No. 04-1052

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

HARRY A. BYRNE, JR.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS APPELLEE

MICHAEL J. SULLIVAN
United States Attorney

S. THEODORE MERRITT
Assistant U.S. Attorney

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4706

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JURISDICTION

This is an appeal from a criminal conviction and sentence. Defendant was charged and convicted of violating two federal statutes: 18 U.S.C. 242, and 18 U.S.C. 1512(b)(3). Add. Exh. A.[1] He was sentenced on December 3, 2003, and

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[1] Citations to "Add. __" refer to the Addendum to defendant's opening brief. Citations to "Tr. Day __ at __" refer to the trial transcript, by day and page. Citations to "Pretrial Tr. __" refer to pages in the transcript of the August 20, 2003, pretrial conference. Citations to "Sent. Tr. __" refer to pages in the transcript of

(continued...)

9final judgment was entered on December 15, 2003. Defendant filed a timely notice of appeal on December 23, 2003. The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by limiting cross-examination of the government's police officer witnesses to exclude inquiry into an unrelated federal prosecution.

2. Whether the evidence was sufficient to support defendant's conviction for witness tampering under 18 U.S.C. 1512(b)(3).

3. Whether defendant's sentence constituted plain error under *United States* v. *Booker*, 125 S. Ct. 738 (2005).

STATEMENT OF THE CASE

Defendant Harry A. Byrne, Jr. was indicted by a federal grand jury and charged with violating one count of 18 U.S.C. 242,[2] and three counts of 18 U.S.C.

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[1](...continued)
the December 3, 2003, sentencing hearing. Citations to "Presentence Rep. __" refer to pages in the Presentence Report prepared by the Probation Office. Citations to "Br. __" refer to pages in defendant's opening brief.

[2] 18 U.S.C. 242 provides a criminal penalty for "[w]hoever, under color of any (continued...)

1512(b)(3),[3] in connection with his assault of Garett Trombly, an arrestee, in the guard room of a Boston police station and his attempts to cover up the offense. He was tried before a jury from August 25, 2003 to September 4, 2003 (Stearns, J., presiding).

At the close of the government's case, defendant moved for judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure. Tr. Day 6 at 58. He argued, first, that the evidence was insufficient to convict on any of the Section 1512(b)(3) counts, because, he contended, the government had failed to prove that a federal investigation had begun at the time that the tampering occurred. Tr. Day 6 at 58-61. He also argued that the evidence was insufficient to convict on the Section 242 count because there were too many inconsistencies in the witnesses'

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[2](...continued)
law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States[.]"

[3] 18 U.S.C. 1512(b)(3) provides a criminal penalty for "[w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to–

* * * * *

> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense [.]

testimony. Tr. Day 6 at 61. The district court denied the Rule 29 motion. Tr. Day 6 at 64. At the end of the trial, the jury convicted Byrne on all counts. Tr. Day 8 at 2-5.

On December 3, 2003, in accordance with the Sentencing Guidelines, the district court sentenced defendant to 70 months incarceration. Sent. Tr. 1, 42. Judgment was entered on December 15, 2003.

STATEMENT OF FACTS

At the time of the incidents that led to the indictment in this case, Harry Byrne was a sergeant in the Boston Police Department assigned to District 14 in the Allston-Brighton area. Tr. Day 6 at 65-66. In addition to his regular shifts, Byrne worked on paid details, funded by one or more of the colleges in the area, and designed to address illegal drinking by the many college students residing in the district. Tr. Day 6 at 67-68.

During such a paid detail on Friday night, September 7, 2001, Byrne participated in the arrest of 4 students – the manager and three players from Boston College women's basketball team – outside an apartment house at 20-21 Commonwealth Avenue. Tr. Day 2 at 133-135; Tr. Day 6 at 83-87. As the students were being arrested, Maureen Leahy, another member of the women's basketball team, approached Byrne and asked him why her teammates were being

arrested. Tr. Day 2 at 134-135. Leahy testified at trial that Byrne told her to mind her own business or he would arrest her as well, and that he said to her "[g]et away, drunk nitwit." Tr. Day 2 at 135-137.

The next night, Byrne was again working a paid detail, and again encountered students outside the apartment house at 20-21 Commonwealth Avenue. Tr. Day 6 at 94-95. Garett Trombly, Tom Davis, Maureen Leahy, and Kristen Scheier were among the students who had been at a gathering in Tom Davis's apartment in the building that evening. Tr. Day 2 at 37-40, 137-138; Tr. Day 3 at 125-126; Tr. Day 4 at 23-24. All four testified that, as they left the apartment, Byrne drove up in his cruiser and began verbally abusing Leahy. Tr. Day 2 at 39-42, 138-140; Tr. Day 3 at 127; Tr. Day 4 at 27-28. Byrne called her over to his car, asked her if she had been at the apartment the night before and began yelling obscenities at her, telling her that he should have arrested her the previous night, that she brought trouble everywhere she went, that she was a drunk, and that he was going to call her coach. Tr. Day 2 at 41-42, 139-140; Tr. Day 3 at 127; Tr. Day 4 at 27-28. Leahy began crying and Davis came over to her and put his arm around her. Tr. Day 2 at 42-43, 140-141; Tr. Day 3 at 127-128; Tr. Day 4 at 28.

Byrne then got out of his car, approached Davis and began angrily berating him, saying he would "beat your ass" or "kick your ass." Tr. Day 2 at 43, 141. Davis testified that he thought Byrne was trying to pick a fight with him. Tr. Day 4 at 29-30. The students began to walk away, and some of them yelled comments, including obscenities, to and about Byrne. Tr. Day 2 at 44; Tr. Day 3 at 129; Tr. Day 4 at 31. Trombly testified that he said, loudly enough for Byrne to hear, in response to a student who said that Byrne was only doing his job: "That's bullshit, and it didn't say on the side of his car, protect, serve and harass girls in a crowd." Tr. Day 2 at 44.

Byrne then radioed for assistance, and a second cruiser, occupied by Officers Gregory Lynch and Kevin Peckham, arrived. Tr. Day 2 at 45, 142, Tr. Day 3 at 12-14; Tr. Day 4 at 32; Tr. Day 6 at 6-7, 105. Byrne instructed Lynch and Peckham to arrest Trombly. Tr. Day 3 at 16; Day 6 at 8, 110. Lynch and Peckham both testified that they arrested Trombly without any direct involvement by Byrne. Tr. Day 3 at 18-20; Tr. Day 6 at 9. Lynch grabbed Trombly by the arm and walked him to his cruiser, where he frisked him. Tr. Day 3 at 18; Tr. Day 6 at 9-10. Lynch took an unopened can of beer and a cell phone from Trombly's pants pockets and placed them in the trunk of the cruiser. Tr. Day 3 at 18; Tr. Day 6 at 9. Lynch then handcuffed Trombly, using his (Lynch's) handcuffs, and placed

Trombly in the cruiser. Tr. Day 3 at 19-20; Tr. Day 6 at 9-10. Trombly did not resist in any way. Tr. Day 2 at 45; Tr. Day 3 at 19.

Meanwhile, Davis began asking what was going on, waiving his cell phone in the air, and stating that he wanted to make a complaint. Tr. Day 2 at 46; Tr. Day 3 at 131; Day 4 at 33. Byrne then arrested Davis. Tr. Day 2 at 46; Tr. Day 3 at 21; Tr. Day 4 at 34. Byrne pushed Davis up against the car and handcuffed him. Tr. Day 2 at 46; Tr. Day 3 at 21-22; Tr. Day 4 at 34-35. In the process, Davis's cell phone was knocked to the ground and broken. Tr. Day 2 at 46-47; Tr. Day 3 at 22; Tr. Day 4 at 35. Byrne then placed Davis in the back seat of Lynch and Peckham's cruiser, next to Trombly. Tr. Day 2 at 47; Tr. Day 3 at 22-23; Tr. Day 4 at 36. Lynch and Peckham drove to the District 14 station house, followed by Byrne. Tr. Day 3 at 24. On the way, while Davis was agitated, Trombly was calm, and sought to calm Davis down. Tr. Day 2 at 47; Tr. Day 3 at 23-24.

At the station house, Lynch and Peckham took Trombly and Davis out of the cruiser and brought them to a ramp in the booking area, where two or three other arrestees were handcuffed to a rail, awaiting booking. Tr. Day 2 at 48; Tr. Day 3 at 24-25. Lynch had custody of Trombly and Peckham had custody of Davis. Tr. Day 3 at 25. As Lynch was bringing Trombly up the ramp to the booking area, Byrne told Lynch to uncuff him. Tr. Day 2 at 48; Tr. Day 3 at 30-31. Lynch first

put Davis's and Trombly's cell phones in the guardroom, which was adjacent to the ramp and booking area. Tr. Day 3 at 31-32. Then, after retrieving the keys to his handcuffs from Peckham, Lynch uncuffed Trombly and brought him to the guardroom, where Byrne was standing. Tr. Day 2 at 48-49; Tr. Day 3 at 31-32. Lynch testified that Trombly was not acting in a belligerent or threatening manner and that he was not concerned that it was a risk to anyone's safety to remove his handcuffs in the guardroom. Tr. Day 3 at 32-33.

After Trombly was brought into the guardroom, Byrne began shouting at him, saying "You think you're a tough guy? You thought you were a tough guy out on the street. Let's see how tough you are in here, you fucking punk." Tr. Day 2 at 49. Byrne then hit Trombly in the face. Tr. Day 2 at 49. According to Trombly, Byrne grabbed him by the throat and hit him again, on the left side of his face, then threw him across the room where he hit a bench and landed on the floor. Tr. Day 2 at 50. Byrne then lifted him up by his shirt and started yelling at him again, saying that he was a "pussy," and his father was "a pussy for not teaching you better." Tr. Day 2 at 50-51; Tr. Day 3 at 34-36, 164-165. As Lynch walked out of the guardroom, he heard Byrne saying something to Trombly about spitting on him and "[g]et your hands off me;" then Lynch heard a bang. Tr. Day 3 at 33. When Lynch turned around, he saw Byrne on top of Trombly, who was on the

bench, and Byrne had his hands on Trombly's chest. Tr. Day 3 at 33. Lynch then saw Byrne slap Trombly, hitting him with his right hand on the left side of Trombly's face, and then push Trombly backward, where he landed on a table, knocking the two cell phones on the floor. Tr. Day 3 at 38-39. Byrne then stomped on the cell phones and threw them. Tr. Day 3 at 39. Lynch testified that he never saw Trombly put his hands on Byrne or say anything to him, and that he (Lynch) did not come to Byrne's assistance. Tr. Day 3 at 36-38.

Officers Jeremiah Harrigan and Kristine Straub were standing outside the station house at this time, where Harrigan could see through the window into the guardroom. Tr. Day 3 at 157-158; Tr. Day 4 at 154. Harrigan saw Trombly backing up, unsteady on his feet, as though he was trying to keep his balance, and Byrne was facing Trombly and moving toward him. Tr. Day 3 at 159-160. Concerned that "[t]here was something going on in the guardroom that might require [their] immediate attention," Harrigan and Straub entered the station and went into the guardroom. Tr. Day 3 at 162-163; Tr. Day 4 at 155-156. As they entered the guardroom, Harrigan and Straub heard Byrne angrily swearing at Trombly. Tr. Day 3 at 164-165; Tr. Day 4 at 157. Trombly was saying, "I won't, sir or I didn't do that, sir." Tr. Day 3 at 165; see Tr. Day 4 at 158. Harrigan and Straub both saw that Byrne was holding Trombly, and both saw Byrne hit Trombly

on the left side of the face with his right hand, then push Trombly onto a table. Tr. Day 3 at 166-169; Tr. Day 4 at 158-161. Harrigan observed a cell phone on the floor, and saw Byrne step on it and then throw it off the wall. Tr. Day 3 at 170. Neither Harrigan nor Straub saw Trombly resist or take a swing at Byrne. Tr. Day 3 at 167-168; Tr. Day 4 at 160-161, 163. Harrigan testified that Trombly's demeanor was not aggressive, belligerent, or threatening. Tr. Day 3 at 165-166.

After this encounter, Byrne instructed Harrigan to take Trombly back to the ramp and handcuff him to the railing. Tr. Day 3 at 170; Tr. Day 4 at 162. Harrigan instructed Trombly to stand up and Trombly complied and was taken to the ramp where Harrigan and Straub handcuffed him to the railing. Tr. Day 3 at 170-171; Tr. Day 6 at 15-16. After Trombly was returned to the ramp, he was booked by Officer Peckham. Tr. Day 6 at 16.

Tom Davis also observed some of what went on in the guardroom from the ramp where he was handcuffed while awaiting booking. Tr. Day 4 at 40. He saw Byrne approach Trombly and angrily shout at him. Tr. Day 4 at 41. He saw Byrne punch Trombly in the face, then, after the door was closed, heard more thuds and smacks. Tr. Day 4 at 41-42. When Straub and Harrigan opened the door to enter the guardroom, Davis saw Byrne punch Trombly while holding him by the throat.

Tr. Day 4 at 43. The door closed again and Davis could not see any more, but did hear another thud and a crash. Tr. Day 4 at 43.

After their release early Sunday morning, September 9, Davis and Trombly went to the hospital. Tr. Day 2 at 58. In the emergency room, x-rays showed that Trombly had a broken jaw on the left side of his face. Tr. Day 2 at 59; Tr. Day 4 at 124. The emergency room physician who examined Trombly testified that his jaw was pushed over so that he could not close his mouth all the way, and that it was apparent that he was in pain. Tr. Day 4 at 119, 124. He had suffered a displaced fracture, meaning that the bone "was not only fractured, but the bone had actually been moved over and displaced[.]" Tr. Day 4 at 125. She testified that such a displaced fracture results from "a considerable amount of trauma" such as a car accident, and is not common in someone who has been assaulted. Tr. Day 4 at 128. Trombly was referred to an oral surgeon, who wired his jaw shut. Tr. Day 2 at 59. The wiring was loosened in stages and was finally removed after six weeks; for the first two weeks, Trombly could eat only through a straw. Tr. Day 2 at 59-60.

Byrne wrote an incident report and a complaint regarding Trombly's arrest. Tr. Day 3 at 42, 44. In both, Byrne stated that *he* had arrested Trombly, and that Trombly had put his hands on him during the course of the arrest. Tr. Day 3 at 43-

45. Based upon Byrne's complaint, Trombly was charged with assault and battery on a police officer, resisting arrest, providing alcohol to minors, and drinking in a public way. Tr. Day 2 at 62. Trombly appeared in Brighton District Court on these charges on Monday, September 10. Tr. Day 2 at 61. Because his jaw was wired shut, he could not speak; his lawyer told the court that his jaw had been broken by a Boston police officer the night before. Tr. Day 2 at 61. The charges were later dropped by the Suffolk County District Attorney's Office. Tr. Day 2 at 64.

On Tuesday, September 11, a newspaper article appeared publicizing Trombly's courtroom assertion that his jaw had been broken by a Boston police officer, and that he had been "viciously beaten" in the station house. Tr. Day 3 at 41; Tr. Day 5 at 52-53. After this allegation was brought to the attention of William Evans, the Captain in charge of District 14, Evans reviewed Byrne's incident report and asked Byrne about it. Tr. Day 5 at 9-15. Byrne denied that he had assaulted Trombly. Tr. Day 5 at 15. He told Evans that Trombly "was a fresh kid [who had] * * * spit on him [and that Byrne] put the handcuffs on him and threw him into the cruiser." Tr. Day 5 at 15. Byrne said nothing to Evans about what had happened at the station house. Tr. Day 5 at 15. Evans also received a telephone call about the incident from the police commissioner's office, and a letter

from Maureen Leahy. Tr. Day 5 at 16-17. After receiving the letter, he notified the Internal Affairs unit. Tr. Day 5 at 17. By September 24, the FBI and the Boston Police Department Anti-Corruption Unit were investigating the incident. Tr. Day 5 at 17-18, 62-64.

Peckham heard about Trombly's allegations and about the investigation when he returned to work after his days off. Tr. Day 6 at 19. Within a week after the incident, Byrne approached Peckham in the station house. Tr. Day 6 at 19-20. Peckham testified that Byrne told him that "he talked to the captain; everything's all set. He stated that he did the prebooking, the booking, and placed him in a cell; all we did was transport him back to the station." Tr. Day 6 at 20. Then Byrne told him, "Don't worry about it. You guys don't know nothing." Tr. Day 6 at 21. When Peckham told Byrne that his (Peckham's) name was on the booking sheet, Byrne told him to say that he (Byrne) had done the prebooking and that Peckham had finished the booking and put Trombly in his cell." Tr. Day 6 at 22-23. Byrne told him not to tell investigators anything, except that he did not see anything and that he had left the prisoner with Byrne. Tr. Day 6 at 23. Finally, Byrne told Peckham to tell Lynch what he had said. Tr. Day 6 at 24. At the time of this conversation, Byrne was the patrol supervisor. Tr. Day 6 at 20.

Peckham did convey to Lynch the substance of his conversation with Byrne. Tr. Day 6 at 24; Tr. Day 3 at 46-47. Peckham told Lynch that Byrne had told him that they "had to say that nothing happened, the incident never happened." Tr. Day 3 at 47. Later, Byrne approached Lynch and told him that "the feds were in the station earlier today and not to talk about it in our car." Tr. Day 3 at 49.

Some days after the incident, Byrne approached Harrigan and told him that the FBI was investigating the incident, along with the Boston Police Department, and that they might be coming around for interviews. Tr. Day 3 at 172-174. Byrne told him that "nothing happened" or there was "nothing to see." Tr. Day 3 at 174-175. Sometime later, before October 3, 2001, Byrne approached Straub as well. Tr. Day 4 at 163-164. Byrne told her that Internal Affairs and the FBI were investigating the incident and that "All you know is that you were on the street that night." Tr. Day 4 at 166.

Byrne told quite a different story in his testimony. He claimed that when he encountered Leahy for the second time, early on Sunday morning, September 9, he was concerned about her because she appeared to be intoxicated and he thought that her friends were abandoning her. Tr. Day 6 at 97-100. He said that when he spoke to her, he was "stern," and "fatherly." Tr. Day 6 at 101. Byrne claimed that Trombly was drinking from an open can of beer when he saw him on the sidewalk;

and that he called for Trombly's arrest because Trombly spit on him. Tr. Day 6 at 104-105. Byrne testified that he participated directly in Trombly's arrest and that Trombly had swatted his hand away when Byrne put his arm on him. Tr. Day 6 at 110-113. Byrne testified that he gave Lynch his handcuffs to cuff Trombly, and that when Lynch frisked Trombly, the only thing he removed from his pockets was an unopened can of beer. Tr. Day 6 at 114-115. When they returned to the station house, according to Byrne, he told Lynch to uncuff Trombly so that he could reclaim his handcuffs. Tr. Day 6 at 126-127. As they approached the guard room, Lynch uncuffed only one of Trombly's hands, Byrne claimed, leaving Trombly with his right hand free. Tr. Day 6 at 128-130. Byrne testified that Trombly then reached into his pocket for his cell phone and Byrne saw a black object. Tr. Day 6 at 130. Fearing that Trombly had a gun, Byrne claimed, he reacted quickly and pinned him against the wall, hitting Trombly with the palm of his hand in the process. Tr. Day 6 at 131-132. When he saw that Trombly only had a cell phone in his hand, Byrne said, he threw it against the wall out of frustration. Tr. Day 6 at 134. Byrne admitted that he "spew[ed] profanities at Trombly." Tr. Day 6 at 136.

Byrne also denied that he had told Lynch, Peckham, Straub, or Harrigan to lie about the events involving Trombly. Tr. Day 6 at 145-150. He claimed that Kristine Straub asked him about the incident, and that he told her not to worry, that

no one had been viciously beaten or had suffered a broken jaw, and not to talk about it in the station, but to go about her duties. Tr. Day 6 at 147. He said that he then went to Harrigan and asked him if he was worried about reports of the incident, and told him not to talk about it so that it would not be blown out of proportion. Tr. Day 6 at 147-148. Byrne claimed that he spoke to Lynch and Peckham together and told them the same thing he had told Straub and Harrigan. Tr. Day 6 at 149-150.

Byrne admitted that he had not written any report or told his superior officers about his version of the events in the guardroom involving Trombly. Tr. Day 6 at 154. He also admitted that he had not recovered the opened can of beer he claimed Trombly was drinking, and that he had not told Lynch or Peckham that Trombly had spit on him when they arrived to make the arrest. Tr. Day 6 at 168-169. Finally, Byrne admitted that he knew that use of excessive force by a police officer could be a federal criminal violation. Tr. Day 6 at 174.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it limited cross examination by foreclosing questioning of the government's police officer witnesses about the *Conley* case. When "defense counsel [has been] afforded a reasonable opportunity to impeach adverse witnesses," limitations on cross-

examination are reviewed only for abuse of discretion. *United States* v. *Gonzalez-Vazquez*, 219 F.3d 37, 45 (1st Cir. 2000). In this case, defense counsel had ample opportunity to question the officers in an effort develop the defense's contention that the officers were conforming their testimony to the government's version of the facts. Permitting questioning about a different case, in which a police officer was prosecuted for perjury for lying before a grand jury, would have added little to the defense's theory in this case, while measurably confusing the issues before the jury. Moreover, the defense did not make a proffer of what it expected to elicit in response to the *Conley* questions, or even explain to the district court the purpose of the questions. Thus, the district court could not know whether the questions were intended to show bias or merely to inflame the jury. Finally, the lack of a proffer also deprives this Court of any indication whether defendant was prejudiced by the limitation on cross-examination.

Defendant's contention that the evidence was insufficient to sustain the witness tampering convictions under 18 U.S.C. 1512(b)(3) is foreclosed by this Court's decision in *United States* v. *Bailey*, 405 F.3d 102, 107-109 (1st Cir. 2005). The sole basis for Byrne's challenge to the sufficiency of the evidence on these counts is his contention that the government failed to prove that a federal investigation was underway at the time of Byrne's communications with the four

officers. *Bailey* expressly rejected the contention that Section 1512(b)(3) "requires an existing or imminent federal investigation at the time of the defendant's misleading conduct." 405 F.3d at 108. Thus, defendant's sufficiency claim must fail.

Defendant's sentence, imposed under the Sentencing Guidelines, was not plain error and therefore should be affirmed. Byrne has not established a reasonable probability that his sentence would have been different under an advisory Guidelines system. While the district judge expressed reservations about the calculation of the sentence, his reservations stemmed from uncertainty about a *legal* issue regarding the calculation of the offense level, and from his belief that Byrne would have received a shorter sentence in state court. But defendant has not renewed his legal challenge to the Guideline calculation in this Court. And the district court's belief that a state court would have imposed a shorter sentence is not a permissible sentencing factor under *United States* v. *Booker*, 125 S. Ct. 738 (2005). Therefore an adjustment to the Guideline sentence on that basis would have been unreasonable.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING CROSS-EXAMINATION AS TO BIAS ON THE PART OF THE POLICE OFFICERS WHO TESTIFIED FOR THE GOVERNMENT

Byrne erroneously contends (Br. 15-32) that the district court violated his Sixth Amendment right to confront the witnesses against him when it limited cross-examination of the police officers called by the government by foreclosing questions regarding the government's unrelated prosecution of Kenneth Conley for perjury.[4] As this Court has emphasized, while a defendant's right to cross-examine witnesses is secured by the Sixth Amendment, that right is "not unlimited." *United States* v. *Gonzalez-Vazquez*, 219 F.3d 37, 45 (1st Cir. 2000). "When a witness's credibility is at issue, the trial court may limit cross-examination as long as the court allows 'sufficient leeway to establish a reasonably complete picture of the witness' veracity, bias, and motivation.'" *Ibid.* (quoting *United States* v. *Laboy-Delgado*, 84 F.3d 22, 28 (1st Cir. 1996)). "Confrontation clause challenges are

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[4] Kenneth Conley is a Boston police officer convicted of perjury and obstruction of justice for lying to a federal grand jury regarding the alleged beating of a plain clothes police officer by other police officers. See *United States* v. *Conley*, 323 F.3d 7 (1st Cir. 2003) (en banc). An appeal from the district court's decision on remand in *Conley* is pending in this Court. *United States* v. *Conley*, No. 04-2424 (argued May 6, 2005).

reviewed *de novo* to determine whether defense counsel was afforded a reasonable opportunity to impeach adverse witnesses; once that threshold is reached, the trial court's restrictions on the extent and manner of cross-examination are reviewed only for abuse of discretion." *Gonzalez-Vazquez*, 219 F.3d at 45 (quoting *United States* v. *Balsam*, 203 F.3d 72, 87 (1st Cir.), cert. denied, 531 U.S. 852 (2000)). "[R]estrictions on cross-examination regarding bias are erroneous only if they are 'manifestly unreasonable or overbroad.'" *United States* v. *Callipari*, 368 F.3d 22, 36 (1st Cir. 2004), vacated on other grounds, 125 S. Ct. 985 (2005), (quoting *United States* v. *Gomes*, 177 F.3d 76, 81-82 (1st Cir. 1999)).

In this case, defense counsel was afforded ample opportunity to question the police officer witnesses about potential bias, including questions regarding intimidation by the United States Attorney's office and fear of prosecution for perjury. The district court properly limited this cross-examination to exclude questions about the *Conley* case, which would have added little to the defense's contentions regarding bias, but would have measurably confused the issues before the jury. Because the defense did not make a proffer or otherwise explain what it expected this line of questions to show, there was no way for the district court to determine whether the cross-examination was intended to show bias or rather to inflame the jury by seeking to create a connection between this case and a highly

publicized, but unrelated, case. The district court therefore did not abuse its discretion when it barred questions regarding the *Conley* case. And, because defendant has failed to show prejudice, the district court's ruling provides no basis for reversal of defendant's conviction.

1. The defense was afforded an adequate opportunity during cross-examination to develop its theory of bias, *i.e.*, that the testimony of the police officers who testified for the government was influenced by fear that they would be prosecuted for perjury if they did not testify in accordance with the government's version of the facts.

The government had already established during direct examination that Lynch, Harrigan, and Straub were testifying pursuant to an immunity order issued by the district court that compelled their testimony and provided that their testimony could not be used against them unless they committed perjury. Tr. Day 3 at 11, 155; Tr. Day 4 at 152-153. The defense reminded the jury of this order during Lynch's cross-examination, characterizing Lynch's testimony as being under a "cloak of protection" by the United States. Tr. Day 3 at 58. The defense also questioned Lynch at length about alleged intimidation by the prosecution. In response, Lynch denied that he was concerned that the government would be displeased with his testimony, but said that he was concerned "that people would

think that I'm committing perjury and would be charged criminally on that." Tr. Day 3 at 59.

Defense counsel then asked Lynch if he was "familiar with an officer by the name of Kenny Con[ley]?" Tr. Day 3 at 62. The district court sustained the prosecution's objection to this question, stating "No more inquiry on this subject. Let's move on." Tr. Day 3 at 62. This ruling, however, did not end the line of questioning concerning Lynch's fear of prosecution for perjury.

Immediately after the ruling on the Conley question, defense counsel asked Lynch again whether he was concerned that the government would think that he was untruthful. Tr. Day 3 at 62. The judge observed that counsel had already asked the question, and instructed him to ask it "one more time * * * and then move on to something else." Tr. Day 3 at 62. Lynch responded that it was "in the back of [his] mind" that the government would think he was untruthful. Tr. Day 3 at 62. Defense counsel continued with the line of questioning, asking whether Lynch had received "any kind of signal" from the prosecution regarding how they wanted him to testify. Tr. Day 3 at 62. Lynch said that the prosecutors had "just asked [him] questions about the incident" and denied that the government's questioning had "suggested what they wanted to hear." Tr. Day 3 at 62-63. Defense counsel then read a series of questions from the transcript of Lynch's

grand jury testimony and asked Lynch whether the prosecutor's questions were giving him clues as to how he was to answer. Tr. Day 3 at 63-66. Lynch denied that he perceived the questions that way, and said that "I could only give the answer I know." Tr. Day 3 at 66. Defense counsel also asked Lynch about a question asked of him in the grand jury as to whether he believed he had been treated fairly by the United States's Attorney's Office. Tr. Day 3 at 67-69. In response to repeated questions from defense counsel, Lynch denied that he found this question odd, and stated that he believed that he could freely and honestly answer the question. Tr. Day 3 at 68-69. In response to questions on redirect, Lynch explained what he had already told the grand jury – that he had feared that he might have liability for failing to stop Byrne from assaulting Trombly. Tr. Day 3 at 121-122.

Defense counsel also questioned Peckham about intimidation by the government. Tr. Day 6 at 46-47. Peckham said that he found testifying before the grand jury to be a "little bit" intimidating. Tr. Day 6 at 46. He said that he found it "a little bit" intimidating that someone from the Boston Police Department's Anticorruption Divison was in the courtroom during the trial. Tr. Day 6 at 46-47. Like Lynch, he denied that he was surprised by the question, before the grand jury, whether he felt that he had been fairly treated by the prosecutors, and said that he

believed he could answer the question honestly. Tr. Day 6 at 46-47. On redirect, Peckham denied that the prosecutor had told him what to say in the grand jury. Tr. Day 6 at 48. He explained that he had been interviewed by the Assistant United States Attorney before his grand jury testimony, and that the questions he was asked before the grand jury were based upon that interview. Tr. Day 6 at 48-49.[5]

As this recitation demonstrates, and contrary to defendant's representation (Br. 15), the district court did not "preclud[e] cross-examination as to bias on the part of the government-witness police officers." Rather, the district court permitted extensive, direct questioning of the officers as to whether they felt intimidated by the government, whether they feared prosecution for perjury, and whether the government had signaled to them the testimony that it expected them to give.[6] This questioning placed before the jury the defense's contention that the officers had tailored their testimony to satisfy the prosecution, and that they had

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[5] Using a question asked of Officer Straub as an example, defendant asserts (Br. 20-21 n.14) that the government suggested answers to its witnesses through the questions it asked before the grand jury. This contention is contradicted by the record. Like Peckhham, Straub testified that the questions she was asked in the grand jury were based upon information she had provided to the government before her testimony. Tr. Day 4 at 185.

[6] Defense counsel did not question Straub or Harrigan about the immunity order or about purported intimidation by the government, but nothing in the judge's rulings prevented them from doing so.

done so because they feared they would be prosecuted for perjury. Indeed, the possibility of perjury prosecutions was put before the jury by the *government*, when it elicited testimony about the immunity orders, which expressly provided that the officers could be prosecuted for perjury if they did not tell the truth.

The jury was thus well aware that the police officers testifying for the government were subject to prosecution for perjury if they lied. Informing the jury that the United States had, in fact, prosecuted a Boston police officer for perjury because he had lied to the grand jury in another case would have added little to the defense's theory.

Nor was it improper to permit the government to elicit testimony from Lynch that he had been concerned about prosecution for failure to stop Byrne from assaulting Trombly. See Br. 27. The defense had questioned Lynch about the immunity order, had described his testimony as being under a "cloak of protection" by the United States, and elicited from him the statement that he had been concerned that he might be charged by the government. See Tr. Day 3 at 57-59. The prosecution was entitled to permit Lynch to clarify his testimony by explaining just why he feared prosecution.

2. Further, the questions about *Conley* would not have been probative without an extended inquiry into the merits of the *Conley* case. Implicit in

defendant's argument that the questioning would have demonstrated bias is the assumption that Conley was wrongly prosecuted, and that the officers in this case lied to avoid a similarly unjustified prosecution. Certainly that is the message the defense was seeking to convey to the jury. See Br. at 19-21. The alternative scenario is that the officers in this case were prompted to tell the *truth* to avoid prosecution for perjury. Of course, choosing between these competing scenarios, and avoiding the prejudice to the government that would have resulted from the defense's questions, would have required a mini-trial of the *Conley* case. Such an interjection of an entirely different prosecution into the trial would have hopelessly confused the issues in this case.

The trial judge "'retains wide latitude to impose reasonable limits' on cross-examination in order to avoid confusion of the issues or extended discussion of marginally relevant material." *Gonzalez-Vazquez*, 219 F.3d at 45 (quoting *United States* v. *Twomey*, 806 F.2d 1136, 1139 (1st Cir. 1986)). The district court did not abuse its discretion in this case when it limited cross-examination by precluding inquiry into the unrelated *Conley* prosecution.

3. Moreover, defense counsel failed to make a proffer or otherwise explain to the district court what it expected its questions regarding *Conley* to show. Byrne claims now that the inquiry was intended to show bias. But without a proffer or

even an explanation of the purpose of the inquiry, there was no way for the district court to know that it was not intended merely to inflame the jury about a highly publicized case.

Byrne's contention (Br. 24 n.16) that an offer of proof was neither necessary nor possible is incorrect. The court's ruling on the government's objection indicated only that the district judge was familiar with the *Conley* case and did not believe that it should be interjected into this one. But such familiarity did not inform the district court as to the substance or the purpose of the testimony the defense expected to elicit in response to its questions.

Nor would it have been futile for the defense either to make an offer of proof or to offer an explanation of the purpose of the inquiry before the district court. Before the trial began, the district court judge stated that he did not permit sidebar conferences. Pretrial Tr. 15-16. The judge asked the parties to forewarn him if they thought that an issue might arise that would require a conference so that it could be dealt with outside the jury's presence. Pretrial Tr. 16. Both parties took advantage of these opportunities. Tr. Day 1 at 2-3; Tr. Day 3 at 2-5, 112. And the prosecution asked the district court to revisit an evidentiary ruling it had already made. Tr. Day 4 at 2-4. Defense counsel must have anticipated that his inquiry about the *Conley* case would elicit an objection. Yet he did not raise the issue at

the beginning of the trial day, even as he raised other issues regarding Lynch's testimony. Tr. Day 3 at 2-5. Nor did he raise the matter during a break in Lynch's testimony after the judge's ruling on the matter. Tr. Day 3 at 112.

4. Finally, this Court may reverse Byrne's conviction only if it finds that the district court's limitation of cross-examination was "clearly prejudicial." *Callipari*, 368 F.3d at 36. Because Byrne made no proffer at trial, there is nothing in the record to indicate what the officers would have said about the *Conley* case. Thus, particularly in light of the officers' consistent testimony that they had *not* tailored their testimony to conform to what they thought the government wanted to hear, he has failed to establish that he was prejudiced by the district court's ruling.

The district court's limitation of cross-examination of the police officer witnesses who testified for the government thus provides no basis for reversal of the conviction.

II

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION ON THE WITNESS TAMPERING COUNTS

Viewed in the light most favorable to the government, the evidence in this case established that Byrne sought to persuade Lynch, Peckham, Straub, and Harrigan to lie to investigators regarding the arrest and subsequent assault of

Garett Trombly, an assault that Byrne knew to be a federal criminal violation. On appeal, defendant challenges the sufficiency of the evidence on these counts on only one ground (Br. 32-40): that the government failed to prove that a federal investigation was underway at the time of Byrne's communications with the four officers. Of course, three of the officers, Lynch, Harrigan, and Straub, testified that Byrne told them that the FBI *had* begun its investigation at the time he sought to persuade them to cover up his offense. See pp. 13-14, *supra*. In any event, Byrne's contention that a pending federal investigation is required is foreclosed by this Court's decision in *United States* v. *Bailey*, 405 F.3d 102, 107-109 (1st Cir. 2005).

Bailey expressly rejected the contention that Section "1512(b)(3) requires an existing or imminent federal investigation at the time of the defendant's misleading conduct." 405 F.3d at 108. As this Court wrote in *Bailey*, that contention is inconsistent with the plain language of the statute. "Nothing in this provision implies that a federal investigation must be imminent or underway at the time of the actus reus. To the contrary, and as several circuits have recognized, the statutory language suggests that Congress intended § 1512(b)(3) not merely to safeguard the integrity of ongoing or imminent federal investigations, but more broadly to facilitate federal law enforcement's ability to gather information about

possible federal crimes – including federal crimes that are not yet under investigation at the time of the offense." *Ibid.* Thus, "the requirements of the statute are satisfied so long as the possibility exists that the defendant's misinformation will eventually be communicated to federal officials." *Id.* at 107 n.1 (citing *United States* v. *Baldyga*, 233 F.3d 674, 680 (1st Cir. 2000), cert. denied, 534 U.S. 871 (2001)).

Here, the internal investigation of Trombly's assertions began within days after the incident. Captain Evans testified that he was informed of Trombly's allegations on Monday morning, September 10, and that he reviewed the incident report and asked Byrne about the incident within a day or two. Tr. Day 5 at 9-10, 15. Around the same time, after receiving a letter from Maureen Leahy, he notified Internal Affairs of the matter. Tr. Day 5 at 17. Indeed, according to Byrne's own testimony, it was the September 11 newspaper reports of Trombly's allegations and the subsequent discussion of the incident among the officers within the station house that prompted him to talk to the four officers about the matter. Tr. Day 6 at 143-150. Further, the evidence at trial established that allegations of excessive force by police officers may be investigated by the FBI as well as by the Boston Police Department, and that the Department works "as an investigative partner" with the FBI in such investigations. Tr. Day 5 at 61.

Thus, it was predictable, when Byrne sought to persuade the officers to lie about the Trombly incident, that that misinformation eventually would be conveyed to federal officials investigating a federal criminal offense. This evidence was sufficient to establish a violation of Section 1512(b)(3) under these circumstances.

III

DEFENDANT'S SENTENCE WAS NOT PLAIN ERROR UNDER *BOOKER*

1. In *United States* v. *Booker*, 125 S. Ct. 738 (2005), the Supreme Court issued two rulings regarding the Federal Sentencing Guidelines. First, the Court held that the Sixth Amendment is violated when a sentence imposed under the Guidelines is increased based upon the district judge's finding of a fact, other than a prior conviction, that was not found by the jury or admitted by the defendant. *Id.* at 748-756 (opinion of Stevens, J., for the Court). The Court explained that it is the mandatory nature of the Guidelines that implicates the Sixth Amendment. *Id.* at 750. Second, the Court held that the remedy for this constitutional deficiency was the severance and excision of the two provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq*., that make application of the Guidelines

mandatory. 125 S. Ct. at 756-769 (opinion of Breyer, J., for the Court).[7] The Court concluded that this approach would best achieve Congressional intent, by "mak[ing] the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct – a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve." *Id*. at 757.

In imposing sentence, the Court held, district courts must consider the factors set out in 18 U.S.C. 3553(a), including the sentencing ranges set forth in the Guidelines. 125 S. Ct. at 764-765. Thus, while the Guidelines will no longer be mandatory, district courts "must consult those Guidelines and take them into account when sentencing." 125 S. Ct. at 767.

While the *Booker* holdings apply to all cases (such as this one) pending on direct review, not every application of the Guidelines gives rise to a Sixth Amendment violation or requires a remand for resentencing. *Booker*, 125 S. Ct. at 769; *United States* v. *Antonakopoulos*, 399 F.3d 68, 79-80 (1st Cir. 2005). Where the defendant did not preserve the issues resolved in *Booker*, his sentence will be vacated only upon a showing that (1) the district court misapplied the Guidelines in

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[7] The Court excised 18 U.S.C. 3553(b)(1), which requires the court to impose a sentence within the Guideline range, in the absence of a departure; and 18 U.S.C. 3742(e), which sets forth the standards for review on appeal. 125 S. Ct. at 764.

a way that plausibly affected the sentence; or (2) application of the Guidelines in his case constitutes plain error. 125 S. Ct. at 769; *Antonakopoulos*, 399 F.3d at 80-81. Byrne concedes (Br. 42 n.21) that he did not raise a *Booker* challenge to the application of the Guidelines to his sentence below. Therefore plain error review applies in this case.[8]

As *Antonakopoulos* explained, a Guidelines sentence may be vacated for plain error under *Booker* if there is "an error that is plain and that affect[s] substantial rights" and if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." 399 F.3d at 77 (quoting *United States* v. *Olano*, 507 U.S. 725, 732, 736 (1993)). The first two prongs of this analysis are satisfied whenever a defendant was sentenced under a mandatory Guidelines system. *Antonakopoulos*, 399 F.3d at 77. Thus, appellate review for plain error focuses on the third and fourth prongs. To establish the third plain error prong, the defendant bears the burden of showing that there was prejudice, *id.* at 77; that is, that there was a "reasonable probability" that his sentence would have been

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[8] Byrne raised several issues regarding the calculation of his sentence under the Guidelines in the district court, challenging the selection of the base offense level, the addition of four levels for serious bodily injury, and the addition of two levels for obstruction of justice, under U.S.S.G. 3C1.1. See pp. 34-35, *infra*. But he has made no argument regarding these challenges in his opening brief and therefore has waived them on appeal.

different under an advisory Guidelines system, *id*. at 78-79. For the reasons set forth below, defendant has not made such a showing in this case.

2. Calculation of defendant's sentence was based upon his conviction on the Section 242 count. See Present. Rep. at 10-12. The offense guideline for Section 242 is U.S.S.G. 2H1.1 (2003), which provides, in pertinent part:

> (a) Base Offense Level (Apply the Greatest):
>
> (1) the offense level from the offense guideline applicable to any underlying offense;[9] [or]
>
> * * * * *
>
> (3) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage[.]

The Probation Office recommended, and the district court determined, that the applicable underlying offense in this case was aggravated assault, and applied the guideline for that offense, U.S.S.G. 2A2.2.[10] The district court thus began with

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[9] The first Application Note to Section 2H1.1 explains that "'[o]ffense guideline applicable to any underlying offense' means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1)."

[10] The first Application Note to Section 2A2.2 explains that "'[a]ggravated assault' means a felonious assault that involved * * * (B) serious bodily injury[.]" "'Serious bodily injury' means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty;

(continued...)

a base offense level of 15; added four levels for serious bodily injury, in accordance with U.S.S.G. 2A2.2;[11] added six levels because the offense was committed under color of law, in accordance with U.S.S.G. 2H1.1(b)(1); and added two levels because the defendant had obstructed justice, in accordance with U.S.S.G. 3C1.1, for a total offense level of 27. Sent. Tr. 37-41; see Present. Rep. 11.

In the district court, defendant challenged the selection of the base offense level, the addition of four levels for serious bodily injury, and the addition of two levels for obstruction of justice. He contended that Trombly's broken jaw did not constitute serious injury. Sent. Tr. 18-23. Thus, the underlying offense, he argued, should not be aggravated assault, but minor assault, for which the base offense level is six. U.S.S.G. 2A2.3(a). See Sent. Tr. 18-19. Because U.S.S.G. 2H1.1(a) directs the use of the greatest offense level, as between the underlying offense and the level set forth in Section 2H1.1, the defendant contended, the correct base

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[10](...continued)
or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. 1B1.1(L).

[11] The "Specific Offense Characteristics" provides, in relevant part, that "[i]f the victim sustained bodily injury," the offense level should be increased "according to the seriousness of the injury." U.S.S.G. 2A2.2(b)(3). For "Bodily Injury," the level is to be increased by two. U.S.S.G. 2A2.2(b)(3)(A). For "Serious Bodily Injury," the level is to be increased by four. U.S.S.G. 2A2.2(b)(3)(B).

offense level should be ten as set forth in 2H1.1(a)(3), rather than 15, as provided in U.S.S.G. 2A2.2(a). Sent. Tr. 19-20. With the addition of six levels because the offense was committed under color of law, the defendant argued that his offense level should be 16, rather than 27. Sent. Tr. 20. Defendant did not challenge the application of the Sentencing Guidelines to his case or argue that his Sixth Amendment rights had been violated.

The district court concluded "that Mr. Trombly's injuries qualify as 'serious,' in the sense that 'serious' is defined in Guideline 1B1.1, Note 1(L)." Sent. Tr. 38. "'Serious bodily injuries,' as they have been defined in similar cases," the court explained, "have included, as the government points out, a broken jaw as is the case here, a fractured elbow, temporary unconsciousness, 25 stitches, a broken wrist, and a broken ankle, all injuries that seem, to me, to be commensurate with or, perhaps, less severe than the injuries suffered by the victim in this case." Sent. Tr. 38-39.

The court stated that "the more difficult issue" was whether the cross-referencing provision of the civil rights guideline – U.S.S.G. 2H1.1(a)(1) – should apply independently of subsection (a)(3) of the guideline, which provides for a base offense level of 10 where the offense involves the use or threat of force. Sent. Tr. 39-40; see U.S.S.G. 2H1.1(a)(3). The "best argument for saying that the civil

rights guideline without a cross-referencing enhancement should control," the court said, was "that this crime, even despite the serious injury, would be punishable under state law by a maximum two-and-a-half year sentence as assault and battery." Sent. Tr. 39-40. The district court then stated, however, that the courts of appeals had held that the cross-reference provision does "stand independently of subsection (a)(3)." Sent. Tr. 40. And, the district court stated, "except for the argument I have just made, I agree [that the cross-referencing provision] otherwise applies in this case." Sent. Tr. 40. This question, the district court stated, would be decided by this Court on appeal. Sent. Tr. 40.

The district court explained that "federal sentencing simply does not operate the way state sentencing does," and that he lacked the discretion that a state judge has. Sent. Tr. 41. The difference in this case between a three-to-four-year range and a six-to-seven-year range, the court said, depended "upon how one analyzes the difficult legal issue raised by the civil rights guideline." Sent. Tr. 41. Believing he was "bound by precedent," the district judge adopted the probation office's calculation of the total offense level of 27, with a range of 70 to 87 months incarceration. Sent. Tr. 41. But because of "doubt on the legal issue in the case," the court imposed the lowest sentence within the range of 70 months. Sent. Tr. 41.

3. Defendant contends (Br. 48-51) that there was a reasonable probability that the district court would have imposed a shorter sentence but for the mandatory Guidelines. To be sure, the district judge here expressed uncertainty about the sentence imposed under the Guidelines. But this uncertainly stemmed from the judge's doubts about a legal question regarding the selection of the appropriate guideline provision in establishing the base offense level, and the judge's belief that the defendant would have been subject to a shorter sentence in state court. See Sent. Tr. 39-41. Defendant has not raised the legal issue of the appropriate base offense level in this appeal. And, if the judge had imposed a lower sentence on the ground that the defendant would have received a shorter sentence in state court, such a departure from the Guideline range would be subject to reversal on appeal even after *Booker*.

As this Court held in *United States* v. *Snyder*, 136 F.3d 65, 66, 68-69 (1st Cir. 1998), cert. denied, 532 U.S. 1057 (2001), disparity between federal and state sentences is an impermissible ground for a downward departure under the Guidelines. *Snyder* recognized that avoiding unwarranted sentencing disparities was one of the Sentencing Commission's mandates, as set forth in the Commission's enabling legislation. 136 F.3d at 68-69 (citing 28 U.S.C. 991(b)(1)(B)). But the legislative history of this provision, *Snyder* explained,

made it "crystal clear" that Congress was concerned with "variations among federal courts across the nation, without reference to their state counterparts." 136 F.3d at 69. Indeed, "departures aimed at alleviating federal/state sentencing disparity are flatly incompatible with" the Congressional goal of avoiding disparities among federal sentences, because such departures "would recreate the location-based sentencing swings that Congress sought to minimize when it opted for a guideline paradigm." *Ibid.*

The reasoning of *Snyder* is equally applicable after *Booker*, which instructed district courts to consider the factors set forth in 18 U.S.C. 3553(a), and to consult the Guidelines in imposing sentence. *Booker*, 125 S. Ct. at 764-765; see *United States* v. *Serrano-Beauvaix*, 400 F.3d 50, 55 (1st Cir. 2005). One of the statutory sentencing factors is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). In accordance with this directive, the Sentencing Commission formulated the Guidelines initially by canvassing prior sentencing practice and attempting to identify and assign weights to all the factors – both aggravating and mitigating – that judges traditionally used in determining an

appropriate sentence.[12] As *Booker* recognized, the Commission has continued to study federal sentencing decisions and "to modify its Guidelines in light of what it learns, * * * thereby promot[ing] uniformity in the sentencing process." 125 S. Ct. at 766. For the reasons this Court identified in *Snyder*, see 136 F.3d at 69, a decision to depart from the sentencing range calculated under the *federal* Guidelines because the resulting sentence is longer than would be imposed by a *state* court would frustrate the predominant Congressional intent of promoting uniformity in federal sentencing.

Further, this was not simply a case of assault. It was an abuse of power in the form of a brutal attack on an arrestee by a police sergeant, carried out, not during the course of an arrest, but in the calm of the station house. The abuse of power was then compounded by Byrne's use of his supervisory position in an effort to induce four police officers to lie to investigators to cover up his crime. Reducing defendant's sentence because he would have received a lower sentence if he had been convicted of assault in state court would have been unreasonable.

For these reasons, this Court should affirm the sentence imposed in this case.

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[12] See U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16-17 (1987); see also 28 U.S.C. 994(m) (requiring Commission to ascertain average sentences).

4. We acknowledge this Court's statement that it is "inclined not to be overly demanding as to proof of probability where, either in the existing record or by plausible proffer, there is reasonable indication that the district judge might well have reached a different result under advisory guidelines." *United States* v. *Heldeman*, 402 F.3d 220, 224 (1st Cir. 2005). If the Court is inclined to vacate and remand for resentencing in this case, we urge the Court to instruct the district court that it is impermissible to impose a lower sentence merely because the Guideline sentence is higher than the defendant would have received in state court.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

R. ALEXANDER ACOSTA
Assistant Attorney General

S. THEODORE MERRITT
Assistant U.S. Attorney

JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division-Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4706

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,843 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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LINDA F. THOME
Attorney for the United States

Dated: June 2, 2005

CERTIFICATE OF SERVICE

I certify that, on June 2, 2005, two copies of the BRIEF FOR THE UNITED STATES AS APPELLEE were served, by first class mail, postage prepaid, on the following counsel of record:

Frank A. Libby, Jr.
R. Matthew Rickman
Kelly, Libby & Hoopes, P.C.
175 Federal Street
Boston, MA 02110

LINDA F. THOME
Attorney