Nos. 16-11588-GG, 16-11590-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROBERT WADE UMBACH;
CHRISTOPHER KINES,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. *Robert Umbach, et al.*, Case No. 16-11588-GG

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for the United States as appellee hereby certifies that in addition to the persons listed in defendants' briefs filed December 27, 2016, the following persons and parties may also have an interest in the outcome of this case:

1. Wheeler, T.E., II, Acting Assistant Attorney General, United States Department of Justice, Civil Rights Division

s/ Christine A. Monta
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Date: February 27, 2017

STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to defendants' request for oral argument in this case.

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STATEMENT OF JURISDICTION

These appeals are both from a judgment of conviction and sentence issued under the laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. On March 15, 2016, the court sentenced defendants and entered final

judgment. Doc. 267, 269.[1] Defendants filed timely notices of appeal. See Doc. 278, 280, 283-284, 287. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to convict defendants of violating 18 U.S.C. 1512(b)(3).

2. Whether the district court abused its discretion in instructing the jury on the elements of 18 U.S.C. 1512(b)(3).

3. Whether the district court abused its discretion in any of the evidentiary rulings Kines challenges.

4. Whether the cumulative effect of Kines's claimed errors entitles him to a new trial.

5. Whether the district court erred in applying a two-level sentencing enhancement for abuse of a position of trust under U.S.S.G. § 3B1.3.

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[1] Citations to "Doc. __, at __" refer to the documents in the district court record, as numbered on the docket sheet, and page numbers within those documents. Citations to "Umbach Br. __" and "Kines Br. __" refer to page numbers within defendants' respective briefs. Citations to "Ex. __" refer to exhibits introduced at trial.

STATEMENT OF THE CASE

1. Procedural History

On July 9, 2014, a grand jury returned a seven-count indictment charging four police officers—Wiley Griffin IV, Elizabeth Croley, and the two appellants, Robert Umbach and Christopher Kines—with various civil-rights and obstruction-of-justice violations stemming from Griffin's beating of a civilian, Aaron Parrish, and the other officers' subsequent efforts to cover up Griffin's responsibility for that beating. Doc. 1. Griffin was charged under 18 U.S.C. 242 with using excessive force in violation of Parrish's Fourth Amendment right. Doc. 1, at 2 (Count 1). Croley was charged under 18 U.S.C. 242 with violating Parrish's due process rights by intentionally withholding exculpatory evidence, and with obstruction of justice under 18 U.S.C. 1519 for falsifying an incident report. Doc. 1, at 2-3 (Counts 2-3). Kines and Umbach were each charged with two counts: (1) obstruction of justice under 18 U.S.C. 1519 for providing a knowingly false witness statement (Counts 4-5), and (2) obstruction of justice under 18 U.S.C. 1512(b)(3) for providing misleading statements to the Federal Bureau of Investigation (FBI) (Counts 6-7). Doc. 1, at 3-6.

Following a 13-day trial, a jury acquitted Umbach and Kines of intentionally falsifying their witness statements with the intent to impede a federal investigation (Counts 4-5), but found them guilty of lying to the FBI about Griffin's involvement in the beating of Aaron Parrish (Counts 6-7).[2] Doc. 166. Umbach and Kines filed motions for a new trial (Doc. 176, 178-179, 189), which the district court denied (Doc. 251, 253). The court also denied their oral motions for judgment of acquittal, on which it had reserved ruling during trial. Doc. 251, at 5; Doc. 253, at 4; see also Doc. 310, at 71; Doc. 311, at 8; Doc. 313, at 43-44.

The court held a sentencing hearing on March 15, 2016. Doc. 305, 335. Rejecting the government's requested calculation method under U.S.S.G. § 2J1.2(c), the court calculated Umbach's and Kines's base offense level at 14 under U.S.S.G. § 2J1.2(a)-(b). Doc. 305, at 28-29. Over defendants' objection, the court then added a two-level enhancement for abuse of position of trust under U.S.S.G. § 3B1.3. Doc. 305, at 29. Based on the court's calculation, Kines and Umbach fell into a sentencing range of 21-27 months. Doc. 305, at 70, 75. The court departed

[2] The jury acquitted Griffin of the civil-rights violation but convicted Croley of both counts with which she was charged. Doc. 166. Croley has not appealed.

downward to sentence each to 15 months' imprisonment. Doc. 267, 269. Defendants filed timely notices of appeal. See Doc. 278, 280, 283-284, 287.

Umbach and Kines both filed motions for bond pending appeal (Doc. 273, 276), which the district court denied on July 28, 2016 (Doc. 321). Pursuant to Federal Rule of Appellate Procedure 9(b), defendants then filed motions for bond pending appeal in this Court. On October 21, 2016, this Court granted Umbach's motion for bond pending appeal but denied Kines's motion. Notwithstanding that ruling, Kines remains at liberty at the time of this filing. See Kines Br. 4 n.2.

2. Statement Of Facts

This case arises from an incident at Bikefest, an annual event in Bainbridge, Georgia, in September 2012. Doc. 315, at 7. Christopher Kines and Robert Umbach were both deputies in the Decatur County Sheriff's Office (DCSO) assigned to patrol Bikefest. Doc. 316, at 63. Co-defendant Elizabeth Croley was a DCSO captain on duty at Bikefest. Doc. 316, at 57, 63. Co-defendant Wiley Griffin IV (Griffin, also known as Little Wiley) was a deputy in the nearby Grady County Sheriff's Office who was also working Bikefest security. Doc. 316, at 62, 64, 90. Griffin's father is Wiley Griffin III, who was the Sheriff of Decatur

County (Sheriff Griffin)—and thus Kines's, Umbach's, and Croley's boss—at the time of the incident. Doc. 316, at 110.

The central allegation at trial was that Griffin, without justification, beat an unarmed and restrained Bikefest attendee in the face with a metal flashlight, setting in motion a series of events in which the other three defendants acted to cover up Griffin's use of force to protect their boss's son. Umbach and Kines were ultimately convicted of one count each of witness tampering for knowingly providing false statements denying Griffin's role in the assault to FBI agents.

a. The Beating

The government's evidence showed that, at around midnight on Saturday, September 15, 2012, Umbach and Kines were assisting with the arrest of Aaron Parrish, a Bikefest attendee who had been attempting to intervene in the arrest of his stepfather. Doc. 315, at 7; Doc. 316, at 5-8, 65-67. Multiple eyewitnesses testified that while Kines and Umbach were in the process of restraining Parrish, who was pinned face-down on the ground, Griffin approached from behind, grabbed Parrish by the hair, pulled his head back, and beat him in the face with a metal flashlight as many as five or more times. Doc. 315, at 68-69; Doc. 316, at 71, 87-88; Doc. 317, at 141-146; see also Doc. 199, at 34-47. Two witnesses

testified that Griffin later admitted to them that he had beaten a civilian with a flashlight. Griffin's then-girlfriend, Brooke Brown, testified that Griffin told her shortly after the incident that he had just "beat the shit out of somebody with a flashlight." Doc. 318, at 133-134. And DCSO deputy Vincent Edmond testified that Griffin admitted on several occasions that he beat Parrish with a flashlight, eventually confessing that he did so without justification. Doc. 315, at 115-120. Additionally, Chip Nix, a former DCSO captain who witnessed the incident, testified that earlier that evening Griffin appeared "pumped up" with "adrenalin" and said they were "going to fuck somebody up tonight." Doc. 316, at 64-65.

Parrish suffered serious injuries consistent with being bludgeoned in the face with a metal flashlight. A photograph taken shortly after the beating shows Parrish with blood streaming down his face and his right eye swollen shut. Doc. 165-11; see Doc. 315, at 32-33. Indeed, Parrish's wife, Carla, testified that when she arrived at Bikefest to retrieve her husband, she could not even recognize Parrish because his face was so deformed. Doc. 315, at 11; see also Doc. 316, at 88. Parrish was disoriented and had cuts and bruising both above and below his eye. Doc. 315, at 12, 17, 34, 37, 42; Doc. 318, at 69; Doc. 319, at 159. The treating ophthalmologist testified that Parrish exhibited "subconjunctival hemorrhage,

which is bleeding that covers the white part of the eye," "significant swelling around the eye," and "inflammation on the inside of the eye," and that he reported pain and blurred vision. Doc. 319, at 159-164; see also Doc. 165-5 to 165-11. It took several weeks for Parrish's cuts and bruising to heal and two to three months for the blood to clear from his eye. Doc. 315, at 25; Doc. 317, at 176.

b. The Cover-Up And Parrish's State Prosecution

Parrish was not arrested or charged with any offense the night of Bikefest; in fact, he was permitted to leave with his wife. Doc. 315, at 15-17; Doc. 316, at 93-94. The following week, however, Parrish twice went to the DCSO to complain about the officers' treatment of him. Doc. 315, at 25-26; Doc. 316, at 123; Doc. 317, at 162. (Parrish did not know at the time that it was Sheriff Griffin's son, a Grady County deputy, who had beaten him. Doc. 317, at 164.) After the second visit, Parrish received a phone call from a DCSO deputy informing him that DCSO had decided to charge him with two state-law felonies: obstruction of justice for allegedly punching Croley in the chest during the scuffle preceding his arrest, and attempting to grab an officer's weapon during the arrest.[3] Doc. 317, at 164-168;

[3] Captain Nix testified that, as Griffin was beating Parrish, Nix heard one of the officers say "stop trying to get my gun, boy." Doc. 316, at 72. Nix believed that the officers were trying to manufacture a justification for the beating, as

(continued…)

see also Doc. 196, at 231; Doc. 197, at 88, 99. Former DCSO deputy Charlie Lee Emanuel, Jr., testified that Croley told him expressly that they were pressing charges because Parrish was "complaining about the Bike Fest incident." Doc. 318, at 76-77; see also Doc. 316, at 123-124, 149.

The same day that Parrish first went to DCSO to lodge a complaint, Croley instructed Kines and Umbach to write witness statements regarding the Bikefest incident. See Doc. 165-2, at 1; Doc. 165-3, at 1. Kines's and Umbach's written accounts both provided support for the two criminal charges against Parrish, *i.e.*, that he had punched Croley in the chest, and that he had reached for Umbach's gun as Kines and Umbach were attempting to restrain him. See Doc. 165-2, at 2; Doc. 165-3, at 2. Neither account, however, mentioned that Griffin had beaten Parrish in the face with his flashlight (Doc. 165-2, at 2; Doc. 165-3, at 2), although DCSO policy required officers to document any use of force that caused injury to a civilian (Doc. 197, at 132-134).

(…continued)
Parrish was neither reaching for anyone's gun nor in a position where he could have done so. Doc. 316, at 73-74; see also Doc. 315, at 109-110; Doc. 317, at 150. Officer Edmond testified that Griffin later confessed to him that Parrish "hadn't grabbed anybody's gun." Doc. 315, at 120.

The government presented evidence that the omission of Griffin's use of force from the Bikefest incident report was deliberate. Captain Chip Nix testified that he attended a meeting about Bikefest in Croley's office with DCSO undersheriff Wendell Coffer and Croley, who was working on the Bikefest incident report at the time. Doc. 316, at 98-100. According to Nix, when Coffer asked whether they should include Griffin in the report or leave him out, Sheriff Griffin responded from the adjoining office that he would "prefer" his son "not to be in it." Doc. 316, at 108-109; see also Doc. 199, at 22-24 (Captain Julian Crowder confirming that Nix told him about "a meeting where they agreed to leave Little Wiley out of the incident report"). The Bikefest incident report that Croley prepared, to which Umbach's and Kines's statements were appended, did not mention Griffin's name. Doc. 165-1; see also Doc. 319, at 18-19.

Parrish, who maintained that he neither punched Croley nor reached for anyone's gun, pled not guilty and was tried on both counts in a state jury trial in February 2013. Doc. 196, at 232. Both Kines and Umbach testified at Parrish's criminal trial. Kines testified, consistent with his witness statement, that he used "defensive tactics" to subdue Parrish, striking him "four or five" times in "pressure points" like the jugular vein and carotid artery. Doc. 165-14; see Doc. 165-2, at 2.

Umbach testified that he believed Kines hit Parrish when ordering Parrish to let go of Umbach's weapon. Doc. 165-16. Neither Kines nor Umbach mentioned Griffin's assault on Parrish in their state trial testimony. Doc. 319, at 72. Parrish was acquitted of attempting to grab Umbach's gun but convicted of punching Croley in the chest. Doc. 317, at 169; Doc. 196, at 177.

c. The FBI Investigation

In August 2013, six months after his criminal trial, Parrish contacted the FBI to report Griffin's use of force against him. Doc. 317, at 171; Doc. 318, at 191-193. FBI Special Agent Steve McDermond opened a federal civil-rights investigation and obtained DCSO's investigative file. Doc. 318, at 191, 193. Through his investigation, McDermond uncovered that Croley, who was the investigating officer on Parrish's criminal case, had omitted from the file she provided to the district attorney's office an eyewitness report stating that it was actually Parrish's stepfather Mike Green, not Parrish, who had punched Croley in the chest. Doc. 319, at 46-59. As a result of this withholding, the district attorney prosecuting Parrish at his state trial was not aware of the eyewitness's exculpatory statement and, accordingly, that statement was never provided to Parrish's defense attorney. Doc. 196, at 170-183; Doc. 197, at 23-24, 29-33. This intentional

withholding of exculpatory evidence was the basis for Croley's conviction under 18 U.S.C. 242. See Doc. 1, at 2; Doc. 166.

Agent McDermond also obtained, through his investigation, Kines's and Umbach's written witness statements. Doc. 318, at 193-196. As noted above, those statements did not mention anything about Griffin's use of force against Parrish. Umbach's report stated only that Griffin was driving the golf cart that escorted Parrish to the Bikefest command center following his arrest. Doc. 319, at 16; Doc. 165-3, at 2. Kines's statement did not mention Griffin at all, although he provided the names of other deputies at the scene. Doc. 319, at 6; Doc. 165-2, at 2. Nor, as stated above, did either defendant mention Griffin's assault during their testimony at Parrish's criminal trial, transcripts of which McDermond likewise received. Doc. 318, at 198; Doc. 319, at 72; Doc. 165-14, 165-16.

In light of these omissions, Agent McDermond interviewed Kines and Umbach in November 2013; the government played portions of these audiorecorded interviews at trial. Doc. 319, at 9, 16, 64, 124. Both Kines and Umbach told McDermond that Griffin did not use any force against Parrish during the Bikefest incident. Umbach proclaimed "one hundred percent certainty" that Griffin did not strike Parrish, stated that he "would have seen" if Griffin had hit

Parrish, and explained that he could not see how it was "physically possible" for Griffin to have hit Parrish in the head given the officers' respective positioning. Gov't Ex. 19c, 19e-19g. Kines, for his part, insisted that he was the only officer who used force against Parrish, having struck him once in the temple (a statement that conflicted with his testimony at Parrish's criminal trial that he struck Parrish "four or five times" in "pressure points"), and that he "would have seen" and "would have definitely remembered" if someone else had beaten Parrish in the face with a flashlight. Doc. 319, at 75-76, 79-80, 196-197; Gov't Ex. 18a-18f. Kines's and Umbach's false statements in their FBI interviews were the bases for their convictions under 18 U.S.C. 1512(b)(3). Doc. 1, at 5-6; Doc. 166.

SUMMARY OF THE ARGUMENT

The United States agrees that the district court erred in imposing a two-level sentencing enhancement for abuse of a position of trust under U.S.S.G. § 3B1.3 and therefore that a remand for resentencing is warranted. Defendants' remaining arguments, seeking reversal of their convictions, are meritless.

First, contrary to defendants' contention, the evidence was more than sufficient to convict them of providing misleading statements to the FBI in violation of 18 U.S.C. 1512(b)(3). There was substantial evidence that Griffin

bludgeoned Parrish with a flashlight while Kines and Umbach were restraining him, yet both defendants stated in their FBI interviews that Griffin did not hit Parrish and that they would have seen if he had. Defendants' principal argument—that the jury could not conclude that these statements were knowingly false because there was insufficient evidence that defendants actually saw Griffin assault Parrish—ignores the standard of review for sufficiency claims. Viewing the evidence in the light most favorable to the government, the jury could rationally conclude that defendants in fact saw Griffin beat Parrish and thus were lying when they said that they did not.

Kines raises a laundry list of instructional and evidentiary claims, many of which the district court rejected in denying Kines's new-trial motion, and none of which has merit. The district court's jury instruction on 18 U.S.C. 1512(b)(3) accurately defined the elements of that charge, and the court had broad discretion to use the particular wording that it did to elaborate on the intent element. The various evidentiary rulings Kines challenges also fell well within the district court's substantial discretion over the admission of evidence.

Because the trial court committed no errors, Kines's cumulative-error claim also fails. But even if there were any conceivable error, reversal would not be

warranted, as Kines cannot show that any combination of his asserted errors deprived him of his constitutional right to a fair trial.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANTS OF VIOLATING 18 U.S.C. 1512(b)(3)

A. Standard Of Review

A court reviewing a claim that the evidence was legally insufficient must review the evidence in the light most favorable to the prosecution, *United States* v. *Hernandez*, 743 F.3d 812, 814 (11th Cir. 2014), and must uphold the verdict so long as "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *United States* v. *Hunt*, 526 F.3d 739, 745 (11th Cir. 2008) (citation omitted).

B. The Evidence Amply Supports The Jury's Verdicts

Defendants both contend that the evidence was insufficient to convict them of violating 18 U.S.C. 1512(b)(3). That argument fails.

Section 1512(b)(3) makes it a federal offense to "knowingly * * * engage[] in misleading conduct toward another person, with intent to * * * hinder, delay, or prevent the communication to a law enforcement officer or judge

of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(b)(3). Thus, to secure a conviction under Section 1512(b)(3), the government must prove beyond a reasonable doubt that the defendant (1) knowingly and willfully engaged in misleading conduct toward another person, (2) with the intent to hinder, delay, or prevent the communication of information to a federal official, (3) about the commission or the possible commission of a federal crime. *United States* v. *Ronda*, 455 F.3d 1273, 1284 (11th Cir. 2006). Defendants dispute only the first element, contending that the government failed to prove beyond a reasonable doubt that they knowingly engaged in misleading conduct in their FBI interviews.

1. Contrary to defendants' arguments, the evidence, viewed in the light most favorable to the government, amply supported the jury's verdicts that defendants knowingly engaged in misleading conduct in violation of Section 1512(b)(3)—*i.e.*, that they falsely told the FBI that Griffin never hit Parrish, when they knew he had. "[M]isleading conduct," for purposes of Section 1512(b)(3), includes "knowingly making a false statement," "intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading," or

"intentionally concealing a material fact, and thereby creating a false impression by such statement." 18 U.S.C. 1515(a)(3)(A)-(B); see also Doc. 311, at 45.

Here, there was substantial evidence that Griffin beat Aaron Parrish in the face. Multiple eyewitnesses testified that they saw him do so. See Doc. 315, at 68-69; Doc. 316, at 71, 87-88; Doc. 317, at 141-146; see also Doc. 311, at 34-47. Two witnesses also testified that Griffin admitted that he had beaten an arrestee with a flashlight. Doc. 315, at 113-118, 120; Doc. 318, at 133-134. And the photographic and medical evidence showed that Parrish sustained injuries consistent with such a beating. Doc. 199, at 35-36; Doc. 308, at 11-12; Doc. 317, at 173-177; Doc. 319, at 158-164.

Yet, both Kines and Umbach—who were in the process of restraining Parrish when the beating occurred and thus in very close proximity to it—told the FBI explicitly that Griffin did not hit Parrish, that Kines was the only officer who used force against Parrish, and that, given their positioning, they would have seen if Griffin had beaten Parrish in the face. Gov't Ex. 18a-18f, 19a-19g. Agent McDermond testified that Kines and Umbach made these statements, and the government introduced through McDermond audio excerpts of Kines's and Umbach's FBI interviews. Doc. 319, at 10, 16-17; Doc. 196, at 49. Given the

substantial evidence that Griffin beat Parrish in Kines's and Umbach's presence, a rational jury could conclude that defendants' insistence in their FBI interviews that he did not was knowingly false.

2. Umbach contends that the jury could not conclude that his statements were false because he "never said Griffin did not hit Parrish" but only that he did not *see* him do so, and the evidence did not establish that Umbach actually saw the assault. Umbach Br. 24. This argument, however, mischaracterizes Umbach's statements in his FBI interview. Umbach did not tell the FBI agents that Griffin *might* have hit Parrish but that he, Umbach, simply did not see it himself. Rather, Umbach told the agents explicitly that (1) "Wiley Griffin Junior actually never laid hands on [Parrish] until" after the scuffle, when Umbach asked Griffin to escort the handcuffed Parrish to the Bikefest control center (Gov't Ex. 19b; see also Gov't Ex. 19d-19e); (2) given Umbach's positioning during the scuffle, he "would have seen it" if Griffin had struck Parrish (Gov't Ex. 19a, 19c); (3) he "could say" with "one hundred percent certainty" that "the only people who ever had contact with [Parrish]" were Umbach when he took him to the ground and Kines when he struck him (Gov't Ex. 19e); and (4) given Kines's positioning, it would have been *physically impossible* for Griffin or anybody else to have struck Parrish on the head

(Gov't Ex. 19f ("There's no way anybody else could have did anything in the front just because * * * Kines is a big guy * * * and Kines took up the majority of the body as far as the upper part."); Gov't Ex. 19g ("There's just no way I can see anybody else striking him from the front. * * * The only open part of his body was like from his calf down. * * * I don't see physically possible [sic] how that could have happened."). A reasonable juror could rationally conclude from these statements that Umbach intended to convey not just that he did not see Griffin hit Parrish in the face with a flashlight, but that Griffin *did not in fact* hit Parrish at all.

Even if Umbach's statements had been limited to stating that he did not himself see Griffin hit Parrish, a jury could reasonably conclude that Umbach was lying when he did so. Several witnesses, all of whom were farther from the action than Umbach, testified that they saw Griffin beat Parrish in the face. Doc. 315, at 57, 68-69, 73, 93 (Brenda Stogner); Doc. 316, at 71-72, 87-88 (Chip Nix); Doc. 199, at 34-35 (Robbie Lynn Webb). The jury could rationally infer that Umbach saw it too, given that he was holding Parrish down at the time and thus was in extremely close proximity to the assault.[4] See Doc. 315, at 67-69; Doc. 316, at

[4] Umbach's suggestion on appeal (Br. 27) that his view of the assault would have been obstructed by "three bodies"—Kines, Parrish, and Griffin—was not a theory he argued below, either in his motion for judgment of acquittal or in closing

(continued…)

179; Doc. 317, at 63. Indeed, Umbach himself told the FBI agents repeatedly that, given his positioning, he "would have seen" if Griffin had struck Parrish in the head. Gov't Ex. 19a, 19c-19d, 19f. Although Umbach dismisses those statements as "speculation" and an "overestimation of what he could have seen" (Umbach Br. 29), the jury was entitled to believe Umbach's insistence that he was in a position to see any assault on Parrish's upper body and, likewise, to disbelieve his claims that from that position he did not see Griffin hit Parrish in the face. See *Ronda*, 455 F.3d at 1295 (holding that a jury could rationally conclude that an officer who asserted repeatedly that he "believed" a suspect was armed "knew in fact" that the suspect was unarmed and "never actually believed" that he was armed). This Court must presume that the jury resolved any "credibility choices in favor of the jury's verdict." *Hernandez*, 743 F.3d at 814.

(…continued)
argument. See Doc. 310, at 18-28; Doc. 312, at 31-44. In any event, Umbach's newfound obstructed-view theory, which he pieces together entirely from Chip Nix's testimony about how the officers were positioned when he arrived on the scene, is a stretch. Nix—a witness Umbach and his co-defendants went to great lengths to discredit—never suggested, much less testified, that Umbach's view of Parrish's head might have been blocked, and Umbach himself stated repeatedly in his FBI interview that he "would have seen" if anyone had hit Parrish in the face. Gov't Ex. 19a, 19c-19d, 19f.

3. Kines's sole contention is that there was insufficient evidence for the jury to conclude that he actually saw Griffin hit Parrish. See Kines Br. 31-34. That argument fails for the same reasons Umbach's does. The evidence showed that Kines was in the midst of pinning Parrish down and thus was in close proximity to the assault. Kines told the FBI agents that he "would have seen" if anybody had hit Parrish (Gov't Ex. 18c) and "would have definitely remembered" if someone had beaten him with a flashlight while Kines was holding him down (Gov't Ex. 18a). The jury could reasonably conclude from these facts that Kines saw Griffin assault Parrish and, accordingly, that his statements to the FBI that he did not see anybody hit Parrish (Gov't Ex. 18b-18c) were knowingly false. Kines's argument (Br. 32-33) that the situation was "volatile" and happened quickly is beside the point. On sufficiency review, this Court must draw all reasonable inferences in favor of the jury's verdict. *Hernandez*, 743 F.3d at 814. The jury could reasonably infer from Kines's proximity to the assault and his own statements to the FBI that, notwithstanding the volatility of the situation, Kines was in a position to see Griffin beat Parrish in the face with a flashlight.

II

THE JURY INSTRUCTIONS DEFINING THE ELEMENTS OF 18 U.S.C. 1512(b)(3) WERE PROPER

A. Standard Of Review

This Court applies a "deferential standard of review to a district court's jury instructions." *United States* v. *Starke*, 62 F.3d 1374, 1380 (11th Cir. 1995). While claims that a jury instruction misstates the law are reviewed *de novo*, "[i]f the instructions accurately reflect the law," this Court gives the trial court "wide discretion in determining the style and wording of the instructions." *United States* v. *Williams*, 526 F.3d 1312, 1320-1321 (11th Cir. 2008). This Court "will not reverse a conviction on the basis of a jury charge unless the issues of law were presented inaccurately, or the charge improperly guided the jury in such a substantial way as to violate due process." *Id.* at 1320 (citation omitted).

B. The District Court Did Not Abuse Its Discretion In Instructing The Jury On The Elements Of 18 U.S.C. 1512(b)(3)

1. Prior to trial, the government submitted requested jury instructions, which included an instruction defining and explaining the elements of 18 U.S.C. 1512(b)(3). Doc. 107, at 36-39. At the charge conference, Kines objected to the government's proposed instruction as "argumentative" and "a little biased." Doc.

311, at 20; see also Doc. 341, at 47; Doc. 342, at 40. The government, in turn, argued that its instruction "puts forth the correct standard" of law and is supported by "extensive case law." Doc. 342, at 24, 61. The district court ultimately gave the government's requested charge, minus one paragraph[5] (see Kines Br. 43 n.53), and with some wording modifications. Doc. 161, at 20-22; Doc. 311, at 44-47; see Attachment.

Kines reraised his challenge to this instruction in both his new-trial motion (Doc. 176, 178) and his motion for bond pending appeal (Doc. 276, at 2). The district court again rejected Kines's arguments, explaining that its charge was "consistent with 18 U.S.C. § 1512(b)(3), the indictment, [and] the pertinent case law" and that Kines failed to articulate "how the jury was improperly guided by the jury instructions." Doc. 251, at 14-15.

2. Kines asserts (Br. 41-44) that the district court's instruction on the elements of 18 U.S.C. 1512(b)(3) constituted reversible error. Critically, Kines does not contend that the court's instruction misstated the law or elements of

[5] The court did not explain why it omitted that particular paragraph, which instructed that the jury could consider the natural and probable consequences of the defendants' actions and that the defendant did not need to know the federal nature of the crime. See Doc. 107, at 37. Appellants had not specifically objected to this language.

Section 1512(b)(3). Nor can he, as the instruction given accurately encapsulated the requirements of Section 1512(b)(3) as defined in the statute and this Court's precedent. See, *e.g.*, *United States* v. *Ronda*, 455 F.3d 1273, 1284 (11th Cir. 2006); 18 U.S.C. 1515(a)(3); Attachment.

Instead, Kines objects only to the language of one paragraph of the instruction, listing factors the jury could consider in assessing whether defendants harbored the requisite intent. That paragraph read:

> In determining whether the defendant had the required intent, you should consider all the circumstances of the case, including, among other things, the following: (1) the defendant's knowledge, experience and training regarding permissible uses of force; (2) the defendant's knowledge, experience and training regarding the preparation of police reports; (3) whether the defendant knew that incidents of excessive force are investigated by federal authorities; and (4) any other circumstances as shown by the evidence which might assist you in determining defendant's knowledge and intent.

Doc. 161, at 21-22; Doc. 311, at 46. Kines argues (Br. 43) that this paragraph was "redundant, conflicting, and unduly emphasized the government's allegations that [defendants] were involved in a deliberate cover-up."

As Kines acknowledges, however, the district court has "broad discretion in formulating jury instructions as long as those instructions are a correct statement of the law." Kines Br. 42 (quoting *United States* v. *Garcia*, 405 F.3d 1260, 1273

(11th Cir. 2005)). Here, the language to which Kines objects fell well within that broad discretion. Whether Kines knew that federal authorities investigate incidents of excessive force (see Kines Br. 43) is certainly pertinent to what Kines intended when he lied to FBI agents about Griffin's use of force. Likewise, Kines's "knowledge, experience and training" regarding permissible uses of force and the preparation of police reports is relevant to what Kines intended in omitting Griffin's conduct from his account of the incident, insofar as it showed that he would have understood that Griffin's use of force was impermissible and that he had a duty, as an officer, to report it. Kines Br. 43 (citation omitted). Nothing in this instruction "unduly emphasized" the prosecution's theory (Kines Br. 43); it simply provided the jury a nonexhaustive list of circumstances to consider in assessing the defendants' knowledge and intent—a hardly intuitive task for a lay juror. Kines does not and cannot explain how this relatively benign instruction "improperly guided the jury in such a substantial way as to violate due process." *Williams*, 526 F.3d at 1320 (citation omitted).

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ANY OF THE EVIDENTIARY RULINGS KINES CHALLENGES

A. Standard Of Review

"The admissibility of evidence is committed to the sound discretion of the trial court." *Nicholson* v. *Gant*, 816 F.2d 591, 600 (11th Cir. 1987). This Court may reverse a conviction based on a district court's evidentiary rulings "only where it can be shown that the trial court abused its broad discretion and where the ruling adversely affected appellant's substantial rights." *Ibid.*

B. None Of Kines's Asserted Evidentiary Errors Warrants Reversal Of His Conviction

Kines raises seven evidentiary issues (Kines Br. iv-v, Issues 1-4, 6-7, 9), none of which has merit.

1. The District Court Did Not Abuse Its Discretion In Permitting Chip Nix To Offer Lay Opinion Testimony Regarding Griffin's Use Of Force

a. On the second day of trial, the government called Chip Nix, a former DCSO captain who witnessed Griffin's assault on Parrish. Early in Nix's testimony, the district court sustained a defense objection to a question regarding the "standard for the appropriate amount of force an officer can use in any given

situation," explaining that the government could ask Nix, a lay witness, about his training and personal observations but not about "standard[s]," which would constitute an expert opinion. Doc. 316, at 52-54. The prosecutor adhered to that ruling, rephrasing her question to focus on Nix's training. Doc. 316, at 55.

Nix subsequently testified that, as Kines and Umbach were holding Parrish down, Griffin approached, grabbed Parrish's head or hair, and hit him several times in the face with a flashlight. Doc. 316, at 66-71. The government then asked Nix whether he saw "any reason" for Griffin to hit Parrish in the face with his flashlight. Doc. 316, at 77. All four defendants objected, arguing that the government was improperly trying to elicit expert testimony from Nix, whom the government had not identified or sought to present as an expert witness. Doc. 316, at 78-80. When the court agreed that because Nix had not "been noticed as an expert," his testimony must be "limited to what he saw, heard, [and] observed," the government responded that, under Federal Rule of Evidence 701, "a lay witness can give an opinion about matters that they perceive themselves," and that it could provide the court "case law addressing this very situation." Doc. 316, at 80-81. The defendants then moved for a mistrial, at which point the court released the jury so it could hear arguments on the motion. Doc. 316, at 83-86.

At the hearing, the government reiterated that it was not seeking to elicit an expert opinion but only an opinion "based on the witness's perception of the events that transpired," which Rule 701 permits. Doc. 309, at 3. The government also noted that the question to which defendants objected—"did you see any reason for" Griffin to hit Parrish in the face with a flashlight—was "nearly identical" to questions of lay witnesses that courts have upheld under Rule 701. Doc. 309, at 3-8, 17-19 (citing *United States* v. *Myers*, 972 F.2d 1566 (11th Cir. 1992), and *United States* v. *Perkins*, 470 F.3d 150 (6th Cir. 2006)). Given that, the government urged, there was "no basis for a mistrial." Doc. 309, at 9.

The court ruled that, under Rule 701, the government could ask Nix "based on his observations at the time, what, if anything, he observed to justify the use of force," but "[n]o other opinion" beyond that "narrow" question, and denied defendants' mistrial motion. Doc. 309, at 21-22, 25. When trial resumed, the prosecutor asked Nix the question the court had authorized: "Based on your observations at that time, was there anything you observed that justified [Griffin]'s use of force?" Doc. 316, at 87; see Doc. 309, at 25. Nix responded "No, ma'am." Doc. 316, at 87.

b. Kines argues (Br. 22) that the district court erred in permitting the government to ask Nix whether he "observe[d]" anything "that justified that use of force" because such question "was tantamount to allowing Mr. Nix to testify as an expert." But "the admissibility of lay opinion testimony is committed to the sound discretion of the district court and will not be overturned on appeal" absent a "clear abuse of discretion." *Myers*, 972 F.2d at 1577. The district court committed no clear abuse of discretion in permitting the government to elicit this limited lay opinion testimony from Nix, much less in denying the "extreme remedy" of a mistrial. *United States* v. *Moran*, 778 F.3d 942, 966 (11th Cir.), cert. denied, 136 S. Ct. 168 (2015).

Federal Rule of Evidence 701 permits a lay witness to give opinion testimony that is "rationally based on the witness's perception" and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702," the rule governing expert testimony. Fed. R. Evid. 701(a) and (c). This Court has construed that rule to permit police officers called as lay witnesses "to give opinion testimony based on their perceptions and on their experience as police officers." *United States* v. *Novaton*, 271 F.3d 968, 1009 (11th Cir. 2001); see also *Tampa Bay Shipbuilding & Repair Co.* v. *Cedar Shipping Co.*, 320 F.3d 1213, 1223 &

n.17 (11th Cir. 2003) (reaffirming *Novaton* and upholding lay witnesses' opinion testimony "based upon their particularized knowledge garnered from years of experience within the field"); *Perkins*, 470 F.3d at 153, 156 (upholding lay testimony "framed in terms of [the witnesses'] eyewitness observations and particularized experience as police officers").

Here, the district court restricted the government to asking Nix's opinion based on his "observations at the time" (Doc. 309, at 21, 25; Doc. 316, at 87), precluding any questioning about use-of-force "standard[s]" generally (Doc. 316, at 52-54). That ruling was consistent with this Court's precedent. See *Perkins*, 470 F.3d at 153, 156; *Novaton*, 271 F.3d at 1009.

Moreover, the opinion that Nix offered was not "the sort that only * * * an expert witness would be allowed to testify to." *United States* v. *Smith*, 811 F.3d 907, 909 (7th Cir. 2016). "Anyone who saw" Griffin's assault on Parrish "would have been able to offer an opinion on whether the force" seemed reasonable. *Ibid.* (upholding, in an 18 U.S.C. 242 prosecution, police officers' lay testimony that a fellow officer "had used excessive, unreasonable force" against restrained arrestees). "[I]t does not take any specialized or technical knowledge" to realize that hitting a restrained, unarmed man multiple times in the face with a flashlight is

not justified. *United States* v. *Hill*, 643 F.3d 807, 842 (11th Cir. 2011). Thus, there was "little or no danger" that the government presented Nix as a lay witness in order "to evade the reliability requirements of Rule 702." *Ibid.*

c. In any event, any conceivable error was harmless as to Kines. Nix's opinion that Griffin's use of force was unjustified related solely to the Section 242 charge against Griffin, of which the jury acquitted him; it had no bearing on either obstruction charge against Kines. Furthermore, Nix was subject to extensive cross-examination, during which defendants were able to challenge his opinion that Griffin's use of force was unjustified by eliciting, for example, that Nix did not know how Parrish was behaving before Nix arrived, and that Nix himself was "concerned enough" about Parrish's conduct to "pull out [his] Taser." Doc. 316, at 143, 173. See *Novaton*, 271 F.3d at 1009; *Myers*, 972 F.2d at 1577.

2. The District Court Did Not Abuse Its Discretion In Permitting Captain Nix To Testify Regarding Sheriff Griffin's Statement That He Preferred That His Son Be Left Out Of The Bikefest Incident Report

a. Chip Nix testified about a conversation that took place in Croley's office sometime after Bikefest. According to Nix, Wendell Coffer, a DCSO undersheriff, queried whether they should mention Griffin in the Bikefest incident report or leave him out, at which point DCSO Sheriff Griffin—Griffin's father—responded

from the adjoining office that he would prefer they omit his son from the report. Doc. 316, at 108-109.

Prior to eliciting this testimony, the government requested a bench conference as a precaution in light of concerns the defense had raised pretrial regarding the admissibility of co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E). Doc. 316, at 100; see Doc. 80-81, 94, 110. Umbach's counsel argued that Sheriff Griffin's statement was inadmissible hearsay under Rule 801(d)(2)(E) because the government could not establish that a conspiracy existed, a prerequisite to admissibility under that rule. Doc. 316, at 103. The government responded that it was not seeking to admit Sheriff Griffin's statement under the co-conspirator exception to the bar on hearsay; rather, the government was offering the statement not for its truth (*i.e.*, that Sheriff Griffin really wanted the officers to leave his son out of the report) but simply to show why Croley left Griffin out of the report. Doc. 316, at 104, 107-108. The district court overruled defendants' hearsay objection, noting that Nix would be "fully open to cross examination" about the statement. Doc. 316, at 107.

The government then elicited Sheriff Griffin's statement from Nix, at which point the court gave an immediate cautionary instruction informing the jury that

the statement was "not offered for the truthfulness of whether that is in fact what [Sheriff Griffin] said or what he intended, but simply for what this witness claims he observed." Doc. 316, at 109.

b. Kines argues (Br. 23-26) that Sheriff Griffin's statement was inadmissible under Rule 801(d)(2)(E) because the government did not prove, and the court did not find, that Sheriff Griffin and the defendants were part of a conspiracy. As explained above, however, the government did not seek to admit the statement under Rule 801(d)(2)(E), nor was that the ground upon which the court admitted it. Rather, the government elicited Sheriff Griffin's statement to explain why Croley left Griffin's name out of the incident report, a non-hearsay purpose. Indeed, the district court expressly instructed the jury that it was *not* to consider the statement for "the truth of what's asserted." Doc. 316, at 109. Moreover, defendants were able to cross-examine Nix about Sheriff Griffin's statement to raise doubts about whether the statement was in fact made. See Doc. 316, at 144-145 (Kines eliciting that Nix may not have initially told Agent McDermond about Sheriff Griffin's statement, which "would be a significant oversight"); Doc. 312, at 68 (Kines's closing). Under these circumstances, the

district court did not abuse its "broad discretion" over evidentiary decisions. *Nicholson*, 816 F.2d at 600.

3. The District Court Did Not Abuse Its Discretion In Precluding Kines From Attempting To Impeach Parrish With Specific Allegations From His Civil Complaint

a. On direct examination of Aaron Parrish, the government elicited that Parrish had filed a civil lawsuit against the DCSO "[f]or what they had done to [him]" at Bikefest. Doc. 317, at 172-173. On cross-examination, and pursuant to a prior district court order limiting cross-examination into Parrish's civil case (see Doc. 108), Umbach elicited that Parrish's lawsuit "wasn't just against" DCSO but also named Griffin, Croley, Umbach, and Kines as defendants, and that the suit sought "to get money" from "each of these individual people." Doc. 317, at 203.

Kines then attempted to impeach Parrish with certain allegations from Parrish's civil complaint, which was drafted and filed by Parrish's attorney, that Kines claimed were inconsistent with Parrish's trial testimony. Doc. 318, at 16-18. At a bench conference requested by the government, the district court asked Kines whether Parrish's civil complaint was "verified," which would make it "the same

as a sworn statement."[6] Doc. 318, at 16-17. Kines responded that it was not, but that he sought to use the complaint as an "in judicio" admission. Doc. 318, at 17; see Ga. R. Evid. 18-2. The court explained that, unless the complaint were verified, the court could not be certain that the allegations in it represented Parrish's statements and were not simply "just general allegations * * * filed on [Parrish's] behalf by counsel." Doc. 318, at 17-18. Accordingly, the court concluded that it "wouldn't be proper" to impeach Parrish with any inconsistencies in his unsworn civil complaint. Doc. 318, at 18.

b. Kines contends (Br. 27-28) that this restriction violated Federal Rules of Evidence 613 and 801(d)(2)(D). That is incorrect.

Rule 801(d)(2)(D), which concerns admissions by a party opponent, is irrelevant here. Parrish is not a party to this case; thus, whether or not his

[6] Georgia law requires that certain types of pleadings be "verified," meaning that the plaintiff swears under oath that "the facts stated in the pleading are true to the best of his knowledge and belief." Ga. Code. Ann. § 9-10-111 (2016). Generally speaking, civil complaints seeking only damages "need not be verified or accompanied by affidavit." Ga. Code Ann. § 9-11-11 (2016).

"attorney was his agent" within the meaning of Rule 801(d)(2)(D) (Kines Br. 27 n.30) is beside the point.[7]

Nor did the district court abuse its discretion under Rule 613. Rule 613(b) governs circumstances in which "[e]xtrinsic evidence of a witness's prior inconsistent statement" is admissible for impeachment purposes.[8] Fed. R. Evid. 613(b). It is axiomatic that, for this rule to apply, the prior inconsistent statement must actually be the witness's own statement and not that of some other person. See, *e.g.*, *United States* v. *Cuevas Pimentel*, 815 F. Supp. 81, 83 (D. Conn. 1993) ("[C]ourts appear to take it for granted that a statement is admissible as a statement of a witness *only* where that statement was in fact made by the witness."). "[A] witness may not be impeached with a third party's characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own." *United States* v. *Saget*, 991 F.2d 702,

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[7] For the same reason, the two Fifth Circuit cases upon which Kines relies are inapposite, as both concern the admission of prior pleadings against a *party* as admissions by a party opponent. See Kines Br. 28 (citing *Mitchell* v. *Freuhauf Corp.*, 568 F.2d 1139, 1147 (5th Cir. 1978), and *Hardy* v. *Johns-Mansville Sales Corp.*, 851 F.2d 724, 745 (5th Cir. 1988)).

[8] Although Kines cites Rule 613(a) in his brief (Br. 28), he actually appears to be invoking Rule 613(b), which governs prior inconsistent statements.

710 (11th Cir. 1993) (finding no abuse of discretion where district court precluded impeachment using a law-enforcement officer's summary of the witness's statements); see also *United States* v. *Carter*, 776 F.3d 1309, 1329 (11th Cir. 2015) (same); *Cuevas Pimentel*, 815 F. Supp. at 83 ("[A]s a general matter, Rule 613(b) does not permit an attorney's statements to be introduced as prior inconsistent statements of that attorney's client.").

Here, the district court precluded Kines from impeaching Parrish using particular allegations from Parrish's civil complaint because Kines could not verify that they were in fact Parrish's statements and not merely the representations of Parrish's counsel. Doc. 318, at 17-18; see also Doc. 251, at 8-9, 15 (order denying Kines's new-trial motion). That ruling fell well within the court's discretion. As Kines acknowledged, Parrish's civil complaint was "unverified," meaning that he had never sworn to the truth of the facts alleged therein. Doc. 318, at 17. Indeed, Parrish testified that he was not even sure he had "actually seen a copy of the civil lawsuit" filed on his behalf. Doc. 317, at 202. Under these circumstances, it was reasonable for the court to conclude that it lacked a sufficient basis to find that Parrish had "subscribed to or otherwise adopted" the allegations in the civil complaint "as his own." *Saget*, 991 F.2d at 710.

4. The District Court Did Not Abuse Its Discretion In Permitting The Government To Introduce Excerpts From Kines's FBI Interview

Kines argues (Br. 29-31) that the district court abused its discretion in permitting the government to introduce excerpts of his audiorecorded FBI interview rather than requiring it to play the interview in its entirety. Not so.

Federal Rule of Evidence 106 provides: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part * * * that in fairness ought to be considered at the same time." Fed. R. Evid. 106. Rule 106, however, "does not automatically make the entire document admissible." *United States* v. *Simms*, 385 F.3d 1347, 1359 (11th Cir. 2004) (citation omitted). Rather, "the rule permits introduction only of additional material that is relevant and is necessary to qualify, explain, or place into context the portion already introduced." *Ibid.* Moreover, "[w]hen multiple defendants are involved and statements have been redacted to avoid *Bruton* problems," the rule of completeness is violated "only when the statement in its edited form . . . effectively distorts the meaning of the statement or excludes information substantially exculpatory of the nontestifying defendant." *United States* v. *Range*, 94 F.3d 614, 621 (11th Cir. 1996) (citation omitted); see *Bruton* v.

United States, 391 U.S. 123 (1968) (admission of a co-defendant's statement incriminating the defendant violates the defendant's Sixth Amendment rights).

Here, before the government was permitted to introduce its excerpts of defendants' FBI interviews, defendants made a general objection to the interviews "not being [admitted] in their entirety." Doc. 318, at 203; see also Doc. 319, at 3. In response, the government explained that it could not "put the entire recording of each of the defendant[s'] interviews into evidence" because "there are *Bruton* statements on each of the recordings." Doc. 318, at 204. The district court ruled that the government was not required, under the rule of completeness, to play the entire recording so long as defendants had the opportunity to play any additional portions of the recording necessary to "complet[e]" the portions already played. Doc. 318, at 205. That was a correct articulation of the rule of completeness. See Fed. R. Evid. 106; *Simms*, 385 F.3d at 1359.

Notwithstanding this ruling, Kines never sought, during either Agent McDermond's testimony or the defense's evidentiary presentation, to play any additional portions of his FBI interview "to qualify, explain, or place into context the portion already introduced." *Simms*, 385 F.3d at 1359 (citation omitted). Although Kines now argues on appeal that he should have been permitted to play

"his explanation of the situation which he confronted prior to, during, and immediately after the altercation with Mr. Parrish" to give "context" to his statements about Griffin (Kines Br. 31), he did not seek to do so below, asserting only a blanket request, before the government introduced the recordings, that the government be required to play "the entire interview" (Doc. 319, at 3). Having failed to avail himself of the opportunity the district court provided to introduce additional excerpts, Kines cannot now complain that the district court abused its discretion in permitting the government to play only the excerpts it did.

Nor has Kines "identified for this Court" which "specific portions" of his FBI interview he would have introduced or "explained how the additional [portions were] necessary" to put the government's excerpts in context. *United States* v. *Langford*, 647 F.3d 1309, 1331 (11th Cir. 2011). In excerpts the government played, Kines told the FBI agents that he hit Parrish once in the temple to incapacitate him (Gov't Ex. 18d-18f), that he did not see Griffin or anybody else hit Parrish (Gov't Ex. 18b), that he "would have seen" if anybody else had hit him (Gov't Ex. 18c), and that he "would have definitely remembered" if someone had been hitting Parrish with a flashlight while Kines was holding him down (Gov't Ex. 18a). Kines does not explain how those excerpts were "misleading" (Br. 31),

much less how any other portions of his interview—which are not in the record and which he does not identify—would have provided "necessary" context to them. *Simms*, 385 F.3d at 1359 (citation omitted).

5. The District Court Did Not Abuse Its Discretion In Excluding Kines's Exhibits K22a, K22b, And K22c, As There Was No Evidentiary Basis For Their Admission

a. During Agent McDermond's direct examination, the government introduced, and the district court admitted, a two-page excerpt from Kines's testimony at Parrish's state-court criminal trial. Doc. 319, at 73-74; Doc. 165-14. The admitted excerpt contained Kines's description at Parrish's trial of the force he used to subdue Parrish—four or five strikes at "pressure points"—which differed significantly from Kines's claim in his FBI interview nine months later that he punched Parrish only once in the temple. See Doc. 319, at 75-76, 79-81.

On cross-examination, Kines attempted to introduce through McDermond four additional excerpts of Kines's testimony from Parrish's state-court criminal trial. Doc. 196, at 3-9. The government objected to the admission of three of the excerpts, labeled Exhibits K22a, K22b, and K22c, noting that the only conceivable basis for a defendant introducing his own statements, when he is not testifying and subject to cross-examination about them, see Fed. R. Evid. 801(d)(1); note 10,

infra, would be under the rule of completeness, and none of the three statements identified "relates to the topics covered with this witness yesterday from the state trial."[9] Doc. 196, at 4-5; see also Doc. 196, at 6 ("[I]t's a statement of the defendant, and the defendant can't be a proponent of his own * * * statements."). The court sustained the government's objection, ruling that under the rule of completeness Kines could introduce excerpts "that relate to the testimony that was presented" but that he would have to wait until the defense case to try to introduce any additional excerpts falling outside the scope of McDermond's testimony. Doc. 196, at 8; see also Doc. 251, at 10-11.

During a break between witnesses in the defense case, Kines again attempted to introduce Exhibits K22a, K22b, and K22c into evidence. Doc. 198, at 81. The government again objected, arguing that "there's no foundation for admitting these." Doc. 198, at 82. When Kines admitted that the excerpts contained Kines's own prior testimony, not that of another witness, the district

[9] Although Exhibits K22a, K22b, and K22c are not in the record, Kines provided a description of them in his new-trial motion (see Doc. 178, at 12 n.6), and the district court affirmed that description in its order denying Kines's motion, (Doc. 251, at 10). Because the fourth excerpt, Exhibit K22d, fell within the scope of McDermond's direct testimony, the government did not object to its admission on rule-of-completeness grounds. See Doc. 196, at 5, 9; Doc. 160-6.

court sustained the government's objection. Doc. 198, at 83. The court reaffirmed that ruling in its order denying Kines's motion for a new trial. Doc. 251, at 10-12.

b. Kines continues to argue (Br. 34-37) that the district court erred in excluding Exhibits K22a, K22b, and K22c. Yet, as below, Kines fails to provide any evidentiary basis for their admissibility. See *Langford*, 647 F.3d at 1327 (proponent of evidence must establish its admissibility). Kines's testimony at Parrish's criminal trial is hearsay.[10] See Fed. R. Evid. 801(c). Hearsay evidence is generally not admissible unless it falls within an exception to the hearsay rule. Fed. R. Evid. 802. Kines has not argued that his prior testimony falls within any hearsay exception. The cases he cites (Br. 36-37) are inapposite, as they all involve situations in which *the government* sought to introduce a defendant's prior testimony as an admission by a party opponent. See Fed. R. Evid. 801(d)(2); note 10, *supra*. There is no comparable rule permitting a nontestifying defendant to admit his *own* hearsay statements to support his own case.

[10] Kines's prior testimony does not meet the definition of non-hearsay under either prong of Rule 801(d): Because Kines himself seeks to admit the testimony, it does not constitute an admission by a party opponent under Rule 801(d)(2). Nor does it satisfy Rule 801(d)(1), as Kines did not testify and thus was not subject to cross-examination about his testimony at Parrish's trial.

To the extent Kines suggests (Br. 34) that the district court reneged on a promise that he could introduce these exhibits in his "own case," Kines misunderstood the court's ruling. The court ruled that Kines could not introduce these exhibits in its cross-examination of McDermond because they fell outside the scope of the direct examination. In stating that Kines could present these exhibits in his "own case" should he "choose to," the court was merely advising Kines of the appropriate time procedurally to attempt to introduce them—the court did not purport to be promising their admissibility. See Doc. 196, at 8. Kines, as the proponent of the evidence, still had the burden to set forth a basis for their admission, which he failed to do.

To the extent Kines's brief (Br. 37) can be construed as raising a rule-of-completeness argument, that argument also fails.[11] Kines sought to introduce excerpts from his prior testimony in which he described the events at Bikefest as unfolding quickly. See Kines Br. 35 n.42, 37. The excerpts the government

[11] Although Kines urges (Br. 37) that permitting the government to introduce "select portions" of his prior testimony allowed it to be "taken out of context and misinterpreted," he does not invoke the rule of completeness or develop such an argument in any depth. Issues insufficiently developed on appeal are generally deemed waived. See *Greenbriar, Ltd.* v. *City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989).

introduced, however, already contained this description. See Doc. 165-14, at 1 ("I mean, all this happened in, like I said, a matter of seconds."); Doc. 165-14, at 2 ("Like I said, it happened so fast that I couldn't tell you where—I tried to—tried to strike him."). Accordingly, the district court did not abuse its discretion in concluding that the three proffered excerpts, which would have simply reiterated the excerpts already admitted, were not "necessary for completeness purposes." Doc. 251, at 10-11; see also Doc. 196, at 8. For the same reason, any conceivable error in excluding these excerpts was harmless, as they would have been merely cumulative of the excerpts already admitted.

6. The District Court Did Not Abuse Its Discretion In Permitting The Government To Call Two Rebuttal Witnesses

Kines argues (Br. 37-41) that the district court abused its discretion in permitting the government to call two witnesses, Robbie Lynn Webb and Julian Crowder, to testify in rebuttal. But "the decision to permit rebuttal testimony is one that resides in the sound discretion of the trial judge." *United States* v. *Mock*, 523 F.3d 1299, 1303 (11th Cir. 2008) (citation omitted). The district court's ruling fell within that discretion.

a. Webb was unquestionably a proper rebuttal witness. The purpose of rebuttal is "to explain, repel, counteract, or disprove the evidence of the adverse

party." *Mock*, 523 F.3d at 1303 (citation omitted). Here, the defense made a concerted effort to develop a theory that Parrish's injuries were caused by falling face-first onto a trailer hitch—an alternative explanation that, if believed, would have provided reason to doubt whether Griffin beat Parrish with a flashlight. To rebut that evidence, the government sought to call Webb, head of Bikefest security, to testify that "he saw how Mr. Parrish was injured" and that it occurred by Griffin "hitting him up side of the head." Doc. 199, at 8, 34-35. The court permitted the government to elicit this limited testimony, ruling that it was "clearly[] within the bounds of rebuttal." Doc. 199, at 14. In doing so, the court rejected Griffin's argument that the defense "did not establish evidence that the trailer hitch caused the injury," concluding that this was "a fair implication" from the defense evidence that the government had a right to rebut. Doc. 199, at 12. The court reaffirmed this ruling in its order denying Kines's new-trial motion. Doc. 251, at 12.

Kines's suggestion (Br. 39) that the defense "did not * * * contend or even suggest that Mr. Parrish might have been injured when his face struck a trailer hitch" is belied by the record. First, the defense elicited a detailed description of the hitch from Don Green, the owner of the trailer, establishing that it was about ten inches long and made of metal, and thus "if somebody hit it hard, it might

would leave a bruise [sic]." Doc. 198, at 8-9. Next, the defense elicited that Dwayne Williams, a Bikefest security volunteer, returned to the scene the next morning and noticed that there was blood on the hitch of Green's trailer, which "had done turned black [sic] and a little bit of red." Doc. 198, at 38-39, 53. Finally, the defense called Charles Macon Moore, another Bikefest security volunteer, who stated that he was in close proximity to the scuffle and saw the officers take Parrish to the ground near the trailer hitch. Doc. 198, at 60-61, 64-65.

It was reasonable to infer that the defense was attempting to establish from this series of witnesses that Parrish had hit his face on the trailer hitch. Indeed, the government plainly understood that to be the defense's purpose. See Doc. 198, at 73-74 (prosecutor establishing on cross-examination that Moore "didn't see Mr. Parrish get hit by the trailer hitch at all" and that Parrish "probably would have had to be much closer to" Moore to have done so); Doc. 311, at 60-61 (prosecutor arguing in closing that Parrish's injuries were consistent with being hit by a flashlight, "not a trailer hitch the way the defense has suggested"). Accordingly, the court did not abuse its discretion in allowing the government to rebut that evidence through Webb.

Kines also contends (Br. 39-40) that the court should have disallowed Webb's rebuttal testimony because it conflicted somewhat with that of other government witnesses, insofar as Webb believed Griffin hit Parrish with his bare hand, not a flashlight. See Doc. 199, at 37-38 (Webb testifying on cross-examination that he observed Griffin hit Parrish with his hand, although he was "not certain" there was "no flashlight involved"). In Kines's view, the government should have been required to call Webb in its case-in-chief, not on rebuttal, to permit defendants an opportunity to cross-examine him on a fuller range of issues. See Kines Br. 40-41. It is axiomatic, however, that the government "is entitled to prove its case by evidence of its own choice." *Old Chief* v. *United States*, 519 U.S. 172, 186 (1997). The government had no obligation to present Webb in its case-in-chief, and its failure to do so did not render his proper rebuttal testimony somehow improper.

Moreover, nothing precluded the defendants from calling Webb as a defense witness if they believed his testimony would be helpful to them; indeed, the defendants actually subpoenaed Webb for trial but apparently decided not to call him. See Doc. 187, at 35. And regardless, even on rebuttal, defendants were able to elicit a number of helpful facts from their cross-examination of Webb, such as

that he heard someone yell "Get your f-ing hand off my gun" just before Griffin hit Parrish, that he did not see Griffin use a flashlight, and that Parrish was highly intoxicated and resisting arrest. See Doc. 199, at 36-41.

b. Nor did the district court abuse its discretion in permitting the government to call Julian Crowder on rebuttal. The defense spent considerable energy, during both the government's case-in-chief and the defense case, attempting to discredit Chip Nix, a key eyewitness to Griffin's assault on Parrish. In its cross-examination of Nix, which spanned nearly five hours over two days (see Doc. 140, 142, 316-317), the defense sought to create an inference that Nix fabricated his account implicating Griffin in the beating after Griffin's father, the DCSO sheriff, denied Nix a promotion in early 2013 (see, *e.g.*, Doc. 316, at 160-162, 191-192, 209, 212; Doc. 317, at 3-7, 13, 97-105; see also Doc. 311, at 64-65, 98-102; Doc. 312, at 13, 33-34 (closing arguments)). To counter that inference, the government sought, in its case-in-chief, to elicit evidence through former DCSO deputy Charlie Lee Emanuel that, on the night of Bikefest, "before any incentive to lie" arose, Nix told Emanuel that Griffin had beaten Parrish in the face with a flashlight. Doc. 318, at 80. Although the government urged that prior consistent statements are admissible in these circumstances under the Federal

Rules of Evidence (Doc. 318, at 79-80, 83; see Fed. R. Evid. 801(d)(1)(B)(i)), the district court sustained defendants' objection to this testimony, stating that it was "not letting it in at this point" (Doc. 318, at 84).

In its case-in-chief, the defense called three witnesses—one of whom was DCSO captain Julian Crowder—whose sole purpose was to testify that, in their view, Nix was not trustworthy. See Doc. 197, at 179-183 (ATF Agent Jeff Reed); Doc. 198, at 89-90, 113 (District Attorney Joe Mulholland); Doc. 198, at 123, 136 (Crowder). On cross-examination of Crowder, the government attempted to elicit evidence that Nix had consistently reported Griffin's involvement to Crowder since the night of the incident, to rebut the defense implication "that he's lying and making this up." Doc. 198, at 134. The district court sustained the defense's objection, ruling that, while prior consistent statements are admissible "where there is an accusation [of] recent fabrication," the proposed line of questioning was outside the scope of the direct examination. Doc. 198, at 135. Thus, the court stated, while the government could "recall him again and ask him something else another day," it could not elicit a prior inconsistent statement on cross-examination when Crowder was called solely "for character." Doc. 198, at 134-135.

After the defense rested, the government stated that it intended to recall Crowder in its rebuttal case to testify about Nix's prior consistent statements regarding Griffin's role in the assault, citing Federal Rule of Evidence 801(d)(1)(B). Doc. 199, at 8-9, 11. When Umbach objected that the government should have presented such testimony during its case-in-chief, the government reminded the court that it had attempted to elicit such evidence in its case-in-chief through Emanuel but the court had ruled that it "was proper rebuttal evidence, not proper case in chief evidence." Doc. 199, at 10. The court permitted the testimony, explaining that it was "a recent fabrication issue" and that "it would be now unfair to the government to prevent it at this point" given that the court had "restricted the government from presenting [such testimony] in its direct case." Doc. 199, at 13-14.

Crowder then testified on rebuttal that Nix told him on the night of the incident that it was Griffin, not Kines, who had struck Parrish; that Nix repeated that account in the days after Bikefest; and that Nix told Crowder about "a meeting between him, the Sheriff, Major Coffer, and Captain Croley" in which "they agreed to leave [Griffin] out of the incident report." Doc. 199, at 19-24. As to the

last statement, the court instructed the jury that it was not being admitted for its truth "but just that it was stated according to the witness." Doc. 199, at 22.

Kines does not dispute that Crowder's testimony was admissible as a prior consistent statement under Federal Rule of Evidence 801(d)(1)(B), but argues only that he should have testified in the government's case-in-chief, not in rebuttal. Kines Br. 39. The district court rejected this argument below, however, noting that it had "basically restricted the government from presenting" such prior consistent statements in its case-in-chief, and thus it would be "unfair" to bar it from presenting them on rebuttal. Doc. 199, at 13. The district court did not abuse its "broad discretion" in permitting Crowder to testify on rebuttal given that backdrop. *United States* v. *Hawkins*, 905 F.2d 1489, 1496 (11th Cir. 1990).

7. The District Court Did Not Abuse Its Discretion In Permitting The Deliberating Jury To Re-Listen To The Admitted Portions Of Defendants' Audiorecorded FBI Interviews

Finally, Kines contends (Br. 44-47) that the district court erred in permitting the jury, upon request, to re-listen to the admitted portions of his and Umbach's audiorecorded FBI interviews during deliberations. See Doc. 313, at 8-14 (replaying the admitted portions in open court). That is incorrect. The district court has "broad discretion to permit a jury to" review during deliberations "any

tape recordings that have been admitted as exhibits during trial." *United States* v. *Scaife*, 749 F.2d 338, 347 (6th Cir. 1984) (citing *United States* v. *Sims*, 719 F.2d 375, 379 (11th Cir. 1983)).[12] Permitting the deliberating jury to rehear the properly admitted excerpts of defendants' FBI interviews was well within that discretion.

Kines's reliance on *United States* v. *Richard*, 504 F.3d 1109 (9th Cir. 2007), is misplaced. In *Richard*, the Ninth Circuit held that the district court abused its discretion in replaying for the deliberating jury selected portions of a crucial witness's audiotaped *trial testimony*, where (a) "[t]he portion replayed primarily consisted of the core of the government's case against" the defendant and omitted parts of the witness's testimony that were helpful to him, and (b) "the district court did not admonish the jury against unduly emphasizing the testimony." *Id.* at 1114-1115. This case, however, involves not taped portions of trial testimony—which can be misleading if presented in an imbalanced way—but audiorecordings of FBI interviews that were admitted into evidence as government exhibits. "[P]ermitting a jury to view properly admitted *exhibits* is quite different from permitting the jury

[12] See also *United States* v. *Zepeda-Santana*, 569 F.2d 1386, 1391 (5th Cir. 1978) (binding on this Court under *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)); *United States* v. *Williams*, 241 F. App'x 681, 684 (11th Cir. 2007).

to hear a readback of actual trial testimony." *United States* v. *Chadwell*, 798 F.3d 910, 915 (9th Cir. 2015) (emphasis added; internal quotation marks omitted). Moreover, unlike in *Richard*, the court here expressly instructed the jury to "remember all of the evidence and not simply the part that's being replayed." Doc. 313, at 9.

IV

NO "CUMULATIVE ERROR" REQUIRES REVERSAL OF KINES'S CONVICTION

Kines contends (Br. 47-48) that the cumulative effect of his asserted instructional and evidentiary errors entitles him to a new trial. But "where there is no error or only a single error, there can be no cumulative error." *United States* v. *House*, 684 F.3d 1173, 1210 (11th Cir. 2012). For the reasons explained above, the trial court did not abuse its discretion in any of the rulings Kines challenges. The accumulation of non-errors cannot collectively amount to reversible error.

Even assuming error in some or all of the rulings Kines appeals, Kines would not be entitled to reversal. This Court may reverse a conviction for cumulative error only "where an aggregation of non-reversible errors yields a denial of the constitutional right to a fair trial." *United States* v. *Reeves*, 742 F.3d 487, 505 (11th Cir. 2014); see also *United States* v. *Ladson*, 643 F.3d 1335, 1342

(11th Cir. 2011) ("There is no cumulative error where the defendant 'cannot establish that the combined errors affected his substantial rights.'") (citation omitted). "A defendant is entitled to a fair trial but not a perfect one." *United States* v. *Ramirez*, 426 F.3d 1344, 1353 (11th Cir. 2005) (citation omitted).

Here, the government presented overwhelming evidence that Kines made false and misleading statements to the FBI in violation of 18 U.S.C. 1512(b)(3). Despite substantial evidence that Griffin beat Parrish in the face, the jury heard audiorecordings of Kines stating that he himself was the only person who struck Parrish, that he did not see Griffin hit Parrish with a flashlight, and that he "would have seen" it and "would have definitely remembered" if that had happened. Gov't Ex. 18a-18c. Moreover, most of the errors Kines claims—the admission of Nix's opinion testimony, Sheriff Griffin's comment that he wanted Griffin left out of the incident report, and Webb's and Crowder's rebuttal testimony; the denial of impeachment using Parrish's civil complaint; and the exclusion of three excerpts from Kines's state-trial testimony—related to other issues in the case and had little to no bearing on the obstruction count of which Kines was ultimately convicted. Under these circumstances, Kines cannot plausibly show that the combination of these alleged errors deprived him of his constitutional right to a fair trial.

V

THIS COURT SHOULD REMAND FOR THE DISTRICT COURT TO RESENTENCE DEFENDANTS WITHOUT APPLICATION OF A TWO-LEVEL ABUSE-OF-TRUST ENHANCEMENT

A. Standard Of Review

Whether a sentencing enhancement imposed under U.S.S.G. § 3B1.3 for abuse of a position of trust was justified is a question of law reviewed *de novo*. *United States* v. *Garrison*, 133 F.3d 831, 837 (11th Cir. 1998). The district court's factual determination that a defendant abused a position of trust is reviewed for clear error. *Ibid.*

B. The Government Agrees That Imposition Of The Two-Level Abuse-Of-Trust Enhancement Was Erroneous And That A Remand For Resentencing Is Appropriate

1. Background

a. The United States Probation Office prepared defendants' Presentence Investigation Reports (PSRs). Doc. 213-214, 248-249. Pursuant to the Obstruction of Justice guideline, U.S.S.G. § 2J1.2(a)-(b), the Probation Office calculated defendants' base offense level for violating 18 U.S.C. 1512(b)(3) at 14. Doc. 213-214, at 8; see also Doc. 218, at 2. The Probation Office also recommended a two-level enhancement under U.S.S.G. § 3B1.3 for abuse of a

position of public trust, resulting in a total offense level of 16. Doc. 213-214, at 8; Doc. 248-249, at 8. Both defendants objected to the imposition of the abuse-of-trust enhancement. See Doc. 216, at 6-10; Doc. 222, at 1.

The government, in its written objections to the draft PSRs, argued that the Probation Office incorrectly calculated defendants' base offense level. Doc. 218, at 2-4; see also Doc. 231, at 1-3. As the government explained, U.S.S.G. § 2J1.2(c) states that where the offense of conviction involved obstructing the investigation or prosecution of a criminal offense, the court should apply U.S.S.G. § 2X3.1, the cross-reference for accessory after the fact, if the resulting offense level under the cross-reference is greater than that calculated under U.S.S.G. § 2J1.2(a)-(b). Doc. 218, at 2. Applying the cross-reference to U.S.S.G. § 2X3.1, the government argued, would result in a base offense level of 22.[13] Doc. 218, at

[13] Section 2X3.1 provides for a base offense level "6 levels lower than the offense level for the underlying offense." U.S.S.G. § 2X3.1(a)(1). Here, the underlying offense appellants were convicted of covering up was Griffin's alleged civil rights violation, which triggers U.S.S.G. § 2H1.1. That guideline, in turn, provides that the base offense level for a civil rights violation is the offense guideline applicable to the underlying offense, *i.e.*, Griffin's assaultive conduct. U.S.S.G. § 2H1.1(a)(1). The government contended below that Griffin committed the equivalent of an aggravated assault, which triggers a base offense level of 14 under U.S.S.G. § 2A2.2(a). Doc. 218, at 3; Doc. 231, at 3. Adding an additional 4 levels under U.S.S.G. § 2A2.2(b)(2) for Griffin's use of a dangerous weapon, 4 levels under U.S.S.G. § 2A2.2(b)(3)(D) for the degree of injury Parrish sustained,

(continued…)

4. Because 22 is higher than the base offense level of 14 the Probation Office calculated under U.S.S.G. § 2J1.2(a)-(b), the government argued that under U.S.S.G. § 2J1.2(c) defendants' offense level should be 22, not 14. See Doc. 218, at 2. The government also urged that, because the offense level of 22 would encompass a 6-level enhancement under U.S.S.G. § 2H1.1(b)(1)(B) for the fact that the underlying assault was committed under color of law, see note 13, *supra*, the court should not impose an additional two-level enhancement for abuse of a position of trust under U.S.S.G. § 3B1.3. Doc. 218, at 4 n.4; Doc. 231, at 3 n.3.

b. The district court held a sentencing hearing on March 15, 2016. Doc. 305, 335. Addressing the government's objection to the calculation of defendants' total offense level, the district court questioned whether application of the cross-reference in U.S.S.G. § 2J1.2(c) would result in a higher offense level than 14, noting its skepticism as to whether aggravated assault was the correct offense for calculating the underlying civil-rights violation, as the government contended.

(…continued)
and 6 levels under U.S.S.G. § 2H1.1(b)(1)(B) because Griffin committed the assault under color of law, the government calculated the total offense level for the underlying civil rights violation at 28. Accordingly, the government contended, under U.S.S.G. §§ 2J1.1(c) and 2X3.1(a)(1), defendants' base offense level for obstructing the federal investigation into Griffin's alleged civil rights violation would be 6 levels lower than 28, *i.e.*, 22. Doc. 218, at 4.

Doc. 335, at 4-11; see note 13, *supra*. The government responded that, notwithstanding any factual disputes at trial, the court could find by a preponderance of the evidence, based on the extent of Parrish's injuries and the numerous witnesses who testified that Griffin beat Parrish with a flashlight, that Griffin committed an aggravated assault. Doc. 335, at 6-7, 12.

Defendants, for their part, argued that a finding that Griffin committed an aggravated assault as opposed to simple assault would be a "stretch" given the factual uncertainty as to whether Griffin used a flashlight during the beating. Doc. 335, at 19-22. Defendants also reiterated their objections to the two-level abuse-of-trust enhancement. Doc. 335, at 40-43. In response, the government stated that, in its view, the abuse-of-trust enhancement "probably does not apply here," both because the six-level increase under U.S.S.G. § 2H1.1 that the government proposed would adequately account for the fact that the assault was committed under color of law, and because "the application notes and definitions" in U.S.S.G. § 3B1.3 "do not seem to squarely apply here." Doc. 335, at 44.

The district court rejected both the government's and defendants' arguments, agreeing with the Probation Office's calculation of a total offense level of 16. Doc. 305, at 27. As to the base offense level, the court stated that, in light of the

"conflicts in the evidence" regarding whether Griffin used a flashlight to beat Parrish, it could not find by a preponderance of the evidence that the offense underlying defendants' obstructive conduct was an aggravated assault. Doc. 305, at 28. Accordingly, the court concluded, application of the cross-reference in U.S.S.G. § 2J1.2(c) would not result in a greater offense level than the 14 that U.S.S.G. § 2J1.2(a)-(b) prescribed. Doc. 305, at 29. As to the abuse-of-trust enhancement, the court concluded that, because it was "clear that each officer at * * * the relevant times of the offenses were public officers," the two-level enhancement under U.S.S.G. § 3B1.3 applied.[14] Doc. 305, at 29.

With a total offense level of 16 and a criminal history score of zero, defendants fell into a guideline imprisonment range of 21-27 months. Doc. 305, at 70, 75. The district court sentenced Kines and Umbach to 15 months each, finding that to be "an appropriate [downward] variance" based on an individualized assessment of the 18 U.S.C. 3553(a) factors. Doc. 305, at 71, 75, 77.

[14] The district court reaffirmed this ruling in its order denying defendants' motions for bond pending appeal. Doc. 321, at 2-5.

2. Defendants' Conduct Did Not Constitute An Abuse Of Position Of Trust Warranting A Two-Level Enhancement Under U.S.S.G. § 3B1.3

The government agrees that the two-level enhancement under U.S.S.G. § 3B1.3 for abuse of a position of trust does not apply to defendants' conduct in this case. Therefore, a remand for resentencing is appropriate.

Sentencing Guideline § 3B1.3 provides for a two-level increase where the defendant "abused a position of public or private trust * * * in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Thus, for the enhancement to apply, the preponderance of the evidence must show (1) that the defendant occupied a position of trust, and (2) that he abused that position of trust to commit or conceal the offense of conviction. See *United States* v. *Nuzzo*, 385 F.3d 109, 115 (2d Cir. 2004).

Substantial case law supports the proposition that police officers—even relatively low-level deputies—occupy a position of public trust within the meaning of U.S.S.G. § 3B1.3. See *United States* v. *Terry*, 60 F.3d 1541, 1545 & n.4 (11th Cir. 1995); *United States* v. *Pedersen*, 3 F.3d 1468, 1471 (11th Cir. 1993); see also *United States* v. *Parker*, 25 F.3d 442, 449-450 (7th Cir. 1994); *United States* v. *Innamorati*, 996 F.2d 456, 490 (1st Cir. 1993); *United States* v. *Rehal*, 940 F.2d 1, 5 (1st Cir. 1991); *United States* v. *Foreman*, 926 F.2d 792, 795-797 (9th Cir.

1990). Thus, we do not agree with defendants' contention that they did not occupy a position of trust within the meaning of U.S.S.G. § 3B1.3. [15]

There is no evidence, however, that Kines or Umbach *abused* their positions as police officers (or, in Umbach's case, as a former police officer) to "significantly facilitate[]" the commission of the particular offense for which they were convicted, namely, their effort to obstruct the federal investigation into Griffin's alleged violation of Parrish's civil rights. U.S.S.G. § 3B1.3. In every case upholding application of an abuse-of-trust enhancement to a police officer, there existed evidence that the officer somehow took advantage of his position—either his status as a police officer or the knowledge or access to resources he acquired from the position—to commit or conceal the crime of conviction. In

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[15] That Umbach was no longer employed by the DCSO at the time he committed his obstruction offense would not automatically disqualify him from an abuse-of-trust enhancement. A former police officer who takes advantage of the status, knowledge, or resources he gained from his prior position of public trust to commit or conceal a crime would be subject to the enhancement under U.S.S.G. § 3B1.3. See *Innamorati*, 996 F.2d at 490 (upholding abuse-of-trust enhancement for former state police officer who used his prior position to gain access to a license plate registry computer); cf. *Nuzzo*, 385 F.3d at 115-117 (accepting the proposition that a former INS agent could be subject to a U.S.S.G. § 3B1.3 enhancement even if he was no longer employed by INS, but holding that the defendant did not use his former status as an INS agent to facilitate the crime of conviction).

Terry, for example, this Court upheld application of an abuse-of-trust enhancement to a patrol officer who had facilitated a drug transaction by (a) driving by in his marked patrol car to provide his co-conspirators security, and (b) using his police radio to post a lookout to deter other police from interfering. 60 F.3d at 1545. Likewise, in *Pedersen*, this Court upheld an enhancement where a police detective used his position as a police officer to access confidential personal information stored in government databases, which he then sold to a private company. 3 F.3d at 1469, 1471-1472. And in *Foreman*, the Ninth Circuit affirmed application of the enhancement where a police officer who was confronted by DEA agents while smuggling drugs through an airport flashed her badge and told them she was a sworn police officer to deter them from pursuing her. 926 F.2d at 795-797.[16]

Here, by contrast, there was no evidence that Kines or Umbach took advantage of his status, knowledge, or resources as a police officer to significantly

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[16] See also *United States* v. *Belwood*, 222 F.3d 403, 406 (7th Cir. 2000) (corrections officer took advantage of the fact that, as an officer, he was not subject to search to smuggle drugs into the prison where he worked); *Parker*, 25 F.3d at 449-450 (police officer provided co-conspirators in armed robberies with police response times and a police scanner to help avoid detection); *United States* v. *Pascucci*, 943 F.2d 1032, 1037 (9th Cir. 1991) (U.S. Marshal used his resources as a federal marshal to track down the name and address of a person he and a co-defendant sought to blackmail).

facilitate his obstruction of the federal investigation into Griffin's alleged civil-rights violation. While defendants might certainly have *hoped* that their positions as police officers would make them more credible in the eyes of the FBI agents, there is no evidence in the record that they did anything affirmatively in their FBI interviews to attempt to leverage that status to facilitate their obstructive efforts, akin to the officer in *Foreman* flashing her badge to deter the DEA from questioning her, see 926 F.2d at 795-796. Applying the enhancement on these facts would mean that every police officer who is guilty of lying to the FBI under Section 1512(b)(3) would be subject to an abuse-of-trust enhancement simply by virtue of being a police officer, regardless of whether he actively attempts to abuse that position of trust to facilitate his obstructive conduct. Under the language of the guideline and the relevant case law, something additional is required, beyond simply being a police officer, for an officer convicted of obstructing justice to receive a sentencing enhancement under U.S.S.G. § 3B1.3. See *Rehal*, 940 F.2d at 5-6 (noting that not every police officer who commits a crime is subject to an enhancement for abusing the public trust).

For these reasons, the government agrees with defendants that application of the two-level enhancement under U.S.S.G. § 3B1.3 was improper here. Because it

is not "clear from the record that the district court would have imposed the same sentence absent" the enhancement, a remand is appropriate to permit the district court to resentence Kines and Umbach under a correct guidelines calculation. *United States* v. *Hall*, 704 F.3d 1317, 1323 (11th Cir. 2013) (citing *United States* v. *Keene*, 470 F.3d 1347, 1350 (11th Cir. 2006)).

CONCLUSION

For the foregoing reasons, this Court should affirm defendants' judgments of conviction, vacate their sentences, and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

This brief is preceded by the United States' Motion To File An Oversized Brief As Appellee, filed in this Court on February 16, 2017, and is 14,080 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4, if applicable.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Dated: February 27, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeal for the Eleventh Circuit by using the appellate CM/ECF system and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid.

I also certify that all counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Christine A. Monta
CHRISTINE A. MONTA
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Attachment

District court's jury instruction on the elements of 18 U.S.C. 1512(b)(3):

To find Defendants Umbach and Kines guilty of Counts Six and Seven respectively, in violation of 18 U.S.C. § 1512(b)(3), the Government must prove each of the following facts beyond a reasonable doubt:

(i) That the Defendant knowingly engaged in misleading conduct toward another person, as alleged;

(ii) That the Defendant acted with the intent to hinder, delay, or prevent the communication of the information alleged and that it was reasonably likely that the information would have been provided to a federal law enforcement officer or federal judge; and

(iii) That the information related to the commission or possible commission of a federal offense.

"Misleading conduct" includes knowingly making a false statement and intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading with the intent to mislead.

The Government must show that the defendant acted with the intent to hinder, delay, or prevent the communication of truthful information, and that there was a reasonable likelihood, that absent the alleged conduct, the information would have been provided to federal law enforcement authorities. In determining whether the defendant acted with the intent to hinder, delay or prevent communication of truthful information, you may consider whether the defendant acted with the purpose of preventing the transfer of truthful information to law enforcement officers or courts, generally. This fact may be proven by evidence that the defendant acted with the purpose of preventing the transfer of truthful information to federal law enforcement officers or federal courts generally.

The Government is not required to establish that the defendant intended to keep truthful information from a specific federal law enforcement officer or a specific federal judge, or that the defendant knew that the persons from whom he intended to conceal truthful information were federal law enforcement officers or judges.

In determining whether the defendant had the required intent, you should consider all of the circumstances of the case, including, among other things, the

following: (1) the defendant's knowledge, experience and training regarding permissible uses of force; (2) the defendant's knowledge, experience and training regarding the preparation of police reports; (3) whether the defendant knew that incidents of excessive force are investigated by federal authorities; and (4) any other circumstances as shown by the evidence which might assist you in determining defendant's knowledge and intent.

To satisfy the final element of Section 1512(b)(3), the Government must prove that the truthful information a defendant intended to conceal related to the commission or possible commission of a federal offense. Because the statute explicitly refers to the possible commission of a federal offense, the Government need not prove that any person was actually guilty of any underlying federal offense.

Doc. 161, at 20-22; see also Doc. 311, at 44-47.