Nos. 05-1377, 05-1440

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JOSEPH LEMOURE AND JOSEPH F. POLITO,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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LEGISLATIVE HISTORY

GUIDELINES

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742. Defendants Joseph LeMoure and Joseph Polito were sentenced on March 8, 2005, L. App. 15; P. App. 14-15,[1] and final judgment was entered on March 10, 2005, L. App. 15; P. App. 14-15. LeMoure filed a notice of appeal on March 11, 2005, L. App. 15, and

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[1] This brief uses the following abbreviations: "Supp. App. __" for the page number of the Appellee United States' Supplemental Appendix; "L. App. __" for the page number of LeMoure's Appendix; "P. App. __" for the page number of Polito's Appendix; "L. Br. __" for the page number of LeMoure's opening brief; and "P. Br. __" for the page number of Polito's opening brief.

Polito filed his notice of appeal on March 17, 2005, P. App. 14. Both are timely under Rule 4(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Whether the district court correctly allowed the charged violations of 18 U.S.C. 1503 in Counts Nine and Ten of the indictment to be decided by the jury.

2. Whether the evidence presented was sufficient to support Polito's convictions under 18 U.S.C. 1512(b)(1).

3. Whether the district court's instructions on Section 1512(b)(1) constituted plain error.

4. Whether, under review for plain error, Polito's Double Jeopardy rights were violated.

5. Whether admission of LeMoure's conversation with Joseph Weddleton about invoking the Fifth Amendment as evidence was plain error.

6. Whether in calculating a Guideline sentence range, the district court correctly concluded that LeMoure had obstructed an investigation which included allegations that he used a dangerous weapon.

STATEMENT OF THE CASE

Defendants Sergeant Joseph LeMoure and Officer Joseph Polito were members of the Boston Police Force. Supp. App. 53, 60. In the early morning hours of June 24, 2000, LeMoure pursued and stopped a car. Supp. App. 170-171. LeMoure pulled a passenger, Peter Fratus, out of the car, threw him to the ground,

hit him with a flashlight, and punched and kneed him in the head. Supp. App. 170-171. To cover up these actions, LeMoure and Polito recruited Biagio DeLuca, Dante Tordiglione, and Ralph DeRota to falsely claim to the Boston Police Internal Affairs Division (IAD) that they had witnessed the incident in order to support LeMoure's story about what took place. Supp. App. 62, 425-426. LeMoure and Polito persuaded and attempted to persuade these witnesses to stick to their false stories when they were deposed for the civil case Fratus brought against LeMoure and subpoenaed before the grand jury. Supp. App. 31-32, 80, 82-83, 99-100, 105, 109-110, 436-487, 439, 443.

On July 29, 2003, a federal grand jury returned a twelve-count indictment, L. App. 21-49; P. App. 30-58, charging LeMoure with one count of violating 18 U.S.C. 242 (deprivation of constitutional rights); one count of violating 18 U.S.C. 371 (conspiracy to obstruct justice); one count of violating 18 U.S.C. 1512(b)(3) (witness tampering and obstruction of justice); four counts of violating 18 U.S.C. 1512(b)(1) (witness tampering in official proceeding); two counts of violating 18 U.S.C. 1503 (obstruction of justice); two counts of violating 18 U.S.C. 1622 (subornation of perjury); and two counts of violating 18 U.S.C. 1623 (perjury).

The same indictment charged Polito with one count of violating 18 U.S.C. 371; one count of violating 18 U.S.C. 1512(b)(3); four counts of violating 18 U.S.C. 1512(b)(1); two counts of violating 18 U.S.C. 1503; and one count of violating 18 U.S.C. 1622.

After a nine-day jury trial, both defendants were convicted of conspiracy, witness tampering, obstruction of justice and subornation of perjury under Sections 371, 1512(b)(1), 1503, 1622, and LeMoure was convicted of perjury under Section 1623. Supp. App. 606-608. The jury was unable to reach a verdict on the Section 242 count charged against LeMoure and the Section 1512(b)(3) count charged against both defendants. Supp. App. 606. On March 8, 2005, LeMoure was sentenced to 48 months' imprisonment followed by two years' supervised release. Supp. App. 710-711. Polito was sentenced to 36 months' imprisonment followed by two years' supervised release. Supp. App. 712. On March 10, 2005, upon motion of the government, the court dismissed the Section 242 charge against LeMoure and the Section 1512(b)(3) charge against both defendants. L. App. 15; P. App. 14.

STATEMENT OF FACTS

In the early morning hours of June 24, 2000, Stephen Duong drove past the East Boston Police Station. Supp. App. 165-167. Peter Fratus was in the passenger seat and Edgar Smith was in the back seat. Supp. App. 166. Fratus testified that there was music playing in the car and he had his hand out the window "catching the wind." Supp. App. 166. LeMoure, who was the duty supervisor at the East Boston Police Station, Supp. App. 404, was standing outside when the car drove past, Supp. App. 167. After the car went by, LeMoure jumped into an available cruiser and pursued it without informing the dispatcher of his

actions. Supp. App. 404. After LeMoure pulled the car over, Supp. App. 167, he went directly to the passenger side of the car and accused Fratus of giving him the finger. Supp. App. 170. He then pulled Fratus out of the car, swung him into a brick wall, threw him to the ground, punched and kneed him in the head, and hit him in the head with a flashlight. Supp. App. 170-171. LeMoure then yanked Fratus up and forcefully put him back in the passenger seat of the car. Supp. App. 172-173. Fratus testified that the blows to his head were painful, but probably were delivered with less than full force. Supp. App. 172. Doung corroborated this account, but thought that LeMoure had punched Fratus while he had the flashlight in his hand rather than directly hitting Fratus with the flashlight. Supp. App. 111-112. Peter Bolger witnessed the incident from his second floor apartment, Supp. App. 290, across the street from where the incident took place, Supp. App. 304, after being awakened, Supp. App. 293-294. He remembered seeing a police officer yelling at and kicking a civilian who was laying on the ground. Supp. App. 294-296.

Duong drove away from the scene and, soon after, called 911 to report that his friend had been beaten up by a Boston police officer. Supp. App. 174, 116. Duong then turned his car around and went back to where the incident had taken place to wait for the ambulance. Supp. App. 175-176. Boston Police Sergeant O'Connor, from the same East Boston station as LeMoure, Supp. App. 399, arrived at the scene. Supp. App. 176. Fratus and Duong told O'Connor that

Fratus had just been beaten up by a Boston police officer. Supp. App. 176, 117. O'Connor asked if they had gotten a license plate number or badge number and asked if they were sure it was a Boston police officer because there were a lot of other types of police officers around. Supp. App. 176-177, 122. Fratus and Duong described LeMoure, and Fratus told O'Connor that he had noticed that the car was a Boston police car. Supp. App. 177, 123.

During the conversation with O'Connor, an ambulance arrived and Fratus went into the ambulance to be examined. Supp. App. 177-178. The emergency medical technicians (EMTs) examined him and felt a hematoma on the top of his head. Supp. App. 158. The EMTs encouraged Fratus to go to the hospital for further evaluation, but he refused. Supp. App. 159. In the opinion of one of the EMTs, Fratus was not intoxicated and did not smell of alcohol. Supp. App. 160. While Fratus was in the ambulance, O'Connor asked Duong whether Fratus had been drinking, and Duong said that he had been drinking earlier in the day. Supp. App. 123. O'Connor informed Duong that if Fratus wanted to press charges against the officer who had assaulted him, he (Duong) would be arrested for driving with a minor under the influence. Supp. App. 123-124. When Fratus got out of the ambulance, O'Connor told him to talk to Duong. Supp. App. 178. Duong told Fratus that if he wanted to press charges, they would both be arrested because Fratus had been drinking earlier. Supp. App. 179. Fratus then went over to O'Connor, and O'Connor confirmed that if he wanted to pursue the matter, he

would be arrested and brought back to the police station. Supp. App. 179. Fratus decided to leave the scene rather than go to the Police Station. Supp. App. 179-180.

At some point, while still at the scene, Duong got a call on his cell phone. Supp. App. 124. The caller asked whether his friend had been beaten up by Boston police and whether Duong was sure his friend "didn't stick up his middle finger." Supp. App. 124-125. Duong tried to give the phone to one of the officers on the scene so that he could hear the voice, which Duong believed to be the voice of the police officer who had assaulted Fratus. Supp. App. 125. The caller hung up, and Duong saved the number in his phone. Supp. App. 125.

After Duong and Fratus left the scene, they dropped Edgar Smith off at his house. Supp. App. 126. Duong then called the number he had saved in his phone and gave the phone to Fratus, telling him that it was the cop who beat him up. Supp. App. 126-127. Fratus recognized the voice from the earlier incident. Supp. App. 181. The person on the other end of the line asked if Fratus was sure he had not given someone the finger and said it sounds like Fratus got what he deserved. Supp. App. 181.

Duong and Fratus then bought a camera and took pictures of Fratus's injuries. Supp. App. 129-130. The pictures introduced at trial showed: a ripped shirt; a bump and laceration on Fratus's head and a scrape on his neck; a bump on the right side of his head with a little bit of blackness on his right eye; a cut and

bump on the left side of his head; a cut and bump on the back of his head; and a scrape on the back of his head. Supp. App. 182-183.

The next day Fratus woke up nauseous, with a throbbing headache and pain in his face. Supp. App. 183. He rested on Saturday. Supp. App. 184. He tried to eat on Sunday and felt pain in his jaw. Supp. App. 184. He then went to the hospital and was examined. Supp. App. 183-184. The examining doctor noted the presence of abrasions and contusions. Supp. App. 143. Fratus was diagnosed with an incomplete temporal bone fracture based on the results of a CT Scan[2] and post-concussive syndrome. Supp. App. 148-149. Fratus was discharged from the hospital. Supp. App. 149.

Fratus contacted an attorney who filed a complaint with the Boston Police Internal Affairs Division (IAD). Supp. App. 187-188. The IAD initiated an investigation, and in December 2000, LeMoure received notice that the complaints filed against him were sustained. Supp. App. 402-404. In the early part of 2001, Joseph Polito approached his close friends Dante Tordiglione and Biagio DeLuca, and asked if they would give statements to the IAD on behalf of Joseph LeMoure. Supp. App. 62, 425-426. He told them that LeMoure, his boss and close friend, Supp. App. 424, was being falsely accused based on an incident that happened in East Boston. Supp. App. 62-63, 426. Both Tordiglione and DeLuca were

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[2] Subsequent review of the MRI by a radiologist hired by LeMoure disagreed with the initial diagnosis of temporal bone fracture. Supp. App. 478-480.

reluctant at first but Polito assured them that nothing would happen to them and they agreed to give the statements. Supp. App. 64, 426-427.

DeLuca was supposed to give a very specific eye witness account of the incident, while Tordiglione was just going to confirm it. Supp. App. 64. After agreeing to give the statement, DeLuca was contacted by IAD. Supp. App. 427. He then called Polito. Supp. App. 427. Polito brought DeLuca a drawing of the intersection where the incident occurred and a description of what he should say to IAD. Supp. App. 427. He was instructed to tell IAD that he saw a dark vehicle with three passengers; one passenger started walking toward a police officer yelling profanity and threatening to sue him; the passenger then turned and ran away from the officer, but the officer chased and caught up to him and they both fell to the ground; finally the passenger jumped up and got back in the car which took off toward Chelsea. Supp. App. 428. Polito instructed DeLuca to say that he was coming from the Palace nightclub and that Tordiglione was with him in the car. Supp. App. 429. Polito also told DeLuca to say that he had later bumped into LeMoure outside of a restaurant and mentioned to him that he had seen the incident, at which point LeMoure took down his contact information. Supp. App. 429. Polito told DeLuca that LeMoure really appreciated what he was doing. Supp. App. 429.

Polito told Tordiglione to just say that he saw a car get pulled over and a kid get out yelling and threatening to sue the officer and that he then lost interest. Supp. App. 63.

A couple of weeks after Polito's initial discussions with DeLuca and Tordiglione about giving a statement, they met at a club to briefly go over the statements the two would give. Supp. App. 66. Polito assured them this would be a one-time thing and was not going to go further than the IAD. Supp. App. 66-67. He mentioned that LeMoure really appreciated what they were doing for him. Supp. App. 67.

Both DeLuca and Tordiglione gave their statements to the IAD. Supp. App. 69-70, 430-431. When DeLuca contacted Polito after giving the statement, Polito assured him that it was over and that he had done a good thing. Supp. App. 431. When Tordiglione contacted Polito after giving the statement, Polito said that LeMoure owed him a favor and that he would get a free dinner sometime. Supp. App. 70-71.

LeMoure also asked his close friend Joseph Weddleton to approach Ralph DeRota, a barber who lived near where the incident had taken place, and ask him to give a statement to the IAD in support of LeMoure's version of the incident. Supp. App. 312-314. LeMoure and Weddleton knew DeRota because they frequented the same bar. Supp. App. 267, 314-315. Weddleton went to DeRota with a written account of what DeRota should say to the IAD. Supp. App. 317.

Weddleton first asked if DeRota had seen the incident, and DeRota said that he had not. Supp. App. 317. Weddleton then said a kid had filed a complaint against LeMoure and asked if DeRota would give a statement saying that he had seen the incident. Supp. App. 270-271, 317. DeRota agreed and Weddleton told him the story LeMoure wanted him to give to the IAD. Supp. App. 319. DeRota was to say he saw a kid get out of his car talking and flaring his arms at a Boston police officer; that the officer grabbed him by the arm to keep him from leaving the scene; the kid pulled away, hit a building and fell down; the officer tried to get him up; the kid continued to give him a hard time, but finally the officer was able to put the kid back in the car. Supp. App. 271-272. Weddleton told DeRota that LeMoure would thank him for doing this. Supp. App. 273. Weddleton gave DeRota's phone number to LeMoure. Supp. App. 319. After his meeting with Weddleton, DeRota got a call from the Boston Police. Supp. App. 273. He then went to police headquarters and gave his statement. Supp. App. 273-274. LeMoure informed Weddleton that DeRota had been a good witness. Supp. App. 320. Later, Weddleton and LeMoure ran into DeRota at a restaurant and LeMoure paid his tab. Supp. App. 275-276.

Even with the statements of the recruited witnesses, the IAD sustained the complaint filed against LeMoure. Supp. App. 402, 411. As a result, LeMoure was suspended. Supp. App. 431. After the IAD sustained the complaint, Polito organized a benefit to raise money for LeMoure because he had been suspended

from the force. Supp. App. 72, 431-432. Polito and Weddleton sold tickets to the benefit for $50 each. Supp. App. 323, 432. DeLuca and Tordiglione attended the event. Supp. App. 74-75, 432. Polito gave Tordiglione a ticket and told him that it was important that he come as a show of solidarity for LeMoure. Supp. App. 74-75. At the event, LeMoure told Tordiglione that he appreciated Tordiglione's giving a statement to IAD and described the situation as "really an us-against-them thing." Supp. App. 76.

After the IAD complaint was sustained, LeMoure learned that Fratus had filed a civil lawsuit against him. Supp. App. 323-324. He told Weddleton that he viewed this development as inevitable. Supp. App. 323-324. He also told Weddleton that the three witnesses, Tordiglione, DeLuca, and DeRota, would be subpoenaed for the civil case. Supp. App. 324. He suggested to Weddleton that DeRota could look at the transcript of his IAD statement to refresh his memory for the civil deposition. Supp. App. 324.

Sometime in the summer of 2002, DeRota was served with a subpoena for a deposition in the civil case. Supp. App. 276-277. After this occurred, Weddleton contacted DeRota and brought him the transcript of his IAD statement to review. Supp. App. 278-279. Weddleton told DeRota that he should say the same thing in the deposition that he had said to the IAD. Supp. App. 326. At the deposition, DeRota and LeMoure pretended not to know each other, and DeRota repeated the false testimony that he had given to the IAD. Supp. App. 282-283. After the

deposition, LeMoure told Weddleton that DeRota had been a good witness and that he had stuck to his story. Supp. App. 327.

Sometime after the benefit, Polito told DeLuca that LeMoure was being sued by Fratus. Supp. App. 433. Polito warned DeLuca that he might be getting a subpoena, but that he was doing the right thing and it was just a civil matter. Supp. App. 433. Polito also told DeLuca that LeMoure would do anything in his power to keep DeLuca out of trouble even if it meant settling the case. Supp. App. 433. When DeLuca was subpoenaed, Supp. App. 433, he called Polito to say that he was starting to get nervous, Supp. App. 435. Polito told him that it was just a civil matter and nothing criminal would ever come out of it. Supp. App. 435. DeLuca, who had become a police cadet in June 2001, Supp. App. 424, expressed concern about the possibility that he would lose his job, Supp. App. 436. He later met with LeMoure and Polito at a restaurant where LeMoure told him he was doing a good thing and to just stick to his story. Supp. App. 436. When DeLuca expressed concern about his job, LeMoure told him that he would lose his job if he changed his story now. Supp. App. 437.

At some point after the benefit, Polito also told Tordiglione that there had been a civil suit filed against LeMoure. Supp. App. 77. Tordiglione was then served with a subpoena to appear for a deposition in that civil suit. Supp. App. 77. Tordiglione told Polito he was upset about the subpoena because Polito had assured him the IAD statement was a one time thing and he did not want to lie

under oath. Supp. App. 79-80. Polito responded that people lie in civil suits all the time and it was not a big deal. Supp. App. 80. Polito told Tordiglione that he should stick to the story he told to the IAD. Supp. App. 80. Tordiglione discussed the situation with his girlfriend at the time, who advised him that if he lied under oath, he would be committing perjury and could go to jail. Supp. App. 81. He later saw Polito in the street and expressed his concern about what he should do. Supp. App. 82. Polito responded, "[d]o what you got to do." Supp. App. 82. However, when Tordiglione said he was planning to tell the truth, Polito came back and told him that was not an option and that he should stick to his story. Supp. App. 82.

The next day, Polito told Tordiglione that LeMoure wanted to speak to him and they went to LeMoure's house. Supp. App. 82-83. Tordiglione again aired his concerns, but LeMoure told him that a civil suit is not a big deal, that people lie under oath all the time, and that if he just stuck to his story everything would be fine. Supp. App. 83. LeMoure also said that they needed to stick together and show unity on this. Supp. App. 84. Polito added that the plaintiff in the case was a project rat and they had to keep Tordiglione's statement solid because they could not let someone like that "get over Joe LeMoure." Supp. App. 84. Polito then gave Tordiglione a copy of his statement to IAD, and both he and LeMoure said that Tordiglione should read it over to make sure that his testimony stayed consistent. Supp. App. 85. Tordiglione also reviewed DeLuca's IAD statement

while he was still at LeMoure's house. Supp. App. 85. LeMoure, Polito and Tordiglione then left LeMoure's house and went for drinks. Supp. App. 92. LeMoure and Polito again assured Tordiglione that lying under oath was no big deal and urged him to stick to his story. Supp. App. 92. LeMoure told Tordiglione that he had a suit going on with the city and that, when he won that suit, he would give Tordiglione $10,000 for his trouble. Supp. App. 92. Polito had also previously raised the possibility of payment. Supp. App. 92.

Before their depositions, Tordiglione and DeLuca had a conversation. Supp. App. 99, 437. Tordiglione said that he did not think it was a good idea to lie under oath and he was just going to say he did not remember anything. Supp. App. 99, 438. DeLuca said that he did not want to lose his job so he was going to stick to his story. Supp. App. 99, 438.

DeLuca called Polito to tell him what Tordiglione had said and express his concern. Supp. App. 438. Polito said not to worry because no one would believe Tordiglione since he had changed his story. Supp. App. 438. Polito told DeLuca that LeMoure was likely to be a lieutenant and would take care of him when this was over, and that if he changed his story now, they would all go to jail. Supp. App. 439. At this point, Polito gave DeLuca a copy of his statement to IAD to review in preparation for the deposition. Supp. App. 439.

At his deposition, DeLuca stuck to the same false story that he had told the IAD. Supp. App. 440. After the deposition, he called Polito and said the lawyer

had known he was lying. Supp. App. 441. Polito called Tordiglione to tell him that DeLuca had stuck to his story and now it was up to him to go in and back DeLuca up. Supp. App. 99-100.

At his deposition, Tordiglione said that he did not remember the incident. Supp. App. 100-101. However, he testified falsely that his IAD testimony was true and based on his own observation of the incident. Supp. App. 101. He also testified that no one had told him what to say to IAD, and that he did not speak to Polito about the IAD statement before or after he gave it. Supp. App. 101. Tordiglione called Polito to tell him that he had tried to cover everyone, including himself, but that the deposition had gone very badly. Supp. App. 102.

LeMoure also gave deposition testimony. Supp. App. 454-465. He testified that Fratus got out of the car while he was still in his police cruiser and began walking toward him and yelling. Supp. App. 456. He stated that Fratus fell down while he was attempting to gain control of Fratus, Supp. App. 457, and that after Fratus fell down, he placed his knee on Fratus's chest, Supp. App. 458. LeMoure said that he then picked Fratus up, Supp. App. 459, and used some force to get Fratus back into the car, Supp. App. 459-460. LeMoure testified that he did not strike, kick, or knee Fratus, and that he did not pull him out of the car. Supp. App. 460-461. He further testified that Fratus's face did not bang against the wall or pavement. Supp. App. 460-461. LeMoure stated that he was not holding any object in his hand during the incident. Supp. App. 461. LeMoure testified that

had not met Ralph DeRota, Biagio DeLuca, or Dante Tordiglione prior to the time they came forward as witnesses. Supp. App. 463-465. LeMoure said that he met DeLuca while on duty several months after the incident and, in the course of their conversation, DeLuca happened to mention that he and a friend had witnessed the incident. Supp. App. 463-464. The civil lawsuit settled. Supp. App. 104.

Sometime after his deposition testimony, DeLuca was visited by FBI agent Maureen Robinson. Supp. App. 442. She told him that she knew he was lying, but he denied it and stuck to his story. Supp. App. 442. She then served him with a grand jury subpoena. Supp. App. 442. DeLuca then called Polito and told him what happened, and Polito told DeLuca that he would call LeMoure and see what he thought. Supp. App. 443. Polito then picked DeLuca up and told DeLuca that LeMoure would help him with the lawyer's fee, that the government did not really have anything on him, and that the whole thing would eventually go away if he stuck to his story. Supp. App. 443. They then picked up Tordiglione and told him what had happened. Supp. App. 443, 104-105. Tordiglione got upset and said he thought it was stupid to lie to the FBI. Supp. App. 105. Polito said that they could not get caught for anything they had done so far and, if he just stuck to the original story, things would be okay. Supp. App. 105. DeLuca told Tordiglione that he still planned to stick to his story. Supp. App. 105. Tordiglione told them he was still with them, but, immediately after, told his father about his predicament. Supp. App. 106.

Soon after, Tordiglione was served with a grand jury subpoena. Supp. App. 107. He called Polito to let him know that he got the subpoena, but then got in touch with an attorney. Supp. App. 107-108. Tordiglione and his attorney met with the prosecutors at the U.S. Attorney's Office. Supp. App. 108. At some point after he talked to the federal prosecutor, Tordiglione called Polito to tell him he had spoken to a lawyer and could no longer talk about the case. Supp. App. 109. Polito told him that there were a lot of people involved and if he changed his story, "the pyramid would crumble and everything would be gone." Supp. App. 109. Tordiglione called Polito again to get DeLuca's phone number, which had recently been changed, and he accused Polito and LeMoure of having taken advantage of him. Supp. App. 109-110. Polito told him to just stick to the story. Supp. App. 110. Tordiglione was granted immunity by the government. Supp. App. 61.

DeRota was also visited by the FBI. Supp. App. 285. He immediately confessed that he had lied. Supp. App. 285. He then obtained an attorney and was granted immunity by the government. Supp. App. 286. DeRota later got a call from Weddleton and told Weddleton that the FBI had been to see him. Supp. App. 286.

Sometime after he was visited by the FBI, DeLuca met with LeMoure. Supp. App. 444. LeMoure told him that he was doing the right thing and, if he stuck to his story, everything would be okay. Supp. App. 444. LeMoure then

went over to DeLuca's house to assure DeLuca's mother that everything would be okay and that he would turn himself in if things got too hot. Supp. App. 445. Later, Polito gave DeLuca $2000 for a lawyer which he said came from LeMoure. Supp. App. 445. After meeting with a lawyer, DeLuca told LeMoure that the lawyer had advised him to "plead the Fifth." Supp. App. 446. LeMoure told him that if he did that he would lose his job and that he should stick to his story instead. Supp. App. 446. LeMoure said that the only reason DeLuca had been visited by the FBI was that Tordiglione, whom LeMoure called a rat and "Sammy the Bull," had changed his story. Supp. App. 446-447. LeMoure said that nobody would believe Tordiglione because he had changed his story so often. Supp. App. 448. Polito later gave DeLuca another $5000 from LeMoure for his lawyer's fees. Supp. App. 448.

At some point, DeLuca called Tordiglione and told him that his attorney said the government had nothing on them, that he was going to stick to his story, and that Tordiglione should do the same. Supp. App. 451-452.

Before testifying in the grand jury, DeLuca talked to Weddleton, who told him that the FBI had requested his fingerprints and that the other witness, DeRota, may have ratted on everybody. Supp. App. 452. After that, DeLuca got a different attorney. Supp. App. 419, 452. He eventually pleaded guilty to perjury and agreed to testify truthfully in exchange for the government's promise to recommend probation. Supp. App. 419, 452.

SUMMARY OF ARGUMENT

This Court should affirm Polito's convictions and sentence.

1. Polito's argument that 18 U.S.C. 1503 does not allow conviction for witness tampering ignores the language of the provision's omnibus clause. Section 1503 clearly applies to corrupt influencing of a witness if, in so doing, a defendant "influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." This Court should follow the clear majority of courts of appeal and reject the argument that legislative action in 1982 and 1988 silently repealed Section 1503's coverage of witness-related obstruction of justice. Even if this Court were to find error, it should determine that the error was not obvious and decline to reverse on plain error review.

2. The government presented sufficient evidence for a reasonable jury to find Polito guilty of the violations of 18 U.S.C. 1512(b)(1) charged in Counts Five, Six, Eleven, and Twelve of the indictment. The jury did not need to find that Polito engaged in misleading conduct in order to convict him because there was sufficient evidence that he corruptly persuaded witnesses "with the intent to influence, delay, or prevent the testimony of any person in an official proceeding." 18 U.S.C. 1512(b)(1). Polito admits that he asked his friends to lie and told them what to say. That constitutes corrupt persuasion for purposes of Section 1512(b)(1).

3. The district court correctly instructed the jury on Counts Five, Six, Eleven, and Twelve of the indictment alleging violations of Section 1512(b)(1).

A. The court's instructions made clear that "misleading conduct" for purposes of Section 1512(b)(1) must be directed at the witness whose testimony the defendant was trying to influence. In any event, Polito was almost certainly convicted of the Section 1512(b)(1) violations based on his corrupt persuasion of the witnesses. Therefore, any error in defining misleading conduct would not have affected Polito's substantial rights and thus would not warrant reversal on review for plain error.

B. The district court correctly instructed the jury on the *mens rea* element of Section 1512(b)(1), and made clear that they must find that Polito was conscious of his wrongdoing in order to convict.

C. Polito's argument that the district court committed plain error by failing to make the nexus requirement of Section 1512(b)(1) sufficiently clear assumes, incorrectly, that his convictions of Counts Five, Six, Eleven, and Twelve were based on convincing his friends to lie to the Boston Police. Rather, these convictions were based on his repeated attempts to convince his friends to stick to their story in their civil depositions and for purposes of the federal investigation.

4. Polito's contention that the district court committed plain error by failing, *sua sponte*, to conclude Counts Six, Nine, and Ten of the indictment violated the Double Jeopardy Clause is without merit. None of Polito's

convictions violate his Double Jeopardy rights under the *Blockburger* test. In any event, if there was error, the error was not clear or obvious.

This Court should affirm LeMoure's convictions and sentence.

5. The district court did not commit plain error by failing to, *sua sponte*, exclude testimony on the conversation between LeMoure and Joseph Weddleton about the possibility of Weddleton invoking the Fifth Amendment. This testimony is not even prejudicial since the government did not suggest that LeMoure's suggestion that Weddleton "take the Fifth" was illegal. Indeed, LeMoure argued on cross-examination that the testimony showed that LeMoure refrained from asking Weddleton to lie for him, and rather advised Weddleton to do what was in his own best interest.

6. The district court correctly determined LeMoure's offense level under the Federal Sentencing Guidelines. The court correctly concluded that LeMoure's actions obstructed an investigation into a violation of 18 U.S.C. 242 that included allegations that he hit Fratus with a police flashlight. Thus, the court properly referenced both Sentencing Guidelines § 2H1.1 (offenses involving individual rights) and Sentencing Guidelines § 2A2.2 (aggravated assault).

ARGUMENT[3]

I

THE DISTRICT COURT CORRECTLY ALLOWED THE CHARGED VIOLATIONS OF 18 U.S.C. 1503 IN COUNTS NINE AND TEN OF THE INDICTMENT TO BE DECIDED BY THE JURY

Counts Nine and Ten of the indictment charged Polito with obstructing the due administration of justice in violation of 18 U.S.C. 1503. Polito failed to move for dismissal of Counts Nine and Ten in district court. See Fed. R. Crim. P. 12(b)(3)(B). Therefore, his challenge to those counts in this Court should be reviewed for plain error. See *United States* v. *Fusaro*, 708 F.2d 17, 25-26 (1st Cir. 1983). To show plain error, Polito must establish that: (1) an error occurred (2)

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[3] Polito's arguments, responded to in Sections I-IV of this brief, concern his convictions for obstructive conduct related to the civil case filed against LeMoure and a grand jury inquiry into his conduct and that of LeMoure.

Polito's convictions related to the civil case against LeMoure are:

Count Five - violation of Section 1512(b)(1) - attempting to convince Tordiglione to stick to the false story in Tordiglione's deposition testimony. **Count Six** - violation of Section 1512(b)(1) - influencing DeLuca to stick to the false story in DeLuca's deposition testimony.

Count Nine - violation of Section 1503 - endeavoring to influence the due administration of justice in the civil suit against LeMoure by persuading and attempting to persuade Tordiglione and DeLuca to give false deposition testimony.

Count Eight - violation of Section 1622 - suborning DeLuca's perjurious deposition testimony.

Polito's convictions related to the Grand Jury are:

Count Eleven - violation of Section 1512(b)(1) - attempting to influence Tordiglione to stick to the false story in proceedings before the Grand Jury.

Count Twelve - violation of Section 1512(b)(1) - attempting to influence DeLuca to stick to the false story in proceedings before the Grand Jury.

Count Ten - violation of Section 1503 - endeavoring to influence the due administration of justice in the proceedings before the Grand Jury by attempting to persuade Tordiglione and DeLuca to give false testimony.

which was clear or obvious and which not only (3) affected his substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of the judicial proceeding. See *United States* v. *Henderson*, 320 F.3d 92, 102 (1st Cir. 2003), (citing *United States* v. *Gomez*, 255 F.3d 31, 37 (1st Cir. 2001)). See also *United States* v. *Winter*, 70 F.3d 655, 659 (1st Cir. 1995) ("Even if an appellant establishes plain error affecting substantial rights, the decision to correct that error lies within the sound discretion of this court."). This Court has "leeway to correct only the most egregious of unpreserved errors." *United States* v. *Sanchez-Berrios*, 424 F.3d 65, 73 (1st Cir. 2005).

Here, review of the indictment and Section 1503 shows there was no error, plain or otherwise, in the district court.

Section 1503(a) of Title 18 provides in relevant part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be punished as provided in subsection (b).

(emphasis added).

The plain language of the statute broadly covers corruptly influencing, obstructing, impeding, or endeavoring to influence, obstruct, or impede "the due administration of justice." 18 U.S.C. 1503(a). Unlike the first clause of Section 1503, which limits its application to actions taken to influence jurors, courts, and other judicial officials, the omnibus clause has no such limitation. It clearly encompasses corruptly influencing the due administration of justice by influencing and attempting to influence the testimony of witnesses.

Prior to 1982, the first clause of Section 1503 contained direct reference to "any witness, in any court of the United States or before any United States commissioner or other committing magistrate." The 1982 amendment, part of the Witness and Victim Protection Act (WVPA), Pub. L. No. 97-291, 96 Stat. 1248, removed that direct reference to witnesses from Section 1503 but the omnibus clause of the statute remained unchanged. WVPA § 4(c), 96 Stat. 1253. Therefore, both before and after the 1982 amendment of Section 1503, the omnibus clause punishes witness tampering which "corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. 1503.

Polito's argument that the 1982 amendment removed coverage of witness tampering completely ignores the plain meaning of the omnibus clause. The WVPA also created 18 U.S.C. 1512, which specifically addresses "the influencing of witnesses, victims, and informants." See *United States* v. *Ladum*, 141 F.3d

1328, 1337 (9th Cir. 1998). Polito argues that by amending Section 1503 and enacting Section 1512, Congress intended to remove witness tampering from the scope of Section 1503. However, nothing in the text of Section 1512 purports to change the meaning of the omnibus clause of Section 1503. Thus, Polito asks this Court to recognize a repeal by implication. Repeals by implication, however, are disfavored, especially in the face of plain statutory language. *United States* v. *Aguilar*, 515 U.S. 593, 616 (1996) (Scalia, J., concurring and dissenting) ("It is, moreover, 'a cardinal principle of statutory construction that repeals by implication are not favored.'") (quoting *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976) and *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)).

Justices Scalia, Thomas and Kennedy addressed this issue in a portion of their concurring and dissenting opinion in *Aguilar*, which reached issues not examined by the majority. They concluded that the omnibus clause of Section 1503 reaches witness tampering. That opinion stated:

> The 1982 amendment, however, did nothing to alter the omnibus clause, which by its terms encompasses corrupt "endeavors to influence, obstruct, or impede, the due administration of justice." The fact that there is now some overlap between § 1503 and § 1512 is no more intolerable than the fact that there is some overlap between the omnibus clause of § 1503 and the other provisions of § 1503 itself. It hardly leads to the conclusion that § 1503 was, to the extent of the overlap, silently repealed.

Id. at 615-616.

The majority of courts of appeal have reached the same conclusion. See *e.g.*, *United States* v. *Ladum*, 141 F.3d 1328, 1338 (9th Cir. 1998) (determining that "the omnibus clause of § 1503 continues to prohibit witness tampering" and supporting that determination with the conclusion that "the drafters of the 1988 legislation (amending Section 1512) believed that the omnibus clause of § 1503 would still prohibit witness tampering."); *United States* v. *Tackett*, 113 F.3d 603, 607-612 (6th Cir. 1997) (extensively analyzing the 1982 amendment to Section 1503 and the 1988 amendment to Section 1512 and determining that Congress did not intend by those amendments to remove witness tampering from the coverage of Section 1503's omnibus clause.); *United States* v. *Maloney*, 71 F.3d 645, 658-659 (7th Cir. 1996) (concluding that Section 1503 continues to cover witness tampering after the Congressional action in 1982 and 1988); *United States* v. *Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992) (same); *United States* v. *Kenny*, 973 F.2d 339, 342-343 (4th Cir. 1992) (same).

Polito relies on *United States* v. *Hernandez*, 730 F.2d 895 (2d Cir. 1984) and *United States* v. *Masterpol*, 940 F.2d 760 (2d Cir. 1991), to argue that the court should have dismissed Counts Nine and Ten. In *Hernandez* and *Masterpol*, the Second Circuit concluded that Section 1503 does not cover witness tampering because the 1982 legislation deleted all reference to witnesses in Section 1503 and added Section 1512 to specifically punish witness tampering. *Masterpol*, 940 F.2d at 763 (citing *Hernandez*, 730 F.2d at 898). In *Masterpol*, the Second Circuit also

found support for this conclusion in the 1988 amendment of Section 1512. *Ibid.* The 1988 amendment, however, provides no support for Polito's argument. In 1988, Section 1512 was amended "to cover non-coercive witness tampering." *Ladum*, 141 F.3d at 1337; see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a), 102 Stat. 4397-4398. This amendment did not alter the omnibus clause of Section 1503 or purport to change its meaning. *Ladum*, 141 F.3d at 1338. To the contrary, legislative history confirms that "the drafters of the 1988 legislation believed that the omnibus clause of § 1503 would still prohibit witness tampering." *Ibid.* The section-by-section analysis accompanying the act notes that the Second Circuit's decision in *Hernandez* has been rejected by other circuits. 134 Cong. Rec. S17,630-02 (November 10, 1988) (statement of Senator Biden). The analysis makes clear that Section 1503 continues to cover witness tampering, noting that the amendment to Section 1512 is "intended * * * merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (*and is*) found in section 1503." 134 Cong. Rec. S17,630-02 (November 10, 1988) (statement of Senator Biden) (emphasis added). Rather than supporting Polito's argument, "all the evidence points in just the opposite direction." *Tackett*, 113 F.3d at 610.[4]

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[4] *Hernandez* relied heavily on a statement by Senator Heinz that the WVPA "amends section 1503 so it will make no mention of, and provide no protection to, supenaed [*sic*] witnesses." *Hernandez*, 730 F.2d at 899 (quoting 128 Cong. Rec. S13063 (daily ed. Oct. 1, 1982) (emphasis)). The Sixth Circuit explained that

(continued...)

The Second Circuit has not reconsidered this issue since its decision in *Masterpol*, but recently admitted that the reasoning of *Masterpol* "has been rejected by every other federal court of appeals that has considered the issue." *United States* v. *Bruno*, 383 F.3d 65, 87 (2d Cir. 2004).[5]

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[4](...continued)

> [t]he remainder of Senator Heinz's comments, however, make it impossible to take this statement at face value. The senator explicitly stated that the final version of the bill did not contain an omnibus clause because such a provision would be "beyond the legitimate scope of this witness protection measure [and] is probably duplicative of [o]bstruction of justice statutes already in the books." 128 Cong. Rec. S26,810. This statement would make no sense if Senator Heinz truly believed that the new law excluded witness tampering from the scope of § 1503's omnibus clause: Congress would hardly omit a new provision from the final legislation as duplicative of an existing law and simultaneously repeal the older provision.

Tacket, 113 F.3d at 610.

Despite *Hernandez*'s heavy reliance on an isolated floor statement to reach the conclusion that the WVPA silently repeals the omnibus clause's coverage of witness-related obstruction, *Masterpol* makes no mention of the legislative history of the 1988 amendment of Section 1512 rejecting *Hernandez*'s interpretation of Section 1503.

[5] In *United States* v. *Marrapese*, 826 F.2d 145, 147-148 (1st Cir. 1987), this Court recognized the split on this issue between the Second Circuit and the other circuits that have considered it. However, in *Marrapese*, the Court resolved the issues before it without determining the proper coverage of Section 1503. *Ibid.* Though it did not directly address this issue, in *United States* v. *Foley*, 871 F.2d 235, 235 (1st Cir. 1989), this Court upheld the Section 1503 conviction of a

(continued...)

This Court should reject the reasoning and conclusion of *Hernandez* and *Masterpol* since they are inconsistent with the plain language of Section 1503 and based on a flawed reading of legislative history. Instead, this Court should follow the clear majority position on this issue and determine that Section 1503 properly supports Polito's convictions on Counts Nine and Ten.

Even if this Court is persuaded by the reasoning in *Hernandez* and *Masterpol*, it should find that the district court did not commit plain error. With no decision on point in this circuit and the majority of courts rejecting the reasoning and conclusion of *Hernandez* and *Masterpol*, the error, if any, was by definition not clear or obvious as is required for reversal under plain error review.

II

THE EVIDENCE PRESENTED WAS SUFFICIENT TO SUPPORT POLITO'S CONVICTIONS UNDER 18 U.S.C. 1512(b)(1)

This Court reviews *de novo* the sufficiency of the evidence, examining "all the evidence, direct and circumstantial, in the light most favorable to the prosecution, drawing all reasonable inferences consistent with the verdict, and avoiding credibility judgments, to determine whether a rational jury could have

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[5](...continued)
defendant who "threatened a witness to prevent him from giving information to the government."

found the defendant guilty beyond a reasonable doubt." *United States* v. *Beckett*, 321 F.3d 26, 33 (1st Cir. 2003).

Section 1512(b)(1) of Title 18 provides:

> Whoever 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--
>
> (1) influence, delay, or prevent the testimony of any person in an official proceeding
>
> *****
>
> shall be fined under this title or imprisoned not more than ten years, or both.

Politio appears to argue, P. Br. 9-11, that there was insufficient evidence to convict him of Counts Five, Six, Eleven, and Twelve — all of which involved violations of Section 1512(b)(1) — because there is no evidence that he engaged in misleading conduct toward Tordiglione or DeLuca. Instead, he argues, the evidence was "clear that [he] asked [them] to lie and provided the details of the falsehood to be told." P. Br. 10-11. The premise of this argument appears to be that Section 1512(b)(1) is violated only when a defendant engages in misleading conduct. That interpretation ignores the plain statutory language, which clearly punishes corruptly persuading another person. 18 U.S.C. 1512(b)(1) (punishing a defendant who "uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, *or* engages in misleading conduct toward another person") (emphasis added). By Polito's own admission, the jury was presented with clear evidence that he asked witnesses to lie and told them what to say. P. Br.

10-11. Coaching witnesses to lie is corrupt persuasion for purposes of Section 1512(b)(1). See *United States* v. *Cruzado-Laureano*, 404 F.3d 470, 487 (1st Cir. 2005) ("Trying to persuade a witness to give false testimony counts as 'corruptly persuading' under § 1512(b).").

Polito relies on *United States* v. *King*, 762 F.2d 232, 237-238 (2d Cir. 1985), as authority for his argument that Section 1512(b)(1) does not support a conviction for asking a witness to lie without engaging in any misleading conduct toward the witness. *King*, however, dealt with an earlier version of the statute which did not include "corruptly persuades another person, or attempts to do so." See Anti Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (amending 18 U.S.C. 1512); see also *United States* v. *Khatami*, 280 F.3d 907, 912 (9th Cir. 2002) (noting that *King* dealt with an earlier version of Section 1512 and Congress later closed the gap in the statute which *King* identified). Accordingly, it does not support Polito's argument.

III

THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY ON SECTION 1512(b)(1) DID NOT CONSTITUTE PLAIN ERROR

Polito did not object below to the court's jury instructions on Section 1512 and, therefore, this Court should review his claim on appeal only for plain error. *United States* v. *Molina*, 407 F.3d 511, 527 (1st Cir. 2005) (jury instructions not objected to when given subject only to plain error review); see p. 22, *supra* (explaining requirements of the plain error standard).

A. The Jury Instructions Correctly Defined "Misleading Conduct" For Purposes Of Section 1512(b)(1)

Polito asserts that the district court's jury instructions were erroneous because they did not make clear that "misleading conduct" for purposes of Section 1512(b)(1) must be directed at the witness and not government officials or an official proceeding. P. Br. 12-13. This assertion is meritless because the jury instructions make clear that the misleading conduct must be done "with the intent to influence, delay or prevent *the testimony of a person* in an official proceeding." Supp. App. 520 (emphasis added). The court emphasized this requirement, stating "[s]o again, there must be proof of the specific intent to accomplish that purpose, to influence, delay or prevent *the testimony of a person* in an official proceeding." Supp. App. 522 (emphasis added). In order to find that the misleading conduct was done with the intent to influence testimony, the jury would have to find that the misleading conduct was directed at the witness whose testimony Polito was charged with influencing or attempting to influence. Nothing in the jury instructions for the Section 1512(b)(1) counts (Five, Six, Eleven and Twelve) suggests that Polito could be convicted for engaging in misleading conduct toward the official proceeding.

In any event, the evidence was more than sufficient to convict Polito for corruptly persuading witnesses to lie in an official proceeding. Indeed, Polito admits, he "asked [Tordiglione and DeLuca] to lie and provided the details of the

falsehood to be told." P. Br. 10-11. Therefore, even if the court had somehow suggested that Polito could be convicted for engaging in misleading conduct toward the proceeding, it would not have affected his substantial rights since the jury could convict Polito solely on the basis of his having asked witnesses to lie.

B. The District Court Correctly Instructed The Jury On The Mens Rea *Element Of Section 1512(b)(1)*

Polito also argues, P. Br. 25-28, that the district court ignored the requirement that violations of Section 1512(b)(1) be committed "knowingly." However, this element was clearly conveyed in the district court's instructions. The court instructed the jury that to convict it must find that Polito "knowingly corruptly persuaded or engaged in misleading conduct toward another person." Supp. App. 520. In *Arthur Andersen* v. *United States*, 544 U.S. 696, 705-706 (2005), a case decided two months after the jury instructions in this case were given, the Supreme Court made clear that the term "knowingly corruptly persuade" requires that a defendant be conscious of wrongdoing. This requirement was clearly conveyed by the district court even though it did not have the benefit of the *Arthur Andersen* decision. The Court instructed the jury that it must find that Polito acted with "an improper purpose," which necessarily entails consciousness of wrongdoing. An example of this, the court noted, is "*deliberately* asking or suggesting to a person, directly or indirectly, to lie or testify falsely," but only if such conduct was "motivated by an improper purpose."

Supp. App. 521 (emphasis added). The court's instruction on the required *mens rea* was not error, and certainly not plain error.

C. The District Court Correctly Instructed The Jury On The Nexus Required By Section 1512(b)(1) Between The Obstructive Conduct And The Testimony Defendant Intended To "Influence, Delay, Or Prevent"

Polito next argues, P. Br. 26-28, that the district court erred by failing to instruct the jury about the required nexus between his obstructive conduct and the testimony he intended to "influence, delay, or prevent." See 18 U.S.C. 1512(b)(1). Polito relies on the Supreme Court's holding in *United States* v. *Aguilar*, 515 U.S. 593 (1996), that, for purposes of Section 1503, the defendant must know "that his actions are likely to affect the judicial proceeding" in order to have "the requisite intent to obstruct." 515 U.S. at 599. He then appears to argue, P. Br. 26-27, that he could not properly be convicted of obstruction of justice with respect to the civil case against LeMoure and the grand jury proceeding because there was not a sufficient nexus between those proceedings and his convincing witnesses to lie to the Boston Police Department IAD.

First, *Arthur Andersen* should not be read as imposing on Section 1512(b)(1) the precise nexus requirement which *Aguilar* held applicable to Section 1503. The language of the two statutes is significantly different. While Section 1503 punishes "endeavors to influence, obstruct, or impede, the due administration of justice," Section 1512(b)(1) prohibits "intent to influence, delay, or prevent the testimony of any person in an official proceeding." In *Arthur Andersen*, the Court

made clear that, in order to be found guilty of violating Section 1512(b)(1) or (2), the person engaging in obstructive conduct must "have in contemplation" some official proceeding where that conduct might have an effect. 544 U.S. at 707-708. In contrast, the majority in *Aguilar* read the word "endeavor" as making "conduct punishable where the defendant acts with an intent to obstruct justice, *and* in a manner that is likely to obstruct justice." 515 U.S. at 601 (emphasis added). By its terms, Section 1512(b)(1) requires *only* "intent" to "influence, delay, or prevent" testimony. It would seem to follow, therefore, that the nexus required by Section 1512(b)(1) should not require a defendant to know "that his actions are *likely* to affect the judicial proceeding." See *Aguilar*, 515 U.S. at 599.

In any event, Polito's nexus argument ignores the fact that he was not convicted for convincing witnesses to lie to the IAD, but rather for convincing and attempting to convince witnesses to "stick to their story" in the civil deposition and grand jury proceeding. Supp. App. 31-32, 80, 82-83, 99-100, 105, 109-110, 436-487, 439, 443. The jury instructions made this clear. For the Section 1512(b)(1) counts, the court instructed that the jury must find that Polito had the "specific intent" to influence "testimony of a person in an official proceeding," and instructed that civil depositions and grand jury proceedings were official proceedings. Supp. App. 522. In addition to these clear instructions, the jury had the indictment which made specific reference in each count to a particular proceeding, civil deposition or grand jury. P. App. 42-43, 50-51. The instructions

and indictment, thus, make clear that the jury should convict only for obstructive conduct intentionally directed at the identified proceeding, civil deposition or grand jury, and not previous obstructive conduct. The court specifically instructed the jury, in the context of Count Three (18 U.S.C. 1512(b)(3)), that causing false information to be provided to the IAD "does not itself constitute a federal offense." Supp. App. 518. There is a presumption that the jury followed the court's instructions. *United States* v. *Kornegay*, 410 F.3d 89, 97 (1st Cir. 2005).

In any event, even if the jury instruction did not properly describe the required nexus between the obstructive conduct and the proceedings, reversal under the plain error standard would be unwarranted. Polito's substantial rights were not affected because of the overwhelming evidence that he influenced and attempted to influence the witnesses to "stick to their story" in the civil deposition and grand jury proceeding. Supp. App. 31-32, 80, 82-83, 99-100, 105, 109-110, 436-487, 439, 443.

IV

NONE OF POLITO'S CONVICTIONS VIOLATE HIS DOUBLE JEOPARDY RIGHTS

This Court should review Polito's claim that he was subjected to multiple punishments for the same offense only for plain error because it was not raised at trial. *United States* v. *Patel*, 370 F.3d 108, 114 (1st Cir. 2004); see p. 22, *supra* (explaining requirements of the plain error standard).

Polito contends that his double jeopardy rights have been violated by multiple convictions in a single trial based on the same underlying facts. This Court has recognized that, in this context, "the Double Jeopardy Clause protects against multiple punishments for the same offense," where such punishments are not authorized by Congress. *Patel*, 370 F.3d at 114. Therefore, "determining the permissibility of imposing multiple punishments for one course of conduct is a matter of discerning [Congress's] intent." *Ibid.*

If the intent of Congress is not apparent, "the *Blockburger* test is employed to determine whether [Congress] intended to authorize multiple punishments." *Ibid.* "Under *Blockburger*, 'where the same act or transaction constitutes a violation of two (or more) distinct statutory provisions, the test to be applied to determine whether there are two (or more) offenses or only one is whether each provision requires proof of an additional fact which the other does not.'" *Ibid.* (quoting *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)).

Polito misunderstands the *Blockbuger* test when he complains that "the same proof" was allowed to form the basis of his convictions under multiple statutes. See P. Br. 20, 24. This Court has made clear that "[t]he *Blockburger* test looks to the elements of each offense rather than to the evidence used to prove these elements." *United States* v. *Lanoue*, 137 F.3d 656, 661 (1st Cir. 1999). For example, in *United States* v. *Abreu*, this Court applied the *Blockburger* test and concluded there was no Double Jeopardy problem where "conviction under [one

count of an indictment] required proof that defendant maintained a [cocaine] distribution center, [but conviction under another count] required proof of actual distribution of cocaine," because "[t]hese are separate facts to be proven." 952 F.2d 1458, 1464 (1st Cir. 1992).

A. Polito's Conviction For Violation Of Section 1512(b)(1) Charged In Count Six Of The Indictment Did Not Violate His Double Jeopardy Rights

Convictions for violations of Section 1622 and Section 1512(b)(1) do not violate Polito's Double Jeopardy rights under *Blockburger*[6] because each requires proof of an additional fact which the other does not. In order to convict Polito under Section 1622 the government had to prove that he

> 1) "Procured [DeLuca]" to
> 2) "knowingly"
> 3) "make[] any false * * * declaration, or make[] or use[] any other information, including any book, paper, document, record, recording, or other material * * * contain[ing] any false * * * declaration"
> 4) which is material, and
> 5) made "under oath" or "in any declaration certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code," and
> 6) made "in any proceeding before or ancillary to any court or grand jury of the United States."

See 18 U.S.C. 1622; 18 U.S.C. 1623.

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[6] Polito does not actually cite *Blockburger* in making this claim, however, his claim that his conviction for violation of Section 1512(b)(1) charged in Count Six should be dismissed as a "lesser included offense" of the violation of Section 1622 charged in Count Eight is controlled by *Blockburger*. See *United States* v. *Perez-Gonzalez*, 445 F.3d 39, 45 (1st Cir. 2005).

To prove that Polito violated Section 1512(b)(1) the government had to prove that he

> 1) "knowingly"
> 2) "use[d] intimidation, threaten[ed], or corruptly persuade[d] [DeLuca], or attempt[ed] to do so, or engage[d] in misleading conduct toward" him
> 3) with the "specific intent"[7] "to influence, delay, or prevent [his] testimony"
> 4) "in an official proceeding."

See 18 U.S.C. 1512(b).

Polito admits, P. Br. 16, that Section 1622 requires proof of a fact that Section 1512(b)(1) does not require — that DeLuca actually committed perjury. However, it is also true that Section 1512(b)(1) requires proof of a fact that Section 1622 does not — that Polito intended to "influence, delay or prevent [DeLuca's] *testimony in an official proceeding*." Section 1622 does not require intent to influence "testimony in an official proceeding" because it can be violated by convincing another to lie in "in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code." See 18 U.S.C. 1623. Applying the *Blockburger* test leads to the conclusion that Congress intended to authorize multiple punishments for violation of Section 1622 and Section 1512(b)(1).

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[7] See *United States* v. *Frankhauser*, 80 F.3d 641, 651 (1st Cir. 1996).

B. Polito's Convictions For Violation Of Section 1503 Charged In Counts Nine And Ten Of The Indictment Did Not Violate His Double Jeopardy Rights

Convictions for violations of Section 1503 and Section 1512(b)(1) also do not violate Polito's Double Jeopardy rights under *Blockburger* because each requires proof of a fact which the other does not. To prove Polito violated Section 1503's omnibus clause the government had to prove that he:

1) acted "corruptly or by threats or force, or by any threatening letter or communication" to
2) "endeavor to" (or in fact) "influence, obstruct, or impede"
3) "the due administration of justice"
4) with knowledge or notice of a pending proceeding.

See 18 U.S.C. 1503.[8]

Section 1503 requires proof of facts not required to prove a violation of Section 1512. Perhaps the most obvious example is that Section 1503 requires proof that a proceeding was pending and that the defendant knew or had notice of that pending proceeding at the time of the defendant's obstructive conduct. Section 1512(b)(1) has no such requirement. Indeed, Section 1512(f)(1) states that "[f]or purposes of this section an official proceeding need not be pending or about to be instituted at the time of the offense." See also *United States* v. *Frankhauser*,

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[8] Although, not immediately obvious on the face of the statute, Element 4 is nonetheless clearly required. See *Frankhauser*, 80 F.3d at 650 (interpreting the Supreme Court's decision in *Aguilar* as reaffirming "the proposition that a defendant may be convicted under section 1503 only when he knew or had notice of a pending proceeding").

80 F.3d 641, 650-652 (1st Cir. 1996) (evidence sufficient to sustain conviction for violation of Section 1512(b) but not sufficient to sustain conviction for violation of Section 1503 because the Court was "unable to find any evidence that Frankhauser knew or had notice of the pending grand jury proceeding").

Likewise, Section 1512(b)(1) requires proof of facts not required to prove a violation of Section 1503. Section 1512(b)(1) requires "intent to influence, delay, or prevent the testimony of any person in an official proceeding." This specific intent to affect the *testimony of another* is not required to prove a violation of Section 1503. Thus, the Court has upheld convictions under Section 1503 for making false statements before a grand jury, see *United States* v. *Flemmi*, 402 F.3d 79, 84-85 (1st Cir. 2005), hiding weapons related to the grand jury investigation, *ibid*, informing the target of an investigation of a pending indictment, *United States* v. *Connolly*, 341 F.3d 16, 21 (1st Cir. 2003), and causing an anonymous letter to be sent to a judge crediting certain claims that were made at a trial over which he was presiding, *ibid*.

This Court, therefore, should conclude that Congress intended to authorize multiple punishments for violations of these distinct statutes.

C. No Plain Error

Finally, even if this Court determines that conviction under both Sections 1512(b)(1) and 1622 or both Sections 1512(b)(1) and 1503 violate Polito's Double

Jeopardy rights, it should hold that the district court's failure to reach that conclusion, *sua sponte*, was not plain error.

Courts of appeals have upheld convictions based on the same underlying facts for violations of Sections 1622, 1503 and 1512(b)(1). See *e.g.*, *United States* v. *Ruhbayan*, 406 F.3d 292 (4th Cir. 2005) (upholding convictions under Sections 1503, 1512(b)(1) and 1622 based on defendant's having convinced his girlfriend to lie at trial); *United States* v. *Davis*, 380 F.3d 183 (4th Cir. 2004) (upholding convictions under Sections 1503, 1512(b)(1) and 1622 based on attempts to persuade a witness to testify falsely); *United States* v. *Moody*, 977 F.2d 1420 (11th Cir. 1992) (affirming convictions under Sections 1503, 1512(b)(1) and 1622 based on defendant's coaching of a witness) (see more detailed explanation of the facts in *United States* v. *Moody*, 763 F. Supp. 589 (E.D. Ga. 1991)); see also *United States* v. *Pagan-Santini*, 451 F.2d 258 (1st Cir. 2006) (affirming convictions for violation of Sections 1622 and 1503 based on defendant's efforts to persuade witnesses to testify falsely and assist them in doing so).

Polito does not cite any case, and the government is aware of none, which concludes that Section 1512(b)(1) is a lesser included offense of Section 1622 or that convictions for violations of Sections 1512(b)(1) and 1503 based on the same underlying facts violate the Double Jeopardy Clause. Thus, if the district court erred by not reaching such a conclusion, the error was certainly not clear or obvious.

Indeed, this Court recently found no plain error when a Double Jeopardy argument regarding "18 U.S.C. § 844(i) (arson), 18 U.S.C. § 1341 (mail fraud), and 18 U.S.C. § 844(h)(1) (using fire to commit a felony)" was raised for the first time on appeal. *Patel*, 370 F.3d at 114-117 ("In any event, we need not conclusively resolve these legal issues at this juncture since Patel did not raise them in the district court. Whatever merit Patel's 'combination' argument may have, the emergent law concerning 'combination' double jeopardy claims was neither 'clear' nor 'obvious' and therefore Patel cannot establish plain error.").

D. Remedy

Finally, as Polito admits, P. Br. 17, if this Court holds that one or more of Polito's convictions violates the Double Jeopardy Clause, it should vacate and reverse only the offending convictions. *United States* v. *Lilly*, 983 F.2d 300, 305 (1st Cir. 1992). We note that Polito's sentence consists of "equal terms of 36 months on each of the counts of conviction, all to be served concurrently." Supp. App. 712. Therefore, even if this Court dismissed Counts Six, Nine, and Ten, Polito would serve the same amount of time in jail based on his convictions for the offenses charged in Counts Two, Five, Eight, Eleven, and Twelve.

V

ADMISSION OF EVIDENCE OF LEMOURE'S CONVERSATION WITH JOSEPH WEDDLETON ABOUT INVOKING THE FIFTH AMENDMENT WAS NOT PLAIN ERROR

LeMoure admits, L. Br. 41, that this Court should review for plain error the district court's failure to, *sua sponte*, exclude a portion of Weddleton's testimony, because defense counsel did not object to its admission at trial. See p. 22, *supra* (explaining requirements of the plain error standard).

Even if LeMoure had objected at trial, this Court's review of a district court's ruling on a Rule 403 objection would be extremely deferential. See *United States* v. *Richardson*, 421 F.3d 17, 41 (1st Cir. 2005) ("Only rarely—and in extraordinarily compelling circumstances—will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the * * * weighing of probative value and unfair effect."). Weddleton's testimony provided the evidence to support LeMoure's convictions of witness tampering with respect to DeRota and subornation of DeRota's perjured deposition testimony. Weddleton was LeMoure's close friend, and was the messenger who carried LeMoure's request for false testimony to DeRota.

LeMoure asserts that it is "likely that the jury convicted Mr. LeMoure of conspiracy as well as the other counts based upon * * * highly prejudicial and improperly admitted evidence regarding LeMoure's discussion with Weddleton

about his Fifth Amendment rights," and urges this Court to reverse all counts of his conviction because of the "prejudicial spill over" caused by this alleged error. L. Br. 45. Specifically, he argues that he could have been convicted of the conspiracy charged in Count Two solely based on this conversation. L. Br. 45.

This argument is completely without support in the record. The government did not assert at trial that LeMoure's suggestion that Weddleton could "take the Fifth" was criminal, and did not claim that it was part of the conspiracy charged in Count Two. Instead, the indictment lists 23 overt acts alleged to have furthered the conspiracy charged in Count Two and the government introduced more than sufficient evidence of those acts. L. App. 25-30. It is illogical to conclude that LeMoure was convicted on the basis of that brief testimony rather than proof of the 23 overt acts.

LeMoure argues that testimony about this conversation should have been excluded pursuant to Rule 403 of the Federal Rules of Evidence because it was more prejudicial than probative. L. Br. 40. Weddleton testified that after he received his grand jury subpoena, he discussed his situation with LeMoure, and LeMoure mentioned that he could "take the Fifth." Supp. App. 335. It is not clear why Weddleton's recounting of a conversation about his options with LeMoure in which LeMoure raised the possibility of invoking the Fifth Amendment Privilege is prejudicial to LeMoure absent any suggestion that such a discussion was illegal. Supp. App. 335. Weddleton testified about the conversation to explain that he

tried to avoid testifying in a way that would be adverse to the interests of his best friend, LeMoure, but was forced to do so through a grant of immunity. Supp. App. 335. In fact, as emphasized by LeMoure's attorney on cross-examination, Supp. App. 386-387, LeMoure's suggestion that Weddleton could take the Fifth portrayed LeMoure in a positive light since (i) LeMoure advised Weddleton to do what was in his best interest and (ii) LeMoure did not suggest that Weddleton testify falsely.

Even if this testimony was more prejudicial than probative under Rule 403, allowing it did not affect LeMoure's substantial rights or affect the outcome of the trial in light of the abundance of evidence supporting each of LeMoure's convictions.

VI

IN CALCULATING A GUIDELINE SENTENCE RANGE THE DISTRICT COURT CORRECTLY CONCLUDED THAT LEMOURE HAD OBSTRUCTED AN INVESTIGATION WHICH INCLUDED ALLEGATIONS THAT HE USED A DANGEROUS WEAPON

While recognizing that, pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines are now advisory, the district court considered the application of the Guidelines as a factor in determining the appropriate sentence. Supp. App. 660. At the sentencing hearing, the court was presented with a Pre-sentence Report (PSR) which calculated LeMoure's total offense level

to be 24, L. App. 17, carrying a sentencing range of 51 to 63 months' imprisonment, L. App. 19A. The court adopted the PSR calculations of LeMoure's offense level. Supp. App. 677-678.

The court sentenced LeMoure to 48 months' imprisonment. Supp. App. 710. The court explained that it found the Guidelines less helpful where their application was complex. Supp. App. 705. Referring to 18 U.S.C. 3553, the court determined that the most relevant sentencing factors in this case were the nature and circumstances of the offense (Section 3553(a)(1)) and the particular goals for the sentence (Section 3553(a)(2)). Supp. App. 706-707. The court concluded that LeMoure and Polito's offenses "represent a direct insult to the rule of law." Supp. App. 710.

A. Standard Of Review

Although *Booker* made the Sentencing Guidelines advisory, this Court has concluded that "so far as the Guidelines bear upon the sentence imposed, the court's calculation must be correct, subject of course to the limitations of plain error or harmless error review." *United States* v. *Robinson*, 433 F.3d 31, 35 (1st Cir. 2005). This Court reviews "the district court's interpretation of the Guidelines *de novo* and its factual findings for clear error." *United States* v. *Brown*, 450 F.3d 76, 80 (1st Cir. 2006).

B. Calculation Of The Sentence

Pursuant to Section 3D1.1 of the Guidelines the PSR grouped the counts on which LeMoure was convicted into two groups. Group 1 relates to the civil case of *Fratus* v. *LeMoure* and Group 2 relates to the criminal investigation. Sentencing Guidelines § 3D1.2(b). Counts Four, Five, Six, Seven, Eight, Nine, Thirteen, Fourteen and part of the conspiracy charged in count Two were grouped together in Group 1. L. App. 13. All of the offenses in Group 1 were calculated pursuant to Sentencing Guidelines § 2J1.2 (obstruction of justice) or Sentencing Guidelines § 2J1.3 (perjury or subornation of perjury; bribery of witness), which each provide a base offense level of 14. L. App. 14. The offense level was then adjusted upward by 4 levels pursuant to Sentencing Guidelines § 3B1.1(a) to reflect LeMoure's role as an organizer or leader of a criminal activity involving five or more participants, producing a Group 1 offense level of 18.

Counts Ten, Twelve, and the remainder of Two were grouped together in Group 2. L. App. 14. The offense level for all of the offenses in this group were calculated using Sentencing Guidelines § 2J1.2. L. App. 14. Under Section 2J1.2(c)(1) (obstruction of justice), where, as here, "the offense involved obstructing [an] investigation or prosecution" the offense level is the greater of the level produced by applying Section 2J1.2 or that produced under Sentencing Guidelines § 2X3.1. See L. App. 15. Here, the Section 2X3.1 level is higher.

Section 2X3.1 (accessory after the fact) provides that the base level is 6 levels lower than the underlying offense. The PSR determined that the underlying offense was the charged violation of 18 U.S.C. 242, and the applicable guideline is Section 2H1.1 (offenses involving individual rights). L. App. 15. Section 2H1.1 in turn provides that the base offense level is the greater of 10 (since the offense involved use of force against a person) or the offense level applicable to the underlying offense. L. App. 15. The PSR determined that here the underlying offense is aggravated assault. L. App. 15. Section 2A2.2(a) places the base offense level for aggravated assault at 14. The PSR added 4 levels for use of a dangerous weapon and 3 levels for bodily injury to the victim. See L. App. 16; Sentencing Guidelines §§ 2A2.2(b)(2) and 2A2.2(b)(3). Since, pursuant to Section 2A2.2, the offense level for the underlying offense of aggravated assault is 21, the base level for Section 2H1.1(a)(1) is 21. The PSR then added 6 levels under Section 2H1.1(b)(1) because "the offense was committed under color of law," yielding a Section 2H1.1 offense level of 27. L. App. 16. Then, referring back to Section 2X3.1, the PSR subtracted 6 levels for a base offense level of 21. L. App. 16. Finally, the PSR adjusted the offense level upward by 2 levels, pursuant to Section 3B1.1(c), because of LeMoure's role as a "manager and supervisor in this criminal activity," for a total Group 2 offense level of 23. L. App. 16.

Pursuant to Sentencing Guidelines § 3D1.3, the PSR applied the Group 2 offense level because it was the highest. It then added one level under Section 3D1.4 to account for Group 1, yielding a combined offense level of 24. L. App. 17. The sentencing range for an offense level of 24 is 51 to 63 months. See L. App. 19A.

C. The Court Correctly Relied On Sentencing Guidelines § 2A2.2 Without Holding An Evidentiary Hearing

LeMoure contends that the court erred (1) "by finding that the appropriate guideline cross-reference for U.S.S.G. Manual Section 2J1.2 was § 2A2.2 (aggravated assault) rather than § 2H1.1," L. Br. 28, and (2) by failing to make factual findings to support its decision to cross-reference Section 2A2.2, L. Br. 30-31.

As explained above, however, LeMoure's sentence reflected an application of Section 2H1.1. L. App. 15-16. Section 2A2.2 came into play through the command of Section 2H1.1(a)(1) to apply "the offense level from the offense guideline applicable to any underlying offense."

1. The Court Properly Referenced Sentencing Guidelines § 2A2.2

LeMoure acknowledges, L. Br. 30, 37-38, that in sentencing for obstruction of justice the proper focus is on the crime that was under investigation. See *United States* v. *Conley*, 186 F.3d 7, 24 (1st Cir. 1999) (concluding, in a case

involving an identical sentencing guidelines progression, that the factual allegations considered as part of the federal investigation determine whether reliance on Section 2A2.2 is correct). LeMoure's claim that he was not under investigation for attacking Fratus with a dangerous weapon is incorrect.

The PSR concluded that the offense underlying LeMoure's Section 242 charge was aggravated assault. L. App. 15. The commentary to Section 2A2.2 defines aggravated assault, in relevant part, as "felonious assault that involved a dangerous weapon with intent to cause bodily injury * * * with that weapon." The district court rejected LeMoure's argument that Section 2A2.2 should not be used because there was conflicting testimony about whether he hit Fratus with a police flashlight. The court correctly concluded that it was not required to resolve that factual dispute. Supp. App. 672. Rather, the court concluded that reference to Section 2A2.2 was appropriate because use of the flashlight was clearly a subject of the federal investigation. Supp. App. 672.

The conclusion that LeMoure's use of a flashlight to hit Fratus was under investigation is supported by the record. The government represented at the sentencing hearing that Fratus "said from day one when he made his first complaint to IAD all the way through the civil depositions, all the way through trial, that he was hit twice on the head with a flashlight by Sergeant LeMoure." Supp. App. 670. At trial, the government asserted that LeMoure hit Fratus with a flashlight. Supp. App. 543. This assertion was supported by the consistent

testimony of Fratus, Supp. App. 171, 183, 220-221, 223-224, 229-230, 239-242, 244-245, 260-261, and the testimony of Duong that LeMoure had the flashlight in his hand during the incident, Supp. App. 111-112.

LeMoure offers no real support for his claim that his use of the flashlight was not under investigation. Instead, he asserts that he did not act out of concern about Fratus's claim that he was hit with a flashlight. L. Br. 32-33, 34. However, whether LeMoure was concerned about these allegations is of no significance. As this Court has held, "lack of knowledge of the specific offenses under investigation is irrelevant." *Conley*, 186 F.3d at 25.

LeMoure points to Dr. Mendel's grand jury testimony that Fratus did not sustain a temporal lobe fracture, as well as discrepancies among the eyewitness accounts. L. Br. 33-34, 38 n.14. However, Mendel's testimony does not dispute Fratus's claim that he was hit by a flashlight. Supp. App. 467-468. It only indicates that, in Mendel's professional opinion, the blow did not cause a skull fracture, Supp. App. 478-479, and that a victim who sustained multiple heavy blows to the head would typically have more soft tissue swelling that was shown by Fratus's CT Scan, Supp. App. 486-487. At most, LeMoure shows that use of the flashlight was a disputed fact, which shows that it was indeed under investigation.

LeMoure points out that Count One of the indictment, charging the Section 242 violation, does not actually assert that LeMoure used a flashlight, and argues this shows that the flashlight claim "was never part of the federal grand jury investigation." L. Br. 34-37. This argument misses the point. What was under investigation is relevant, not what was in the indictment. Although potentially indicative of some facts under investigation, the purpose of an indictment is not to indicate what the grand jury investigated.[9]

2. An Evidentiary Hearing Was Not Required

LeMoure relies on *United States* v. *Connolly*, 341 F.3d 16 (1st Cir. 2003), to argue that he was entitled to an evidentiary hearing. Specifically, he asserts that the investigation of his use of the flashlight was not based on "legitimate evidence," L. Br. 37. Instead, he contends that at the time of his obstructive conduct, the contention that he used a flashlight "had simply become a

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[9] However, the grand jury returned a superseding indictment after *Blakely* v. *Washington*, 542 U.S. 296 (2004) charging that "[t]he deprivation of constitutional rights charged in Count One of this indictment involved a dangerous weapon with intent to do bodily harm, as described in USSG § 2A2.2(b)(2)(C)." Supp. App. 638. On September 7, 2004, the government filed this superceding indictment which added charges relevant to sentencing factors. These were added in the wake of *Blakely*, which held that facts forming the basis of defendant's sentence under the Washington state sentencing guidelines must be found by a jury. At the pretrial conference on September 23, 2004, the district court expressed the view that the application of *Blakely* to the Federal Sentencing Guidelines was still not clear and, until the Supreme Court ruled on the issue, the Sentencing Guidelines would continue to apply. Supp. App. 647-648. In light of the court's statement, the prosecutor withdrew the superceding indictment. Supp. App. 649.

prosecutorial weapon for inducing a plea or threatening a more serious enhancement at sentencing," L. Br. 34.

In *Connolly*, this Court suggested that it could be "appropriate" for a sentencing court to conduct a factual inquiry where an "overzealous prosecutor" sought "to enhance the perjurer's sentence by spuriously convincing a grand jury to increase the counts in an indictment." 341 F.3d at 32. Here, the victim consistently testified that LeMoure hit him with a flashlight, Supp. App. 171, 183, 220-221, 223-224, 229-230, 239-242, 244-245, 260-261, and another witness to the incident also placed the flashlight in LeMoure's hand during the incident, Supp. App. 111-112. LeMoure fails to point to any evidence supporting his claim that the investigation of his use of a flashlight was illegitimate.

Moreover, in *Conley*, this Court rejected LeMoure's claim that an evidentiary hearing was required because he was not actually convicted of violating Section 242, L. Br. 37-38. 186 F.3d at 24-25 (concluding that defendant's acquittal of the underlying crime was not relevant to a determination of the offense that was the subject of the obstruction of justice charge and affirming the district court's application of the Guidelines).

Furthermore, even if there had been error in applying the Sentencing Guidelines it would be harmless. The judge was not bound by the Guidelines, sentenced below the Guideline range for each defendant, expressed doubt about

the value of the guidelines when their application was so complex, Supp. App. 705, and explained that he found the circumstances of the offense (Section 3553(a)(1)) and the particular goals for the sentence (Section 3553(a)(2)) more relevant, Supp. App. 706-708.

CONCLUSION

This Court should affirm Polito and LeMoure's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 12.0 and contains 13978 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: August 31, 2006

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2006, two copies of the foregoing BRIEF FOR THE APPELLEE were served by first-class mail, postage prepaid, on the following counsel of record:

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