# 09-2703-cr

*To Be Argued By*:
RAHUL KALE

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 09-2703-cr**

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

GREGORY LYNCH

*Defendant-Appellant.*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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## Statement of Jurisdiction

The district court (Dorsey, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on June 19, 2009. JA111-12. On June 22, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA 118. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

## Statement of Issue
## Presented for Review

Did the district court commit procedural error by including Lynch's conviction for breach of peace in his criminal history computation, and was any hypothetical error harmless because the court immediately departed downward on the theory that inclusion of that conviction overstated Lynch's criminal history?

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### Preliminary Statement

Gregory Lynch was the leader of a counterfeit check conspiracy operating in the Bridgeport, Connecticut area between March 2006 and February 2007. After pleading guilty to conspiracy to commit bank fraud, Lynch faced a Guidelines sentencing range, according to the Presentence Report, of 46-57 months of imprisonment based on his leadership role in the offense and his significant criminal history. Lynch objected to inclusion of a breach of peace

conviction in his criminal history score. The district court observed that it could either disregard that conviction, or count it and depart downward to compensate for its inclusion – either option yielding the same result. The court settled on the latter course, and sentenced Lynch to 46 months in prison. Dissatisfied with his sentence, Lynch filed this appeal. He claims that the district court committed procedural error by including his 1999 conviction for breach of peace in his criminal history score, and argues that he might have obtained a lower sentence if the court had used a lower advisory sentencing range as the starting point for considering whether to downwardly depart.

For the reasons discussed below, although it is a close question, the district court properly counted the breach of peace conviction. The Court need not, however, reach that issue. Even if inclusion of that offense was erroneous, any miscalculation was harmless because the court departed downward to offset the inclusion of that offense – thereby nullifying any impact the breach of peace conviction might have had on the sentence. Moreover, the court understood its discretion to impose a sentence below the resulting advisory guideline range (whether through a departure or variance), but believed it was appropriate in light of all the sentencing factors not to do so. Because the court chose to impose a sentence at the *top* of the advisory guidelines range – that is, 46 months – it is clear that the court would not have exercised its discretion to depart or vary further than it did.

## Statement of the Case

On December 4, 2008, a federal grand jury returned an indictment charging the defendant, Gregory Lynch, with five counts of bank fraud. JA 8-10.

On February 10, 2009, a federal grand jury returned a superseding indictment, charging Lynch with conspiracy to commit bank fraud, bank fraud, and wire fraud. JA 11-17.

On April 2, 2009, Lynch pleaded guilty to Count One of the superseding indictment, charging conspiracy to commit bank fraud in violation of 18 U.S.C. §371, pursuant to a written plea agreement with the Government. JA 18-43. The plea agreement stipulated a Sentencing Guidelines range of 37 to 46 months of imprisonment based on the parties' contemplation that Lynch had a total offense level of 19 and a criminal history category III. JA. 48. After the United States Probation Office prepared a Presentence Report, the district court (Peter J. Dorsey, J.) held a sentencing hearing on June 19, 2009. JA 75-110. The court sentenced Lynch to 46 months of imprisonment. The district court arrived at this sentence after departing downward from a Guidelines range of 46-57 months, based on Lynch's argument that his criminal history score, calculated at category IV in the Presentence Report, was overstated. JA 106.

On June 22, 2009, Lynch filed a timely notice of appeal. JA 118. In this appeal, Lynch challenges his sentence as procedurally unreasonable. Lynch is currently incarcerated pursuant to his sentence.

## Statement of Facts and Proceedings Relevant to this Appeal

### A. Lynch pleads guilty to defrauding Webster Bank

In pleading guilty to the conspiracy count in the indictment, Lynch admitted that, between March 2006 and February 2007, he agreed with others to defraud a financial institution. JA 38. The stipulation of offense conduct, which is part of the plea agreement and which Lynch agreed was "a fair and accurate assertion that gave rise to the charge" (JA 40), recites that Lynch knowingly and willfully directed accomplices to open accounts in the names of various businesses and to deposit counterfeit checks into those business accounts. JA 53. The stipulation further states that the defendant either withdrew, or directed others to withdraw and provide the proceeds of the withdrawals to him, the proceeds of the counterfeit checks. JA 53. As a result of Lynch's conduct, Webster Bank lost more than $200,000. JA 53.

Additionally, in the stipulation of offense conduct, Lynch agreed that his scheme to defraud two individuals of approximately $95,000 was relevant offense conduct. JA 53-54. In total, the defendant agreed to pay all victims of his criminal conduct approximately $376,000. JA 46.

### B. The district court sentences Lynch to 46 months in prison, after departing downward to eliminate the effect of Lynch's breach of peace conviction on his criminal history score

After Lynch entered his guilty plea, the Probation Office prepared a Presentence Report ("PSR"). The Probation Office calculated Lynch's offense level as follows: a base offense level of 6 under U.S.S.G. § 2B1.1(a)(2); an increase of 12 levels for a loss of funds of more than $200,000 under U.S.S.G. § 2B1.1(G)); an increase of 4 levels pursuant to U.S.S.G. § 3B1.1(a) because the defendant directed the activities of five or more accomplices; and a reduction of 3 levels for acceptance of responsibility under U.S.S.G. § 3E1.1(a) and (b)(1). Thus, Lynch's total offense level, as calculated by the Probation Office, was 19. PSR ¶¶ 21-28. The Probation Office further concluded that Lynch fell within Criminal History Category IV, based on four previous convictions dating between 1996 and 2002 for assault in the third degree, kidnapping in the first degree, breach of peace, and possession of a controlled substance in the seventh degree. PSR ¶ 36.

The Presentence Report stated that the breach of peace conviction stemmed from the following conduct at the Bridgeport Correctional Center, where Lynch was incarcerated:

> The responding trooper interviewed the victim, inmate Omar Fairfax, who provided a written statement that indicated on October 17, 2009, he had gotten into an argument with inmate Gregory Lynch.

> Specifically, when Fairfax had asked for the glass of water, Lynch responded stating Fairfax had to say "please." Fairfax responded stating he was not going to say "please" because he was not Lynch's slave. Lynch then told Fairfax that he was old enough to be Fairfax's father, and he should show some respect. On October 18, 1999, the two got into a second verbal altercation. Fairfax reported that, shortly thereafter, the door of his cell was opened by a correctional officer who permitted Lynch to enter. Lynch threw Fairfax against the cell wall, choked him and threw him onto the floor. Lynch then attempted to drag Fairfax out of the cell, before the correctional officer told him to stop. Statements from eleven of fourteen inmates in the area, as well as injuries visible on the victims [sic] neck and to his clothes, confirmed his version of the assault. Several other inmates in the area were interviewed and reported hearing Lynch tell Fairfax he was going to "fuck him up," and state as he left the cell, "Now what, boy." Lynch was interviewed by the trooper and admitted getting into an argument with Fairfax, but denied assaulting Fairfax. At the time of the assault, Fairfax was being held as a youthful offender and Lynch was an adult inmate. Lynch was initially charged with Assault 3rd Degree, but was ultimately convicted of [breach of peace]. Two correctional officers involved were charged with Conspiracy to Commit Assault 3rd Degree.

PSR ¶ 33.

In his sentencing memorandum, Lynch objected to the inclusion of the breach of peace conviction in his criminal history category calculation. JA 59. Specifically, Lynch argued that "Judges in this District have found repeatedly that 'breach of peace' is 'similar' to 'disorderly conduct or disturbing the peace,'" and thereby, in light of his sentence to an unconditional discharge, should not be counted in his Criminal History Category pursuant to U.S.S.G. § 4A1.2(c)(1). In the alternative, Lynch sought a downward departure to Category History III based on an overstatement of his criminal history. JA 59. Counsel also sought a downward departure pursuant to *United States v. Fernandez,* 877 F.2d 1138 (2d Cir. 1989), to effectuate the plea agreement, which had calculated Lynch's Criminal History Category at III, without counting the breach of peace conviction. JA 60.

At the sentencing, in response to Lynch's claim that the breach of peace conviction was akin to disorderly conduct, the district court indicated that it was concerned by Lynch's course of conduct that led to the breach of peace conviction:

> You're right that disorderly conduct and breach of the peace are somewhat reflective of common conduct, but on the other hand, if you look at the background of the charge, he was originally charged with assault.
>
> Now, whether that charge was legitimate as an assault charge, or whether he got a heck of a good benefit of the doubt by a reduction of the charge to

> which he was permitted to plea, I don't suppose we'll ever know . . . .
>
> . . . I do think that it's possible that there was some legitimacy to the fact that he was originally charged with an assault.

JA 76-77. The district court then observed that the breach of peace crime played no role in the context of the court's ultimate criminal history calculation:

> Now, how much, where does it fall in the realm of things in the sliding scale, I'm not sure, but I think you have a legitimate point that could be raised . . . .
>
> . . . .
>
> I suppose that the opportunity on the part of judges, to apply a degree of discretion evens these things out, and I could do one of two things. I could leave the criminal history stand as appropriately quantifiably a level IV, and buy your argument of a criminal history that overstates his conduct, or I could remove the two points, drop him back down to the III, as per the Plea Agreement, and frankly, you get the same thing.

JA 78-79. After raising the two possible courses it could take with regard to the Sentencing Guidelines, the district court concluded:

> [I]n consequence, I think what I am going to do in order to deal with the objection that you have raised, I am going to leave the criminal history at a Level IV, but I am going to depart downward to the Level III – to a Category III, because I think you have got a legitimate point to make at the Level IV.

JA 79. In the course of the proceeding, before hearing from the parties, the district court restated:

> I am going to count both points that [defense counsel] has challenged, and leave the Presentence Report's calculation of the criminal history level at a IV, but on the basis that the – that [defense counsel] has raised, as far as the two points are concerned, is not without some legitimacy.
>
> . . . .
>
> . . . . In order to alleviate the unfairness, to an extent that there is unfairness in including these two factors, I am going to temper the Presentence Report's criminal history category by departing downward to accomplish, in effect, the same thing that [defense counsel] would help me do formally, by reducing the Category IV to Category III . . . .

JA 98. The district court next heard from Lynch, his attorney, and the Government's attorney. JA 99-103.

After hearing from the parties, the district court addressed the relevant factors involved in sentencing under

18 U.S.C. § 3553(a)(2), and explained the reasoning underlying its sentencing decision. The district court observed that a "theft of $376,000, as I understand it, is a very serious matter." JA 103. The court recognized that "to the extent of the $376,000, a sentence of some significance is required in order to promote respect for the law." JA 103-04. Turning to the importance of deterrence, the district court noted that despite Lynch's significant criminal history, he only served one sentence "and then only to a limited degree, out of the 18 months that was imposed" that had "not apparently deterred him from the conduct, and solely the conduct, for what he stands convicted in this court." JA 104. The district court concluded that "a significant sentence is appropriate in this case, in order to deter the defendant and others from similar courses of conduct." JA 105. The court further observed that "protection of the public results from the period of incarceration and, to a certain extent, the period of supervised release that will follow." JA 105. With regard to the fourth factor, the district court found that Lynch would be "afforded the opportunity, during the period of incarceration . . . to pursue further education, to pursue vocational training in order to develop job skills . . . ." JA 105. The district court then reiterated that based on arguments of defense counsel, "what results in a Category IV as opposed to a Category III, does tend to overstate both the criminal history and also the propensity on the part of the defendant to recidivism." JA 106. Finally, the court noted that it was "troubled by the further assertion of losses sustained as reflected in the Presentence Report, and in the count that is going to be dismissed . . . ." JA 106. The district court then sentenced Lynch to 46 months of incarceration, which it noted was at

the top of the advisory guidelines range after the downward departure. JA 106.

## Summary of Argument

1. Although the Court need not reach this complicated issue, the Government believes that under the better view of Connecticut law and this Court's multifactor approach to U.S.S.G. § 4A1.2(c), the district court properly included Lynch's 1999 breach of peace conviction in calculating Lynch's criminal history category.

First, there are some distinctions among offense elements that set apart the defendant's breach of peace conviction from disorderly conduct or disturbing the peace. Connecticut has separate statutes penalizing breach of peace, disorderly conduct, and creating a public disturbance. There is concededly substantial overlap among these statutes, for example to the extent that they punish "fighting or . . . violent, tumultuous or threatening behavior" in various circumstances. Yet only the breach of peace statute also punishes a person who "assaults or strikes another." The Connecticut Supreme Court has held that no provision of the breach of peace statute should be read as surplusage, and so it would appear that the reference to assault in the breach of peace statute should be interpreted as involving the causation of pain or injury, congruent with the usage of the term "assault" elsewhere in the state penal code, to render it distinct from "fighting" as used elsewhere in the statute. Here, the defendant's conduct as related in the Presentence Report involved a premeditated attack on another inmate in a detention facility, which left visible

choke marks on the victim's neck. This places the defendant's conduct within that portion of the breach of peace statute that prohibits assault, which is more serious than "fighting" which is covered by a disorderly conduct or disturbing the peace offense.

The other factors are neutral or tip in favor of a finding that the breach of peace conviction is more serious than disorderly conduct or disturbing the peace. The maximum punishment for breach of peace in Connecticut is six months – twice the maximum three months applicable to disorderly conduct. Although the penalty imposed in Lynch's case was an unconditional discharge, it bears note that he was already incarcerated and that even the maximum six-month sentence would have expired before his release. The level of moral culpability for an assault is also elevated above that of mere fighting (which is covered by disorderly conduct as well), because causing pain or injury reflects harm to a victim that is not necessarily present for disorderly conduct offenses. And the likelihood of recurrence is high for this defendant, based partly on the planning required for his attack in the breach of peace offense, as well as his remaining history of violence. Although the multifactor analysis is necessarily imprecise, the defendant's breach of peace offense was more serious than disorderly conduct or disturbing the peace. In any event, for the reasons set forth below, the district court's decision to depart downward makes it unnecessary for this Court to reach the issue of when a Connecticut breach of peace conviction must be counted toward a defendant's criminal history score.

2. Any hypothetical error in the district court's inclusion of the breach of peace offense in calculating Lynch's criminal history score was harmless by any standard, because the district court downwardly departed to offset the impact of that offense. When defense counsel objected to counting the breach of peace conviction, the court explained that it could accommodate that concern in either of two ways: either not counting the conviction in the first place, or counting it and then departing downward to eliminate its impact on the defendant's criminal history category. The court opted for the latter course. Because the two options yielded the same effective result, any arguable error in choosing one over the other was necessarily harmless.

Nor is there any merit to the defendant's claim that, if the district court had declined to count the breach of peace conviction in the first place, he was more likely to receive a downward departure from a lower starting point. The district court made clear that its downward departure was motivated entirely by its desire to offset the impact of the breach of peace conviction on the defendant's criminal history score. The court repeatedly explained that Criminal History Category IV overstated the defendant's criminal record, whereas Category III was fair. The record therefore does not support the defendant's speculation that the court might have been inclined to depart below Category III. Indeed, the district court chose to sentence the defendant at the upper end of the post-departure guideline range of 37-46 months – a choice that completely undermines any suggestion that the district court would have been inclined to depart downward beyond 37 months.

## Argument

### I. The defendant was not prejudiced by the district court's decision to count his breach of peace conviction toward his criminal history score, because the court downwardly departed to offset any impact that offense might have on his sentence

#### A. Governing law and standard of review

The Sentencing Guidelines specifically allow sentences for misdemeanors and petty offenses to be counted in determining a defendant's criminal history score. U.S.S.G. § 4A1.2(c). However, sentences for certain enumerated offenses "and offenses similar to them" are excluded if the sentence was for a probationary term less than a year or a term of imprisonment less than thirty days. *Id.* Among the enumerated offenses in § 4A1.2(c) are "Disorderly conduct or disturbing the peace." *Id.*

In considering whether an offense should be included in the determination of a defendant's criminal history score as "similar to" an enumerated minor offense in U.S.S.G. § 4A1.2(c), this Court looks to whether the offense punishes only one basic form of conduct, or a range of conduct "under a broad rubric." *United States v. Morales*, 239 F.3d 113, 118 (2d Cir. 2000). Where, as here, a "statute punishes a range of conduct," the district court's determination must "focus on the particular conduct of the defendant . . . , a matter to which [this Court] is to give 'due deference.'" *Id.* (citing 18 U.S.C. § 3742(e)).

In examining whether a prior offense is "similar to" an offense listed in § 4A1.2(c), this Court applies a multifactor test, promulgated by the Fifth Circuit, that includes a comparison of: the punishment imposed for the listed and unlisted offense; the perceived seriousness of the offense as implied by the punishments; the elements of the offense; the defendant's level of culpability; and the degree to which the commission of the offense predicts recidivism. *United States v. Sanders*, 205 F.3d 549, 552 (2d Cir. 2000) (citing *United States v. Hardeman*, 933 F.2d 278, 281 (5th Cir. 1991)); *United States v. Martinez-Santos*, 184 F.3d 196, 206 (2d Cir. 1999) (adopting *Hardeman* test). Additionally, this Court may consider "any other factor the court reasonably finds relevant in comparing prior offenses and Listed Offenses." *Morales*, 239 F.3d at 118. The Sentencing Commission has codified the *Hardeman* multifactor test in Application Note 12 to U.S.S.G. § 4A1.2, which was adopted through Amendment 709 to the Guidelines Manual, effective November 1, 2007.

Whether a prior offense is similar to an offense listed in U.S.S.G. § 4A1.2(c) is reviewed de novo on appeal. *United States v. Ubiera*, 486 F.3d 71, 74 (2d Cir. 2007).

**B. Discussion**

At the outset, Lynch recognizes that this Court can consider both the procedural and substantive reasonableness of a district court's imposed sentence, but argues only that "the district court's sentence was procedurally unreasonable." Def. Br. 10. Specifically, Lynch contends that the district court mistakenly concluded that Lynch was

in Criminal History Category IV instead of Category III based on his breach of peace conviction. Def. Br. 4. In addition, Lynch claims that the district court would have departed downward to Criminal History Category II had the court not made the erroneous criminal history calculation. *Id.*

It is concededly a complicated question whether Lynch's conviction under Connecticut's breach of peace statute should be counted under U.S.S.G. § 4A1.2(c). The Government did not express a view on this matter in the district court, because it had stipulated in the plea agreement that the defendant fell within Criminal History Category III. *See* JA 67 n. 1 (government sentencing memorandum asking district court to depart downward from PSR's calculation of criminal history category as IV to effectuate the parties' intentions in the plea agreement, where stipulation regarding criminal history was based only on information known to Government at time of plea). There was accordingly no occasion for the Government to express a view as to whether the district court should reach that conclusion by not counting the breach of peace conviction, or instead by counting it and then departing downward on the basis of overstated criminal history (as the district court chose to do). For the same reason, as discussed in the second point below, this Court need not reach this issue on appeal.

In the event the Court disagrees, and believes that it must address the question of the defendant's pre-departure criminal history score, the Government offers its view that the path taken by the district court to reach its result was

correct. The Government believes that the better view is that under the multifactor test adopted by this Court and codified in the Guidelines commentary, the particular violation committed by the defendant in this case was properly counted because it involved assaultive conduct – which under Connecticut law is generally considered violent conduct that yields pain or injury. Such conduct is more serious than "disorderly conduct or disturbing the peace." Nevertheless, the Court need not reach that issue in this case, because the district court expressly departed downward in the defendant's criminal history category, with the express intention of negating any effect that the breach of peace conviction might have had on the defendant's sentence. The defendant's sentence can and should be affirmed because any arguable error in including the breach of conviction was harmless by any measure.

### 1. The inclusion of the breach of peace conviction in the calculation of Lynch's criminal history category was proper

Lynch argues that his breach of peace conviction should have been excluded from his criminal history score because he received a sentence of less than a year of probation and three months of imprisonment and because it is substantially similar to disorderly conduct or disturbing the peace, which are enumerated in § 4A1.2(c). To be sure, it is uncontested that Lynch's sentence for his 1999 breach of peace conviction was less than a year of probation and less than three months of imprisonment. Accordingly, his sentence should not receive a criminal history point if his breach of peace conviction falls within the category of

"disorderly conduct or disturbing the peace," or similar offenses by whatever name. However, application of this Court's multifactor test suggests that the facts underlying Lynch's breach of peace conviction involved a violation of that portion of the Connecticut statute that punishes anyone who "assaults or strikes another," Conn. Gen. Stat. § 53a-181(a)(2), which is more serious than the offenses listed in § 4A1.2(c). Accordingly, the district court properly added one point for Lynch's breach of peace conviction.

**a. The similarity of the offense elements**

In comparing an unlisted offense to the Listed Offense, this Court first looks to the law of the state in which the conviction was obtained. *See, e.g., Morales*, 239 F.3d at 119 (looking to New York's Penal Law to ascertain "how seriously New York regarded [the defendant's] conduct"). Under Connecticut General Statute § 53a-181:

> (a) A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) *assaults or strikes another; or* (3) threatens to commit any crime against another person or such other person's property; or (4) publicly exhibits distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and

> hazardous or physically offensive condition by any act which such person is not licensed or privileged to do.

(Emphasis added). Subsection (b) of the statute describes second-degree breach of the peace as a class B misdemeanor.

By contrast, Connecticut General Statute § 53a-182 defines the offense of disorderly conduct:

> (a) A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior; or (2) by offensive or disorderly conduct, annoys or interferes with another person; or (3) makes unreasonable noise; or (4) without lawful authority, disturbs any lawful assembly or meeting of persons; or (5) obstructs vehicular or pedestrian traffic; or (6) congregates with other persons in a public place and refuses to comply with a reasonable official request or order to disperse; or (7) commits simple trespass.

Disorderly conduct is a class C misdemeanor. *Id.*

Moreover, Connecticut law includes a statute known as "Creating a Public Disturbance," which is simply an infraction that carries no threat of imprisonment:

> (a) A person is guilty of creating a public disturbance when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he (1) engages in fighting or in violent, tumultuous or threatening behavior; or (2) annoys or interferes with another person by offensive conduct; or (3) makes unreasonable noise.

Conn. Gen. Stat. §§ 53a-181a, 53a-36.

As is immediately apparent from a comparison between Connecticut's statute proscribing breach of the peace and the statute describing disorderly conduct, the first mode of proof for the statutes is the same. The Connecticut Supreme Court has broadly construed the phrase "fighting or . . . violent, tumultuous or threatening behavior" to encompass, for example, "fighting words" that are likely to prompt imminent physical retaliation. *See State v. Szymkiewicz*, 237 Conn. 613, 619-20 (1996). However, breach of the peace in the second degree specifically includes assaultive conduct as its second mode of proof, which is not included in any mode of proof for disorderly conduct. The term "assault" is generally used in Connecticut statutes as involving the causation of injury. *See, e.g.,* Conn. Gen. Stat. § 53a-61(a).[1]

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[1] Breach of peace would appear to differ from an assault offense under Connecticut law because each statute sets out a different mens rea. To commit a breach of peace, the defendant must act "with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof." Conn. Gen. Stat. § 53a-181(a). By contrast, to commit an assault in the second degree, the defendant must act with intent to injure. Conn. Gen.

In the context of the breach of peace statute, the Connecticut Supreme Court has explained that all portions of a statute must be given separate meaning, and not regarded as surplusage. *See Szymkiewicz*, 237 Conn. at 620. To regard the assault and striking portion of § 181(a)(2) as subsumed within the "fighting" provision of § 181(a)(1) would reduce the former to surplusage, which is disfavored under Connecticut law. Accordingly, it would appear that Connecticut courts would require something additional for proof of a subsection (2) violation, at a minimum physical injury. Notably, the conduct underlying Lynch's breach of peace conviction was assaultive in nature. Lynch was charged with choking a youthful offender who was in the same prison as Lynch and throwing him to the floor. The attack left visible injuries around the youthful offender's neck, placing his conduct within subsection § 181(2) – which is more serious than any of the broader categories listed in the disorderly conduct statute.[2]

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Stat. § 53a-61(a).

[2] Lynch's argument that "people are charged and convicted in Connecticut on a daily basis for breaches of peace that involve no violence whatsoever" (Def. Br. 8) is undoubtedly true, but not dispositive. As this Court has made plain, "our analysis also considers 'the actual conduct involved . . . .'" *United States v. Ubiera*, 486 F.3d 71, 75 (2d Cir. 2007); *see also Sanders*, 205 F.3d at 553 ("[W]e, like the Seventh and Ninth Circuits, look to the actual conduct involved and the actual penalty imposed – rather than the range of possible conduct or the range of possible punishments – when determining whether a prior offense is 'similar' to a Listed Offense"). As the PSR describes, Lynch's 1999 conviction for

**b. The comparative punishments imposed**

As noted above, under Connecticut law, second-degree breach of the peace is a class B misdemeanor punishable by a maximum sentence of six months imprisonment. Conn. Gen. Stat. § 53a-36(2). Disorderly conduct is a class C misdemeanor punishable by a maximum sentence of three months imprisonment. Conn. Gen. Stat. § 53a-36(3). That breach of the peace has a maximum penalty twice that of disorderly conduct demonstrates that the former crime is considered to be more serious.

Lynch attempts to dismiss the two-fold increase in the maximum sentence as "a similar low level of punishment." Def. Br. 9. This Court has found far lower differences in penalties to weigh against finding an unenumerated offense to be excluded from a criminal history score calculation. *See Ubiera*, 486 F.3d at 75 (even though maximum penalties of shoplifting and passing a bad check were the same under New Jersey law, that the unenumerated crime of shoplifting carries a minimum sentence of community service that passing a bad check does not found to be a "key difference").

**c. The sentence imposed**

Lynch was sentenced on January 24, 2000, to an unconditional discharge for his conviction of breach of the peace. Although such a sentence could be viewed as an

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breach of peace was predicated on an act of premeditated violence.

indication that the crime was not perceived to be serious, it bears noting that Lynch was in prison at the time he was sentenced, had just completed seven days in punitive segregation for fighting, and was not discharged from prison until December 7, 2000, at which time he started a five-year probationary sentence. PSR ¶ 32. Since Lynch was already in prison, and could have received only a maximum term of six months of imprisonment that would have expired before his incarceration ended, Lynch's sentence to an unconditional discharge does not necessarily reflect an understanding that his crime was not serious.

**d. The level of culpability involved**

This Court has described the task of "weighing relative culpability" as examining "the 'degree of moral guilt.'" *Ubiera*, 486 F.3d at 75 (quoting *Morales*, 239 F.3d at 119). The defendant's conduct that resulted in his conviction for breach of the peace had a high degree of moral guilt. To be sure, as noted above, Lynch's conduct involved choking and throwing to the ground a youth, resulting in visible marks to the youth's neck. As the PSR describes, however, his conduct was not a spontaneous fight, but rather a calculated attack in retribution for perceived disrespectful remarks the youth made to Lynch two days earlier. PSR ¶ 33. In fact, the PSR demonstrates that Lynch secured the assistance of prison guards (*id.*) to ensure that his planned attack would achieve no resistance, conduct that had broader repercussions on the public's ability to trust its public servants. *Ubiera*, 486 F.3d at 76 (noting that because shoplifting unlike writing a bad check "diminishes trust in

the retail marketplace, it has insidious collateral impacts on the public as a whole").

**e. The likelihood of recurrence**

While it is difficult to ascertain the likelihood of recidivism, Lynch's actions after the conduct underlying his breach of peace conviction demonstrate that Lynch is likely to repeat his criminal conduct. Less than two months after Lynch attacked the youthful offender, he was cited for fighting in prison and placed in punitive segregation for seven days. PSR ¶ 32. On May 30, 2008, Lynch's wife reported to police in Georgia that Lynch had raped and physically abused her. PSR ¶ 41. On November 20, 2008, in Connecticut, Lynch was arrested for a myriad of charges including two counts of third degree assault and risk of injury to a child. PSR ¶ 40. To be sure, the rape charge from 2008 remains pending, but repeated instances of violence similar to the conduct underlying Lynch's 1999 breach of the peace conviction certainly demonstrate some penchant for recidivism.

An analysis of the *Hardeman* factors demonstrates that the unenumerated crime of second-degree breach of the peace is not similar to disorderly conduct.

Lynch relies on Black's Law Dictionary to demonstrate that there is no difference between breach of peace and disorderly conduct. But reliance on a dictionary for a generic description is irrelevant because this Court looks to Connecticut law to ascertain any distinction. *See Morales*, 239 F.3d at 119. Nonetheless, the very excerpt from Black's

that Lynch supplies demonstrates the dissimilitude between breach of the peace and disorderly conduct. Def. Br. 6. Lynch cites: "One who commits a breach of the peace is guilty of disorderly conduct, but not all disorderly conduct is necessarily a breach of the peace." (*Id.* (citing Black's Law Dictionary, 4th Ed. (1951))). If Black's Law Dictionary is correct, then disorderly conduct is a lesser-included offense of breach of peace. *See, e.g., Sansone v. United States*, 380 U.S. 343, 350 (1965) ("A lesser-included offense is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense"). If disorderly conduct is a lesser-included offense of breach of peace, then it is less serious than breach of peace and the two crimes are necessarily dissimilar for purposes of the Guidelines' criminal-history computations.

Nor is there any merit to Lynch's attempt to equate breach of the peace with disturbing the peace, a listed crime. Def. Br. 10. Notably, under Connecticut law, the statute defining disorderly conduct specifically includes "disturb[ing] any lawful assembly or meeting of persons." Conn. Gen. Stat. § 53a-182(4). Breach of the peace in the second degree, as defined in Connecticut General Statute § 53a-181, contains no such reference to disturbing or creating a disturbance.

Undaunted, Lynch cites a nonprecedential Fourth Circuit decision for the proposition that the conduct breach of the peace and disturbing the peace are "essentially identical." Def. Br. 9 (citing *United States v. Moore*, 92 Fed. Appx. 46, 47 (4th Cir. 2004)). Even ignoring that *Moore* is based on

an analysis of North Carolina law, and not Connecticut law, the case is inapposite. In *Moore*, the panel was asked to determine whether the defendant's conviction for breach of peace with a sentence of one year of probation could not be counted in his criminal history score because the defendant's "conduct was most analogous to loitering, an offense not counted under § 4A1.2(c)(2)." *Id.* That the Fourth Circuit rejected the defendant's argument and found breach of peace to be more akin to disturbing the peace, which was countable in light of the sentence imposed, is hardly surprising.

**2. Even if the district court erred in counting the breach of peace conviction in Lynch's criminal history score, the error was necessarily harmless because the court departed downward in the defendant's criminal history category to offset the impact of that conviction**

In any event, even if the district court was mistaken in including Lynch's breach of peace in the second degree conviction in his criminal history score, any error was harmless. The record reflects that the district court, as a practical matter, did not consider the breach of peace conviction in arriving at Lynch's ultimate criminal history category. Notably, in Lynch's sentencing memorandum, defense counsel informed the court that Lynch was seeking a downward departure because *Criminal History Category IV* "significantly over-represents the seriousness of his criminal history as well as his likelihood of recidivism," and because the parties' stipulation in the plea agreement to Criminal History Category III was "fair." JA 59-60.

Before ruling on Lynch's request, the district court observed that its ability "to apply a degree of discretion evens these things out, and [it] could do one of two things." JA 78. It "could leave the criminal history stand as appropriately quantifiably a level IV, and buy [defense counsel's] argument of a criminal history that overstates [Lynch's] conduct, or [the court] could remove the two points, drop [Lynch] back down to the III, as per the Plea Agreement, and frankly, you get the same thing." JA 78-79. Noting the argument that counsel had raised seeking a downward departure, the district court found that Category IV applied, but then granted Lynch's request for a downward departure to offset inclusion of the breach of peace conviction. JA 79. The court determined that defense counsel had "a legitimate point to make at the Level IV," JA 79, because "Category IV as opposed to Category III, does tend to overstate both the criminal history and also the propensity on the part of the defendant to recidivism," JA 106.

The district court's comments demonstrate that independent of its counting of the breach of peace conviction, the district court believed Lynch's criminal history should most fairly be assessed as category III.[3] To the extent the breach of peace conviction entered the district

[3] Nor was the district court incorrect in determining that Lynch deserved a criminal history category III. The Presentence Report indicates that among Lynch's six prior adult convictions were convictions for third-degree assault and first-degree kidnap, PSR ¶¶ 29-35, hardly the record of a criminal neophyte.

court's calculation, it purposefully negated the inclusion of that offense through a downward departure. As the district court explicitly stated, the alternative calculation, which would have excluded the breach of peace conviction and the downward departure, would have resulted in "the same thing." JA 79. Because the district court offset any impact the breach of peace conviction had on its Guidelines calculation, any error was necessarily harmless. *See United States v. Jass*, 569 F.3d 47, 57-58 (2d Cir. 2009) ("Where we identify procedural error in a sentence, but the record indicates clearly that 'the district court would have imposed the same sentence' in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.") (quoting *United States v. Cavera*, 550 F.3d 180, 197 (2d Cir. 2008) (en banc)).

Lynch stretches to find a potential scenario in which there could have been a difference between simply not counting the breach of peace conviction (as Lynch would have preferred), or counting it and then departing downward to nullify its impact (as the court chose to do). He surmises that because "the sentencing judge acknowledged that Lynch's criminal history score overstated his criminal history . . . had he properly calculated Lynch's CHC as level III and then found that his criminal history was overstated, he would then have departed to CHC II . . . ." Def. Br. at 12. Lynch's argument, however, is based on a faulty premise that the district court intended to depart one criminal history category down no matter what the criminal history calculation was. Lynch's premise has no basis in the record.

The district court's criminal-history departure was tied to the fact-specific conclusion that Category IV overstated the defendant's criminal history – not to the general (and irrational) notion that whatever Lynch's criminal history score might be, it would necessarily overstate his criminal history. As discussed above, the record reflects that while the district court believed that Lynch had a "legitimate point to make *at the Level IV*" that his criminal history was overstated," JA 79 (emphasis added), it found that "Category IV *as opposed to Category III*, does tend to overstate both the criminal history and the propensity on the part of the defendant to recidivism," JA 106 (emphasis added). That the district court specifically differentiated between Category IV (which the district court found to overstate the criminal history) and Category III demonstrates that the district court found Category III to address Lynch's criminality appropriately, and had no intention to depart below Category III.

Further support for the district court's belief that Category III was an appropriate criminal history category for Lynch can be found in the sentence the district court imposed on Lynch. Lynch's guidelines range at a Category III and an offense level 19 was 37-46 months in prison. Lynch's Guidelines, had he been calculated at Category II, would have resulted in a range of 33-41 months of imprisonment. That the district court sentenced Lynch at the top of Category III certainly demonstrates that the court had no desire to depart below that range. Thus, Lynch should not be heard to argue that his sentence was based on the district court's mistaken belief that the it was constrained to find Lynch a Criminal History Category III.

Indeed, at no time during the sentencing hearing did the district court suggest that it could not legally depart downward to a criminal history category II, or otherwise impose a sentence below the advisory range. To the contrary – the court acknowledged that it was much easier for it to "get to the fair result" now that the guidelines were no longer mandatory. JA 79. The court clearly understood its authority after *Booker* to have a "sense of what's just . . . and in consequence, I think it's appropriate to try to do that by whatever route you take, and be somewhat confident that what you have done in deciding a particular sentence to be imposed, fairly and justly resolves the case." JA 80. In short, the district court understood that it could depart downward or otherwise vary below the advisory guidelines range based on Lynch's argument that he posed a low likelihood of recidivism. The record does not provide "clear evidence of a substantial risk that the [district court] misapprehended the scope of its departure authority." *United States v. Sero*, 520 F.3d 187, 192 (2d Cir. 2008).[4]

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[4] The defendant does not frame his claim as challenging the extent of the downward departure granted by the district court, but only as challenging the starting point from which that departure was granted. Put another way, he does not claim that he deserved a departure from Category IV to Category II. Indeed, such a claim would be vain, in light of this Court's repeated holdings that to the extent a defendant is essentially challenging the extent of a departure, such a claim is not reviewable on appeal. *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006).

## CONCLUSION

For the foregoing reasons, this Court should affirm the defendant's sentence.

Dated: May 27, 2010

Respectfully submitted,

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**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,485 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

RAHUL KALE
ASSISTANT U.S. ATTORNEY

# ADDENDUM

**18 U.S.C. § 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

**(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;

**(2)** the need for the sentence imposed --

**(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

**(B)** to afford adequate deterrence to criminal conduct;

**(C)** to protect the public from further crimes of the defendant; and

**(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

**(3)** the kinds of sentences available;

**(4)** the kinds of sentence and the sentencing range established for --

**(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

> **(I)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> **(ii)**that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

**(B)** in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

**(5)** any pertinent policy statement–

**(A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of

Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

**(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

**(7)** the need to provide restitution to any victims of the offense.

* * *

**(c) Statement of reasons for imposing a sentence.** The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence --

**(1)** is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

**(2)** is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the

extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

**U.S.S.G. § 4A1.2 (2009) Definitions and Instructions for Computing Criminal History**

. . . .

**(c) <u>Sentences Counted and Excluded</u>**

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least

thirty days, or (B) the prior offense was similar to an instant offense:

. . . .

Disorderly conduct or disturbing the peace

. . . .

**Connecticut General Statute § 53a-61 - Assault in the third degree: Class A misdemeanor.**

(a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) recklessly causes serious injury to another person; or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.

(b) Assault in the third degree is a class A misdemeanor and any person found guilty under subsection (3) of subsection (a) of this section shall be sentenced to a term of imprisonment of one year which may not be suspended or reduced.

**Connecticut General Statute § 53a-181 - Breach of the peace in the second degree: Class B misdemeanor.**

(a) A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such other person's property; or (4) publicly exhibits distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do.

(b) Breach of the peace in the second degree is a class B misdemeanor.

**Connecticut General Statute § 53a-181a - Creating a Public Disturbance: Infraction**

(a) A person is guilty of creating a public disturbance when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he (1) engages in fighting or in violent, tumultuous or threatening behavior; or (2) annoys or interferes with another person by offensive conduct; or (3) makes unreasonable noise.

(b) Creating a public disturbance is an infraction.

**Connecticut General Statute §53a-182 - Disorderly conduct - Class C misdemeanor.**

(a) A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior; or (2) by offensive or disorderly conduct, annoys or interferes with another person; or (3) makes unreasonable noise; or (4) without lawful authority, disturbs any lawful assembly or meeting of persons; or (5) obstructs vehicular or pedestrian traffic; or (6) congregates with other persons in a public place and refuses to comply with a reasonable official request or order to disperse; or (7) commits simple trespass, as provided in section 53a-110a, and observes, in other than a casual or cursory manner, another person (A) without the knowledge or consent of such other person, (B) while such other person is inside a dwelling, as defined in section 53a-100, and not in plain view, and (C) under circumstances where such other person has a reasonable expectation of privacy.

(b) Disorderly conduct is a class C misdemeanor.

**ANTI-VIRUS CERTIFICATION**

Case Name: U.S. v. Lynch

Docket Number: 09-2703-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 5/27/2010) and found to be VIRUS FREE.

Louis Bracco
*Record Press, Inc.*

Dated: May 27, 2010

# CERTIFICATE OF SERVICE

09-2703-cr USA v. Lynch

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I also certify that the original and five copies were also shipped via Hand delivery to:

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Notary Public:

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**Sworn to me this**

May 27, 2010

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Notary Public, State of New York
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Qualified in Kings County
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