Nos. 10-1518, 10-1534, 10-1701, 10-1708

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

_____

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CARLOS PAGAN-FERRER,
JUAN MORALES-ROSADO,
JOSE PACHECO-CRUZ,
AARON VIDAL-MALDONADO,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
SHARON M. MCGOWAN
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-1144

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JURISDICTIONAL STATEMENT

Defendants-Appellants' jurisdictional statements are complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in refusing to conduct an evidentiary hearing regarding defendants' post-conviction allegation that the courtroom was closed during jury selection when defendants' own affidavits

indicate that they deliberately chose not to raise any such concern with the court at the time of the alleged closure.

2. Whether the district court abused its discretion in deciding that, rather than declaring a mistrial, a curative instruction would be sufficient to correct any potential prejudice that might have resulted from a witness's reference to the outcome of an earlier civil proceeding against the City of San Juan.

3. Whether the district court erred in denying a motion to suppress a witness's in-court identification of Carlos Pagan-Ferrer (Pagan) based on the court's determination that the identification was sufficiently reliable to satisfy due process.

4. Whether the evidence presented was sufficient to support the convictions of Jose Pacheco-Cruz (Pacheco), Juan Morales-Rosado (Morales), and Aaron Vidal-Maldonado (Vidal).

5. Whether the district court's jury instructions on consciousness of guilt constituted plain error.

6. Whether, under plain error review, there was a material variance between the allegations in the indictment against Morales and the evidence presented against him that was so significant as to affect his substantial rights or the integrity of the proceedings.

7. Whether the sentence the district court imposed on Vidal after consulting the advisory guidelines in effect at the time of Vidal's sentencing implicates any Ex Post Facto concerns.

8. Whether the district court's decision to reject Morales' argument that he should receive a more lenient sentence than other defendants who pled guilty and cooperated with the government was clearly erroneous.

STATEMENT OF THE CASE

This case involves the use of excessive force and other misconduct by law enforcement officers of the San Juan Municipal Police Department (SJMPD). During a stop and arrest of Jose Antonio Rivera-Robles (Rivera), several officers beat and kicked Rivera, who became unconscious and died as a result of these blows.

During the investigations that followed, each of the defendants made false statements and engaged in otherwise misleading conduct, first with regard to the local Puerto Rico investigators and later as to the Federal Bureau of Investigation (FBI) Agents investigating the incident. Morales also made misleading statements to a federal grand jury regarding both his knowledge of and his whereabouts during the incident.

On July 8, 2008, a federal grand jury returned a 17-count indictment against Appellants Vidal, Pagan, Morales and Pacheco, along with two other defendants

who ultimately negotiated guilty pleas with the United States. App. 1-17.[1] The indictment charged Morales, Pacheco, Pagan and Vidal (along with two co-defendants, Elias Perocier Morales (Perocier), and Eliezer Rivera-Gonzalez (Rivera-Gonzalez)) with depriving Rivera of his constitutional rights by willfully using unreasonable force against him while acting under color of law, and by aiding and abetting each other, resulting in Rivera's bodily injury and death, under 18 U.S.C. 242 and 2 (Counts 1-3). App. 1-2. In addition, Vidal, the commanding officer at the scene, was charged with violating Rivera's constitutional rights by intentionally failing to intervene to protect Rivera from harm from the other officers under his supervision both at the time of Rivera's arrest, and later at the SJMPD Impact Unit station house, under 18 U.S.C. 242 (Count 4). App. 3.

Along with the civil rights counts, Morales, Pacheco, Pagan, Vidal, and Rivera-Gonzalez were charged with knowingly and willfully making materially false statements to federal investigators, under 18 U.S.C. 1001 (Counts 5-9), and with obstruction of justice, under 18 U.S.C. 1512(b)(3) (Counts 10-15). App. 3-9.

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[1] Citations to "App. __" are to page numbers in Volume I and II of the Appendix for the United States as Appellee filed along with this brief. Volume I contains pages 1-518, and Volume II contains pages 519-926. Citations to "D.E. __" refer to documents in the district court record, as numbered on the district court's docket sheet, that are not contained in the Appendix. When citing to the briefs of Appellants, the government will use either "Br. __" or "[Last Name] Br. __" as appropriate.

Finally, Morales was charged with lying to a federal grand jury under 18 U.S.C. 1623 (Count 16).[2] App. 9-11.

On August 13, 2009, a jury returned convictions against all of the defendants. D.E. 378-381. Vidal was convicted of the civil rights counts, both due to his failure to protect Rivera that night from the harm caused by other police officers under his supervision, and based on his own actions. The jury made the specific additional findings that Vidal's actions resulted in the death of Rivera. He was also convicted of making false statements to the FBI, and of obstructing justice. Vidal was acquitted of the charge alleging that he assaulted Rivera at the Impact Unit station house where Rivera was taken after his arrest (Count 3).

Pagan and Morales were convicted of all three counts pertaining to them. In addition to the counts involving the making of false statements to the FBI, and obstructing justice, they were convicted of the civil rights counts. With respect to this count, however, the jury found that the government proved that Pagan's and Morales' actions resulted in bodily injury but not in the death of the victim. Morales was also convicted of making false material declarations before the grand

[2] Morales was also charged with impeding a grand jury investigation, pursuant to 18 U.S.C. 1503(a) (Count 17) (App. 11-12), but this count was dismissed by the government prior to the case being sent to the jury.

jury. Pacheco was convicted of making false statements to the FBI, and of obstructing justice, but was acquitted of the civil rights charge.

Vidal was sentenced to 200 months' imprisonment. Pagan and Morales each received sentences of 120 months, and Pacheco was sentenced to 57 months' imprisonment.

STATEMENT OF THE FACTS

1. Sometime after midnight on Sunday, July 20, 2003, while on patrol in a marked SJMPD vehicle, SJMPD Officer Wilbert Salas Lopez (Salas) and SJMPD Sergeant Omar Vazquez Ferrer (Vazquez) noticed Rivera running down the middle of a street and behaving strangely. App. 359-361. Rivera shouted at the officers something to the effect of "they" were following him, and "they" wanted to kill him. App. 362. When the two officers stepped out of their car to investigate further, Rivera pushed past Sergeant Vazquez and Officer Salas, ran to the police car, got into the driver's seat, and started to drive away. App. 363-364. Sergeant Vazquez attempted to hold onto the driver's door of the car as it sped away, but eventually fell to the ground, injuring his arm. App. 366, 399.

Officer Salas and Sergeant Vazquez radioed for help. App. 366. Minutes later, other SJMPD officers arrived on the scene in two marked police cars. App. 366-367. Officer Salas and Sergeant Vazquez got into separate cars, and each sped off in pursuit of Rivera. App. 165-167, 367-368.

Sergeant Vazquez and the officers in his vehicle never caught up with Rivera. Instead, after hearing over the police radio system that the police car Rivera had stolen had been found abandoned, they went to where the car was discovered on Baldorioty Avenue (App. 202, 399), a location close to where Rivera was eventually apprehended. App. 101-102.

In the meantime, Rivera had run into a convenience store at a Citgo gas station on Campo Rico Avenue. Looking scared but uninjured to others in the store, Rivera jumped behind the convenience store counter and seemed to be hiding from someone. App. 133-134. The female cashier screamed and ran outside to get help. App. 134-135. Shortly thereafter, Rivera fled from the store. App. 136-137.

The other vehicle looking for Rivera contained Officer Salas, and three SJMPD Impact Unit officers: Ricardo Carrion (Carrion), Angel Gonzalez Almeida (Almeida), and Marieli Torres Rivera (Torres). App. 167, 367, 457-460. While the officers were driving past the Citgo gas station on Campo Rico Avenue, the convenience store cashier flagged down their car, and reported that a man fitting Rivera's description was causing trouble inside the gas station's convenience store. App. 169, 369, 461.

As the officers pulled into the gas station, Salas saw Rivera leaving the store. App. 169-170, 372, 461-462. He and two of the other officers with him, Almeida

and Torres, immediately exited the car, drew their weapons, and ordered Rivera to stop. App. 170-173, 372-373, 462. Seeing the officers coming toward him, Rivera ran to the gas pump furthest away from the convenience store, grabbed the pump's handle, and began pulling on it. App. 173-175, 373, 462-464. He eventually dropped the gas pump, but continued walking backwards in the direction of the officers. App. 175-179, 373.

When Rivera came close to him, Almeida, who was holding his rifle in two hands, pushed Rivera to the ground with his foot. App. 179-180, 376-377. Salas then straddled Rivera, who lay face down on the ground, and attempted to handcuff him as Torres looked on. App. 180-182, 377-381, 465-467. At this point, Rivera still had no bruises or injuries on his face. App. 181.

Other officers including Sergeant Vidal and Officer Perocier arrived at the gas station. App. 182-183, 383. Vidal approached Rivera and began to assist Salas in handcuffing him. App. 183-184, 383-384, 472-473. As Vidal and Salas attempted to place the handcuffs on Rivera, Perocier kicked Rivera hard in the area of his head and left shoulder. App. 184-185, 377-381. The kick was so strong that it almost knocked over Salas, who was on top of Rivera. App. 185, 378.

Around this time, SJMPD Impact Unit Officers Pagan, Morales and Pacheco arrived at the scene in the white Impact Unit van. App. 105-106, 116 (identifying

van), 473, 571-572. Impact Unit Officer Rivera-Gonzalez also pulled into the gas station, albeit in a separate vehicle. App. 570-572.

As Almeida guarded the scene from a distance with his rifle (App. 142-144, 181-182, 191), the other Impact Unit officers formed a half-circle around Rivera as Salas and Vidal restrained him. App. 104-105, 113a, 139-140, 191, 194-195, 473, 475-479. An officer wearing an Impact Unit regulation boot stomped on Rivera's head (App. 103-104, 382-383), and then the officers began kicking Rivera in the head and upper body. App. 111-112, 195-196, 384-385, 390, 480, 484-485. One witness described the way in which the officers were kicking Rivera as "look[ing] like a soccer match." App. 73. Pagan and Morales each kicked Rivera hard in the upper body area multiple times. App. 195-196, 480, 602, 605-606. Salas recognized his colleague Pacheco in the group of kickers (App. 385, 426, 429), but could not tell for certain whether Pacheco was kicking from his vantage point. App. 407, 427-428. According to eye witnesses, however, all of the men in the circle were Impact Unit Officers (App. 102-105, 113a), and all of them were kicking Rivera. App. 480, 484. In addition, some of the officers, including Perocier and Pagan, punched Rivera in the face. App. 146, 197, 386-389, 393-394.

At the time of the kicking and punching, Rivera was under the control of Salas and Vidal, and did not pose a threat to anyone. App. 186-187, 464-471, 476-479. Nevertheless, Sergeant Vidal, the commanding officer at the scene, neither

said nor did anything to prevent his subordinates from assaulting Rivera. App. 107-108, 144-147, 187, 394-396, 480-481, 483, 485, 584.

Eventually, Vidal instructed the officers to pick Rivera up and to take him to the Impact Unit station house. App. 199-200, 486-487. During this time, Vidal was saying "This one's mine, this one's mine." App. 489. Rivera was placed in the car of SJMPD Impact Unit Officers Juan Monserrate (Monserrate) and Brenda Cotto Miranda (Cotto), and driven to the Impact Unit's station house, which was less than ten minutes away. App. 583-585; see also App. 433-451 (forensic evidence). Meeting them at the station house were Vidal, Perocier, and Rivera-Gonzalez. App. 585-587.

Outside the police station, Officer Monserrate pulled the still-handcuffed Rivera out of the police car and said, "This asshole is faking it." App. 586-587. Rivera was barely conscious at this point and fell to the ground. App. 587-588. Officer Perocier then approached Rivera, and said something to the effect of, "This mother fucker is faking it." App. 591. He then kicked Rivera hard in the face with his boots. App. 591. Vidal did nothing to prevent Perocier's actions before they occurred, and said nothing even after witnessing Perocier's kick to Rivera's face. App. 591-592.

After Perocier's kick, three of the officers – Sergeant Vidal and Officers Perocier and Rivera-Gonzalez – carried Rivera into the police station and dropped

him on the floor. App. 592, 655-656, 659. At some point, as Rivera lay on the floor, his handcuffs were removed. App. 658. Rivera's breathing was labored, his face was "practically disfigured," and he was visibly in need of medical attention. App. 402, 656-657. Sergeant Vidal said, "This mother fucker is faking it," and kicked Rivera in the side. App. 659. Rivera did not move, and eventually other officers called emergency medical personnel to the station house. App. 209-212, 660.

The emergency medical technicians arrived to find Rivera lying unconscious on the floor with bruises on his face. App. 121-125, 162, 660. They asked the officer in charge how long the man had been lying on the floor like that, and were told that he had been there for ten minutes. App. 126. The technicians attempted to revive Rivera, but were unable to do so and declared him dead at the scene. App. 127. An announcement then went out over the police radio that the person who had been arrested at the gas station had died. App. 401.

At this point, SJMPD officers from the gas station who had gone to the location where the stolen police patrol had been recovered began returning to the station house. App. 401, 490-493. As Officer Salas entered the station house, SJMPD Sergeant Ortiz told him that he would have to prepare the arrest report. App. 401. When Salas got inside, however, he saw Rivera lying dead on the floor, "practically disfigured" with "many bruises." App. 401-402. SJMPD Lieutenant

Colon called a meeting of all of the officers involved. App. 405. When Sergeant Vidal said that Salas would prepare the arrest report, Salas refused and insisted that Vidal had been the arresting officer. App. 405.

Later that day, Puerto Rico officials performed an autopsy, and one month later released a report concluding that a brain hemorrhage had been a cause of death. App. 242-243, 307-308. The report indicated that Rivera had suffered blunt force trauma injuries to roughly thirty regions of his body, including numerous blunt force injuries to different areas of his head. App. 246-260, 262-287, 296-304. Due to the presence of cocaine in Rivera's system at the time of his death, the autopsy report did not exclude the possibility that cocaine psychosis had contributed to Rivera's death along with blunt force trauma. App. 307-309. After learning more about the blows to the head and body that Rivera had suffered prior to his death at the station house, however, the coroner revised her prior assessment and concluded that the blunt force trauma to Rivera's head was what caused the fatal brain hemorrhage. App. 318-320. A second forensic expert reviewed the information compiled during the autopsy and confirmed these conclusions. App. 741-745, 750-769.

2. Puerto Rico officials launched an investigation into the death of Rivera, but no one involved offered a complete and accurate account of what had happened that night. See, *e.g.*, App. 216-219, 407-413, 497-500, 661-663. In particular,

Vidal, Pagan, Morales and Pacheco were interviewed in late July 2003 by a Puerto Rico police homicide investigator, Rufino Davila Perez (Davila). Vidal admitted that he had been at the Citgo station on the night of Rivera's arrest, but denied that any of the officers on the scene kicked, punched or otherwise assaulted Rivera. App. 610-616. Pagan, Morales and Pacheco all denied having been at the Citgo station at all, and claimed that they were driving around in the Impact Unit van looking for, and eventually securing, the stolen police vehicle when the events at the Citgo station occurred. App. 616-636.

The officers claimed that the first time they saw Rivera was when they observed him lying on the station house floor with paramedics. App. 623, 629, 635. Davila asked each of them specifically whether they had been at the Citgo station, and each of them denied it. App. 623, 630, 636. They were also asked whether they knew either how or from whom Rivera had sustained his injuries, but they all denied any knowledge regarding the circumstances surrounding Rivera's injuries and death. App. 623-624, 630, 636. The Commonwealth of Puerto Rico did not pursue any criminal charges against Vidal, Pagan, Morales or Pacheco.

3. In 2003, Rivera's family filed a wrongful death suit against the City of San Juan and the San Juan Police Department. *Colon-Ortiz* v. *Municipality of San Juan*, No. 3:03cv1989 (D.P.R.). App. 908-924. The heirs of Rivera's estate sued unnamed law enforcement officers (John Does 1-20), the Municipality of San Juan,

and certain senior officials. The plaintiffs alleged that defendants violated Rivera's civil rights and caused his wrongful death by using excessive and unnecessary force against him. After a trial held in June and July of 2006, a jury found against the plaintiffs on their claim that the police officers had violated Rivera's civil rights, but found for the plaintiffs on their wrongful death claim. App. 920-922; see also App. 925-926.

4. The federal government became involved in 2008, when FBI Agent Luis Rivero interviewed the defendants. App. 666-676, 683-728. During his interviews with Agent Rivero, Vidal continued to deny that Rivera had been punched or kicked at the Citgo gas station or at the police station. App. 692-695, 698-701.

Pagan, Pacheco and Morales repeated their story about hearing the call for officer assistance, and then traveling in the Impact Unit van to look for the stolen police vehicle. App. 706-707, 712-713, 723-724. They all claimed that they went to Baldorioty Avenue, where they allegedly stayed with the abandoned police vehicle while the events at the gas station occurred. App. 707, 714, 724-725.

Agent Rivero specifically asked each of the defendants whether the van in which they were riding entered the Citgo gas station where the assault of Rivera took place. App. 708, 717, 721. They all denied having gone to, or having stopped at, the gas station. App. 708, 717, 721. During his interview with Agent Rivero, Pacheco denied even hearing of any other police officers going to the

Citgo gas station in the early morning hours of July 20, 2003. App. 717. Agent Rivero then asked each of them whether they had kicked or punched Rivera, or had otherwise interacted with Rivera at the gas station, but they denied having done so. App. 708-709, 717, 726-727. Morales told a similar story to a federal grand jury convened to investigate the events of July 20, 2003. App. 731-736.

5. The defendants were indicted by a federal grand jury on July 8, 2008. App. 1. On August 13, 2009, after 26 days of trial, the jury convicted Vidal, Pagan and Morales of violating Rivera's constitutional rights by using excessive force, or by aiding and abetting the use of excessive force by others, while arresting Rivera at the Citgo gas station. D.E. 378-381. Of the three defendants convicted of this count, the jury found only Vidal responsible for Rivera's death. D.E. 378-381. Vidal was also convicted of violating Rivera's constitutional rights by failing to keep Rivera from harm, both by failing to intervene to prevent the officers under his command from using unreasonable force against Rivera, and by failing to get Rivera the medical attention needed as a result of the officers' abuse. D.E. 380. With respect to this count as well, the jury made a separate finding that Vidal's failure to keep Rivera from harm caused Rivera's death. D.E. 380. Pacheco was found not guilty of the civil rights count involving the use of excessive force (D.E. 379), and Vidal was found not guilty of the civil rights count alleging that he had used excessive force against Rivera at the Impact Unit station house. D.E. 380.

All four of the defendants were convicted of making false statements and obstructing justice (D.E. 378-381), and Morales was convicted of perjury before the grand jury (D.E. 378).

6. Almost two years after the jury handed down these convictions, Pagan and Vidal filed a joint motion pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, alleging for the first time that the courtroom was closed during jury selection. App. 834-879. In their motion, they asked the district court to allow them to supplement the record on appeal and to conduct a hearing so that the defendants could develop evidence to support their contention that the courtroom had, in fact, been closed. App. 834-836.

The court initially set a deadline of September 9, 2011, for the government to respond to this motion. D.E. 556. After reviewing the defendants' motion, however, the district court denied their request without waiting for the government's response. App. 880-882; D.E. 560. In its opinion denying the motion, the district court concluded that the defendants' request lacked merit because the motion and the supporting affidavits conceded that, at the time the alleged exclusion purportedly occurred, no one raised the issue with the court. App. 880-882.

SUMMARY OF THE ARGUMENT

1. The district court did not abuse its discretion in declining to hold an evidentiary hearing more than two years after defendants' convictions to allow them to attempt to create a record in support of their allegation that the courtroom was improperly closed during jury selection. Because defendants' motion made clear that they deliberately chose not to raise the issue with the trial judge at the time of the alleged closure, and in light of the fact that the motion was adjudicated by the judge who had presided over the jury selection, it was within the court's discretion to deny defendants' request to hold a hearing to create a record with information that could have been presented to the court during the trial.

2. The district court did not err in determining that a curative instruction would be sufficient to address any prejudicial effect resulting from Officer Torres' reference to the fact that there had been a finding of liability against the Municipality of San Juan in prior civil proceedings. Particularly in light of the district court's prior efforts to ensure that the individual jurors selected to serve in this case were willing and able to follow the court's instructions, the district court reasonably concluded that striking Torres' reference to the outcome of the civil trial, coupled with a specific jury instruction explaining why this evidence was irrelevant and should be disregarded, would remedy any taint that Torres' comments might have caused in the jurors' minds.

3. The district court's decision to allow Officer Salas to make an in-court identification of Pagan, whom Salas had seen on numerous occasions before and after the Citgo gas station incident as a result of their both being SJMPD officers, did not violate Pagan's due process rights. The district court applied the proper legal standard, and correctly determined that any concerns about the reliability of the identification were questions of weight and credibility that were properly left to the jury.

4. The district court correctly denied the Rule 29 motions of Pacheco, Morales, and Vidal, as there was sufficient direct and circumstantial evidence from which a jury could have concluded that the defendants were guilty of the crimes alleged. There was sufficient evidence to prove that Morales and Vidal would have known that there was no justification for the force used against Rivera, who was under the control of SJMPD officers and did not pose a threat to anyone's safety. Likewise, there was ample evidence from which a jury could have concluded that Pacheco, Morales and Vidal made false material statements to investigators about what happened that night, and that their actions obstructed justice.

5. The district court did not commit plain error when providing its consciousness of guilt instruction to the jury. The instruction did not, as Morales alleges, relieve the government of its burden of proof, but rather informed the

jurors that, should they conclude that Morales had made statements that the government had proven to be false, they were permitted to treat these false statements as proof of Morales' consciousness of guilt.

6. There was no material variance between the allegations in the indictment against Morales and the evidence produced at trial. Because there was evidence demonstrating that Morales participated in the arrest of Rivera, as alleged in the indictment, Morales is not entitled to relief on this ground.

7. The Ex Post Facto arguments previously available to defendants sentenced under the prior mandatory Sentencing Guideline regime are no longer applicable now that the Sentencing Guidelines are only advisory. In any event, Vidal suffered no prejudice from the fact that the district court relied on the November 2009 guidelines when sentencing him.

8. The district court did not err in rejecting Morales' request for a downward departure based on Morales' claim that his lesser role entitled him to a sentence more lenient than the sentences of other participants who had pled guilty and cooperated with the government.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO HOLD A HEARING TO ALLOW DEFENDANTS TO SUBSTANTIATE AN ALLEGATION OF COURTROOM CLOSURE THAT COULD HAVE BEEN, BUT WAS NOT, RAISED UNTIL AFTER DEFENDANTS' CONVICTION

Two years after the conclusion of their trial, Pagan and Vidal filed a motion with the district court requesting an evidentiary hearing to clarify the record on whether the courtroom had been closed during jury selection. App. 834-879. Because defendants failed to raise the issue at trial, a Sixth Amendment claim would be subject to plain error review on the merits. *United States* v. *Bucci*, 525 F.3d 116, 129 (1st Cir. 2008). With regard to this issue, however, the only question before the Court is whether the district court abused its discretion in refusing defendants' request for an evidentiary hearing.

A. Standard Of Review

As this Court explained in *United States* v. *Serrano*, "[w]hen a dispute concerning whether the record truly discloses what occurred in the district court, Fed. R. App. P. 10(e), has been submitted to the district court, the court's determination is conclusive absent a showing of intentional falsification or plain unreasonableness." 870 F.2d 1, 12 (1st Cir. 1989) (internal quotation marks and citation omitted). A district court's decision not to hold an evidentiary hearing is

reviewed for abuse of discretion. *United States* v. *Brika*, 416 F.3d 514, 529 (6th Cir. 2005), cert. denied, 546 U.S. 1207 (2006).

B. The District Court's Determination That The Record Did Not Need Clarification Was Not An Abuse Of Discretion

As a preliminary matter, it should be noted that the district court judge who ruled on defendants' motion was the same judge who had presided over the lengthy trial of defendants. In light of his personal knowledge, the district court was particularly well situated to judge the accuracy of the record. Because there is no allegation that the record includes intentional falsification, the question then becomes whether the district court's actions here were plainly unreasonable. The government submits that the court's actions constituted a reasonable exercise of its discretion.

1. From the very beginning of the trial, the district court grappled with how best to elicit answers from the jurors regarding their knowledge about the case without tainting the entire pool, and developed procedures designed to address that concern. Jury selection began on June 8, 2009, when counsel made their initial strikes for cause based on the jurors' responses to the questionnaire. App. 18-19. On that date, counsel for co-defendant Perocier informed the court that his client and the United States had reached a plea agreement. Perocier was sentenced the next day. App. 18, 20.

Jury selection resumed on June 10, 2009, and the court conducted individual voir dire of the jurors in order to ask them what they had heard or read about the case. App. 25 (asking jurors what they had read or heard about the case, followed by a notation in the record that the examination was being conducted in the jury room). During the course of this questioning, the court learned that members of the jury venire had been talking about a newspaper article that had reported about Perocier pleading guilty. App. 29; see also App. 18-20. Consequently, the court questioned multiple jurors to determine who had said what to whom, and who else in the venire may have heard the discussion. App. 30-31, 34-71.

At that point, counsel for Pagan expressed his concern that the jurors were not following the court's instructions to refrain from discussing the case, and asked that all of the remaining jurors in the venire be questioned to determine whether they had answered falsely when asked about their knowledge regarding the case. App. 75. In the Minute Entry reflecting that day's proceedings, the court noted that "[s]everal [jurors] were interviewed by the Court with the presence of counsel in regards to a comment made by a juror as to a newspaper article. The remainder of the panel will be individually interviewed by the Court, tomorrow June 11, 2009." App. 21. At the conclusion of that day's proceedings, the court reconvened the entire venire and specifically instructed them not to read any news

articles or other outside sources about the case. App. 79-83. These proceedings, according to the transcript, "were had in open court." App. 79.

At the start of the next day's proceedings, the district court explained that it would be "celebrating this hearing here in the jury room, since the Court is aware that we cannot ask the questions in the courtroom because an answer by a person, a petit juror, a potential petit juror, could potentially contaminate the entire panel." App. 86. All parties agreed to conduct the hearings in the jury room. App. 86.

2. The record clearly reflects the simple fact that the district court modified its jury selection procedure after a specific concern emerged about jurors discussing the case. As the Third Circuit recently explained, procedures like these, which are designed to prevent "members of the voir dire panel from hearing other members' responses," do not "offend the Sixth Amendment." *United States* v. *Bansal*, 663 F.3d 634, 661 (3d Cir. 2011). Accordingly, the district court did not abuse its discretion in deciding that no evidentiary hearing would be required to "clarify" the record on this issue.

3. Nor does the district court's statement at the commencement of the trial on the merits reasonably suggest that the public had been inappropriately excluded from the jury selection proceedings. App. 96 ("To the public who may not have been to a trial in the federal court, any expressions will not be tolerated."). Rather, the only evidence that defendants can point to in support of their allegation that the

public was impermissibly excluded from the courtroom during jury selection are affidavits of the defendants' counsel and family members. App. 835-836, 854-879.

The government acknowledges that this Circuit's precedent suggests that the more cautious approach might have been for the district court to hold a hearing to determine whether the allegations contained in the affidavit were credible, and if so, the extent to which the public was actually excluded from the courtroom during jury selection. *Owens* v. *United States*, 483 F.3d 48, 66 (1st Cir. 2007). Nevertheless, in light of this Court's more recent discussion in *Bucci* v. *United States*, 662 F.3d 18, 30 (1st Cir. 2011) (*Bucci II)*, regarding the problems that would arise if defendants were permitted to wait until after trial to raise any concerns about courtroom closure, the government submits that the district court did not abuse its discretion in denying the motion for a hearing.

a. In *Bucci II*, this Court determined that the decision of defendants' counsel not to object to the partial closure of the courtroom at the time of the public's exclusion did not constitute ineffective assistance of counsel; consequently, the court would not overlook defendant's failure to raise the issue at trial, and deemed the issue waived. 662 F.3d at 30-33. In reaching its conclusion, this Court emphasized the importance of raising such procedural objections at the time the alleged error occurred, and the problems that would arise if the defendant were permitted to hold such objections in reserve until after the conclusion of the trial.

First, as this Court noted, "a contemporaneous objection calls the Sixth Amendment issue to the trial court's attention and facilitates the court's consideration of the *Waller* [v. *Georgia*, 467 U.S. 39 (1984)] factors, providing an opportunity for the court to articulate its reasoning on the record regarding the closure's justification, scope, and possible alternatives." *Id.* at 30. Second, and perhaps more importantly in terms of the administration of justice, "the contemporaneous-objection rule prevents a litigant from sandbagging the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Ibid.* (internal quotation marks and citation omitted). "Any contrary rule," this Court noted, "could encourage defendants to take their chances on a verdict of not guilty in . . . trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Ibid.* (internal quotation marks and citations omitted); see also *Bansal*, 663 F.3d at 661 (describing defendant's decision to "complain[ ] for the first time on appeal about a decision by the trial court to which he did not object" as "classic sandbagging of the trial judge").

It was precisely these considerations that motivated the district court's rejection of defendants' request to conduct a hearing years after the conclusion of the trial to "clarify" the record regarding whether the courtroom had been closed during jury selection. Expressing concerns similar to those articulated by this

Court in *Bucci II*, the district court took issue with the fact that the defendants deliberately chose not to bring any allegations regarding improper courtroom closure to the court's attention (App. 880-882), thus depriving the court of the opportunity to "correct or avoid the mistake so that it [could not] possibly affect the ultimate outcome." *Bucci II*, 662 F.3d at 30 (citation omitted).

b. Although *Bucci II* involved a habeas proceeding, the same rationale applies in cases on direct appeal. As alleged in the affidavits presented by defendants in support of their motion for an evidentiary hearing,[3] defendants and their counsel were aware *at the time* that the family members were not being permitted to enter the courtroom. App. 835-836, 854-879. In such circumstances, it is appropriate to require defendants to create some kind of record at the time the allegedly improper exclusion took place, or as soon as possible after defendants learned of the allegedly improper exclusion, and, where defendants fail to do so, the district court may deny their request to conduct additional proceedings to "clarify" issues that could have easily been made clear in the record at the time.[4]

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[3] Had the court held an evidentiary hearing, the government would have contested defendants' allegation that any officer of the court prevented defendants' family members from entering the courtroom during jury selection.

[4] Although the Supreme Court's most recent decision on courtroom closure during jury selection post-dates the trial in this case, *Presley* v. *Georgia*, 130 S. Ct. 721 (2010), this Court had already addressed the issue in 2007. *Owens*, 483 F.3d

(continued…)

Faced with similar circumstances, other courts of appeals have affirmed a district court's refusal to conduct a Rule 10(e) hearing to supplement the record with information that was available to counsel at the time of trial. See, *e.g.*, *United States* v. *Hillsberg*, 812 F.2d 328, 336 (7th Cir.) (affirming district court's ruling that Rule 10(e) "does not allow the court to add to the record on appeal matters that might have been but were not placed before it in the course of the proceedings leading to the judgment under review"), cert. denied, 107 S. Ct. 1981 (1987). In fact, the Tenth Circuit reversed a district court's grant of defendant's Rule 10(e) motion where the information that the defendant sought to ensure was clearly reflected in the record was known to the defendant at the time of trial, but was not raised. *Anthony* v. *United States*, 667 F.2d 870, 875 (10th Cir. 1980), cert. denied, 457 U.S. 1133 (1982); *ibid.* (emphasizing that Rule 10(e) "does not grant a license to build a new record") (citing *Fleming* v. *Gulf Oil Corp.*, 547 F.2d 908 (10th Cir. 1977)).

A rule allowing a defendant to demand an evidentiary hearing after the conclusion of trial solely on affidavits from the defendant's counsel and family members alleging for the first time that the courtroom had been improperly closed

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(… continued)
at 66. Therefore, defendants cannot (and do not) allege that their failure to raise the issue can be excused based on a change of law in this Circuit.

would render every criminal proceeding vulnerable to collateral attack in this fashion. Without a requirement that such issues be brought to the court's attention on the record, every defendant would be able to argue that silence in the record makes it "unclear" what really happened.

This concern is not merely hypothetical. There is at least one other case from this district court of which the government is aware in which a defendant has waited until after the conclusion of a trial to raise a claim of improper courtroom closure, and where the court determined that allegation was unfounded. See, *e.g.*, App. 895-907 (Memorandum and Findings of Fact, *United States* v. *Negron-Sostre*, No. 08-310 (D.P.R.), Doc. No. 3937 (Dec. 30, 2011) ("[T]he failure of the defendants' family members to enter the courtroom was due to the attorneys informing the family members that they could not enter the courtroom during the jury selection process, but not because of any Court Order or determination by the deputy marshal in charge to exclude the public. Counsel did not object precisely because there was nothing to which to object.")).

3. The question before the Court is not whether it would have been preferable for the district court to conduct such a hearing. Rather, the question is whether there are circumstances in which a district court may, within its discretion, decide *not* to conduct a hearing. The government respectfully submits that this case – where defendants seek to create a record after the fact on an issue that they

admittedly chose *not* to raise at the time of trial – presents one such set of circumstances.

Therefore, the district court's ruling denying an evidentiary hearing should be affirmed.

II

THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT A CURATIVE INSTRUCTION WOULD BE SUFFICIENT TO OVERCOME ANY POTENTIAL PREJUDICE CAUSED BY A WITNESS'S REFERENCE TO A FINDING OF LIABILITY AGAINST THE CITY OF SAN JUAN IN AN EARLIER CIVIL PROCEEDING

A. Background

During her direct examination, Officer Torres admitted that she did not tell the investigator the whole story in 2003 because she was afraid that she would be implicated in the death of Rivera. App. 497-499. When asked why she decided ultimately to tell the whole truth about what happened at the gas station, Torres stated that she decided to tell the full version of the story to the FBI in 2008 "[b]ecause this time [she] already knew that the truth would come out because the civil trial was over *and that they had won the suit against the Municipality of San Juan*." App. 500, 504. Defendants' counsel rose to object before the complete statement (*i.e.*, the italicized words) was translated from Spanish to English for the jury. App. 501-504.

Defendants' counsel asked the court to declare a mistrial, and insisted that there was no curative instruction that could undo the damage allegedly caused by Torres' reference to the outcome of the civil trial against the City of San Juan (City). App. 501, 504-505. In light of the jurors' understanding of Spanish, the district court told counsel that he would assume that the jurors had heard and understood Torres' complete statement, including her reference to the verdict against the City. App. 512, 517. Outside the presence of the jury, the court discussed with the parties how to proceed and ultimately directed them to submit briefs addressing whether the court should declare a mistrial, or whether a curative instruction would suffice. App. 506, 509-511.

Torres' testimony occurred on July 1, 2009, the last day of trial prior to the July 4 holiday. App. 453. The trial judge had previously informed the jury that court would be adjourned during the week of July 6 because he had a prior commitment at an environmental law conference in Costa Rica. App. 91; see also App. 416-417, 514. As a result, the court set a schedule that would allow the issue to be fully briefed by the time that the proceedings recommenced on July 13, 2009. App. 510-514.

After considering the parties' written submissions (App. 519-542), the court determined that a curative instruction would be sufficient to address Torres' reference to the civil proceedings against the City. App. 555-557. The court then

allowed counsel to offer any suggested revisions to the jury instruction that the court proposed to give to the jury. App. 558-561. At the request of defense counsel, the court agreed not to repeat the question and answer from Torres that had triggered the mistrial motion. App. 561.

> The instruction provided in relevant part:
>
> Ladies and gentlemen of the jury, you may have heard the current witness on the stand, Sergeant Marieli Torres Rivera, reference a prior civil trial and the result thereof.
>
> You should not, however, concern yourself with anything relating to that civil trial. Your verdict must be based at the end of the case solely on the evidence in the present trial, in accordance with the Court's instructions, without any regard to what you may have heard earlier.
>
> The prior civil trial mentioned by Sergeant Torres Rivera did not involve the parties, any of the Defendants in the instant case. The case involved different Defendants and different parties, different legal issues and a different burden of proof for the Plaintiffs.
>
> * * * * *
>
> Further, Defendants were not represented by counsel, as they were not a party and, hence, did not cross-examine or have the opportunity to present any evidence, if they so chose, in the civil case.
>
> * * * * *
>
> The Court strikes the testimony of Sergeant Torres Rivera's reason for changing her testimony, and the existence and result of a civil case, and you are strictly ordered not to consider under any circumstances said testimony about the case.

App. 563-565.

B. Standard Of Review

Defendants allege that Officer Torres' reference to the fact that there had been a finding of civil liability against the City of San Juan was so prejudicial that the only option available to the court was declaring a mistrial. In considering defendants' motion, the district court correctly recognized that declaring a mistrial is a measure of "last resort," and should only be implemented "if the taint is ineradicable, that is, only if the trial judge believes that the jury's exposure to the [improper] evidence is likely to prove beyond realistic hope of repair." *United States* v. *Sepulveda*, 15 F.3d 1161, 1184 (1st Cir. 1993), cert. denied, 512 U.S. 1223 (1994).

The district court's ruling on this question is reviewed for an abuse of discretion. *United States* v. *Reiner*, 500 F.3d 10, 16 (1st Cir. 2007), cert. denied, 552 U.S. 1295 (2008).

C. The District Court Did Not Abuse Its Discretion In Denying Defendant's Motion For A Mistrial

The district court carefully followed this Court's precedent in determining whether Officer Torres' reference to the civil verdict against the City of San Juan warranted declaring a mistrial. Although the government believes that the challenged statement was not necessarily prejudicial to the defendants, the district court was in any event correct to conclude that any prejudice resulting from that statement could be cured through an instruction to the jury.

1. Under *Sepulveda*, the district court must first examine whether the challenged statement was, in fact, "improper." 15 F.3d at 1184. In this case, the parties agreed that the reference to the outcome of the civil trial was improper (App. 519-527),[5] and the district court correctly struck those remarks from the record (App. 563).

2. Under *Sepulveda*'s second step, the court must determine whether the evidence is "seriously prejudicial and that a curative instruction will be an insufficient antidote." 15 F.3d at 1184. The government continues to believe that, even without the kind of detailed curative instruction provided by the court, Torres' comment would have had little effect on the jurors' assessment of the guilt of the individual defendants before them. At no time did Officer Torres refer to

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[5] Although Torres' final remark referencing a civil verdict against the City of San Juan was never translated into English for the jury, the district court assumed that the jury heard and understood Torres' full statement. The government does not take issue with this assumption. See, *e.g.*, *United States* v. *Rullan-Rivera*, 60 F.3d 16, 18 (1st Cir. 1995). But even assuming that the jury understood the untranslated portion of Torres' testimony, the fact that the problematic words were never translated into English, when coupled with the court's detailed instructions, would reaffirm for the jury that this statement was not evidence that they should consider, and that they should follow the district court's direction to disregard it. See *ibid.* (the fact that the jury may have understood the witness's statement even without official translation was not enough to overcome the presumption that the jury would follow the court's instructions to disregard stricken testimony).

any of the defendants by name. Rather, she simply mentioned that there had been a verdict against *the City of San Juan*. App. 500-501, 504.

Defendants exaggerate when they characterize the inadmissible testimony as "go[ing] to the very truth of the charges against defendant." Pagan Br. 44; see also Morales Br. 42-43; Vidal Br. 39-41. Certainly with respect to the three defendants who claimed that they were not at the gas station on the evening of the assault on Rivera, nothing about Torres' statement had any bearing on their culpability. As for Vidal, who was indisputably at the Citgo gas station, any possibility that jurors might have been inclined to hold him responsible because of the finding of liability against the City was amply addressed by the court's curative instructions, which were carefully crafted to ensure that the jurors understood that any finding against the City in a civil matter should have no bearing on their consideration of the *criminal* charges in this case against Vidal and the other defendants.

When assessing the extent to which Torres' reference to a civil trial against the City of San Juan was prejudicial to the defendants, it is important to place this statement in context. As this Court explained in *United States* v. *Freeman*, an appellate court reviewing a district court's denial of a motion for a mistrial must "consider the totality of the circumstances" and must "determine whether the defendant has demonstrated the kind of 'clear' prejudice that would render the court's denial of his motion for a mistrial a 'manifest abuse of discretion.'" 208

F.3d 332, 339 (1st Cir. 2000) (quoting *United States* v. *Torres*, 162 F.3d 6, 12 (1st Cir. 1998)). Torres was the eleventh witness called by the government, and the fifth witness to testify in detail about what happened to Rivera at the gas station. In other words, by the time Torres took the stand, the jurors had heard hours of evidence regarding acts of omission and commission by the officers, and the harm that Rivera had suffered as a result. App. 100-108, 139-151, 183-212, 384-396. The jury already knew that Rivera had died while in police custody, had seen pictures of Rivera's injuries, and heard testimony attributing Rivera's death to the trauma he suffered at the hands of SJMPD officers. App. 246-260, 262-287, 296-304, 307-309, 318-320. Accordingly, at that point in the proceedings, it would have come as little surprise to the jurors that the City of San Juan was held civilly responsible for Rivera's death. Cf. *Sepulveda*, 15 F.3d at 1185 ("We have routinely found cumulative evidence impotent when accidentally uncorked.").[6]

In addition, the district court's instruction carefully explained to the jury the important distinctions between those civil proceedings and this case. App. 563-565. Through this detailed instruction, the district court made clear that any civil trial referred to by Torres had nothing to do with the questions before the jury

[6] As noted previously, pp.13-14, *supra*, the City was not held civilly liable for violating Rivera's civil rights. Rather, it was held liable only on the wrongful death charge.

because that other case involved (1) different parties, (2) a different standard of proof, and (3) different evidence. App. 563-565. The court emphasized that the defendants in this case were not parties to the other proceeding, did not have lawyers representing them, and therefore were in no position to test any of the evidence in that other case. App. 563-565. Contrary to defendants' suggestion that this instruction only "bolstered" Torres' testimony, the court's instruction made clear to the jury that whatever happened in those proceedings was irrelevant to the questions presented to the jury in this criminal case, and that was why they should disregard Torres' reference to the civil trial. See App. 563 ("For all of these reasons, and because your responsibility is to base your verdict exclusively on the evidence in this trial, it would be entirely improper and in violation of your oath for you to consider the existence and the outcome of the civil trial wherein Defendants were not parties in your deliberations.").

When assessing whether any taint caused by Torres' statement was "beyond realistic hope of repair," *Sepulveda,* 15 F.3d at 1184, the court had strong reasons for believing that the jury *in this case* was capable of following his limiting instruction. When, during jury selection, defense counsel repeatedly expressed concern about jurors' willingness and capacity to follow the court's instructions, the court took these concerns very seriously and questioned a relatively high

number of prospective jurors in order to empanel a jury that the court and counsel had confidence could follow the court's instructions. App. 75; see App. 545 n.2.

This Court presumes that, "within wide margins, the potential for prejudice stemming from improper testimony or comments can be satisfactorily dispelled by appropriate curative instructions." *Sepulveda,* 15 F.3d at 1184.[7] Particularly in light of the history of this specific jury, the presumption is appropriate in this case.

3. Although the procedure developed by the court was designed to give the parties an adequate opportunity to present their arguments on the relative merits of

[7] As the government pointed out to the district court (App. 524-525, 538-539), there have been numerous cases involving improper evidence much more directly related to the defendants in a particular case, and thus much more prejudicial, where this Court has agreed with the district court's decision to address any concerns by giving a curative instruction rather than by granting a mistrial. See, *e.g.*, *United States* v. *Bradshaw,* 281 F.3d 278, 283-284 (1st Cir.) (instruction sufficient to cure prejudice caused by testimony from co-conspirators later found to be inadmissible and stricken from record), cert. denied, 537 U.S. 1049 (2002); *Freeman,* 208 F.3d at 344 (curative instruction sufficient to address provisionally admitted hearsay evidence later deemed inadmissible); *Rullan-Rivera,* 60 F.3d at 17-18 (finding curative instruction sufficient to address inadvertent introduction of testimony that defendant was the witness's "drug dealer"); *United States* v. *Paiva,* 892 F.2d 148, 160 (1st Cir. 1989) (instruction sufficient to cure inadmissible hearsay evidence from laboratory report identifying substance as cocaine); *United States* v. *Bosch,* 584 F.2d 1113, 1118 (1st Cir. 1978) (volunteered prejudicial testimony that defendant was recovering from gunshot wound shortly before he allegedly participated in a narcotics transaction could be cured by jury instruction to disregard any evidence of defendant's gunshot wound).

a curative instruction or a mistrial, defendants Pagan and Vidal now suggest that the time that elapsed while the court considered the motion rendered any curative instruction inadequate. Pagan Br. 45; Vidal Br. 40 n.14. Under defendants' formulation, because the court was already planning to be in recess for the week of July 4, its only option was to rule on the spot. This is not what this Circuit's precedent requires or intends. As the district court noted in its ruling, it "determined that it would be proper, *and the parties agreed,* to wait until each party submitted a memorandum with their positions before deciding the matter." App. 538 (emphasis added); see also App. 538 ("No objections were lodged by any party regarding the Court's suggested procedure.").[8]

The case law simply does not support defendants' suggestion that the delay between Torres' statement and the giving of the curative instruction rendered any instruction in this case *per se* ineffective. To the contrary, "an instruction at the conclusion of trial will often be sufficient" to cure any taint caused by a prejudicial remark. *United States* v. *McGrew,* 165 F. App'x 308, 315-316 (5th Cir.)

[8] By failing to request any intermediate instruction to the jury while the court resolved the question of whether to grant a mistrial, defendants waived their right to raise this objection on appeal. *United States* v. *Upton*, 559 F.3d 3, 9 (1st Cir.) ("The right to a jury instruction can be waived by not requesting the instruction, or not objecting at the proper time."), cert. denied, 130 S. Ct. 397 (2009).

(unpublished) (citation omitted), cert. denied, 547 U.S. 1172 (2006); see *United States* v. *Gentles*, 619 F.3d 75, 83 (1st Cir.) (affirming denial of mistrial motion even where court waited until final jury instruction to advise the jury to disregard references to extraneous matters, and to focus only on the evidence before it), cert. denied, 131 S. Ct. 622 (2010). In this case, however, the district court did not wait any longer than necessary for it to reach its conclusion on how to proceed. Rather, after considering the parties' motions, and giving the parties an opportunity to review the court's proposed language, the court issued a strongly worded curative instruction immediately upon the jury's return from the pre-planned recess.

In light of these facts, there is no basis for this Court to rule that the district court abused its discretion. To the contrary, finding for the defendants on this basis would be tantamount to declaring a rule that penalizes district court judges for giving counsel the opportunity to present more than mere off-the-cuff arguments on the serious question of whether the court should nullify the proceedings conducted to date by declaring a mistrial. This Court need not and should not do so.

4. Finally, the defendants have no cause to complain about the specific language contained in the instruction. App. 563-565. The court gave counsel the opportunity to review the proposed instruction, and modified the instruction to take into account the concerns expressed by defendants' counsel. App. 558-560

(striking and modifying language in instruction at defense counsel's request).

Notwithstanding the fact that the defendants were given ample opportunity to raise concerns about the instruction proposed by the court, defendants now insist that the court's instruction was flawed because it "vouched" for the truth of Torres testimony, and thus compounded the harm caused by her statement. See, *e.g.*, Pagan Br. 42-43. By failing to object to the court's proposed instruction to the jury (App. 558-561), defendants have waived their right to raise any objection on appeal. *United States* v. *Upton*, 559 F.3d 3, 9 (1st Cir.), cert. denied, 130 S. Ct. 397 (2009). Even assuming, however, that plain error review applies, defendants' claim fails because there was no error, plain or otherwise. *Ibid.* (error must not only be plain but must also have "affected the substantial rights of the appellant," and have "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings") (citations omitted); see also *United States* v. *Olano*, 507 U.S. 725, 736 (1993).

Defendants assert that the district court's instruction was erroneous and prejudicial because it allegedly confirmed in the jurors' minds that there had, in fact, been a prior civil trial. See, *e.g.*, Pagan Br. 42-43; Vidal Br. 40 n.14. When the instruction is read as a whole, however, defendants' claims of error and prejudice are unreasonable. In addition to telling the jurors to disregard Torres' statement, the district instructed the jury *why* it should do so. The court understood

that the jury's lack of understanding about the differences between the prior civil proceedings and this case might cause some confusion for them. Accordingly, the court correctly decided to explain why those proceedings were irrelevant and thus why Torres' reference to it should be disregarded. And then, even though the court had already given similar instructions to the jury in a general manner throughout the trial, the court specifically emphasized to the jurors that "because [their] responsibility is to base [their] verdict exclusively on the evidence in this trial, it would be entirely improper and in violation of [their] oath for [them] to consider the existence and the outcome of the civil trial wherein Defendants were not parties in [their] deliberations." App. 564. The district court reiterated these instructions in general terms at the conclusion of the trial. App. 776, 780-781 (noting that the defendants did not want the Court to reiterate the specific instruction relating to Torres' testimony). Nothing that the district court did here constitutes error, let alone plain error.

5. Finally, as explained below in greater detail with regard to defendants' challenges to the sufficiency of the evidence, it is highly unlikely that Torres' stray reference to the civil proceedings against the City affected the outcome in this case. "Considering the evidence in this case, the terse character of [Torres'] remarks and the thorough [general] instructions given by the court," *Gentles*, 619 F.3d at 82 (internal quotation marks and citation omitted), and particularly in light

of the fact that the jury returned different verdicts against each of the various defendants in this case, it is highly unlikely that Torres' comment affected the results of this trial. *Ibid.*

For all of these reasons, this Court should find that the district court did not abuse its discretion in denying defendants' motion for a mistrial.

III

THE DISTRICT COURT DID NOT ERR IN RULING THAT THE ADMISSION OF SALAS' IDENTIFICATION OF PAGAN DID NOT VIOLATE DUE PROCESS BUT RATHER INVOLVED QUESTIONS OF WEIGHT AND CREDIBILITY THAT WERE PROPERLY LEFT TO THE JURY TO DECIDE

A. Background

A few days prior to the scheduled testimony of Officer Salas, the government informed the district court that, during a meeting with government attorneys at their office (not in the courthouse), Salas had volunteered that he would recognize one of the participants in the assault at the gas station (whose name he did not know) if he saw the man. App. 229-230, 238. Previously, during his grand jury testimony, Salas had described the man as a light-skinned, tall and hefty person. App. 230, 232. Counsel for Pagan objected and moved to suppress any testimony from Salas identifying his client as someone at the Citgo gas station because Salas had previously not been given the opportunity to identify Pagan through a photo line-up. App. 230-236. The government asserted it was irrelevant

whether the government had shown Salas a photo spread of individuals suspected of being at the Citgo gas station; the issue before the court was whether the identification could be deemed reliable, and reliability could be established in a number of ways. App. 236.

Prior to allowing Salas to testify before the jury, the district court conducted an evidentiary hearing. During the hearing, Salas testified that one of the men at the Citgo gas station that night was "white, tall, * * * husky with a military-type haircut." App. 325. He also testified that this person was approximately 6'1" tall and was wearing the SJMPD Impact Unit uniform. App. 325-326. Although Salas did not know the person's name, he had seen this individual "four or five times" prior to the night of the incident at the gas station, and the man had been wearing a police uniform. App. 325.

Returning to the events of July 20, 2003, Salas testified that he originally saw this man as he was getting up off the ground from where he had been trying to handcuff Rivera. App. 325. Salas testified that he saw the man again later during that incident beating Rivera with his hands. App. 326.

Salas, who was also an SJMPD officer, then explained that he had seen this man "five or six" more times after the night of the gas station incident. App. 327. On those occasions, the man was wearing the uniform of the SJMPD Impact Unit. App. 327.

Finally, Salas noted that he had been at the courthouse a few days previously, expecting to testify, and as he was entering the building, he again saw the man as he was entering through the courthouse checkpoint. App. 328. He recognized the man as the "tall, husky man, white in color and with a military-type haircut" from the gas station incident. App. 327-328. He then identified Pagan as the individual he saw. App. 328. Although Pagan was "somewhat fatter and wearing glasses" as compared to how he looked in 2003, Salas was "100 percent certain" that the man whom he had just identified was the person whom he had seen during the gas station incident. App. 328-329.

In response to questions from the court, Salas testified that he was approximately six or seven feet from Pagan while at the gas station, and that he had observed Pagan "for some seconds." App. 330. Salas recalled the entire incident at the gas station lasting "some 10 to 15 minutes" before he left. App. 331. Salas estimated the time between when Rivera was on the ground until the time that Rivera was picked up and taken off to the station house at "about ten minutes." App. 331. Also in response to questions from the court, Salas reiterated that he saw Pagan on two distinct occasions that night. App. 331. Thereafter, when he saw Pagan, Salas "related him to the Citgo gas station" incident but did not speak to him about it. App. 332.

On cross-examination, Salas acknowledged that he had not previously identified Pagan as one of the individuals at the gas station. App. 334-335. In particular, Salas acknowledged that, in the written statement that he initially prepared for the Puerto Rico investigators, he did not make reference to a tall, husky policeman with a military-style haircut. App. 334-335. He also acknowledged that he deliberately did not make any reference to an individual fitting that description during his first interview with the federal officials investigating this case. App. 338-339 (noting that he did not forget about this individual, but rather decided not to mention it). During his second interview with federal agents, however, Salas revealed that a husky, tall, light-complexioned officer with a military-style haircut was among the Impact Unit officers he saw that night. App. 339.

On cross-examination, Salas acknowledged that he had seen Pagan walking into the courtroom with his counsel, but noted that he did not know that the man was Pagan's attorney. App. 341. Pagan's counsel also asked Salas whether, during the times that he had seen Pagan, Pagan had been wearing a name badge. App. 342. Salas indicated that, if Pagan had been wearing a name badge, he did not notice it. App. 342.

After considering this testimony, and reviewing the cases provided by counsel, the district court announced his ruling from the bench. Noting that the

question was "[w]hether or not there is a very substantial likelihood of irreparable misidentification," he found that this case was "not close," and that Salas' identification raised only issues of weight and credibility that were properly left to the jury. App. 344.

B. Standard Of Review

When reviewing a district court's denial of a motion to suppress an in-court identification, this Court must keep in mind that "identification evidence should be withheld from the jury 'only in extraordinary circumstances.'" *United States* v. *Rivera-Rivera*, 555 F.3d 277, 282 (1st Cir.) (quoting *United States* v. *Holliday*, 457 F.3d 121, 125 (1st Cir. 2006)), cert. denied, 130 S. Ct. 344 (2009). While this Court's review is plenary, the district court's factual findings are assessed against the clear error standard. *Id.* at 283. This Court "will affirm a district court's denial of a suppression motion if any reasonable view of the evidence supports it." *Ibid.*

C. The District Court Properly Determined That Admission Of Salas' In-Court Identification Of Pagan Would Not Violate Due Process

The court gave careful consideration, including an evidentiary hearing outside the presence of the jury where the court could observe the witness's demeanor, to whether Officer Salas' identification of Pagan constituted the kind of "extraordinary case" that would warrant preventing the jury from considering his testimony. Based on the evidence presented, the court correctly concluded that any questions about Salas' identification were issues of weight and credibility that were

ultimately the province of the jury. Particularly considering the fact-specific nature of the district court's determination, this Court should affirm its ruling on this point.

1. When a defendant seeks to suppress a witness's in-court identification on the ground that the identification was tainted by events occurring prior to trial, the court must first determine whether the circumstances surrounding a pre-trial identification were, in fact, "impermissibly suggestive." *Rivera-Rivera*, 555 F.3d at 283. The court assumed for purposes of argument that Salas' encounter with Pagan in the courthouse security area might have been impermissibly suggestive (App. 344), and proceeded to the second prong of the analysis.

As the government pointed out to the district court, however, there was nothing about Salas's identification of Pagan prior to his in-court identification that was "impermissibly suggestive." App. 354-355. Although Salas happened to see Pagan in the courthouse security area a few days prior to his in-court identification, there was nothing about this encounter that would have suggested to Salas that Pagan was the man he saw at the gas station. Government counsel noted that Pagan's only argument under the first prong was that Salas saw Pagan was "dressed in a suit, not all that different from the way that most of the people are dressed in suits here," and "that somehow tainted the process." App. 354-355. In fact, although the district court ultimately gave Pagan the benefit of the doubt on

this threshold question, the court noted that it was "close" as to whether he had established that Salas's identification of Pagan in the courthouse lobby had, in fact, occurred under impermissibly suggestive circumstances. App. 355.

Although Pagan insists that Salas' courthouse identification of him should be deemed suspect because it was not the "least suggestive identification procedure," (*i.e.*, a photo line-up) (Br. 54), the Supreme Court has made clear that the government's decision not to show a witness a photo spread or line-up does not automatically render any future identification made by that witness unreliable. *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972) (noting that "admission of evidence of a showup [identification] without more does not violate due process).[9]

Pagan certainly had the right to (and in fact did) argue to the jury that the failure of the government either to show Salas a photo spread or to have him attend a line up should counsel against deeming his identification of Pagan credible. But that does not render Salas' courthouse lobby encounter with Pagan inherently

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[9] Notwithstanding Pagan's attempt to characterize a photo line-up as a "less suggestive identification procedure" (Br. 52), this Court is well aware that defendants frequently challenge photo line-ups as "impermissibly suggestive." See, *e.g.*, *United States* v. *Holliday*, 457 F.3d 121, 125-126 (1st Cir. 2006), cert. denied, 549 U.S. 1236 (2007). Although, as *Holliday* demonstrates, such challenges are usually without merit, *ibid.*, the government's point here is simply that Pagan would likely have objected to Salas' identification of him regardless of how the pre-trial identification occurred.

suspect, or his subsequent in-court identification of Pagan inherently unreliable. As discussed in greater detail below, the mere existence of plausible arguments against a witness's credibility does not warrant the "extraordinary" remedy of preventing the jury from considering the evidence in the first place.

The government continues to believe that the district court could have disposed of defendant's motion to suppress at the first stage of the analysis, and would urge this Court to affirm the district court's ruling on the ground that there was nothing impermissibly suggestive about the circumstances of Salas' pre-trial identification of Pagan.

2. In any event, the district court proceeded to the second step of the analysis, and evaluated whether, under the totality of the circumstances, Salas' identification of Pagan was reliable. As the district court emphasized, reliability in this context does not mean that the credibility of the witness is beyond question. App. 345. Rather, the question is whether the witness's identification of a defendant is reliable enough as a matter of law to satisfy due process concerns. *Manson* v. *Brathwaite*, 432 U.S. 98, 114 (1977) (observing that "reliability is the linchpin in determining the admissibility of identification testimony"); *United States* v. *De Leon-Quinones*, 588 F.3d 748, 753 (1st Cir. 2009) (accord), cert. denied, 130 S. Ct. 2361 (2010). In this case, there is no reason to disturb the district court's determination that Salas' identification of Pagan was reliable

enough to allow the jury to decide for itself how much weight to give to Salas' testimony.

Consistent with this Court's precedent, see, *e.g.*, *Rivera-Rivera*, 555 F.3d at 283, the district court examined the following factors to determine whether the identification was sufficiently reliable to go before the jury: (1) "the opportunity of the witness to view the person at the time," (2) "his degree of attention," (3) "the accuracy of the witness prior to the description of the Defendant," (4) "the level of certainty at the confrontation and cross-examination," and (5) "the length of time between the crime and the confrontation." App. 345.

Starting with the last factor first, the court acknowledged the delay between the events at the gas station and identification (App. 346), but noted that this Court had authorized the admission of an identification when there had been an even longer delay than present in this case. App. 345 (citing *United States* v. *Flores-Rivera*, 56 F.3d 319, 331 (1st Cir. 1995)).

The district court then assessed the third and fourth factors – accuracy and level of certainty. The court noted that Salas had seen Pagan four or five times prior to the gas station incident, and then another handful of times prior to seeing Pagan in the courthouse. App. 345. This clearly bolstered the strength of Salas' identification, as Salas had reason to interact with Pagan as a fellow SJMPD officer, and thus would have had a reason to recognize his face. App. 345-346; see

United States v. *Recendiz*, 557 F.3d 511, 526 (7th Cir.) (noting that prior association between witness and defendant was factor supporting reliability of witness's in-court identification), cert. denied, 130 S. Ct. 340 (2009).

The district court did *not* find that there was no basis for questioning the accuracy and certainty of Salas' testimony, nor is such a finding required to determine that the testimony was sufficiently reliable to satisfy due process concerns. In fact, the court explicitly acknowledged that "there are many issues of credibility here present," including the fact that Salas did not identify Pagan in his earlier discussion with investigators. App. 346. But those questions, the court found, were "credibility issues and issues of weight" properly reserved for the jury. App. 346.

Finally, the court found that the first two factors outlined in *Rivera-Rivera* – opportunity to view the person at the time and the witness's degree of attention – weighed heavily in favor of allowing the jury to decide for itself whether Salas' identification was credible. No one disputed that Salas saw Pagan at close range, and even if Salas saw Pagan for only two or three seconds, the court reasonably concluded that the events Salas saw were memorable and "important" enough to render it likely that he paid close enough attention to be able to identify Pagan at a later date. App. 346.

The district court found that the lack of prior identification through a line-up or photographic spread was not dispositive because "[this] case has other reliability ingredients that are critical." App. 350-351, 355-356. As the court emphasized, Salas knew Pagan before (even if not by name): "he had seen him before, he had seen him after." App. 351.

Even if this Court believes that the district court should have ruled differently on this question, which the district court viewed as not even being a "close" call, there is no basis for disturbing the jury's verdict against Pagan because any error was "harmless beyond a reasonable doubt." *United States* v. *Jesus-Rios*, 990 F.2d 672, 678 (1st Cir. 1993) (citing *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991)). Officer Salas was not the only individual who put Pagan at the scene of the crime. Officers Almeida and Torres both clearly identified Pagan as one of the individuals who assaulted Rivera at the gas station that night. App. 196-196, 480, 602, 606-607. Moreover, Pagan's alibi was that he was at a different location, along with Morales and Pacheco, when the incident at the gas station occurred. App. 616-624, 701-709. Yet the testimony of numerous witnesses discredited that theory: Officer Almeida clearly identified Morales at the scene (App. 195-196), and Officer Salas testified that he was "100 percent certain" that Pacheco was there. App. 428-429.

For all of these reasons, the Court should affirm the district court's decision to permit Salas to identify Pagan as one of the officers who attacked Rivera at the Citgo gas station on July 20, 2003. The verdict against Pagan is sound and should likewise be affirmed by this Court.

IV

THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANTS' RULE 29 MOTIONS, AS THE EVIDENCE WAS MORE THAN SUFFICIENT TO SUPPORT THEIR CONVICTIONS

A. Standard Of Review

A district court's denial of defendants' motion for judgment of acquittal under Rule 29 is reviewed *de novo*. *United States* v. *Cruzado-Laureano*, 404 F.3d 470, 480 (1st Cir.), cert. denied, 546 U.S. 1009 (2005). In undertaking this task, this Court must decide "whether, after assaying all the evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational factfinder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime." *Ibid.* (citation omitted). The government may make its case through "either direct or circumstantial evidence, or by any combination thereof." *Ibid.* (citation omitted). Moreover, when reviewing the denial of a Rule 29 motion, any disputed issues of fact in the record are resolved in the verdict's favor. *Ibid.* Ultimately, this Court need not find that the jury had no choice but to return a guilty verdict; rather, it "must only

satisfy itself that the guilty verdict finds support in a plausible rendition of the record." *Ibid.* (citation omitted).

After reviewing the record in this case, this Court should affirm the convictions as amply supported by the evidence.

B. Pacheco – Counts 7 And 12

Pacheco contests the sufficiency of the evidence to support his convictions under Count 7, making a material false statement to a federal agent in violation of 18 U.S.C. 1001, and Count 12, obstructing justice in violation of 18 U.S.C. 1512(b)(3). There is more than sufficient evidence in the record to establish Pacheco's guilt.

The elements that the government must prove to establish a violation of 18 U.S.C. 1001 are that a defendant has made "(1) a statement that was (2) false, (3) material, (4) made knowingly and willfully, and (5) made in a matter within the jurisdiction of a federal agency." *United States* v. *Notarantonio*, 758 F.2d 777, 785 (1st Cir. 1985). Similarly, an individual violates 18 U.S.C. 1512(b)(3) when he "knowingly * * * engages in misleading conduct toward another person, with intent to * * * hinder, delay, or prevent the communication to a law enforcement officer * * * of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(b).

There was both direct and circumstantial evidence from which the jury could have drawn the conclusion that Pacheco lied to investigators when he claimed that he was not at the Citgo gas station on the evening of July 20, 2003. App. 624-630, 709-717. First and foremost, there was the eyewitness testimony from Officer Salas, who knew Pacheco personally. App. 407. He stated that he was "100 percent sure" that Pacheco was in that group of officers standing over Rivera. App. 428-429. Second, multiple witnesses placed the Impact Unit van, which Pacheco claimed to be riding in that night, at the scene. App. 105, 116, 473, 571-572.

Moreover, Pacheco's alibi was inextricably intertwined with the alibis of defendants Pagan and Morales. He claimed that he was not at the Citgo station, and had no knowledge of what transpired at the gas station, because he was riding around with defendants Pagan and Morales looking for the stolen vehicle. Yet several eyewitnesses identified Pagan at the scene of the assault on Rivera (App. 195, 386-389, 393-394, 480, 602, 606-607), and one witness definitely identified Morales as having been among those abusing Rivera on the night that he died (App. 195-196). In addition, the jury could have relied on evidence that Pacheco's description of the events that evening did not line up with the stories that Pagan and Morales offered about their whereabouts. App. 616-636, 707-727.

It does not matter that the jury acquitted Pacheco of the charge alleging that he either violated, or aided and abetted the violation of, Rivera's civil rights. The jury's decision to acquit Pacheco on Count 1 does not mean that the juror believed Pacheco was not actually *at* the gas station that night. Rather, the jury likely acquitted on Count 1 because Officer Salas, the only witness identifying Pacheco at the scene, testified that he was only "70 percent certain" that Pacheco was one of the kickers. App. 407; see also App. 422-423 (testifying that he could not tell if Pacheco was one of the kickers); App 431 (agreeing that he "never saw Mr. Pacheco kick anybody on that day").

For Counts 7 and 12, however, it was not necessary for the government to prove that Pacheco was among those officers who assaulted Rivera. Rather, it was sufficient for the government to prove that Pacheco knowingly and willfully misled investigators both as to his whereabouts that evening, and with respect to what he knew about the incident at the Citgo gas station, which were undoubtedly material facts with respect to the investigation regarding the death of Rivera.[10]

At trial, defendants' counsel placed great weight on the fact that Agent Davila's notes did not contain a verbatim transcript of the questions asked and

[10] Contrary to what Pacheco's argument seems to suggest (Br. 52, 58), it does not matter that the government was ultimately able to complete its investigation notwithstanding Pacheco's false statements or that the investigators were not convinced by Pacheco's lies.

answers given during the interview. App. 639-641, 643-644, 648. Although Pacheco continues to pursue this line of attack (Br. 32-33), the success of his argument ultimately turns on the jury's assessment of Davila's credibility. Davila gave clear and unequivocal testimony that he asked the defendants, including Pacheco, (1) whether they had been at the gas station during the early morning hours of July 20, 2003, (2) whether they knew how Rivera received his injuries, and (3) whether they knew who had inflicted the injuries on Rivera. App. 629-630. In light of this evidence, and the fact that this Court must assume that all inferences and credibility assessments necessary to support the verdict were made by the jury, *Cruzado-Laureano*, 404 F.3d at 480, Pacheco's argument cannot prevail.[11]

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[11] On appeal, Pacheco implies that the verdict against him is faulty because neither Investigator Davila nor FBI Agent Rivero informed him that he had a constitutional right not to answer their questions. Pacheco Br. 47-48. As discussed extensively during the trial in connection with the testimony of FBI Agent Rivero, none of the defendants filed pretrial motions to suppress statements made during these non-custodial interviews based on some alleged failure by either Davila or Rivero to advise them of their rights. D.E. 363 at 11-19. Therefore, to the extent that Pacheco is essentially trying to revive this line of argument, his failure to file a pre-trial motion to suppress his statements to the local and federal investigators precludes him from doing so in this appeal. See Fed. R. Crim. P. 12(b)(3)(C); *United States* v. *Perez-Gonzalez*, 445 F.3d 39, 44 (1st Cir. 2006). Particularly where the counsel raising these issues on behalf of the defendants below explicitly disclaimed any intent to seek suppression of these statements (D.E. 363 at 16), this Court should deem any arguments related to this issue waived. *United States* v. *Lopez-Lopez*, 282 F.3d 1, 10 (1st Cir.) (noting that even

(continued…)

For all of these reasons, the district court was correct in finding that the evidence was sufficient for the jury in this case to conclude beyond a reasonable doubt that Pacheco knowingly and willfully lied to both Puerto Rico investigators by falsely telling them that he (along with Morales and Pagan) had been somewhere other than the Citgo gas station on the night of July 20, 2003, and that he had no personal knowledge of what happened at the Citgo gas station. App. 799. Pacheco's convictions should be affirmed.

C. Morales – Counts 1, 6, 11, And 16

For the same reasons that the jury had ample basis for convicting Pacheco on Counts 7 and 12, the jury likewise had sufficient evidence to convict Morales on Counts 6, 11, and 16. In order to convict Morales under 18 U.S.C. 1001 (Count 6) and under 18 U.S.C. 1512(b)(3) (Count 11), a jury needed to find only that Morales was, in fact, at the Citgo gas station in the early morning hours of July 20, 2003, and that he lied to investigators both about his whereabouts and about what he saw that night. The jury could likewise convict Morales of knowingly and willfully making the same false statements to a federal grand jury, in violation of 18 U.S.C. 1623 (Count 16).

(… continued)
plain error review "would be inconsistent with, and would allow [defendant] to escape from his non-compliance with Rule 12"), cert. denied, 536 U.S. 949 (2002).

As for Count 1, the government had to prove only that Morales (1) acted under color of law; (2) deprived Rivera of a constitutional right; and (3) acted willfully, and that as a result, (4) Rivera suffered bodily injury. App. 792 (Instruction 16). With respect to Count 1, the constitutional right at issue was Rivera's Fourth and Fourteenth Amendment "right to be free from 'unreasonable force' used by a person acting under color of law." App. 794 (Instruction 16-B). In this case, there was eyewitness testimony from Officer Almeida identifying Morales as one of the people kicking Rivera as he lay on the ground. App. 195-196. According to Almeida, Morales kicked Rivera multiple times with his boot in the area of his ribs and arms. App. 195-196, 222-224, 226-227. Moreover, Torres testified that *all* of the officers in the circle surrounding Rivera were kicking him. App. 480, 484.

Based on Almeida's positive identification, the testimony of other eye witnesses, and the implausibility of Morales' alibi, a reasonable juror could have concluded beyond a reasonable doubt that Morales was among those at the Citgo gas station who subjected Rivera to unreasonable force. Although Rivera-Gonzalez claimed only to see Vidal at the gas station, the jury could easily have decided that Rivera-Gonzalez had a reason to cover up the wrongdoing of Morales, his friend and co-worker. App. 595-596. Moreover, Morales claimed to be driving around in the Impact Unit van that night, and Rivera-Gonzalez testified that he saw

the van at the gas station. App. 571-572. The jury could take all of this into account when deciding whether to believe Morales or the government as to what happened that night.

Based on the training that SJMPD officers receive regarding the appropriate use of force (App. 186-187, 493-494, 578-579), Morales clearly knew that kicking a vulnerable, and at some point handcuffed, man constituted a violation of that person's constitutional right to be free from unreasonable force by those acting under color of law. As Officer Torres testified, SJMPD officers are taught that once an arrestee is under control and does not present a threat, it is not an appropriate use of force to hit the arrestee. App. 494. At the time Morales arrived, Torres had already put her gun away because it was clear that Rivera was not posing a threat to anyone. App. 464-471. In addition, he was already physically pinned to the ground by Vidal and Salas. App. 186-187, 464-471, 476-479. Accordingly, there could be no doubt in Morales' mind that there would be no justification for kicking a man who was face down on the ground and under the control of a group of officers. App. 494-495; see also App. 186-187. For this reason, the district court did not err in ruling that the evidence was sufficient for the jury to convict Morales of Count 1.[12]

[12] Alternatively, the jury could have easily found beyond a reasonable doubt that Morales was guilty of aiding and abetting the violation of Rivera's rights.

(continued…)

All of the jury's determinations of guilt with respect to Morales were sound, and should be affirmed.

D. Vidal – Counts 1 And 4

Similarly, the district court correctly held that the evidence was sufficient for the jury to convict Vidal on Counts 1 and 4. App. 799. Unlike the other defendants, who claimed not to be at the gas station when Rivera was beaten, Vidal claimed that nothing improper happened on the night of July 20, 2003. App. 610-616, 692-695, 698-701. Then, at trial, Vidal argued that any misconduct happened before he got there and took charge of the scene. App. 773. In his third attempt to exonerate himself, Vidal now argues that, because he "*did nothing*" (Br. 44), the jury could not find him responsible for what happened to Rivera that night. Vidal's arguments are incorrect, both with respect to the sufficiency of the evidence and the applicable legal standard.

(… continued)
Under this theory, the government had to prove only that "someone else committed the charged crime," and that Morales "willfully associated himself in some way with the crime and willfully participated in it as he would in something he wished to bring about." App. 792; see also *United States* v. *Southard*, 700 F.2d 1, 12 (1st Cir.), cert. denied, 464 U.S. 823 (1983). There was ample evidence to demonstrate that Morales "became associated with the [criminal] endeavor and took part in it, intending to ensure its success." *United States* v. *Spinney*, 65 F.3d 231, 235 (1st Cir. 1995).

As to Count 1, the jury heard testimony from numerous eye witnesses that Vidal was one of those holding Rivera down when the officers began kicking and punching him. App. 384-385, 390, 469-472, 475-479. This is not a case where the supervisor walked away from the scene, and in his absence, his subordinates engaged in misconduct. To the contrary, the evidence was clear that Vidal was in the thick of things when the officers began assaulting Rivera. See, *e.g.*, App. 574, 577-578, 580-581. As Officer Torres testified, when Vidal picked Rivera off the ground and brought him to the police car for transport to the Impact Unit station house, he said, "This one's mine, this one's mine." App. 489. This statement as well demonstrates that Vidal intended for Rivera to be "taught a lesson." Regardless of whether Vidal personally kicked or punched Rivera while he lay prone on the ground at the gas station, the evidence was more than sufficient for the jury to conclude beyond a reasonable doubt that Vidal "willfully associated himself in some way with the crime and willfully participated in it as something he wished to bring about." App. 792.[13]

[13] For this reason as well, there is no merit to Vidal's argument that the evidence did not show that Vidal "acted." Vidal Br. 44. Drawing all inferences in support of the verdict, as this Court must, it is clear that the jury could have found beyond a reasonable doubt that Vidal took actions, including his restraint of Rivera, that facilitated the violation of Rivera's rights by the other officers.

Vidal's argument likewise fails as to Count 4. There is no reasonable argument that Vidal lacked notice that allowing his subordinates to punch and kick a handcuffed arrestee multiple times in the head constituted a violation of the arrestee's constitutional rights. *Graham* v. *Connor*, 490 U.S. 386 (1989). As noted previously, the jury heard evidence that, based on the training that SJMPD officers receive, Vidal would have known that the force used that night was far beyond what would have been permissible when arresting an individual who was under control and not posing a threat to the safety of others. App. 186-187, 493-494, 578-579.

As for Vidal's claim that he had no clear duty to intercede in these circumstances, this argument is also wholly without merit. The case cited by Vidal as supporting his position, *Wilson* v. *Town of Mendon*, 294 F.3d 1 (1st Cir. 2002), only further demonstrates that Vidal's conviction under Count 4 was sound. As Vidal acknowledges (Br. 48), this Court in *Wilson* made clear that a supervisor can be held liable "for his failure to intervene in appropriate circumstances to protect an arrestee from the excessive use of force by his fellow officers." *Wilson*, 294 F.3d at 6. Specifically, a supervisory officer may be held liable for the conduct of his subordinates when the supervisor's "action or inaction [is] affirmative[ly] link[ed] . . . to that behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence *or* gross negligence

amounting to deliberate indifference." *Ibid.* (internal quotation marks and citation omitted).

As explained above, Vidal's actions were clearly linked to the misconduct of the other officers kicking and punching Rivera. As one of the people who was keeping Rivera handcuffed on the ground, Vidal's actions certainly constituted more than just "mere inaction." Vidal Br. 48. To the contrary, Vidal's actions are textbook examples of "supervisory encouragement, condonation or acquiescence" in the unreasonable force used by subordinate officers. *Wilson*, 294 F.3d at 6 (internal quotation marks and citation omitted).

Notwithstanding Vidal's current attempt to explain his failure to intervene as excusable in light of "the heat of a spontaneous confrontation at the Citgo station" (Br. 49), the jury obviously decided that Vidal could and should have intervened but willfully failed to do so. In any event, the jury also heard ample evidence about Vidal's failure to keep Rivera from harm even after he was taken away from the "heat" of the initial gas station incident. The evidence showed beyond a reasonable doubt that Vidal also failed in his duty to keep Rivera from harm when he decided to transport Rivera to the Impact Unit station house, rather than to a hospital, even though it would have been clear to anyone from Rivera's condition that he was in need of medical attention. App. 122-126, 581-583. There was also testimony from Rivera-Gonzalez about how Vidal failed to prevent the officers

from continuing to assault Rivera at the station house. App. 591-592. Accordingly, there is no reason for this Court to disturb the jury's decision to convict Vidal on Counts 1 and 4.

Because all of the jury's conclusions regarding Vidal's guilt were supported by the evidence, all of Vidal's convictions should be affirmed.

V

THERE IS NO BASIS FOR THIS COURT TO FIND PLAIN ERROR WITH THE DISTRICT COURT'S JURY INSTRUCTION REGARDING CONSCIOUSNESS OF GUILT

A. Standard Of Review

Morales asserts for the first time on appeal that the instruction regarding the extent to which the jury could infer consciousness of guilt from defendants' acts and statements was flawed because, he argues, it relieved the government of its burden of proof as to one of the elements of Count 1. To properly preserve a challenge to jury instructions, a defendant must object to the instruction immediately after the judge has charged the jury. *United States* v. *Combs*, 555 F.3d 60, 63 (1st Cir.), cert. denied, 129 S. Ct. 2814 (2009). Because Morales failed to preserve this issue below (Morales Br. 37 n.2), this Court reviews this issue for plain error.

Under the plain error test, the appellant must demonstrate that "(1) an error occurred; (2) which was clear or obvious; and which not only; (3) affected the

defendant's substantial rights, but also; (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *Combs*, 555 F.3d at 63 (citation omitted). "While reversal of a conviction predicated on unpreserved jury error is theoretically possible, ... [it is] the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *United States* v. *Garcia-Pastrana*, 584 F.3d 351, 382 (1st Cir. 2009), cert. denied, 130 S. Ct. 1724 (2010).

B. The Jury Instruction Was Not Plainly Erroneous As It Correctly Stated The Law And Did Not Relieve The Government Of Its Burden Of Proof

When assessing a challenge to a trial court's jury instructions, this Court has emphasized that "[a] trial judge has broad discretion in deciding how best to communicate complicated legal rules to a lay jury." *United States* v. *Newell*, 658 F.3d 1, 19 (1st Cir.), cert. denied, 132 S. Ct. 430 (2011) (citation omitted). Moreover, "[w]hen reviewing a district court's instructions to the jury, we look at the charge as a whole, not in isolated fragments." *Ibid.* (citation omitted).

Morales argues that the district court's instruction regarding consciousness of guilt incorrectly told the jury that Morales' statements regarding his whereabouts on the night of July 20, 2003, "had been shown or proven beyond a reasonable doubt to be knowingly false." Morales Br. 38 (emphasis omitted). Morales seems to argue that the district court's instruction signaled to the jury that the government had already proven certain facts, and, in doing so, implicitly

authorized the jury to convict Morales on Count 1 without independently determining that Morales had acted with the requisite intent.

This argument does not withstand scrutiny. Shortly before giving the jury the instruction regarding consciousness of guilt, the district court emphasized that "[i]t is always the Government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from that evidence." App. 785, 790. After giving those instructions, the court offered instructions applicable to this case in particular, but made clear that "the order of the instructions is immaterial." App. 786.

The district court's consciousness of guilt instruction was framed using conditional language: "*When* a Defendant voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be proven beyond a reasonable doubt knowingly false in whole or in part, the jury may consider whether this circumstantial evidence points to a consciousness of guilt as to the civil rights violations as charged in Counts 1, 3, and 4." App. 786 (emphasis added). Nothing about this statement reasonably suggests that the government *had already proven* beyond a reasonable doubt that the defendants had made statements that were false. Moreover, the jury instructions, when read in their entirety, explicitly instruct the jury that it must find

each of the four elements – including defendant's willfulness – beyond a reasonable doubt. App. 792.

Nor was there error with the district court's statement that "[i]ntent is a statement [sic] of mind and can be proven by circumstantial evidence. Indeed, it can rarely be established by any other means." App. 787a. The district court did not tell the jury that the government need not *prove* that defendants had the requisite state of mind. Rather, the district court simply provided the jury with instructions regarding the different ways in which the government might prove this element.

Morales has not met his burden of establishing plain error. Indeed, there was no error, plain or otherwise. Morales' argument for a new trial based on the district court's jury instructions is without merit.

VI

THERE WAS NO MATERIAL VARIANCE BETWEEN THE ALLEGATIONS CONTAINED IN COUNT 16 AND THE EVIDENCE PRESENTED AGAINST MORALES AT TRIAL

A. Standard Of Review

Morales alleges for the first time on appeal that there was a material variance with respect to Count 16 of the indictment charging Morales with making false declarations to a federal grand jury. In Morales' view, there was no evidence that he "participated" in the arrest of Rivera. Morales Br. 44. Because Morales did not

raise this objection below, this Court reviews for plain error. *United States* v. *Combs*, 555 F.3d 60, 63 (1st Cir. 2009) (describing plain error standard); see also *United States* v. *DeCicco*, 439 F.3d 36, 43 (1st Cir. 2006) (citing *United States* v. *Olano*, 507 U.S. 725, 731 (1993)).

B. There Was No Variance Between The Allegations In The Indictment And The Evidence Produced At Trial

"A variance occurs when the proof at trial paints a portrait that differs materially from the scenario detailed in the indictment." *United States* v. *Reeder*, 170 F.3d 93, 105 (1st Cir.), cert. denied, 528 U.S. 872 (1999). The indictment alleged that Morales made six false statements to the grand jury. First, Morales testified that he and the Impact Unit van were at a different location at the time of the assault at the Citgo gas station. Second, Morales testified that he did not see Rivera at the Citgo gas station, but rather saw him at the police station. Third, Morales stated that he did not go to the Citgo gas station. Fourth, he testified that Sergeant Ortiz, Officer Pagan and Officer Pacheco were with him at that different location. Fifth, he testified that he did not participate in any way in the arrest of Rivera. Sixth, he maintained that he did not see anyone kick or strike Rivera at the gas station. The indictment then explains that these statements were false "in that [Morales] was present at the Citgo gas station at the time of [Rivera's] arrest, participated in the arrest of [Rivera] at the Citgo gas station, and witnessed police

officers kicking, punching, and otherwise assaulting [Rivera] at the Citgo gas station." App. 9-11.

There was ample evidence supporting the allegation that Morales' statements to the grand jury were false. Morales cannot dispute that there was significant evidence placing him and the other officers, as well as the Impact Unit van, at the Citgo gas station during the time of the assault on Rivera, permitting a reasonable juror to conclude as much. See discussion Argument IV.C, *supra*. Morales even concedes that there was evidence of his kicking Rivera while Rivera was on the ground. Morales Br. 46. Nevertheless, Morales suggests that there was a variance between the facts alleged in Count 16 and the facts adduced at trial because, he argues, there was no evidence that Morales "participated in the arrest" of Rivera. Morales Br. 46. Specifically, Morales argues that because the evidence "place[d him] kicking Rivera without specifying if [his act] was before Rivera was handcuffed or after," there was a variance between the indictment and the evidence. Morales Br. 46.

This argument lacks merit. "Participating" in an arrest is not limited to the act of handcuffing a suspect, or filling out arrest paperwork. A reasonable juror could easily conclude that kicking Rivera while he was on the ground as other officers were in the process of handcuffing him and bringing him into custody constituted "participation" in Rivera's arrest. The jury's decision to convict

Morales on Count 1 in the indictment, while unnecessary to sustain his conviction under Count 16, likewise reflects the jury's belief that Morales was not merely an innocent bystander but rather joined in the abuse inflicted upon Rivera as they attempted to bring Rivera into custody.

There was no variance, material or otherwise, between the allegations in the indictment and the evidence presented at trial.[14] Accordingly, Morales' conviction under 18 U.S.C. 1623 is sound and should be affirmed by this Court.

VII

VIDAL'S SENTENCE RAISES NO EX POST FACTO CONCERNS

A. Standard Of Review

In reviewing the district court's application of the Sentencing Guidelines, this Court reviews the district court's legal conclusions *de novo* and its factual

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[14] Moreover, there is no plausible claim that the variance Morales alleges affected his substantial rights. "So long as the statutory violation remains the same, the jury can convict even if the facts found are somewhat different than those charged – so long as the difference does not cause unfair prejudice." *United States* v. *Twitty*, 72 F.3d 228, 231 (1st Cir. 1995) (citing *United States* v. *Glenn*, 828 F.2d 855, 858 (1st Cir. 1987). The evidence presented to the jury could lead a reasonable juror to conclude beyond a reasonable doubt that Morales lied before the grand jury with regard to (1) his whereabouts, (2) the whereabouts of his fellow police officers, (3) the whereabouts of the Impact Unit van, and (4) what he witnessed at the Citgo gas station, regardless of how one might characterize his involvement in the actual arrest of Rivera.

findings for clear error. *United States* v. *Cruz-Mercado*, 360 F.3d 30, 35 (1st Cir. 2004). Objections that were not raised before the trial court are reviewed under the plain error standard. *United States* v. *Cruz-Rodriguez*, 541 F.3d 19, 31-32 (1st Cir. 2008), cert. denied, 555 U.S. 1144 (2009).

B. Vidal's Objections To His Sentence Were Forfeited, And Are Nevertheless Without Merit

Vidal argues that the Ex Post Facto Clause required that he be sentenced for the civil rights convictions under the guidelines in effect in 2003, rather than the November 2009 guidelines that were in effect at the time of his sentencing in 2010. Vidal Br. 53-54. His argument is without merit for multiple reasons.

1. First, Vidal acknowledges that he failed to raise this argument below (Br. 50-51), and thus it was forfeited and subject only to plain error review. *United States* v. *Silva*, 554 F.3d 13, 22 (1st Cir. 2009) (citing *United States* v. *Olano*, 507 U.S. 725, 733 (1993)).

2. Second, because the Sentencing Guidelines are no longer mandatory, the Ex Post Facto Clause no longer provides a basis for Vidal to challenge his sentence.

In *Miller* v. *Florida*, 482 U.S. 423 (1987), the Supreme Court held that the Ex Post Facto Clause barred the retroactive application of revised state sentencing guidelines that increased a defendant's presumptive sentencing range compared to the guidelines in effect at the time that the defendant committed the offense. The

Court reasoned that the new guidelines, which "ha[d] the force and effect of law," "substantially disadvantaged" the defendant, because the State's guidelines system created a "high hurdle that must be cleared before discretion [could] be exercised" to impose a non-guidelines sentence. *Id.* at 432, 435. The Court distinguished the Florida guidelines system from the United States Parole Commission's guidelines, noting that the federal parole guidelines "simply provide[d] flexible 'guideposts' for use in the exercise of discretion." *Id.* at 435.

Before *United States* v. *Booker*, 543 U.S. 220 (2005), the federal Sentencing Guidelines (unlike the former federal parole guidelines) were mandatory. Thus, like the Florida guidelines at issue in *Miller*, the federal Sentencing Guidelines both "ha[d] the force and effect of laws," *Booker*, 543 U.S. at 234, and significantly constrained district courts' discretion to impose sentences outside of the Guidelines range. See 18 U.S.C. 3553(b)(1). Courts of appeals, including this Court, had therefore uniformly held that, under *Miller*, the Ex Post Facto Clause precluded the application of revised Guidelines provisions that provided for a more severe sentencing range than authorized by the Guidelines in effect when the defendant committed the offense. See, *e.g.*, *United States* v. *Harotunian*, 920 F.2d 1040, 1041-1042 (1st Cir. 1990).

After *Booker*, however, the Guidelines are now only advisory and do not limit the discretion of sentencing courts in a manner akin to the state guidelines at

issue in *Miller*. For example, in *Rita* v. *United States*, 551 U.S. 338, 341, 350-354 (2007), the Supreme Court held that, unlike the appellate courts, a sentencing court may neither presume that a sentence within the advisory Guidelines range is reasonable nor presume that a sentence outside of the advisory range is unreasonable. Rather, the sentencing court must make an individualized determination based on all of the facts and arguments presented to it, including but not limited to the sentencing range recommended by the advisory guidelines. *Id.* at 351. Likewise, in *Gall* v. *United States*, 552 U.S. 38, 47 (2007), the Supreme Court held that a court of appeals cannot demand an increasingly strong justification for a sentence the farther the sentence varies from the advisory Guidelines range.

Similarly, the Supreme Court has explained that the Guidelines are merely "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough* v. *United States*, 552 U.S. 85, 90 (2007). Indeed, the Court has repeatedly affirmed that district courts may vary from the recommended Guidelines range "based solely on policy considerations, including disagreements with the Guidelines." *Id.* at 101 (citation omitted); see also *Pepper* v. *United States*, 131 S. Ct. 1229, 1247 (2011) ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views."); *Spears* v.

United States, 555 U.S. 261, 265 (2009) (per curiam). And the Court has held that no advance notice is required when a court imposes a sentence outside the advisory Guidelines range based on the sentencing factors in 18 U.S.C. 3553(a), because defendants no longer have "[a]ny expectation subject to due process protection" that they will receive a sentence within the Guidelines range. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008).

Although this Court has, on occasion, assumed without explicitly holding that the Ex Post Facto Clause applies even to sentences under the advisory guidelines,[15] this Court's decision in *United States* v. *Lata*, 415 F.3d 107, 110-111 (1st Cir. 2005), explains why the Ex Post Facto Clause should not apply now that the sentencing guidelines have shifted from a mandatory to an advisory regime. Consistent with the Supreme Court's consideration of the issue, Judge Boudin's opinion correctly explained that the predicate no longer exists for treating changes in the guidelines as though they were changes to the statutorily-prescribed punishment for a crime. *Ibid.* Accordingly, a defendant sentenced under the advisory guideline regime has no claim under the Ex Post Facto Clause.

In sum, the Ex Post Facto Clause does not apply to advisory guidelines that merely "provide flexible 'guideposts' for use in the exercise of discretion," *Miller*,

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[15] See, *e.g.*, *Silva*, 554 F.3d at 22; *United States* v. *McCarty*, 475 F.3d 39, 43 n.4 (1st Cir. 2007).

482 U.S. at 435. Consequently, this Court should rule that Vidal has no basis for challenging his sentence on Ex Post Facto grounds.

3. Even assuming, however, that the Ex Post Facto Clause has some application notwithstanding the fact that the Sentencing Guidelines are now advisory, it is clear that Vidal does not have a legitimate Ex Post Facto grievance here.

When determining whether there are Ex Post Facto concerns with a sentence, a reviewing court must assess the sentence that the defendant would have received if the guidelines in effect at the time of his crime were used, as opposed to the guidelines in effect at the time of sentencing. *Silva*, 554 F.3d at 22. For a defendant who has committed crimes spanning a period of years, the relevant guidelines for purposes of the Ex Post Facto analysis are the guidelines in effect at the time the last crime was committed. *Ibid.* As this Court explained in *United States* v. *Cruzado-Laureano*, a sentencing judge need not apply different versions of the guidelines simply because the case involves crimes committed at different times. 404 F.3d 470, 488 (1st Cir. 2005). Rather, in such circumstances, the comparison is between "the manual in effect at the time the last offense of conviction was completed and the manual in effect at the time of sentencing." *Ibid.* (internal quotation marks and citation omitted); see also U.S.S.G. § 1B1.11(b)(3).

In this case, Vidal's false statement and obstruction of justice crimes occurred in March 2008, and thus it is the guidelines in effect at that time that control for purposes of his sentencing. U.S.S.G. § 1B1.11(b)(3). It is neither factually correct to describe the crimes Vidal committed in 2008 as "minor,"[16] nor is there any basis in law for Vidal's argument that this Court should apply the guidelines in effect at the time of the most "serious" crime. Under this Court's "one-book rule," *Cruzado-Laureano*, 404 F.3d at 488, the proper comparison for Ex Post Facto purposes is between the guidelines in effect in March 2008 (*i.e.*, the November 2007 edition) (App. 888), with the guidelines in effect in April 2010 (*i.e.*, the November 2009 edition) (App. 894). A comparison of these two sets of guidelines reveals that the sentencing range for an individual with an offense level of 39 and a criminal history level of 1 was the same: 262-327 months. Therefore, under this Circuit's clear precedent, there was no error here.

4. Finally, even assuming for purposes of argument that there is any merit to Vidal's contention that the district court should have been guided by the range effective in 2003, and that the correct guideline range for calculating Vidal's sentence would have been 168 to 210 months (based on an applicable base offense

[16] The Government takes issue with the characterization of these crimes as "minor," as Vidal's false statements about what happened on July 20, 2003, were part of why it took almost seven years to bring to justice the individuals responsible for Rivera's death.

level of 25 instead of 29), he is incorrect in arguing that due process requires a more lenient sentence. The district court's sentence of 200 months fell within this range.[17] Moreover, considering the fact that the possible penalty for violations of 18 U.S.C. 242 and 2 that resulted in death was life imprisonment in 2003, there is no reasonable argument that Vidal was not on notice that he faced the possibility of a sentence of 200 months (or more) for his actions. Cf. *Lata*, 415 F.3d at 112 ("Before committing the crime, [defendant] would have known only one thing for certain, namely, the 20-year maximum statutory sentence for bank robbery."). This is not a case where there was an "unexpected and indefensible" alteration in the definition of the crime or the attendant punishment, and thus there can be no due process objection based on a "lack of fair warning." *Id.* at 110-111.

For all of these reasons, it is clear that the district court did not commit plain error when sentencing Vidal to 200 months under Counts 1 and 4. Therefore, the sentence imposed by the district court should be affirmed.

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[17] Notably the trial judge actually sentenced Vidal to less time (200 months) than requested by his attorney (210 months). D.E. 505 at 3; D.E. 547 at 11.

VIII

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN REJECTING MORALES' ARGUMENT THAT HIS SENTENCE SHOULD BE MORE LENIENT THAN THE SENTENCES OF DEFENDANTS WHO PLED GUILTY AND COOPERATED WITH THE GOVERNMENT

A. Standard Of Review

Morales claims that his lesser role in the assault on Rivera warranted a downward departure. As this Court has noted on numerous occasions, the question of a defendant's role relative to other participants is "factbound," and thus a reviewing court will disturb the district court's determination only where there has been "clear error." *United States* v. *Garcia-Ortiz*, 657 F.3d 25, 29 (1st Cir. 2011) (citation omitted), cert. denied, 132 S. Ct. 1126 (2012). As the Sixth Circuit has described it, for a sentencing determination "[t]o be clearly erroneous, . . . a decision must strike the Court as more than just maybe or probably wrong; it must strike [the Court] as wrong with the force [of] a five-week-old, unrefrigerated dead fish." *United States* v. *Lanham*, 617 F.3d 873, 888 (6th Cir. 2010) (citation and brackets omitted), cert. denied, 131 S. Ct. 2443 (2011).

B. The District Court Did Not Err In Denying Morales' Request For A Downward Departure

In this case, Morales was one of six people charged with crimes stemming from the events of July 20, 2003. Although counsel for Morales tried to construe the testimony in a manner that minimized his client's role, the district court

ultimately found that Morales kicked Rivera, and that there would be no way to ascertain definitively just how damaging Morales' kicks had been. App. 823, 830-831.

The district court may have agreed that Morales had a "lesser role" as compared to Perocier, who assaulted Rivera both at the gas station and at the station house (App. 823-824), but that does not render the district court's sentencing decision clearly erroneous as to Morales. When deciding what sentences would be appropriate for the various individuals involved, the district court appropriately considered not only the role of each defendant in the crime, but also the extent to which the individuals involved (1) admitted their wrongdoing (as opposed to forcing the government to go to trial), and (2) provided assistance to the government in bringing others to justice. App. 810-821. He noted in particular that a defendant who pleads guilty may receive credit to which a defendant who does not plead guilty is not entitled. App. 824 (also noting that the law authorizes credit for accepting responsibility, cooperating, and testifying for the government). Therefore, even though the district court gave Morales the same sentence as co-defendant Perocier (120 months) (D.E. 435), the court had legitimate reasons for doing so.

With a total offense level of 33 and a criminal history category of I, the range for Morales was 135 to 168 months. This range reflected a number of

aggravating factors, including (1) Morales' use of military boots to cause serious bodily injury; (2) the fact that Morales committed the offense while acting under color of law, which undermines public trust and confidence in law enforcement; (3) the fact that the victim was restrained in the course of the assault; and (4) Morales' lack of candor and truthfulness about what happened. App. 827-828; see also D.E. 432 at 23-24.

Even though the presentence report identified no information that would warrant a variance in sentencing pursuant to 18 U.S.C. 3553(a) (D.E. 432 at 30), the district court nevertheless decided to impose a sentence below the recommended range. In explaining its decision to do so, the district court noted that Morales was "a young man with a clean record," and that "[o]ther than this event, * * * had an unblemished record as a policeman." App. 830. The court also took into account that Morales' actions did not appear to be premeditated, and the blows were all inflicted during a short period of time. App. 830.

Therefore, it is clear from the record that the district court made a very thoughtful decision when determining the level of punishment that was appropriate for Morales. Thus, there is no basis for this Court to disturb the district court's judgment in this matter, and the sentence imposed by the district court should be affirmed.

CONCLUSION

This Court should affirm the defendants' convictions and sentences.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Sharon M. McGowan
JESSICA DUNSAY SILVER
SHARON M. MCGOWAN
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-1144

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set forth by this Court in its April 24, 2012, order granting the United States' Motion For Leave To File Overlength Brief. The brief was prepared using Microsoft Word 2007 and contains 19,445 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Sharon M. McGowan
SHARON M. MCGOWAN
Attorney

Date: May 2, 2012

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

s/ Sharon M. McGowan
SHARON M. MCGOWAN
Attorney