serious state charges. *Angleton*, 314 F.3d at 770. In addition, the state and federal prosecutions proceeded independently, as there is simply no evidence that the federal prosecutor manipulated the state prosecutor, or vice versa. *United States* v. *Mardis*, 600 F.3d 693, 697 (6th Cir.), cert. denied, 131 S. Ct. 365 (2010). Defendants' suggestion that the subsequent federal prosecution violates principles of double jeopardy must be rejected.

II

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY AS TO COUNT 1 OF THE INDICTMENT (PIEKARSKY & DONCHAK)

The district court's instruction to the jury on Count 1 was correct. In that Count, defendants were charged with violating Section 3631 of Title 42, which makes it a crime willfully to injure, intimidate or interfere with any person "because of his race" and "because he * * * has been * * * occupying * * * any dwelling," 42 U.S.C. 3631(a), or to "intimidate such person or any other person or any class of persons from" occupying a dwelling, 42 U.S.C. 3631(b). The jury was instructed, in relevant part:

> In order to establish a conviction of the violation of that statute, [42 U.S.C.] 3631, the United States must prove beyond a reasonable doubt the following elements: * * *
>
> The third element, that the defendants acted on a count of racial bias and the occupancy of a dwelling in Shenandoah. The third element of the statute 3631 requires proof that Mr. Piekarsky and/or Mr. Donchak acted because of Mr. Ramirez's race and because of the race of other Latino persons occupying dwellings in Shenandoah and because Luis Ramirez and other Latino persons were occupying dwellings in Shenandoah. * * * *The government need not prove that these were Mr. Piekarsky's and/or Mr. Donchak's only motivation[s]*.
>
> *In other words, the government need not prove that race and occupancy were the only reasons for their actions. The presence of other motives, such as personal dislike, anger or revenge does not make the conduct any less a violation of the statute, Section 3631*.

App. Vol. IV, pp. 992-995 (emphasis added).

The district court's instruction was a correct statement of law, as the government is not required to prove in cases where a racially-motivated crime is charged that a defendant acted *solely* on the basis of a victim's race and because that victim was enjoying a federally protected right. Where the government has proven beyond a reasonable doubt that the defendant possessed the specific intent necessary to satisfy the dual intent element of the crime charged, the presence of additional motives does not change the fact that the defendant possessed the specific intent necessary for a conviction. Every court of appeals to have considered the issue over the last three decades has agreed.

Most recently, the Seventh Circuit reiterated its position that, in cases involving racially-motivated crimes, the government is not required to prove that racial animus was a defendant's sole motivation for his actions. *United States* v. *Craft*, 484 F.3d 922, 926 (7th Cir.) (in case charging defendant with using fire to commit a felony (*i.e.*, 42 U.S.C. 3631), "government was not required to prove * * * that racial animus was [the defendant]'s sole motivation" for his crime), cert. denied, 552 U.S. 910 (2007); see also *United States* v. *Hartbarger*, 148 F.3d 777, 784 n.6 (7th Cir. 1998) (approving district court's instruction that defendants charged with violating 42 U.S.C. 3631 "could be found guilty even if they had mixed motives in committing the act"), overruled on other grounds, cert. denied, 525 U.S. 1179 (1999).

The Fifth Circuit first reached this conclusion more than three decades ago in *United States* v. *Johns*, 615 F.2d 672, 675 (5th Cir.), cert. denied, 449 U.S. 829 (1980). The court explained that "[t]he presence of other motives [in a 42 U.S.C. 3631 prosecution], given the existence of the defendants' motive to end interracial cohabitation, does not make their conduct any less a violation of 42 U.S.C. 3631." *Ibid.* The Tenth Circuit reached a similar conclusion in *United States* v. *Magleby*, 241 F.3d 1306, 1310 (10th Cir. 2001) (holding that jury could find defendant guilty of violating 42 U.S.C. 3631 even if defendant "had more than one motive in performing the act as long as the defendant's race was one of his motives"); cf.

United States v. *Gresser*, 935 F.2d 96, 101 (6th Cir.) (rejecting defendant's argument in 42 U.S.C. 3631 case that he was motivated to act against a single minority youth rather than minorities in general, where evidence proved otherwise),[16] cert. denied, 502 U.S. 885 (1991).

Although this Court has not considered the issue in the context of a violation of 42 U.S.C. 3631, it has reached the same conclusion under other statutes requiring proof of the specific intent to violate a protected right. In *United States* v. *Johnstone*, 107 F.3d 200, 209-210 (3d Cir. 1997), the defendant police officer challenged a jury instruction that would allow the jury to convict him of violating 18 U.S.C. 242 even if he was motivated by factors other than an intent to violate a protected right, provided the government proved beyond a reasonable doubt that he had that specific intent. This Court rejected his challenge, holding that the instruction set forth the appropriate legal standard for a violation of 18 U.S.C. 242. *Id.* at 210. This Court reached a similar conclusion in *United States* v. *Ellis (John)*, 595 F.2d 154, 162 (3d Cir.), cert. denied, 444 U.S. 838 (1979), where the defendant requested an instruction that would allow the jury to convict the

[16] This same reasoning applies in cases charging violations of 18 U.S.C. 245, where the government must prove the defendant acted *because of* the victims' race and *because* the defendant was enjoying a federally-protected activity. See *United States* v. *Bledsoe*, 728 F.2d 1094, 1097-1098 (8th Cir.) (rejecting challenge to jury instruction that permitted finding of guilt in case charging violation of 18 U.S.C. 245 where defendant had mixed motives for his actions), cert. denied, 469 U.S. 838 (1984).

defendant of violating 18 U.S.C. 241 (conspiracy against rights) only where "the *[p]redominant purpose* of the conspiracy was to violate the exercise of a Constitutional right." (emphasis added). This Court held that the requested charge would be "improper," reasoning that the jury must necessarily find that the defendant had the specific intent required by the statute before it could return a guilty verdict, but that the intent need not be predominant. *Ibid.*

The above cases make clear that where the government has proven beyond a reasonable doubt that the defendant acted with the intent and for the purposes set forth in a statute, the presence of other motivations or purposes does not minimize or negate *what the government has already proven*. Defendants' arguments (Donchak Br. 31-34; Piekarsky Br. 48-51) that the instruction given somehow diluted a necessary element for conviction under 42 U.S.C. 3631 ignores the simple fact that the district court instructed the jury using language that tracked the language of the statute. Defendants' proposed instruction would not have added anything of value to the instruction already given.

Contrary to defendants' arguments, the instruction did *not* permit the jury to find defendants guilty "even if racial animus and a motive to deprive Luis Ramirez of his housing rights were merely *incidental* to the fight between the Defendants and Ramirez." (Donchak Br. 32; Piekarsky Br. 50) (emphasis added). The jury was twice instructed, plainly and correctly, that they could not convict defendants

unless they found beyond a reasonable doubt that defendants "acted *because of* Luis Ramirez's race *and because* he was occupying a dwelling in Shenandoah, Pennsylvania." App. Vol. IV, p. 993 (emphasis added); see also App. Vol. IV, p. 994. Moreover, this is not a case in which an isolated racial slur was uttered during a street fight. The facts make clear that before, during and after the physical assault on Ramirez, defendants and their co-conspirators taunted the victim because of his race and made repeated references to his, and other Hispanics', presence in Shenandoah. Defendants' argument that the district court erred when instructing the jury on Count 1 should be rejected.

III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT PIEKARSKY'S CONVICTION (PIEKARSKY)

The evidence was more than sufficient to support the jury's verdict that Piekarsky was guilty of interfering with Ramirez's housing rights because of Ramirez's race and because Ramirez and other Hispanics were occupying dwellings in Shenandoah. Piekarsky argues first (Piekarsky Br. 29-30) that the Fair Housing Act does not apply to Ramirez, an undocumented alien, and second (Piekarsky Br. 30-32) that insufficient evidence supported a finding that Piekarsky knew Ramirez occupied a dwelling in Shenandoah. Both arguments fail.

Defendant's first argument fails under the plain language of the statute. Section 3631 of Title 42 makes it unlawful for someone, by force or threat of force,

to willfully interfere with "*any person* because of his race, color, religion, sex, handicap[,] * * * familial status[,] * * * or national origin," and because that person has been occupying a dwelling. 42 U.S.C. 3631(a) (emphasis added). That provision of the statute, by its very terms, is not limited to protecting the rights of citizens. Had Congress intended to protect only citizens, it would have used that term, as it did in Section 3631(c). Where a statute's plain language is unambiguous and expresses Congress's intent with sufficient precision, as it does here, this Court need not look any further to understand the statute's meaning. *Martin* v. *LaSalle Bank, N.A.*, 629 F.3d 364, 367 (3d Cir. 2011), petition for cert. pending, No. 10-1417 (filed May 12, 2011). Defendant's argument that Section 3631's protections apply only to United States citizens should be rejected.

Piekarsky's second argument is equally unsound, as the government need not prove that a defendant knew a victim occupied a particular dwelling to establish a violation of 42 U.S.C. 3631. Section 3631, in addition to prohibiting any person from intimidating or interfering with another person because that person is occupying a dwelling, also prohibits any person from interfering with another "in order to intimidate such person or any other person or any class of persons from" occupying a dwelling. 42 U.S.C. 3631(b). Accordingly, the indictment charged Piekarsky with interfering with Ramirez "because of [his] race and because he was occupying a dwelling in, *and in order to intimidate other*

Latino persons from occupying dwellings in, Shenandoah, Pennsylvania." App. Vol. II, p. 39 (emphasis added). The district instructed the jury – correctly – that "[t]he government [was] not required to prove that [defendants] intended to force Mr. Ramirez or other Latino persons to move out of his house or out of Shenandoah." App. Vol. IV, p. 995. Rather, it is sufficient that the government "prove that [defendants] wanted to interfere with * * * their rights to live in Shenandoah free of racial intimidation." App. Vol. IV, p. 995; see, *e.g.*, *United States* v. *Vartanian*, 245 F.3d 609, 615 (6th Cir. 2001) ("Congress's obvious intent in enacting [42 U.S.C. 3631] was to protect citizens from intimidating discrimination in all aspects of housing selection and purchase."). The government easily established that here.

Defendants and their friends had previously talked about their dislike of Hispanics moving into Shenandoah. See App. Vol. II, p. 221 ("[I]t's not good for our own."). In fact, the group "used to say things like[:] * * * *Get them out of here*." App. Vol. II, p. 221 (emphasis added). When defendants and their friends first encountered Mr. Ramirez in the park, Scully told Ramirez to "[g]o back to Mexico." App. Vol. II, pp. 149, 228; App. Vol. III, pp. 386-387, 639. Scully also told Ramirez that Shenandoah "is our town," and that Ramirez "[didn't] belong here." App. Vol. III, p. 387. During the assault, Scully told Ramirez to "go home you Mexican motherfucker." App. Vol. II, pp. 233-234. And after Ramirez was

beaten into unconsciousness, Piekarsky warned Arielle Garcia to get her "Mexican friends" out of Shenandoah or they would end up like Ramirez. App. Vol. II, p. 325; see also App. Vol. III, pp. 394, 529.

From this evidence, a reasonable juror could easily conclude that defendants acted to injure and intimidate Ramirez so he would not remain in Shenandoah, and to send a message to other Latinos, including Arielle Garcia's "Mexican friends," that they would suffer the same fate if they remained. The government's evidence established that the group did not like "Mexicans" moving into Shenandoah (*e.g.*, "Why are they here?"; "Get them out of here."), and that they told Ramirez, in particular, to leave Shenandoah and "go back to Mexico" because Shenandoah "is our town." The defendants' actions and language make evident that, even if they did not know specifically where, or even if, Ramirez occupied a dwelling in Shenandoah, the group intended to prevent – or intimidate – Ramirez and his "Mexican friends" from settling or remaining in Shenandoah. The government was not required to prove anything else to establish a violation of Section 3631. See App. Vol. IV, p. 995. Indeed, a particular dwelling need not even be in existence or occupied to fall within the protections of the Fair Housing Act. *United States* v. *Gilbert*, 813 F.2d 1523, 1528 (9th Cir.), cert. denied, 484 U.S. 860 (1987).

Defendants' reliance upon *United States* v. *Gresser*, 935 F.2d 96, 101 (6th Cir.), cert. denied, 502 U.S. 885 (1991), to support their argument that the government had to prove that defendants knew Ramirez occupied a dwelling in Shenandoah is misplaced. The defendants in *Gresser* argued on appeal that their actions were directed at particular victims with whom they had a disagreement, and not "*blacks in general*." *Id.* at 100-101 (emphasis added). The court of appeals rejected this argument, and instead held that the defendants' words and actions – burning a cross in a vacant lot after threatening to "blow up all blacks" – was sufficient to support a reasonable inference that the defendants intended to intimidate *all* African-Americans in the area. *Ibid.* The holding in *Gresser* thus did not turn on the defendants' knowledge of where their victims lived, but was based instead on the overwhelming evidence that the defendants intended to threaten and intimidate members of a racial minority group.

IV

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DONCHAK'S CONVICTIONS (DONCHAK)

A. The Evidence Was Sufficient To Establish A Single Conspiracy Between The Defendants And The Local Police Officers To Obstruct Justice

The indictment, in Count 2, charged that defendant Donchak conspired with police officers to falsify police reports with the intent to obstruct an investigation within the jurisdiction of the FBI. Defendant Donchak claims that the evidence at

trial was not sufficient to show he conspired with the police to falsify records. He argues that the evidence supported a finding – at most – of two separate conspiracies (*i.e.*, one among the police and one among the young men), and therefore resulted in a prejudicial variance between the indictment and the proof at trial. Both arguments fail because there was sufficient evidence of a single conspiracy between Donchak and the police to obstruct justice.

Donchak's challenge to the sufficiency of the evidence is reviewed for plain error, as he failed to challenge the sufficiency of the evidence on this Count before the district court. Moreover, Donchak did not request an instruction on single versus multiple conspiracies. See, *e.g.*, Third Circuit Criminal Jury Instructions, 6.18.371H Conspiracy – Single or Multiple Conspiracies. Under any standard of review, however, the evidence was sufficient to support the jury's verdict.

To prove a conspiracy to obstruct justice, the government must "establish that there was an agreement whose object was to obstruct justice, that the defendant knowingly joined it, and that at least one overt act was committed in furtherance of the object of the agreement." *United States* v. *Davis*, 183 F.3d 231, 243 (3d Cir. 1999). To determine whether a series of events constitutes a single conspiracy or multiple conspiracies, this Court considers: (1) whether the conspirators shared a common goal; (2) "the nature of the scheme to determine whether the agreement contemplated bringing to pass a continuous result that will

not continue without the continuous cooperation of the conspirators"; and (3) the extent the participants overlap in their dealings. *United States* v. *Kelly*, 892 F.2d 255, 259 (3d Cir. 1989) (internal quotation marks and citation omitted), cert. denied, 497 U.S. 1006 (1990). When the evidence is viewed in the light most favorable to the government, it more than supports the jury's verdict that defendant Donchak, his friends and the local police entered into a single conspiracy to falsify police reports with the intent to obstruct an investigation that was within the jurisdiction of the FBI. See *United States* v. *Riley*, 621 F.3d 312, 329 (3d Cir. 2010).

The evidence at trial established that defendant Donchak and the Shenandoah police officers shared a common goal:[17] minimizing Donchak's and the other participants' roles in the assault on Ramirez to protect the participants from serious criminal liability (and thereby obstruct an investigation within the jurisdiction of the FBI). The evidence established that shortly after the beating, Donchak met with Officer Hayes and Lt. Moyer as they drove him back to his home. App. Vol. II, pp. 162-163; App. Vol. III, pp. 395-396, 648. The evidence also established that Officer Hayes spoke privately with Piekarsky around the time Lt. Moyer learned from Kaczmarczyk that Ramirez was likely to die. App. Vol. II,

[17] This common goal was, of course, shared by all of the young men who participated in, or were witnesses to, the fatal beating of Ramirez.

pp. 110, 300-301. The evidence also established that Hayes and Piekarsky's mother spoke on the telephone several times in the hours immediately after the beating. App. Vol. III, pp. 709-711. It was *after* these conversations with the Shenandoah police that Piekarsky (and Piekarsky's mother) informed the group assembled at Donchak's house that they needed to get their stories straight to avoid criminal liability. App. Vol. II, p. 240; App. Vol. III, pp. 399-400, 650. From this evidence, a rational juror could reasonably and logically infer that the idea for developing a false story minimizing the group's criminal liability came from the local police – the very entity initially responsible for investigating the offense.

The jury also heard evidence that everyone in Donchak's garage that night agreed to tell the police, when questioned, that the group was not motivated by Ramirez's race, no one kicked Ramirez, no one was drinking, no one ganged up on Ramirez, and that Ramirez fell to the ground after Walsh hit Ramirez in self-defense. If believed, the story the group concocted – that they were not motivated by Ramirez's race, that Piekarsky did not kick Ramirez, and that Walsh hit Ramirez in self-defense – would have furthered the conspirators' shared goal of minimizing the group's criminal liability.

The jury also heard evidence that Scully, the first member of the group to be formally interviewed, stuck to the false story during his interview, and that he relayed what he had told the police when he met with the rest of the group at

Piekarsky's house after his interview. The jury heard evidence that the group again agreed to follow the story they had concocted the night before. Moreover, the evidence established that the rest of the group, when questioned formally by those investigating the beating, initially stuck to the story they had concocted immediately following Donchak's, Piekarsky's and Piekarsky's mother's conversations with the local police. App. Vol. II, pp. 173-174, 242-243; App. Vol. III, pp. 655, 725, 727-729. From this evidence, a jury could reasonably and logically infer that the remaining members of the group joined the conspiracy – first formed between Donchak, Piekarsky, Piekarsky's mother and the local police – to relay a false story to the officers investigating the offense to minimize their criminal liability.

Officer Hayes and Lt. Moyer then did their part by withholding crucial information from investigators with the District Attorney's Office during the initial stage of the investigation, and attempting to manipulate the course of the investigation. See, *e.g.*, App. Vol. III, pp. 579, 584-586, 762-763. The jury heard that Lt. Moyer visited Walsh before his formal interview to confirm that Walsh had the opportunity to talk to his friends. The jury also heard evidence that Lt. Moyer did not challenge the statements the group provided, even though he had heard facts to the contrary on the night of the beating. The jury also heard evidence that shortly after the District Attorney's Office took over the investigation, Piekarsky

and Donchak were charged in another proceeding. When the District Attorney's Office asked for summaries of the local police's investigation into the beating, Moyer and Hayes subsequently provided the District Attorney's Office with incomplete and inaccurate investigative summaries of the events surrounding Ramirez's assault. App. Vol. III, pp. 734-736, 738-740. These false reports indicated, for example, that Arielle Garcia had identified *Scully* on the night of the beating as the person who kicked Ramirez. The jury also heard evidence that, around this time, Lt. Moyer instructed Scully's parents to destroy potential evidence, and later urged Scully's parents to persuade Scully to confess. A rational juror could reasonably and logically infer from this evidence that the defendants and the police worked together to, and did, in fact, present a false story to investigators that would be recorded in official reports, and did so with the intent to impede the investigation into the beating of Ramirez. *Kelly*, 892 F.2d at 259.

To be sure, there may be alternative inferences that can be drawn from this evidence. But any alternative inference is irrelevant. This Court has recognized that "[t]here is no requirement * * * that the inference drawn by the jury be the only inference possible or that the government's evidence foreclose every possible innocent explanation." *United States* v. *Iafelice*, 978 F.2d 92, 97 n.3 (3d Cir. 1992).

As for the second factor – whether the nature of the scheme indicates a single conspiracy – this Court must determine whether "there was evidence that the activities of one group * * * were necessary or advantageous to the success of another aspect of the scheme or to the overall success of the venture." *United States* v. *Greenidge*, 495 F.3d 85, 93 (3d Cir.) (internal quotation marks and citations omitted), cert. denied, 552 U.S. 1017 (2007). The evidence here supports such a finding.

The Shenandoah police knew from witnesses at the scene (*e.g.*, Arielle Garcia) that the group was involved in the assault on Ramirez and that Ramirez had been kicked in the head. App. Vol. III, pp. 478-479, 482, 493-495, 530. Indeed, Lt. Moyer told Barry Boyer that "[t]he guy the boys beat up" was "in pretty bad shape." App. Vol. II, p. 301. The police also knew that Piekarsky, specifically, was involved – Piekarsky spoke with Walsh on the telephone after speaking with the police at the scene, and Piekarsky told Walsh that he (Piekarsky) had spoken to the police about the assault. App. Vol. III, pp. 398-399. Moreover, the group knew that Piekarsky had been the one to kick Ramirez. App. Vol. II, pp. 170, 241, 246; App. Vol. III, pp. 400, 653. And the group learned, after Piekarsky and Piekarsky's mother spoke with police, that Ramirez was critically injured. App. Vol. II, pp. 240, 245; App. Vol. III, pp. 400, 650. At that point, the group agreed to deny that Ramirez had been kicked. App. Vol. II, pp. 172, 246; App.

Vol. III, pp. 404, 654. Thus, the only way for the group and the police to achieve their common goal of minimizing the group's criminal liability was for the defendants (and other participants), when formally questioned, to provide false information to the police, and for the police – *who knew the information was false* – to (1) memorialize the information in their own official reports and (2) allow that information to be memorialized in other investigators' reports. Absent a conspiracy, there would be no reason for the police to withhold from the District Attorney's Office crucial information about the investigation. Indeed, Lt. Moyer visited Walsh before he was formally interviewed by investigators – one of which was to be Moyer himself – to ensure that he had the opportunity to discuss the false story with the other members of the group. App. Vol. III, p. 405. The success of the criminal venture was necessarily dependent upon cooperation among, and coordination between, the group and the police. *Greenidge*, 495 F.3d at 93.

Finally, "there was a great degree of participant overlap in this plan." *Greenidge*, 495 F.3d at 94. As mentioned above, the officers met privately with Donchak and Piekarsky immediately after the assault. Piekarsky's mother also had conversations with Officer Hayes immediately after the assault. Piekarsky and his mother then informed the group assembled at Donchak's house that they needed to get their stories straight to avoid serious criminal liability. Lt. Moyer visited Walsh at his home before Walsh's police interview to confirm that Walsh had

spoken with his friends about the incident. Lt. Moyer also called Scully's parents and directed them to discard a pair of Scully's shoes. And, of course, Lt. Moyer participated in the initial interviews of most of the group members.

From all of this evidence, a jury could reasonably infer that a single conspiracy existed between the group involved in Ramirez's assault and the local police. A rational juror could find that by (1) meeting privately with Donchak and Piekarsky, (2) speaking with Piekarsky's mother repeatedly following the assault on Ramirez, (3) directing Scully's parents to destroy evidence, and (4) ensuring Walsh had the opportunity to speak with other members of the group before his formal police interview, the officers were directing a conspiracy designed to minimize the group's involvement in the assault on Ramirez and shield them from serious criminal liability. Although the officers did not meet privately with each member of the group, the government was not required to prove otherwise. This Court has routinely held that "the government need not prove that each defendant knew all the details, goals, or other participants in order to find a single conspiracy." *Kelly*, 892 F.2d at 260 (internal quotation marks omitted). And although Lt. Moyer took a dominant role in directing the conspiracy, this fact does not suggest more than one conspiracy existed. "[A] single conspiracy can involve one pivotal figure who directs illegal activities while various combinations of other

defendants further those activities in different ways and at different times." *United States* v. *DeVarona*, 872 F.2d 114, 119 (5th Cir. 1989).

Given the totality of the evidence supporting the jury's finding of a single conspiracy in which defendant Donchak was a willing member, no variance existed between the indictment and the evidence adduced at trial. A variance occurs when an indictment charges a single conspiracy but "the evidence at trial proves only the existence of multiple conspiracies." *Kelly*, 892 F.3d at 258. This Court "examine[s] alleged variances on a case-by-case basis," and will uphold the jury's verdict finding a single conspiracy "[i]f, viewing the evidence in the light most favorable to the government, a rational trier of fact could have concluded from the proof adduced at trial the existence of the single conspiracy alleged in the indictment." *Greenidge*, 495 F.3d at 93 (internal quotation marks and citation omitted). Under this standard, the evidence, as outlined above, easily established a single conspiracy.

Even assuming a variance existed, however, a reversal is not warranted unless a defendant suffers substantial prejudice from the variance. See *Greenidge*, 495 F.3d at 95 (explaining that reversal is not automatic, but requires a showing of substantial prejudice); see also *Kelly*, 892 F.2d at 258; *United States* v. *Padilla*, 982 F.2d 110, 115 (3d Cir. 1992). Defendant Donchak cannot make that showing on this evidence.

This Court upheld a district court's judgment directing a verdict of acquittal where prejudice from a variance "derived from the 'spillover of evidence' from one scheme to another." *United States* v. *Camiel*, 689 F.2d 31, 37 (3d Cir. 1982) (citation omitted). This Court reasoned that the government's evidence was voluminous and its presentation confused the chronology of events, thus creating a reasonable likelihood that the jury would be unable to separate offenders and offenses and could have easily transferred the guilt from one alleged co-conspirator to another. *Padilla*, 982 F.2d at 115 (discussing *Camiel*). No such risk was present here.

First, the conspiracy at issue here was much less complex than that in *Camiel*, which involved a forty-four count indictment alleging a sophisticated money-laundering scheme. *Camiel*, 689 F.2d at 34. The facts here "are simple" and the conspiracy alleged is "quite straightforward." *United States* v. *Schurr*, 775 F.2d 549, 557 (3d Cir. 1985), aff'd after rehearing, 794 F.2d 903 (1986). The jury here therefore was not at risk of confusing the members of the conspiracy or their roles in the conspiracy. Second, the possibility of "spillover" from evidence presented against other defendants was highly unlikely, given that neither Lt. Moyer nor Officer Hayes was tried with defendant Donchak. Under these circumstances, defendant Donchak cannot establish any prejudice from a possible variance.

B. The Government Was Not Required To Prove That Defendant Intended To Obstruct A Federal *Investigation*

Defendant Donchak also argues (Donchak Br. 40, 44-45) that the evidence was insufficient to support a finding that Donchak knew that the object of the conspiracy was to obstruct an investigation within the jurisdiction of the FBI, in violation of 18 U.S.C. 1519. Although the jury was, in fact, instructed that it needed to find that Donchak "acted with the intent to impede or obstruct a federal investigation," a specific nexus between the alleged obstructive conduct and the federal investigation is not required to prove a violation of the statute.

Section 1519 of Title 18 penalizes anyone who "knowingly * * * makes a false entry in any record * * * with the intent to impede, obstruct, or influence the investigation * * * of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519. The plain language of the statute 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 previously 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 subjectively aware. In *United States* v. *Yermian*, 468 U.S. 63 (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." *Id.* at 68 (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.*;

see *United States* v. *Feola*, 420 U.S. 671, 676-686 (1975) (knowledge that victim is federal officer not required for conviction of assaulting federal officer in violation of 18 U.S.C. 111).

There is no reason why Section 1519 should be interpreted differently, or why Congress would have expected it to be. Section 1519 was enacted nearly 20 years after *Yermian*. See Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 800 (2002). "[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 enactments to be interpreted in conformity with them." *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995) (alterations and citation omitted). Congress's adoption in Section 1519 of language and structure similar to that of Section 1001 (and its predecessor) accordingly demonstrates that Congress intended a similar interpretation.

The legislative history confirms this interpretation. The Senate Report accompanying the relevant legislation indicates that the intent and federal-agency jurisdiction requirements are separate. 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, ensured that the legislative history reflected Congress's intent to separate the defendant's intent to obstruct from the requirement that a matter be within federal-agency jurisdiction. 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 link between a defendant's conduct and knowledge of an official 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 (Kirby)*, Nos. 10-1266 & 10-1284, 2011 WL 1585076, at *6 (2d Cir. Feb. 25, 2011); see also *id.* at *7 ("By the plain terms of § 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime."). See also *United States* v. *Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 329 (D. Conn. 2007) ("In comparison to other obstruction statutes, § 1519 by its terms does not require the defendant to be aware of a federal proceeding, or even that a proceeding be pending."). The Eleventh Circuit, moreover, has held under plain error review that it was not error to instruct the jury 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), cert. denied, 131 S. Ct. 1601 (2011).

As explained above, this Court's review of Donchak's sufficiency claim is for plain error. Under this standard of review, he cannot establish prejudice, given that (1) it was not necessary for the jury to find that he had the specific knowledge of a pending or potential federal investigation before finding him guilty on Count

2;[18] (2) the evidence was more than sufficient to support a finding that defendant Donchak had the specific intent to obstruct an investigation; and (3) the evidence was more than sufficient to show that the crime defendant Donchak committed was within the jurisdiction of the FBI. Cf. *Fontenot*, 611 F.3d at 736-738.

C. The Evidence Was Sufficient To Support The Jury's Verdict As To Count 3 (Obstruction)

The evidence was sufficient to support the jury's verdict that defendant Donchak obstructed justice, in violation of 18 U.S.C. 1519. Consistent with his challenge to Count 2, defendant Donchak argues (Donchak Br. 45-48) that the evidence was insufficient to support a finding that he acted in concert with the police or that he knew his actions would be the subject of a federal investigation. Like his challenge to Count 2, his challenge to Count 3 is reviewed for plain error.

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[18] Even if it was necessary to show that defendants knew the investigation was federal in nature, the government proved that here. The evidence demonstrated that the local police officers knew that certain racially-motivated crimes, like the one charged here, are within the jurisdiction of the Federal Bureau of Investigation. See App. Vol. III, pp. 605-607 (director of police academy testifying that students are taught that the FBI investigates civil rights offenses, including hate crimes). The evidence also demonstrated that following their private meetings with the police officers, Piekarsky and Donchak met with other members of the group and agreed to a story that eliminated any reference to their racial motivation for their crime. Doing so, of course, would eliminate an essential component of a federal violation. This evidence thus supports the jury's finding, as instructed, that Donchak "acted with knowledge of a federal investigation or at least contemplated that such a federal investigation would occur." App. Vol. IV, p. 1004.

Regardless of what standard this Court applies, however, the evidence supported the jury's finding that defendant Donchak aided and abetted the local police officers in falsifying reports, and shared their intent to obstruct a federal investigation.

As explained *supra*, the evidence established a single conspiracy between the group of young men and the police officers to obstruct the investigation into Ramirez's beating. And as explained *supra*, the evidence established that the police and the group shared the intent to obstruct an investigation within the jurisdiction of the FBI. Donchak's subsequent actions after agreeing to obstruct the investigation were enough to support the jury's finding that he aided and abetted the officers' actions in falsifying reports. As Detective Carroll testified, when Donchak was interviewed by Lt. Moyer and Detective Carroll, Donchak stuck to the story that the group concocted and which Lt. Moyer knew to be false. Donchak did not mention the racial motivation for the group's crime, he denied seeing anyone kick Ramirez, he denied that the group had been drinking, and he claimed that Ramirez threw the first punch. App. Vol. III, pp. 727-729. At no point did Lt. Moyer contradict or challenge Donchak's account of the events surrounding the beating. As a result, Detective Carroll's report reflects the false statements that Donchak made and Lt. Moyer failed to contradict. See Gov. Supp. App., pp. 3-4 (GX 18.15). This evidence is more than sufficient to support the

jury's finding that Donchak aided and abetted the creation of a false report with the intent to impede a federal investigation. See *United States* v. *Lanham*, 617 F.3d 873, 887 (6th Cir. 2010), cert. denied, 131 S. Ct. 2443 (2011) (explaining that "[m]aterial omissions of fact can be interpreted as an attempt to 'cover up' or 'conceal' information," and thus support a guilty verdict under 18 U.S.C. 1519).

V

THE DISTRICT COURT DID NOT IMPROPERLY RESTRICT DEFENDANT'S RIGHT TO PRESENT A DEFENSE (PIEKARSKY)

A. Discussion

To be admissible, evidence must be both (1) relevant and (2) not unduly prejudicial. Thus, even if relevant, a district court may exclude evidence if "its probative value is substantially outweighed by the danger of * * * confusion of the issues, or misleading the jury." See Fed. R. Evid. 403. Here, the district court did not abuse its discretion in excluding argument about distinctions between race and ethnicity for purposes of the Fair Housing Act, or in excluding references to Ramirez's immigration status.

1. Race And Ethnicity

Before trial, the government filed a motion *in limine* to prevent the defense from arguing that defendants' actions were motivated by the victim's ethnicity rather than race, and from introducing evidence of the U.S. Census's practice of distinguishing race and ethnicity for data collection purposes, on the ground that it

would confuse the jury. Supp. App. Vol. II, pp. A107-A113. Defendants opposed the motion, arguing that race and ethnicity are distinguishable, and did so by relying upon cases distinguishing race from *national origin*. Supp. App. Vol. II, pp. A117-A118. At no time, however, did defendant Piekarsky make a proffer of evidence he would present about his motivation for the assault. The district court granted the government's motion, ruling that race was "commonly understood" to apply broadly.[19] Supp. App. Vol. I, p. A50.

On appeal, defendant Piekarsky argues (Piekarsky Br. 20-25) that he should have been permitted to explain to the jury the differences between race, ethnicity and national origin because, if the jury found that Piekarsky's actions were motivated by ethnicity or national origin, Piekarsky could not be guilty of the crime charged. This argument fails.

First, the evidence at trial made clear that defendants were motivated by their perception of Ramirez's *race*. The participants identified Ramirez as being "Hispanic" (App. Vol. II, pp. 148, 227; App. Vol. III, p. 386) or "Mexican," (Gov. Supp. App., pp. 3-4 (GX 18.15)), and considered this to be Ramirez's *race*. For example, both Scully and Walsh testified that the fight was "racially motivated,"

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[19] Contrary to defendant Piekarsky's assertion (Piekarsky Br. 21-24), the district court did *not* rule that the concept of race included alienage and immigration status. As explained in the following subsection, the district court made a separate ruling, independent of its ruling regarding race and ethnicity, which covered Ramirez's immigration status.

App. Vol. II, p. 284; App. Vol. III, p. 460 (Walsh testified that members of the group assaulted Ramirez because he was Hispanic); see also App. Vol. II, p. 289 (Scully testified that the words he used that night were focused on Ramirez's "race"). Moreover, defendants certainly viewed their motivation as racial as they agreed not to tell the police about the "racial" nature of the beating (see *e.g.*, App. Vol. II, p. 172 (the plan involved leaving out "racial slurs"); App. Vol. III, pp. 404 (the plan was to say "there was no race involved"), 651 (Scully told the police the group did not say anything "racial" during the assault), 654 ("[W]e weren't going to say that anything racial was said.")). In addition, the jury was instructed that to find the defendants guilty, they had to find that the defendants acted because of the victim's *race*. The jury was not provided with a definition of race, and was certainly not instructed that ethnicity or national origin could substitute for race. The jury considered the totality of the evidence, including the group's perception of Ramirez's race, the admissions that the assault was "racially motivated," the group's plan to withhold from the police the "racial" nature of the assault, along with the group's references to "Mexicans," "Spic," and "wetback," and concluded that defendants were, in fact, motivated by their perception of the victim's race.

Second, to the extent that defendant argues that Hispanic is an ethnic group, and cannot be considered a race, his argument is flatly contradicted by recent Supreme Court decisions. For example, in cases challenging school admission

policies and voting systems, the Supreme Court has characterized Latinos and Hispanics as a distinct racial group. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (using terms "race" and "ethnicity" interchangeably when referring to Hispanic students); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712 n.2 (2007) (describing "racial breakdown" among "Asian-American," "African-American," "Latino," and "Native-American" groups); *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 439 (2006) (characterizing Latinos as "a racial group").

While there may be reasons for distinguishing between race and ethnicity in other contexts (see Piekarsky Br. 24-25 (discussing distinctions between race and ethnicity for purposes of data collection in the United States Census)), none exists in the context of statutes prohibiting race discrimination, in general, and in the context of the Fair Housing Act, in particular. In *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987), the Supreme Court broadly construed the prohibition on race discrimination in 42 U.S.C. 1981, which originated in the Civil Rights Act of 1866, and specifically rejected a scientific definition of race. *Saint Francis College* held that Section 1981 encompasses discrimination against "identifiable classes of persons who are subjected to intentional discrimination

solely because of their ancestry or ethnic characteristics."[20] 481 U.S. at 613. "Such discrimination," the Court held, "is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory." *Ibid.* The Court reached this conclusion by reviewing the meaning of the term "race" in dictionaries published at the time of the statute's enactment, and finding that it referred to various groups as Finns, Gypsies, Basques, Hebrews, Arabs, Swedes, Norwegians, *etc.* *Id.* at 611-612. Similarly, the Congressional debates on the statute that became Section 1981 included references to a variety of ethnic and national groups, including Scandinavians, Chinese, Latin, Spanish, Anglo-Saxon, Jews, Blacks, Germans, *etc.* *Id.* at 612-613. The Court thus concluded that Section 1981 reaches discrimination against an individual based upon his or her membership in an "ethnically * * * distinctive sub-grouping of *homo sapiens*." *Id.* at 613.

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[20] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pain, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1981(a).

Piekarsky argues (Piekarsky Br. 24) that "[t]here is a huge difference between 1870 and 1968 [when the Fair Housing Act was passed] in how race is viewed in this country." Dictionary definitions of the term "race" from the period when the Fair Housing Act was enacted, however, are broad enough to provide protection for the victim here – whether defendants perceived Ramirez as a Mexican, Hispanic, or Latino. A 1963 dictionary, for example, defines "race" to include: "a division of mankind possessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type." Webster's Seventh New Collegiate Dictionary 704 (1963). Thus, the term "race," as it was understood at the time the Fair Housing Act was enacted, is broad enough to encompass Hispanics, Latinos, and persons of Mexican descent.

Moreover, Section 3631 was added to the Fair Housing Act as part of the legislation that became 18 U.S.C. 245. Section 245 prohibits private interference with a person because of that person's race, color, national origin or religion, and because that person is engaging in or enjoying a federally-protected activity. 18 U.S.C. 245. Section 245, like 42 U.S.C. 1981 and 1982, derives from the Reconstruction-era civil rights statutes (now 18 U.S.C. 241 and 242) and was enacted to cure shortfalls in them. See *United States* v. *Lane*, 883 F.2d 1484, 1488-1489 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990). It stands to reason, then, that Congress would not likely have – without any indication –

adopted a statute with *narrower* definitions than that provided under the earlier civil rights statutes.

Third, to the extent defendant claims he should have been allowed to draw a distinction between race and national origin, the evidence established that defendants and their co-conspirators made no distinction between "Hispanic" and "Mexican," and that they used the terms interchangeably. In fact, the group favored the term "Mexican" when referring to Hispanics in general because they considered it more "offensive," *not* because they actually knew a person's country of origin. App. Vol. II, p. 221. In any event, race, ethnicity, color and national origin are obviously overlapping categories. For that reason, Piekarsky's argument (Piekarsky Br. 21-22) that the indictment alleged defendants targeted Ramirez because of his race, and not his national origin or color (two additional categories which are covered under the Fair Housing Act) is of little consequence. By including all categories in the statute, Congress was ensuring the widest possible coverage of the type of discrimination at issue here, and not requiring that each form of discrimination be assigned to a single category to the exclusion of all others. Thus, it is not inappropriate to consider Hispanic as both a "race" and a "national origin" under the statute any more than it is to consider African American as both a "race" and a "color," or Jewish as both a "race" and a "religion," see *United States* v. *Nelson*, 277 F.3d 164 (2d Cir.), cert. denied, 537

U.S. 835 (2002). Time and again, in practical application, courts refer to anti-discrimination statutes as prohibiting discrimination on the basis of *race*, although the text of the statute may include related, and *overlapping*, considerations.

Thus, like the Supreme Court, other courts – including this one – have merged the concepts of race, ethnicity, and national origin when considering claims brought under anti-discrimination statutes. In *Carrasca* v. *Pomeroy*, 313 F.3d 828 (3d Cir. 2002), plaintiffs, who were Hispanic, claimed that state park rangers violated 42 U.S.C. 1983[21] when the rangers treated plaintiffs differently than others enjoying a park lake. This court reversed the district court's grant of summary judgment in favor of defendants. "[A]s *Mexicans*," this Court explained, "Plaintiffs are members of a protected class." *Id.* at 834 (emphasis added). The inquiry for the Court was whether defendants treated plaintiffs differently "than other similarly situated *non-Hispanic individuals*, because of their *race*." *Ibid.* (emphasis added). This Court held that if plaintiffs' version of the facts were taken as true, defendants' treatment of plaintiffs, including a defendant's "arguably * * * pejorative *racial* slur" of calling plaintiffs' "*Mexicans*," demonstrated that

[21] Section 1983 reads, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. 1983.

defendants "acted with a *racially discriminatory purpose*." *Ibid.* (emphasis added). See also *id.* at 835-836 ("We cannot summarily dismiss Plaintiffs' contention that [defendant's] initial request for immigration documentation and subsequent detention was based solely on Plaintiffs' *appearance as Mexicans*, lending support to their contention that [defendant] had a *racially discriminatory purpose* when apprehending Plaintiffs and further bolstering their *racial profiling* claim.") (emphasis added); see also *Hernandez* v. *New York*, 500 U.S. 352 (1991) (rejecting defendant's *Batson* challenge after prosecutor struck Hispanics from potential jury, where prosecutor provided *race-neutral* reasons for peremptory challenges); *United States* v. *Craft*, 484 F.3d 922, 926 (7th Cir.) (evidence of defendant's "racial animus" was sufficient to support conviction under 42 U.S.C. 3631 where defendant burned property owned by persons of Mexican descent and boasted that he had "cooked the Mexicans"), cert. denied, 552 U.S. 910 (2007); *Jimenez* v. *New York*, 605 F. Supp. 2d 485, 491 (S.D.N.Y. 2009) (explaining that plaintiff in discrimination case "is of *Hispanic race* and Puerto Rican national origin") (emphasis added); cf. *United States* v. *Valencia-Trujillo*, 573 F.3d 1171, 1183-1184 (11th Cir. 2009) (rejecting defendant's *Batson* challenge to government's strike of *Columbian-American* juror, because government provided *race-neutral* reasons for the strike), cert. denied, 130 S. Ct. 1726 (2010); *United States* v. *Wilcox*, 487 F.3d 1163, 1170 (8th Cir. 2007) (rejecting defendant's *Batson*

challenge where prosecutor struck a Hispanic juror because, assuming defendant "made a *prima facie* case of *racial discrimination*, the government offered sufficient *race-neutral* reasons" for the challenge) (emphasis added).

2. Immigration Status

The district court did not abuse its discretion in excluding references to Ramirez's immigration status. Before trial, the government filed a motion *in limine* to exclude any mention of Ramirez's immigration status as improper character evidence that could be perceived by the jury as inflammatory and encourage jury nullification. Supp. App. Vol. II, pp. A94-A99. Defendants opposed the motion, arguing that Ramirez's immigration status was relevant to the elements of the crime charged. Supp. App. Vol. II, pp. A101-A102 ("The Government has the burden of proving that [Ramirez] was assaulted because of his race. The Government must also prove that [Ramirez] had a federally protected housing right which the defendants interfered with. [Ramirez's] immigration status affects both inquiries and is relevant to this case.").

At a hearing on the motion, defense counsel did not raise the issue of Ramirez's immigration status as it relates to defendants' motivation for the assault. Instead, in response to the court's question of the relevance of Ramirez's immigration status, defense counsel questioned whether an illegal immigrant "has a federally protected housing right" such that the protections of Section 3631

would apply (Supp. App. Vol. I, p. A37), and whether the government could show that the defendants knew Ramirez occupied a dwelling in Shenandoah (Supp. App. Vol. I, pp. A38-A39). The court concluded that the statute prohibits persons from intimidating or discouraging someone from occupying a dwelling (and therefore specific knowledge that a victim occupied a particular dwelling was unnecessary), and ruled that defense counsel would be precluded from arguing that defendants did not know whether Ramirez occupied a dwelling in Shenandoah. Supp. App. Vol. I, pp. A41-A42.

The district court's decision was correct. As explained, *supra*, the Fair Housing Act extends its protections to all persons occupying dwellings in the United States, regardless of citizenship. Ramirez's immigration status is therefore irrelevant to that inquiry.

As for Piekarsky's suggestion on appeal that defendants were motivated by Ramirez's immigration status rather than his race, it fails for several reasons. First, the district court did not explicitly rule that defense counsel were precluded from arguing that defendants were motivated by Ramirez's immigration status.[22]

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[22] The following sets forth the court's ruling on the issue of Ramirez's immigration status:

> Court: My take on it, the statute itself though talks about intimidating or discouraging someone from occupying a dwelling. Just the shear evidence of saying, Get out of Shenandoah and go back to
>
> (continued…)

Second, there was no proffer of evidence that defendants knew Ramirez before the

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(…continued)

> Mexico certainly could fit under that. It's up to the jury to decide. So, at least in that context I don't know that there should be any reference to them knowing or not knowing.
>
> Defense: You're talking about his immigration status originally?
>
> Court: Yeah.
>
> Defense: So knowing or not knowing what?
>
> Court: Whether he was occupying a dwelling.
>
> Defense: We would be precluded from arguing the defendants did not know.
>
> Court: No, no - - yes. You would be precluded from inquiring about that, unless I see some cases to the contrary. That's not going to come up in any event until your case, I take it?
>
> Defense: It may come up - - actually it's probably not going to be mentioned by any government witnesses.
>
> Court: Right.
>
> Defense: I don't see the way I have - -
>
> Court: Well, all right.
>
> Defense: Reviewing transcripts and what not, I don't necessarily see that it's going to come up in cross examination.
>
> Court: All right.
>
> Defense: I nevertheless would probably raise it in a motion for judgment of acquittal because I think it's an important element.
>
> Court: Okay. Well, I'm not going to stop you. I'll defer until that time. I'll at least have a chance to look at these cases. I haven't looked at them.

Supp. App. Vol. I, pp. A41-A43. At the close of the government's case, defense counsel moved for a judgment of acquittal on the grounds that: (1) the government did not establish that defendants knew Ramirez occupied a dwelling in Shenandoah; (2) the government did not present any evidence concerning Ramirez's immigration status and the Fair Housing Act does not apply to persons who are in the country illegally; and (3) there is a difference between race and ethnicity and the indictment did not state that defendants were motivated by Ramirez's national origin. App. Vol. III, pp. 764-766.

assault, much less his immigration status. Indeed, Walsh testified that he did not know Ramirez before encountering him in the park. App. Vol. III, p. 442. Third, the group's words on the night of the assault provide overwhelming evidence that they were thinking in terms of the victim's *race*, not immigration status. See Argument III, *supra*. Finally, *even if* Ramirez's immigration status played a part in defendants' motivation for assaulting him,[23] it would not matter. *United States* v. *Leo*, 941 F.2d 181, 195 (3d Cir. 1991) (explaining that even if district court's ruling infringed upon constitutional right to put forth a complete defense, error may be harmless beyond a reasonable doubt). As explained above, Argument II.B., the government is not required to prove that race was a defendant's *only* motivation for engaging in a racially-motivated attack. The evidence that defendants acted because of Ramirez's race was overwhelming. If defendants were also motivated by Ramirez's actual or perceived immigration status, they are no less culpable for violating Section 3631.

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[23] The facts suggest that defendants and their friends viewed most Hispanics as illegal immigrants regardless of their actual status. For example, the group would say, in response to "Hispanic *Americans*" moving into Shenandoah, that Hispanics "don't pay taxes." App. Vol. II, p. 221. Defendants and their friends would question why Hispanics were moving into Shenandoah, and felt it was "not good for [their] own." App. Vol. II, p. 221. Indeed, Scully directed the victim to "[g]o back to Mexico" after the group came across the victim in the park. App. Vol. II, p. 149; see also App. Vol. III, p. 387 ("Get the fuck out of here."); App. Vol. II, pp. 233-234 ("[G]o home you Mexican motherfucker."). This evidence suggests that the group made no distinction between being Hispanic and being an undocumented alien.

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LIMITING DISCUSSION OF DEFENDANTS' PRIOR STATE COURT ACQUITTAL (PIEKARSKY)

As noted in defendants' briefs (Donchak Br. 55; Piekarsky Br. 32-33), defendants were charged locally with murder, voluntary manslaughter, aggravated assault, simple assault, ethnic intimidation, and other related charges. Defendants were ultimately acquitted of most charges, but convicted of simple assault and charges related to their alcohol use.

The district court properly excluded reference to defendants' state court acquittals, and properly limited counsels' reference to the state trial as a "prior proceeding." Before trial, the government filed a motion *in limine* to exclude evidence regarding the defendants' acquittals in state court. Supp. App. Vol. II, pp. A79-A83. Defendants opposed the motion (Supp. App. Vol. II, pp. A84-A93), arguing that their acquittal was relevant because the state court charges were similar to those brought in federal court (Supp. App. Vol. II, pp. A86-A87), and, in any event, the acquittals were admissible to show bias of government witnesses "and to explain any changes in their testimony or to provide a reason for their testifying in the federal case but not the state case" (Supp. App. Vol. II, p. A87). The district court did not rule on the motion before trial.

Defense counsel for Piekarsky raised the issue immediately before his cross-examination of Eileen Burke, an eyewitness to the beating who did not testify at the state trial. App. Vol. II, pp. 330, 333. After some discussion, counsel for Piekarsky informed the court that he intended to cross-examine Ms. Burke about her feelings following the defendants' acquittal in state court; specifically, about comments she made during an interview with bliptv.com.[24] App. Vol. II, pp. 330-333. The government informed the court that it had "no problem" with defense counsel referencing "prior proceedings," but objected to any mention of the defendants' prior *acquittal*. App. Vol. II, p. 333. The district court then ruled that defense counsel could explore Ms. Burke's feelings following the prior proceeding, but could not mention the verdict. App. Vol. II, pp. 334-335. When the district court asked, "Everybody okay with that?," neither defense counsel voiced an objection. App. Vol. II, p. 335.

The district court's ruling was correct. To be admissible, evidence must be (1) relevant, and (2) not unduly prejudicial. See Fed. R. Evid. 401, 403. Evidence of defendants' state court acquittal is irrelevant and unduly prejudicial. First, Rule

[24] Counsel for Piekarsky also informed the court he intended to confront Ms. Burke with a prior inconsistent statement (*i.e.*, her statement to the police). App. Vol. II, pp. 331-332. Defense counsel agreed that that issue was different from the bias issue regarding the prior acquittal, and that there was "no issue" with his ability to impeach Ms. Burke with her prior inconsistent statement. App. Vol. II, p. 332.

401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. As this Court has recognized, "evidence of prior acquittals is generally inadmissible" because, in addition to being hearsay, an acquittal shows only that the government failed to meet its burden of proof beyond a reasonable doubt, not that a defendant is innocent of the crime charged. *United States* v. *Gricco*, 277 F.3d 339, 352 (3d Cir. 2002). Second, "even if the judgments of acquittal were admissible, exclusion under Fed. R. Evid. 403 would be justified – and highly recommended – because the danger of jury confusion would greatly outweigh the evidence's limited probative value." *Ibid.*

Other courts of appeals agree. In *United States* v. *Kerley*, 643 F.2d 299, 300 (5th Cir. 1981), the defendant, a police officer, was charged with a federal civil rights violation after he physically assaulted an arrestee. The defendant was acquitted on a state battery charge and the defendant sought to introduce this evidence to impeach a witness by showing the witness's prejudice and interest in the outcome of the federal trial. *Ibid.* The district court excluded the evidence and the court of appeals agreed, ruling that the state court acquittal was not relevant and, even if relevant, was properly excluded under Rule 403. *Id.* at 300-301; see also *United States* v. *Simmons*, 470 F.3d 1115, 1127 (5th Cir. 2006) (same), cert.

denied, 551 U.S. 1147 (2007); *United States* v. *Jones*, 808 F.2d 561, 566-567 (7th Cir. 1986) (upholding district court's decision under Rules 401 and 403 to exclude any mention of defendant's prior acquittal, but permitting mention of prior "proceeding" or "testimony"), cert. denied, 481 U.S. 1006 (1987).

Piekarsky nonetheless argues (Piekarsky Br. 27) that the district court's ruling limited his ability to explore the bias of witnesses "like Eileen Burke." Piekarsky admits that defense counsel was allowed to impeach Ms. Burke's testimony with her statement to the police shortly after the assault, but claims the district court "refused to allow the defense to question Burke about her being upset with the state court acquittal and arguing this is the reason she was identifying Piekarsky as the one who made the statement." Piekarsky Br. 27. Piekarsky argues that being limited to the phrase "prior proceeding" limited his defense. This argument fails.

Understanding a witness's "motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974). But "[i]t does not follow * * * that the Confrontation Clause * * * prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). Rather, "trial judges retain wide latitude" in imposing "reasonable limits" on cross-examination. *Ibid.* This

Court evaluates whether a trial judge's limits on cross-examination violated the Confrontation Clause by determining (1) whether the trial court's ruling significantly inhibited a defendant's inquiry into the witness's motivation for testifying and, if so, (2) whether the constraints on cross-examination fell within the reasonable limits of a trial court's authority. *United States* v. *Chandler*, 326 F.3d 210, 219 (3d Cir. 2003).

Here, the district court's ruling in no way inhibited Piekarsky's ability to inquire into Ms. Burke's motivation for testifying, much less significantly so. *Chandler*, 326 F.3d at 219. As an initial matter, the questions asked of Ms. Burke and the answers she gave strongly suggested that defendants were subject to a prior trial. The government did not refer to the prior trial during its direct examination of Ms. Burke (see App. Vol. II, pp. 309-329), but Piekarsky's counsel referred to "prior proceedings" at least six times in his initial cross-examination of Ms. Burke. App. Vol. II, pp. 346, 348. In re-direct, the government referred, repeatedly, to Ms. Burke's testimony, under oath, at a "preliminary hearing." App. Vol. II, pp. 356, 358. During Piekarsky's re-cross-examination of Ms. Burke, counsel referred to the "proceeding that followed the preliminary hearing" (App. Vol. II, p. 360); Ms. Burke then actually referred to "the trial" (App. Vol. II, p. 363). Because it was clear from these questions and answers that a prior "proceeding" occurred in which witnesses testified about the incident under oath, and it was all but obvious

these references were to an actual trial (Ms. Burke, in fact, referred to it as such), this case is distinguishable from the Second Circuit's decision in *United States* v. *Giovanelli*, 945 F.2d 479, 488 (2d Cir. 1991), a case upon which Piekarsky relies. In that case, defendants participated in two state trials that ended in acquittals on some charges and mistrials on others. *Id.* at 483. The subsequent federal case lasted 11 weeks and involved more than 100 witnesses. *Id.* at 483-484. The district court restricted the parties from mentioning not only the prior trials, but also the grand jury proceedings and interviews with the local prosecutors. *Id.* at 487-488. The Second Circuit held the district court's ruling to be error, but its reasoning was that the restrictions limited the defense counsel's ability *to focus a witness's attention on a specific prior inconsistent statement*. *Id.* at 488. As a result, defense counsel could not establish that a witness had testified under oath in a manner at odds with his current testimony. *Ibid.* No such risk was present here.[25]

In any event, Piekarsky's counsel thoroughly explored any potential bias Ms. Burke harbored from the outcome of the first trial. Indeed, defense counsel directly, and repeatedly, asked Ms. Burke whether she was upset with the outcome

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[25] Defense counsel agreed that there was "no issue" with his ability to ask Ms. Burke, who did not testify at the state trial, several questions about a police report in an attempt to impeach her current testimony. App. Vol. II, p. 332; see also App. Vol. II, pp. 341-345.

of the prior proceedings. App. Vol. II, p. 346. Ms. Burke, however, proved to be a highly uncooperative, or forgetful, witness. On cross-examination, Piekarsky's counsel confirmed with Ms. Burke that she had been quoted in a newspaper article and had appeared on a national television program to discuss the assault. App. Vol. II, p. 345. When asked whether she had been interviewed by bliptv.com "after proceedings in Schuylkill County," Ms. Burke responded that she could not recall (App. Vol. II, p. 346), and then repeatedly testified that she could not recall stating publicly that she was upset about those proceedings (App. Vol. II, pp. 346-347). Thus, it was unlikely that Piekarsky's counsel would have been able to elicit testimony concerning Ms. Burke's bias even if he *was* permitted to refer directly to the state trial. The test under *Chandler*, however, is not whether the defense inquiry was *effective*, as it arguably was not here; the test is whether the defense inquiry was *inhibited*. *Chandler*, 326 F.3d at 219. Given counsel's direct and repeated questioning about Ms. Burke's potential bias following the prior proceeding's outcome, Piekarsky cannot show that the district court's ruling significantly inhibited his inquiry into Ms. Burke's motivation for testifying. *Ibid.* Even if he could, the district court's decision to limit reference to the prior trial as a prior proceeding fell well within the reasonable limits of the court's authority. *Ibid.*; see also *Gricco, supra*; *Kerley, supra*; *Simmons*, *supra*; *Jones*, *supra*.

VII

THE DISTRICT COURT CORRECTLY APPLIED THE GUIDELINE FOR VOLUNTARY MANSLAUGHTER WHEN CALCULATING DEFENDANTS' SENTENCING OFFENSE LEVEL (PIEKARSKY & DONCHAK)

The district court did not abuse its discretion in sentencing defendants, as it committed no procedural error in calculating defendants' advisory Guidelines range.[26] Section 2H1.1, the Guideline applicable to 42 U.S.C. 3631, directs the sentencing court to apply the base "offense level from the offense guideline applicable to any underlying offense" if it is greater than certain specified levels. U.S.S.G. § 2H1.1(a)(1). The district court, over defendants' objections, agreed with the Probation Office that defendants' underlying offense was voluntary manslaughter. App. Vol. IV, pp. 1107-1108. This determination was correct.

Voluntary manslaughter is defined as "the unlawful killing of a human being without malice" that arises "[u]pon a sudden quarrel or heat of passion." 18 U.S.C. 1112(a); see also *United States* v. *Quintero*, 21 F.3d 885, 889 (9th Cir. 1994). To establish voluntary manslaughter, the government must prove that the defendant

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[26] Defendants do not challenge the substantive reasonableness of their below-Guidelines sentences. After calculating defendants' adjusted offense level, which corresponded to recommended sentence of 151-188 months, the district court credited defendants' with six months' time served for their state convictions on simple assault, and then imposed a below-Guidelines sentence of 108 months' imprisonment based on the court's consideration of the 18 U.S.C 3553 factors. App. Vol. IV, pp. 1123-1135.

"intentionally inflicted an injury upon another from which the other died," and that "the homicide was committed without justification or excuse." *Id.* at 890.

The facts of this case easily establish that defendants' underlying offense, for purposes of calculating their Guidelines range, was voluntary manslaughter. Ramirez's death resulted from defendants' assault upon him, which arose upon a "sudden quarrel." 18 U.S.C. 1112(a). Both defendants engaged personally, and aided others, in a violent physical attack upon Ramirez. Early in the attack, Donchak punched Ramirez about the body while holding a "fist pack." The "fist pack" was designed to provide Donchak with additional power when landing punches. App. Vol. II, pp. 164-165, 293-294. Donchak was also one of three individuals who kicked Ramirez about the head and body while he was lying on the ground. These kicks were so severe that one of the kicks left a *visible shoe print* on Ramirez's chest. Piekarsky, for his part, kicked Ramirez in the head *after* Ramirez had fallen to the ground and *while* Ramirez was lying motionless. Piekarsky's kick was so powerful that Ramirez's head made a "crack[ing]" sound and caused his head to fly to the side. App. Vol. III, p. 488. According to the medical testimony, the kick "caused hemorrhage to the scalp, a fracture of the left side of the skull, [and] bruising of the left side of the brain." App. Vol. III, p. 560. The fracture "started * * * above [Ramirez's] left ear, crossed the midline, [continued] to the right side of the skull, and then connected with" the skull

fracture resulting from Ramirez's fall. App. Vol. III, p. 560. The power necessary to inflict such an injury was described by the forensic pathologist as "something like a field goal kick." App. Vol. III, p. 560. This evidence more than supported the district court's determination that defendant's underlying offense was voluntary manslaughter.

The Eighth Circuit addressed a similar factual scenario in *United States* v. *Long Feather*, 299 F.3d 915 (8th Cir. 2002). The defendant in *Long Feather* challenged the sufficiency of the evidence supporting his conviction for voluntary manslaughter. *Id.* at 917. The victim and defendant had engaged in a physical altercation before briefly separating. *Ibid.* After the two engaged in another physical altercation following a verbal insult, the victim was knocked to the ground. *Ibid.* The defendant then kicked the victim in the head, rendering him unconscious and causing him to make snoring sounds. *Ibid.* The victim did not regain consciousness and died a day later. *Ibid.* The Eighth Circuit easily concluded that the defendant's actions supported a voluntary manslaughter conviction. *Ibid.* The same conclusion applies here.

Defendants contend that the underlying offense was involuntary manslaughter, which arises from "the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18

U.S.C. 1112(a); see also *United States* v. *Pardee*, 368 F.2d 368, 373 (4th Cir. 1966). Defendants' reliance (Donchak Br. 49-50; Piekarsky Br. 52-53) upon *Comber* v. *United States*, 584 A.2d 26 (D.C. 1990), to support their argument is misplaced, as that case actually *supports* the district court's decision here. The District of Columbia Court of Appeals explained in *Comber* that involuntary manslaughter applies where death results "from the delivery of a single or a few blows, *not administered with the intent to kill or inflict serious bodily injury*." *Id.* at 46-47 (emphasis added). Defendants cannot meet that standard, as the evidence here supports the district court's conclusion that defendants acted with the intent to inflict serious bodily injury. Donchak repeatedly struck Ramirez *with a fist pack* so as to deliver more powerful punches and cause more pain than would a normal punch. He was also one of three individuals who kicked Ramirez so hard that Ramirez's chest was swollen and contained *a shoe print*. And Piekarsky's kick was rendered with force equivalent to a field goal kick. By these actions, defendants exhibited intent to inflict serious bodily injury; as such, the involuntary manslaughter Guideline is not applicable.

Defendants argue that the court should not have relied upon cases cited by the Probation Office in its recommendation. Defendants' argument fails for two reasons. First, the district court did not specifically rely on these cases when concluding that defendants' actions constituted voluntary manslaughter for

purposes of calculating defendants' advisory Guidelines range. See generally App. Vol. IV, pp. 1107-1108. Second, those cases, while perhaps *factually* different from the present case, are *legally* indistinguishable, and therefore support the district court's conclusion.

For example, defendants challenge the Probation Office's reliance on *United States* v. *Hatatley*, 130 F.3d 1399 (10th Cir. 1997), on the ground that the defendant in *Hatatley* was the aggressor in the final confrontation before the victim's death. The court's decision, however, was based on its finding that involuntary manslaughter could not apply to the defendant's actions because his actions (like Donchak's and Piekarsky's here) were not lawful, and his unlawful act of aggravated assault (like Donchak's and Piekarsky's here) was a felony. *Id.* at 1403-1404.

Defendants' attempt (Donchak Br. 53-54; Piekarsky Br. 56-57) to distinguish *United States* v. *Benally*, 146 F.3d 1232 (10th Cir. 1998), also fails. The court in *Benally* explained that an involuntary manslaughter instruction may be warranted where a defendant attempts to use non-deadly force in a criminally negligent manner that results in death. *Id.* at 1237. Here, however, Donchak never

acted in self-defense against Ramirez, and Piekarsky's field goal style kick cannot be characterized as non-deadly force.[27]

Defendants' actions support the application of the voluntary manslaughter Guideline. Nothing about the facts of this case suggest that defendants, when punching Ramirez with a metal fist pack, kicking him around his head and chest while he was on the ground, and kicking him "field goal" style after he had been rendered unconscious, were committing "an unlawful act not amounting to a felony," or a "lawful act" committed "in an unlawful manner, or without due caution and circumspection." 18 U.S.C. 1112(a).

[27] The Probation Office's reference to *United States* v. *Fitzgerald*, 882 F.2d 397 (9th Cir. 1989), was not for its factual similarity to the case here, but for its holding that specific intent is not necessary for a conviction of assault resulting in serious bodily injury.

CONCLUSION

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

Respectfully submitted,

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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: July 1, 2011

s/Angela M. Miller
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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:

(1) contains 20,583 words, and an Unopposed Motion For Leave To Exceed Word Limit For Its Brief As Appellee is being filed contemporaneously with this CONSOLIDATED BRIEF FOR THE UNITED STATES AS APPELLEE;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font; and,

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Dated: July 1, 2011

s/Angela M. Miller
ANGELA M. MILLER
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CERTIFICATE OF SERVICE

I certify that on July 1, 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.

I certify that on July 1, 2011, ten (10) paper copies, identical to the brief filed electronically, were sent to the Clerk of the Court by U.S. mail.

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