13-3969(L)

To Be Argued By:
RICHARD SCHECHTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 13-3969(L)
14-420(Con)
14-424(Con)

UNITED STATES OF AMERICA,

Appellee,

-vs-

JOHN MILLER,

Defendant,

(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
United States Attorney
District of Connecticut

KRISHNA R. PATEL
RICHARD J. SCHECHTER
SANDRA S. GLOVER *(of counsel)*
Assistant United States Attorneys

JASON ZULLO, DAVID CARI,
DENNIS SPAULDING,

Defendants-Appellants.

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Pursuant to "Blue Book" rule 10.7, the Government's citation of cases does not include "certiorari denied" dispositions that are more than two years old.

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Alvin W. Thompson, J.) had subject matter jurisdiction over this criminal prosecution pursuant to 18 U.S.C. § 3231.

On October 21, 2013, following a four-week jury trial, the jury returned a verdict finding defendants Dennis Spaulding and David Cari guilty of multiple civil rights violations. GA449.[1]

On January 21, 2014, the district court sentenced Cari principally to 30 months of incarceration. CA18-20; GA455. Judgment entered on January 27, 2014. CA18; GA457-58. On February 4, 2014, Cari filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA1-2; GA460.

On January 23, 2014,[2] the district court sentenced Spaulding principally to five years of incarceration. SA18-20; GA457. Judgment entered on January 28, 2014. SA18; GA458. On January

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[1] The abbreviations used in this brief are as follows: "CA__" (Cari Appendix); "SA__" (Spaulding Appendix); "ZA__" (Zullo Appendix); "GA__" (Government Appendix); and "TR__" (Trial Transcript). Because the trial transcript for this four-week trial is sequentially numbered, the transcript cites are followed by the appropriate volume number.

[2] Although the Judgment states that sentence was imposed January 21, 2014, *see* SA19, the sentence was actually imposed on January 23, 2014 as reflected on the docket sheet.

30, 2014, Spaulding filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA3; GA460.

This Court has appellate jurisdiction over the defendant-appellants' claims pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

I. Viewing the evidence in the light most favorable to the prosecution, was there sufficient evidence to establish that Spaulding (a) participated in a conspiracy to violate the civil rights of Latinos in East Haven; (b) falsely arrested Moises Marin and used excessive force in that arrest; (c) falsely arrested Jose Luis Alvarracin; and (d) prepared false police reports about the arrests of Marin and Alvarracin?

II. Viewing the evidence in the light most favorable to the prosecution: (a) did the district court commit plain error by denying Cari a judgment of acquittal on the false arrest charge as a matter of law; (b) was there sufficient evidence to establish that Cari participated in the conspiracy to violate civil rights; and (c) was there sufficient evidence that Cari obstructed justice by drafting a false police report about an arrest?

III. Did the district court abuse its discretion by excluding a recorded conversation between a witness and his legal advisor: (a) when the statement was made to a legal advisor for the purpose of obtaining legal assistance and there was no waiver of the attorney-client privilege; (b) when the defendants failed to satisfy the requirements of Rule

613(b) for the introduction of the statements; and (c) when the exclusion of the evidence was harmless in any event?

IV. Viewing the jury instructions as a whole, did the district court commit plain error by providing the jury with a correct statement of the law regarding the First Amendment where the court made it clear to the jury that the constitutional violations charged in the indictment involved the Fourth Amendment, not the First Amendment, and the court instructed the jury that it could not convict defendant Cari unless it found that he violated the Fourth Amendment by arresting a person without probable cause?

V. Where the prosecutors' closing arguments commented solely on the evidence presented and neither defendant raised a single objection to any closing comment, is Cari entitled to any relief based on isolated comments made during the prosecutors' closings?

VI. Did the district court impose an unreasonable sentence (a) when it applied a sentencing enhancement for conduct that resulted in a substantial interference with the administration of justice; and (b) when it imposed a 60-month sentence based on its evaluation of the § 3553(a) factors in this case?

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Preliminary Statement

Defendant-Appellants Dennis Spaulding and David Cari were East Haven, Connecticut police officers who violated the civil rights of Latino residents in East Haven and of their advocate, a Roman Catholic priest (Father James Manship)

who tried to expose and stop the police misconduct.

After a four-week trial, a jury convicted Spaulding and Cari on all counts against them. Spaulding, who was convicted of conspiracy to violate civil rights, excessive force, two counts of false arrest, and two counts of obstruction of justice (authoring false police reports to conceal illegal arrests), was sentenced to a Guidelines sentence of 60 months' imprisonment. Cari, who was convicted of conspiracy to violate civil rights, the false arrest of Father Manship, and obstruction of justice (authoring a fictitious police report about his arrest of Father Manship) was sentenced to a below Guidelines sentence of 30 months' imprisonment.

On appeal, Spaulding challenges the sufficiency of the evidence to support his six convictions, one evidentiary ruling and the procedural and substantive reasonableness of his Guidelines sentence. As set forth in detail below, however, the jury's verdict was firmly supported by the evidence, the court's evidentiary ruling was eminently proper, and the court's Guidelines sentence was reasonable given Spaulding's extensive and serious misconduct.

Cari's appeal primarily focuses on a jury instruction. But that instruction is one he modified and previously acknowledged was a correct statement of the law. Cari also challenges the sufficiency of the evidence for his convictions,

and in a supplemental brief, Cari attacks isolated closing arguments made by the prosecutors. As set forth below, the challenged instruction was proper and could have played no role in any of Cari's three convictions, all of which were amply supported by the evidence. Moreover, the prosecutors' closing arguments were proper comments directed to the evidence.

For all of these reasons, the district court's judgments should be affirmed.

Statement of the Case

On January 18, 2012, a grand jury returned a 10-count indictment charging East Haven police officers David Cari, Dennis Spaulding, Jason Zullo and John Miller with conspiracy to violate civil rights, deprivation of civil rights through false arrests and the use of excessive force, and obstructing federal investigations through the creation of false police reports. GA420; ZA18-35. After Miller pleaded guilty to one count of use of excessive force, GA428, on September 25, 2012, a grand jury returned a 12-count superseding indictment against Cari, Spaulding and Zullo. ZA36-52; GA428. Zullo pleaded guilty to one count of obstruction of justice through the filing of a false police report on October 23, 2012. GA430-31.

Trial began on the superseding indictment for Cari and Spaulding on September 23, 2013. GA446. On October 21, 2013, the jury returned a

verdict finding Spaulding and Cari guilty on all counts against them. GA449. Specifically, Cari was convicted of one count of conspiracy to violate constitutional rights, in violation of 18 U.S.C. § 241 (Count 1), one count of deprivation of civil rights through false arrest, in violation of 18 U.S.C. § 242 (Count 11), and one count of obstruction of justice through the filing of a false police report, in violation of 18 U.S.C. § 1519 (Count 12). CA18-20; ZA36-52. Spaulding was convicted of one count of conspiracy to violate constitutional rights, in violation of 18 U.S.C. § 241 (Count 1), one count of deprivation of civil rights through the use of excessive force, in violation of 18 U.S.C. § 242 (Count 5), two counts of deprivation of civil rights through false arrest, in violation of 18 U.S.C. § 242 (Counts 6 and 9), and two counts of obstruction of justice through the filing of false police reports, in violation of 18 U.S.C. § 1519 (Counts 7 and 10). SA18-20; ZA36-52.

Cari and Spaulding moved for a new trial and for a judgment of acquittal challenging the sufficiency and the weight of the evidence against them. GA450. The district court denied these motions in a written ruling dated January 17, 2014. GA4-7; GA455.

On January 21, 2014, the court sentenced Cari to a below-Guidelines sentence of 30 months in prison. CA18-20; GA455. On January 23, 2014, the court sentenced Spaulding to a Guide-

lines sentence of 60 months in prison. SA18-20; GA457.

Both defendants, who are currently serving their sentences, filed timely notices of appeal. *See* GA460.

A. The offense conduct

Beginning as early as 2008, East Haven, Connecticut police officers Dennis Spaulding and Jason Zullo began a concerted campaign of harassing and intimidating Latino business owners and their customers in East Haven. *See* TR1455-56 (VIII); GA8-19; TR221-30 (I). Communications between Spaulding and Zullo demonstrated that they were motivated by anti-immigrant bias. *See* GA8-19. Fellow officer David Cari joined the conspiracy when he falsely arrested an advocate for the victims of Spaulding's and Zullo's abuse, Father James Manship, and then authored a false police report to justify the arrest.

In August 2008, based on concerns raised by another East Haven police officer, then-Lieutenant Henry Butler met with and advised Spaulding about the racial profiling laws in Connecticut and made clear to Spaulding that it was illegal to target individuals based on race or ethnicity. TR1453-56 (VIII). Despite this warning, Spaulding continued his campaign of discrimination against Latino residents of East Haven.

The superseding indictment and evidence at trial focused primarily on three incidents. *See* ZA36-52. The first two incidents involved Latino victims who were arrested by Spaulding without probable cause. *See* Counts 5-7, 9-10. Spaulding assaulted one of the victims and this was the basis for Spaulding's conviction on Count 5 for use of excessive force. The third incident involved Father Manship, who Cari arrested without probable cause. This was the basis for Cari's conviction on Count 11 (false arrest) and Count 12 (obstruction of justice). All three incidents were part of the larger conspiracy to violate the constitutional rights of East Haven residents and Father Manship charged in Count 1.

1. Incident one: On November 21, 2008, Spaulding arrests Moises Marin without probable cause, uses excessive force against Marin and authors a false arrest report (Counts 5-7).

Moises Marin is a native of Ecuador and a United States citizen who owned and operated La Bamba, an Ecuadorian restaurant located in East Haven. TR477-81 (III). Marin described a history of harassment and intimidation of his customers, many who were Latino, by Spaulding which began in 2008. TR483-523 (III). In addition, someone in the East Haven Police Department also harassed Marin by reporting him to

the State's liquor commission for alleged violations of his liquor license. TR497-501 (III).

To document the harassment, Marin followed the advice of the State's liquor commission representative and sought to photograph Spaulding's harassment. TR497-501 (III); TR505 (III). On the evening of November 21, 2008, Marin was informed that Spaulding was harassing some of his customers who had out-of-state license plates. TR510-11 (III); TR595-96 (III). Marin walked outside, approached Spaulding, and asked him to stop harassing his customers. TR511-12 (III). In response, Spaulding laughed. TR511 (III). Marin retrieved his camera from the restaurant, and then took two photographs of Spaulding's car. TR511-12 (III). When Spaulding realized that Marin had photographed him and his car, Spaulding ran to Marin, told him he was under arrest and pushed him to the ground. TR511-14 (III). As Marin testified at trial, Spaulding repeatedly kicked him and cursed at him during the arrest:

> So I took the picture and then when I was walking back in, just walking normally, he, Dennis Spaulding, ran up behind me and he said to me, . . . "You don't take a picture of me."
>
> * * *
>
> He told me, "I'm going to break your fucking face. Fucking Spanish people."

> And he continued to repeat that every so often.
>
> * * *
>
> And that was when I said, "Why do you want to break my face?" And then he continued to repeat the same thing, those bad words that I had said before.
>
> * * *
>
> When I came like this to come down (indicating), he pushed me really hard here (indicating). And then I went down and he had me like this (indicating). And then I put my hands behind my back and he handcuffed me. And then he brut[ally] kicked me on the backside.
>
> And from there he took me, brutally. He lifted me up, I stood up. And he brought me to the car. . . . And he threw me into the car. I went into the car head first. And then he began to kick me (indicating) a lot of times. And then I myself tried to get myself into the car because he wasn't putting me in the car. Because using the kicking blows, he was trying to use that to get me inside. He kicked me all over the place.

TR514-15 (III).

After Marin was restrained in the police car, Spaulding took him to the police station. TR523-

25 (III). During the drive, Spaulding told him that he (Spaulding) did not want Latino owned businesses operating in East Haven. TR523-24 (III). At the police station, Spaulding took Marin's camera, deleted the two photos that Marin had taken of his car, and then threw the camera, rendering it inoperable. TR528-29 (III). Marin was then fingerprinted and photographed for booking; the booking photo depicted some of his injuries. TR528 (III); TR559-60 (III). Spaulding told Marin to wash his face, and then placed him in a jail cell. TR530-31 (III).

Meanwhile, Marin's sister, Wesfalia Rocha, went to the East Haven police station to ask about her brother. TR314-15 (II). At the station, Rocha saw four officers—three men and a woman. TR316-17 (II). When she approached the window to inquire about her brother, she was directed to wait. TR315 (II). While she was waiting, she heard a male voice say: "'Fucking Spanish people.'" TR316-17 (II). According to Rocha, the officers then laughed. TR317-18 (II). Spaulding was among the officers in the group at the station, but Rocha could not identify Spaulding as the speaker. TR316-17 (II).

Almost an hour after Rocha arrived at the East Haven police station, Marin was released. TR531-32 (III); TR318 (II). He was in a lot of pain and was afraid that because his back hurt, he was going to be disabled. TR534 (III). When Rocha saw her brother, she walked outside with

him and asked a different brother (who had come with her to the station) to call for an ambulance. TR318-21 (II). Before the ambulance arrived, Rocha photographed Marin's injuries. TR321 (II). The photos documenting Marin's injuries as well as his clothes from that evening, which contained blood stains, were offered in evidence at trial. GA47-61; *see* TR503 (III); TR546-48 (III). An ambulance arrived in front of the police station and transported Marin to the hospital. TR537 (III).

The hospital records indicate that Marin was pushed to the ground, *see* GA21-46, and further state that Marin was: (1) assaulted, (2) suffered a lip laceration, and (3) suffered contusions, GA24. Although Marin testified that Spaulding had kicked him repeatedly, TR514-16 (III), the emergency room records do not indicate that Marin was kicked. GA21-46.

Spaulding prepared a police report regarding Marin's arrest on November 21, GA62-63, although that report contains several statements that were contradicted by the evidence. For example, the report states that on the night of his arrest, Marin, who was accompanied by three other men, "flagged down" Spaulding, and that when Spaulding rolled down his window, Marin was irate and "started yelling" very loudly and throwing his (Marin's) hands in the air. GA62. According to the report, Marin was yelling, "'You fucking police tow everybodies [sic] car.' 'You

know everyone that comes here has no license.' 'You know everybody is illegal, they are only in this count[r]y to work.'" GA62. Consistent with his earlier testimony, Marin denied that he was accompanied by anyone, denied flagging down Spaulding, and denied yelling or making any of the statements attributed to him. TR552-53 (III). In fact, Marin testified that the expletive attributed to him in Spaulding's report was the same expletive that *Spaulding* used several times when speaking to him. TR554 (III).

Spaulding's report also states that because Marin was yelling at Spaulding, "a crowd had started to form" around Spaulding's police car. GA62. In response, according to the report, Spaulding got out of his car and "ordered the crowd to disburse [sic]." GA62. By contrast, Marin explained that no crowd ever formed and that the only time Spaulding got out of his car was to follow Marin after Marin photographed him. TR554-55 (III). The report also claims that Marin resisted arrest, stating that "Marin tried several times to pull away" from Spaulding when Spaulding was arresting him and that "Marin had to be taken to the ground" so that Spaulding could gain a "tactical advantage." GA62. Marin denied resisting arrest. TR556 (III). Finally, the report states that "Marin's actions resulted in a crowd forming" around Spaulding and that "an unknown male pulled on Marin's arm in an attempt to free [Marin] from [Spaulding's] grasp."

GA62. Marin denied these allegations. TR556 (III).

As a result of the arrest, Marin appeared in state court and was granted "accelerated rehabilitation," the equivalent of a six-month probationary period after which the charges were dismissed. TR545-46 (III).[3] After Marin's arrest, Spaulding began to follow him and twice stopped him without reason. TR565-67 (III). Marin became frightened and concerned that if he got a ticket or was arrested again, he could lose his liquor license and his business. TR568-69 (III). Consequently, Marin went to Ecuador for four months to avoid any further contact with Spaulding. TR565-69 (III).

2. Incident two: On January 21, 2009, Spaulding arrests Jose Luis Alvarracin and John Espinosa without probable cause and prepares a false police report (Counts 9-10).

On January 21, 2009, four friends, Jose Luis Alvarracin, John Espinosa, Xavier Criollo and Wellington Salinas, met up at the house where Espinosa and Alvarracin lived. TR799-804 (V). All four men were born in Ecuador; Espinosa had become a United States citizen. TR792-93

[3] After Spaulding's sentencing, the court issued an order noting that Marin's arrest and prosecution was unlawful and that any records related to that incident should be expunged. GA112-14.

(V); TR801 (V). After a brief discussion, they decided to go to La Bamba for dinner. TR799-804 (V). Salinas drove, although he did not have a driver's license; Alvarracin and Espinosa rode in the back seat. TR805-806 (V); TR814-15 (V). While they were driving to La Bamba, Spaulding began to follow them, TR810-12 (V), and as they pulled into the La Bamba parking lot, Spaulding turned on the lights to his police car, TR811-13 (V). After Salinas stopped the car in the parking lot, Spaulding approached the driver's side of the car. TR813-14 (V).

When Spaulding asked Salinas for his license and registration, Salinas explained that he did not have a license, but handed Spaulding the car registration and his New Haven identification card. TR814-16 (V). Criollo—who was sitting in the front passenger seat—handed Spaulding *his* driver's license. TR816-17 (V). Espinosa testified that Spaulding looked at the license, said it was no good, and threw it back to Criollo saying, "Why? You want to get arrested?" TR817-18 (V). According to Alvarracin, Spaulding added, "All you fucking Spanish drivers drive without a license." TR1095-96 (VI). Alvarracin asked Spaulding why he was treating them that way, and Spaulding responded, "Do you want to get arrested?" TR1096-97 (VI); *see also* TR824-25 (V). When Alvarracin said that they had done nothing wrong, Spaulding placed him under arrest. TR1097-98 (VI); *see also* TR825-26 (V).

By this time, Officer Zullo had arrived on the scene and had searched Criollo. TR826-27 (V); TR830-31 (V). Criollo, who by this point was outside the car, repeatedly asked the officers to return his license. TR831-36 (V). In response, Spaulding told Criollo he was going to be arrested, TR834-35 (V), and then, in fact, arrested him, TR836-37 (V). At about the same time, Espinosa asked Spaulding if he could get out of the car, and after Spaulding said yes, Espinosa got out. TR833-34 (V). When Espinosa asked why the officers were arresting Criollo, Spaulding arrested him, too. TR837-41 (V). At some point after that, Salinas was arrested and placed in the patrol car with Espinosa. TR842-43 (V).

All four arrestees—Espinosa, Criollo, Salinas, and Alvarracin—were transported to the police station. TR844-45 (V); TR856 (V); TR1105-1106 (VI). At the police station, Zullo pushed Alvarracin into a wall, pulled him off, and then pushed his head into the wall. TR1107 (VI). Alvarracin fell to ground, bleeding from his forehead, and asking for help. TR1107-10 (VI). Another police officer came to assist Alvarracin and placed him in a cell. TR1111-12 (VI). Alvarracin asked for medical help, but instead of providing help, Zullo tried to grab Alvarracin again (through the cell bars), and in the process ripped Alvarracin's shirt off. TR1112-13 (VI). All four men spent the night in the jail as bail was set at $2,500 per person. TR863-64 (V).

Spaulding prepared and filed a police report regarding the arrest of Alvarracin and Espinosa, GA64-67, but this report, like Spaulding's report on the arrest of Marin, contains many statements that were contradicted by the evidence presented at trial. For example, the report states that Salinas was the first person to be arrested, GA65, but both Espinosa and Alvarracin testified that that was not true. TR875 (V); TR1136 (VI); *see also* TR828-43 (V); TR1101-1102 (VI). The report also states that after Salinas was arrested, Alvarracin and Espinosa "became belligerent with officers," GA65, a statement that both men denied, TR875-76 (V); TR1136 (VI). Alvarracin and Espinosa also denied the report's description of them as "hanging out the rear seat window yelling" and using expletives including referring to the officers as "Fucking assholes." GA65-66; TR876-77 (V); TR1136-37 (VI). Finally, the report states that "numerous patrons" were standing outside watching as Alvarracin and Espinosa continued to scream and yell. GA66. Again, both men rejected that statement, noting that while a few people had come out of the restaurant, they (Alvarracin and Espinosa) never screamed or yelled. TR877-78 (V); TR1137 (VI).

All four men who were arrested at La Bamba on January 21, 2009, appeared in state court the following day where they were released by the state court judge without having to post bail. TR867-70 (V); TR934-35 (V); TR1126-27 (VI).

The charges against them were nolled. TR938 (V); TR1126-27 (VI).[4]

3. Incident three: On February 19, 2009, Cari arrests Father Manship for videotaping police conduct and prepares a false police report (Counts 11-12).

In 2008, Father Manship, who was the pastor of Saint Rose of Lima Parish in New Haven, began to hear from some of his Latino parishioners about problems in their relationship with the East Haven police department. TR2390 (XIII); TR2408 (XIII); TR2425-27 (XIII); TR2431-32 (XIII). On January 22, 2009—the day after Alvarracin, Espinosa, Criollo and Salinas were arrested—they met with Father Manship at La Bamba. TR1124 (VI); TR2435-40 (XIII). The four men gave Father Manship information about their arrests and their treatment by Zullo and Spaulding. TR1124-26 (VI); TR2435-43 (XIII).

Thereafter, Father Manship conducted a series of meetings at his church where he invited faculty and students from Yale Law School ("YLS") to assist him in strategizing about how to improve the Latino community's relationship with the East Haven police department.

[4] After Spaulding's sentencing, the court issued an order noting that the arrests of Alvarracin and Espinosa were unlawful and that any records related to those incidents should be expunged. GA112-14.

TR2442-56 (XIII); TR2036-39 (X). As a result, Father Manship met with the then East Haven Mayor. TR2450-52 (XIII). In addition, Father Manship and others decided to gather evidence by documenting stories and videotaping police conduct. TR2453-55 (XIII).

To that end, on February 13, 2009, Father Manship videotaped Spaulding's interaction with the Latino driver of a car that appeared to have been stopped by Spaulding. TR2456-72 (XIII). Spaulding saw Father Manship videotaping him and said to him, "You have every right to videotape, but do it from a safe distance." TR2468 (XIII). After videotaping the traffic stop, Father Manship spoke to the driver and reviewed the ticket that Spaulding had issued to the driver. TR2473-74 (XIII). Thereafter, Father Manship approached Spaulding and asked why he (Spaulding) put "white" as the race of the driver on the ticket instead of Hispanic as the driver was Latino. TR2473-74 (XIII). Spaulding responded, "Hispanic is not a race." TR2474 (XIII).

Six days, later, on February 19, 2009, a series of events occurred at "My Country Store" in East Haven. My Country Store is a small grocery owned and operated by an Ecuadorian couple, Marcia Chacon and her husband. TR2026-27 (X); TR2031-32 (X). On that day, Chacon's brother was sitting with a friend in Chacon's car outside the store. TR2040 (X). Spaulding approached the

car, placed Chacon's brother in handcuffs in a police car, and had Chacon's car towed. TR2040-49 (X). Other police officers, including Cari, arrived at the store while the car was being towed. TR2048-51 (X). When Chacon's friend and husband sought to question the police, Spaulding threatened the friend with arrest and Cari threatened Chacon's husband with arrest. TR2047-51 (X). Chacon had her cousin call Father Manship for help. TR2040 (X); TR2477 (XIII).

After Spaulding released Chacon's brother with a ticket, TR2051 (X), Spaulding went inside the store, TR2055 (X). While in the store, Spaulding noticed license plates that were screwed into the back wall inside the store. TR2055-57 (X). Three or four other officers, including Cari, arrived at the store and told Chacon's husband that the license plates had to be taken down. TR2057 (X). Spaulding reiterated that message to Chacon's husband. TR2057 (X). As Chacon's husband and a friend removed the license plates, all of the officers left the store except Cari and Spaulding. TR2058-59 (X).

While Cari and Spaulding were supervising the removal of the license plates, Father Manship entered the store. TR2059-62 (X). Spaulding saw Father Manship, approached him and reminded him about their conversation six days earlier in which he told Father Manship to stay a safe distance away. TR2486-89 (XIII).

Father Manship began to videotape what Spaulding and Cari were doing. TR2490-94 (XIII). Cari looked at Father Manship and asked him, "Sir, what are you doing? Is there a reason why you have a camera on me?" TR2502-2503 (XIII). Father Manship told Cari that he was filming what was happening in the store. TR2503 (XIII). Cari asked, "Why is that?" and Father Manship explained that he was filming to document what happened. TR2506 (XIII). Cari approached Father Manship, saying "Well, I'll tell you what – what I'm going to do with that camera," and then arrested him. TR2509-18 (XIII); GA115. After Father Manship's arrest, several officers, including Spaulding, Zullo, and Cari, came into the store and attempted (unsuccessfully) to retrieve a surveillance video from the store. TR2107-14 (IX); TR1542-44 (VIII) (Lt. Butler identifying the three officers).

Sgt. John Miller brought Father Manship to the police station where he was photographed, fingerprinted, and charged with interference and disorderly conduct. TR2527-42 (XIII). Father Manship was released without a bond but his camera remained in police custody. TR2540-41 (XIII). He was ordered to appear in state court on March 4, 2009. TR2541 (XIII).

In the interim, Cari drafted multiple versions of a police report about the incident. Over the course of 11 days, Cari's multiple drafts of the report repeatedly modified facts to suggest that

Father Manship had resisted arrest and had possibly been carrying a weapon. *See* GA71-110.

The final version of Cari's report was submitted on March 3, 2009, the day before Father Manship was due to appear in court. GA68-70. The report contains many statements that were contradicted by the evidence. Most significantly, Cari repeatedly claims in the report that he did not know that Father Manship was holding a camera. GA69. The report states, for example, that Manship "with[drew] an unknown shiny silver object out of his coat pocket and . . . cuffed the object with his hands in order to conceal the item from police." GA69. At another point, the report suggests that the object in Father Manship's hands was a "possible weapon." GA69. But Cari's conduct on the videotape is inconsistent with these statements. On the videotape, Cari is heard asking Father Manship "[i]s there a reason why you have a *camera* on me?" and "I will show you what I will do with that *camera*." TR2503 (XIII) (emphasis added); TR2516 (XIII) (emphasis added); GA115. Moreover, although the video shows Cari turning his head away from Father Manship as he approached the priest to arrest him, GA115, an East Haven police captain explained to the jury that an officer would not turn his head if he thought someone was holding a gun. TR455-56 (II).

In another inconsistency, Cari's report states that Father Manship resisted arrest, fought with

Cari, and yelled "I'm a priest and you cannot touch me." GA69. Numerous witnesses testified, however, that Father Manship did not resist, did not fight with Cari and did not say anything at all, let alone yell "I'm a priest and you cannot touch me." TR1748-52 (IX); TR2119 (XI); TR2519-21 (XIII).

At Father Manship's arraignment, his attorneys moved to preserve the video camera and the recording made by the priest. TR95 (I). They subsequently moved—successfully—to dismiss the case. TR95-103 (I); TR125-26 (I).

4. Zullo and Spaulding continue to harass Latinos in East Haven.

Even after Father Manship's arrest, Zullo and Spaulding continued to harass members of the Latino community and their advocates. Chacon testified, for example, that after a press conference in March 2009 during which Father Manship's attorneys released his video to the press, she went to her store. That evening, around 8:00 p.m., she noticed that there was a police car parked outside her store; the police stayed there until late that night. TR2121-22 (XI). When she and her husband eventually left in their car at around 11:00 p.m., they were stopped almost immediately by Zullo. TR2123 (XI). Zullo told Chacon's husband that his license and registration did not match, although he eventually let them go. TR2123-25 (XI).

Reina Leon, who owned and operated Los Amigos grocery store, located directly across from La Bamba in East Haven, also testified about the harassment she continued to encounter. TR722-30 (IV); TR738-40 (V); TR749-50 (V). Leon explained that in late February or March 2009, she began filming Spaulding because he was harassing her customers directly outside her store. She provided the video to the press. TR739-41 (V). On one occasion, Spaulding saw Leon videotaping him from inside her store, and so he walked into her store, and demanded the video recorder. TR726-28 (IV). When Leon did not give it to him, Spaulding searched the store for the camera. TR726-28 (IV). He was unable to find it and ultimately left the store. TR727 (IV).

Numerous "chats" between Spaulding and Zullo on their car computers demonstrated their racial animus and their antipathy toward Latino businesses in East Haven. GA8-19. For example, in one of the chats, Zullo wrote Spaulding the following:

> This officer likes harrassing motorist, and is aware of wide spread fraud from persons who have drifted to this country on rafts made of chicken wings and are now residing on Main St East Haven and are registering motor vehicle's to other states. This officer has observed this mostly with Pennsylvania, Tennessee, Wisconsin, South Carolina, and Washington State

registrations. This is a Violation of CGS14-12(a)(2). Paste this on your foreheads!!"

GA8.

* * *

Additional facts are discussed in the appropriate sections below.

B. The superseding indictment

As relevant here, the superseding indictment charged the defendant-appellants with eight counts. Count 1 charged Spaulding, Cari and Zullo with conspiracy to violate the constitutional rights of East Haven residents and their advocates in violation of 18 U.S.C. § 241. In particular, it alleged a conspiracy to deprive victims of their right under the Fourth Amendment to be free of arrest in the absence of probable cause and to be free from unreasonable searches and seizures. ZA36-45.

Counts Count 5-7 charged Spaulding for his conduct in connection with the arrest of Marin. Count 5 charged that he used excessive force against Marin, in violation of 18 U.S.C. § 242. ZA47-48. Count 6 charged Spaulding with the false arrest of Marin, in violation of 18 U.S.C. § 242, ZA48, and Count 7 charged Spaulding with obstruction of justice by authoring a false police report about Marin's arrest, in violation of 18 U.S.C. § 1519. ZA48-49.

Counts 9 and 10 charged Spaulding for his conduct in the arrest of Alvarracin. Count 9 charged Spaulding with the false arrest of Alvarracin, in violation of 18 U.S.C. § 242. ZA49-50. Count 10 charged Spaulding with obstruction of justice by authoring a false police report about that arrest, in violation of 18 U.S.C. § 1519. ZA50.

Finally, Counts 11 and 12 charged Cari for his conduct in connection with the arrest of Father Manship. Count 11 charged Cari with the false arrest of Father Manship, in violation of 18 U.S.C. § 242. ZA50-51. Count 12 charged Cari with obstruction of justice by authoring a false police report about that arrest, in violation of 18 U.S.C. § 1519. ZA51.

Summary of Argument

I. Viewed in the light most favorable to the government, there was more than sufficient evidence to establish Spaulding's guilt beyond a reasonable doubt on each of his six convictions. First, there was sufficient evidence to support Spaulding's conspiracy conviction. Numerous witnesses provided specific details of how they were falsely arrested, beaten and mistreated by Spaulding, Zullo and Cari. In addition, the jury saw the false police reports—including reports apparently drafted in coordination with each other—used to conceal this improper conduct. Moreover, Spaulding's racist comments, made to

victims and in car chats with Zullo, supported the conclusion that he willfully violated the constitutional rights of his victims. In short, the evidence of the concerted course of conduct between Spaudling, Zullo and Cari demonstrated a conspiracy to violate the civil rights of Latino residents of East Haven.

Second, Spaulding was properly convicted of the false arrest of Marin and the use of excessive force in that arrest. The evidence showed that Spaulding arrested Marin without probable cause and that he used excessive force to effectuate that arrest. Spaulding argues that the witnesses supporting these charges lacked credibility, but that argument is one for the jury, not for this Court on appeal.

Third, Spaulding was properly convicted on the charge that he falsely arrested Alvarracin. The evidence showed that Alvarracin asked Spaulding why he was treating them with disdain and Spaulding responded by arresting him. Again, Spaulding argues that the evidence was insufficient because the witnesses lacked credibility, but the jury was entitled to believe the witnesses before it.

Finally, the evidence was more than sufficient to support Spaulding's obstruction of justice convictions for the filing of false reports in connection with the arrests of Marin and Alvarracin. Both reports contained numerous false statements when compared to the testimony of

eyewitnesses to the events. Spaulding contends that the jury should not have believed those witnesses, but that decision was fully within the jury's province.

II. Cari's arrest of Father Manship, a Roman Catholic priest advocating on behalf of victims of police misconduct, was not supported by probable cause as a matter of law. Contrary to Cari's suggestion, it is not a *per se* violation of the law to videotape police activity in a store open for business. There was no probable cause to arrest Father Manship for interfering with an officer, disorderly conduct, or interfering with a search. Accordingly, the district court did not commit plain error in denying Cari's Rule 29 motion and on his charge of falsely arresting the priest.

Moreover, viewed in the light most favorable to the government, there was more than sufficient evidence to establish Cari's guilt for the other two counts of conviction. The evidence established that Cari joined the conspiracy by arresting Father Manship without probable cause and drafting a false police report to discredit the priest—a known advocate for the Latino community. Cari's meeting with Spaulding after the arrest of Father Manship and his drafting of the false police report demonstrated his knowing participation in the conspiracy.

The evidence also established that Cari drafted a false police report about the arrest of Father

Manship. The jury watched the video of the incident and was able to compare that video to the description of the incident in Cari's report. Testimony from eyewitnesses to the arrest further supported the conclusion that the report was false. With this evidence the jury could easily conclude that Cari authored the false report about the arrest of a civil rights advocate to influence a federal civil rights investigation.

III. The district court properly excluded an audio recording of Father Manship's privileged conversation with his legal advisor. The conversation was privileged because it was a conversation between Father Manship and a law student that was designed for the purpose of obtaining legal assistance. Moreover, the YLS Clinic did not waive the privilege by producing the statement because only the client, not the lawyer, may waive the privilege. Furthermore, Father Manship did not waive the privilege by testifying in the grand jury. His testimony only described what he saw that evening; it did not describe his privileged conversations.

Alternatively, the court properly concluded that the defendants failed to satisfy the requirements of Federal Rule of Evidence 613(b) by failing to show that two of the witness's prior recorded statements were inconsistent with his testimony and by failing to confront the witness with the prior statements.

Finally, any error in the exclusion of the audio recording was harmless. The evidence did not relate to any of the substantive counts against the defendants, and to the extent it showed any bias or improper motive by the witness, the defendants had plenty of evidence to that effect already.

IV. The district court provided an eminently proper jury instruction regarding the First Amendment. Because the court made it clear to the jury that the constitutional violation charged in the case was a Fourth Amendment violation, not a First Amendment violation, there is no chance that Cari was convicted for violating a First Amendment right. The court's charge concerning the First Amendment played no role in Cari's three convictions.

V. The prosecutors' closing arguments were fully proper. All of the remarks that highlighted the falsity of Cari's police report were supported by the evidence. The prosecutors' arguments focused solely on the evidence, did not shift the burden to Cari and certainly did not comment on Cari's failure to testify. In any event, Cari's failure to object at any time to any closing argument comment should preclude him from attacking these comments on appeal.

VI. Spaulding's 60-month Guidelines sentence was procedurally and substantively rea-

sonable. The court properly enhanced Spaulding's offense level under U.S.S.G. § 2J1.2(b)(2) because Spaulding's false arrests of two victims caused a substantial interference with the administration of justice when both victims supposed criminal violations resulted in judicial determinations. Moreover, the 60-month Guidelines sentence was substantively reasonable given that Spaulding was convicted after trial of conspiracy to violate civil rights, two false arrests, one count of excessive force for beating a victim, and two counts of obstruction of justice for creating false police reports in contemplation of a federal civil rights investigation.

Argument

I. The evidence was more than sufficient to support the verdicts against Spaulding on all counts.

A. Relevant facts

The trial evidence is set forth in the Statement of the Case above, supplemented as necessary in the Discussion below.

At the close of evidence, Spaulding moved for a Rule 29 judgment of acquittal. TR3069-74 (XVII). He renewed that motion post-verdict. GA450. The district court denied Spaulding's motions at both junctures. TR3081-82 (XVII); GA4-7; GA455.

B. Governing law and standard of review

This Court reviews Spaulding's challenge to the sufficiency of the evidence *de novo* under the well-settled standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *United States v. George*, 779 F.3d 113, 120 (2d Cir. 2015); *United States v. Vargas-Cordon*, 733 F.3d 366, 375 (2d Cir. 2013). Under that standard, the question is whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *George*, 779 F.3d at 120 (quoting *Jackson*, 443 U.S. at 319); *see also United States v. Rosen*, 716 F.3d 691, 702 (2d Cir. 2013). As this Court has explained, "'[t]he ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*.'" *United States v. Corbett*, 750 F.3d 245, 250 (2d Cir.) (quoting *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998)), *cert. denied*, 135 S. Ct. 261 (2014).

The *Jackson* standard is an "exceedingly deferential" standard that preserves the jury's role as fact-finder and evaluator of the evidence. *United States v. Robinson*, 702 F.3d 22, 34-35 (2d Cir. 2012) (internal citations omitted). Applying this standard, the Court views the evidence in its entirety, not in isolation. *George*, 779 F.3d at 120; *see also United States v. Applins*, 637 F.3d 59, 76 (2d Cir. 2011). The Court consid-

ers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. *George*, 779 F.3d at 120; *Vargas-Cordon*, 733 F.3d at 375. The weight of the evidence and the credibility of the witnesses are matters for argument to the jury, not grounds for reversal on appeal. *United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000); *Applins*, 637 F.3d at 76. In short, "the task of choosing among competing inferences is for the jury, not a reviewing court." *United States v. Salmonese*, 352 F.3d 608, 618 (2d Cir. 2003); *see also United States v. Praddy*, 725 F.3d 147, 152 (2d Cir. 2013); *Robinson*, 702 F.3d at 36.

Spaulding was convicted of conspiracy to violate constitutional rights in violation of 18 U.S.C. § 241. To sustain a conviction under this statute, the government must prove that a conspiracy existed to injure, oppress, threaten or intimidate an individual (or a community) in the exercise of rights secured by the Constitution, and that the defendant, under color of law, willfully voluntarily and knowingly joined the conspiracy. *United States v. Guidry*, 456 F.3d 493, 507 (5th Cir. 2006).

Spaulding was also convicted on three counts of deprivation of civil rights, in violation of 18 U.S.C. § 242. To sustain a conviction for false arrest under this statute, the government must prove that the defendant, acting under color of

law, willfully violated the constitutional rights of an individual by arresting and detaining him without probable cause. *See United States v. Lanier*, 520 U.S. 259, 264 (1997) (a conviction under § 242 requires proof that defendant acted willfully, under color of law, to deprive an individual of rights protected by the Constitution); *United States v. McDermott*, 918 F.2d 319, 325-26 (2d Cir. 1990). To sustain a conviction for deprivation of rights by using excessive force in violation of 18 U.S.C. § 242, the government must prove that the defendant acted willfully, under color of law, used excessive force, and caused bodily injury to the victim. *United States v. Cote*, 544 F.3d 88, 98 (2d Cir. 2008); *United States v. Livoti*, 196 F.3d 322, 327 (2d Cir. 1999).

Finally, Spaulding was convicted on two counts of obstruction of justice by authoring a false police report in violation of 18 U.S.C. § 1519. To establish a violation of this statute, the government must prove the following three elements beyond a reasonable doubt: (1) that the defendant concealed, covered up, falsified or made a false entry in a record or document, (2) that the defendant did so knowingly, and (3) that the defendant acted with the intent to impede, obstruct or influence an investigation of a matter within the jurisdiction of an agency of the United States. *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015); *United States v. Gray*, 642 F.3d 371, 375 (2d Cir. 2011) (describing § 1519).

C. Discussion

Spaulding argues that the evidence was insufficient to support all of his convictions. According to Spaulding, there was no evidence that a conspiracy existed, no evidence that he joined and participated in the charged conspiracy, and no evidence to support the substantive convictions relating to Marin or Alvarracin.

Spaulding's arguments rest on an incomplete view of the evidence, and further rest on the failure to draw all inferences from the evidence in favor of the jury's verdict.

1. The evidence was more than sufficient to show that Spaulding was guilty of the charged conspiracy (Count 1).

Viewed in the light most favorable to the government and drawing all reasonable inferences in favor of the verdict, the evidence established the following: (1) that beginning in 2008, Spaulding began a campaign of harassing and intimidating business owners and customers of Latino-owned businesses in East Haven; (2) that Spaulding and Zullo, a co-conspirator in this campaign, both harbored anti-immigrant animus; (3) that Spaulding willfully committed civil rights violations against Latino residents; (4) that Spaulding harassed and physically assaulted Marin, arrested him without probable cause, and then wrote a false police report to conceal

what had happened; (5) that Spaulding arrested Alvarracin without probable cause and then wrote a false police report about what had happened; (6) that Spaulding's co-conspirator Zullo physically assaulted Alvarracin after he was illegally arrested by Spaulding; (7) that Spaulding knew that Father Manship was videotaping his [Spaulding's] activities as they related to his interactions with Latinos before Father Manship's arrest; (8) that Cari was aware that Father Manship was advocating on behalf of Latinos, who had identified Spaulding as their abuser, prior to preparing and finalizing his (Cari's) false arrest report to justify his arrest of the priest; and (9) that Spaulding, and on one occasion, Cari, Spaulding and Zullo together, attempted to retrieve video surveillance evidence of their interactions with Latino residents. *See generally* Statement of the Case.

Spaulding claims, nonetheless, that this evidence was insufficient to show that a conspiracy existed and that he participated in that conspiracy. Spaulding Br. 15-16. This argument fails because, as set forth above, the evidence established the existence of a conspiracy to violate the civil rights of members of East Haven's Latino community. Zullo and Spaulding, who shared a pronounced anti-immigrant bias, focused their attention on Latino-owned businesses and their customers in East Haven. GA10; GA11; GA15; GA17; GA18. They began a campaign to harass

and intimidate Latinos in East Haven, stopping them repeatedly. In November 2008, this harassment campaign escalated when Spaulding arrested Moises Marin without probable cause, and in the process, used excessive force to effectuate the arrest. During the ride to the police station, Spaulding told Marin that he did not want Latino-owned businesses operating in East Haven. Spaulding subsequently filed a false police report to suggest that he had acted responsibly in arresting and subduing Marin and thus to conceal his unlawful conduct.

A similar incident occurred a few months later when Spaulding arrested Alvarracin and Espinosa without probable cause. Zullo was present and assisted with the arrests. In the course of this incident, Spaulding made several comments indicating that he was motivated by an anti-immigrant bias, including his statement that "[a]ll you fucking Spanish drivers drive without a license." TR1095-96 (VI). After Alvarracin was taken to the police station, Zullo assaulted Alvarracin, causing injury to Alvarracin and ripping his shirt. Later, as with the arrest of Marin, Spaulding filed a police report that misstated the facts of the arrest to suggest that he had properly arrested Alvarracin based on probable cause and that Alvarracin had been belligerent.

In addition, the evidence showed that as the harassment continued, Father Manship began to

assist members of the Latino community in East Haven with documenting the mistreatment they suffered at the hands of the East Haven police. In particular, Father Manship, and others in the community, began to videotape interactions with the police. Spaulding was aware of Father Manship's activities.

Finally, the evidence showed that on February 19, 2009, Cari joined the conspiracy when he arrested Father Manship without probable cause. After the arrest, Cari, Zullo and Spaulding attempted to recover video surveillance footage that would have documented their actions in the store. Cari ultimately prepared a false police report to justify Father Manship's arrest. When he filed this false report, he knew that Father Manship was acting as an advocate for Latinos on police misconduct issues, and shaped his report to discredit Father Manship.

In sum, the evidence established that Zullo, Cari and Spaulding engaged in a concerted campaign to deprive the Latino citizens of East Haven of their constitutional rights to be free from the use of excessive force and to be from arrest without probable cause. They worked together on the arrests and in the preparation of their reports to accomplish the goals of the conspiracy.

Further, the evidence established that Spaulding was a full participant—indeed, a leader—in the charged conspiracy. To begin, several Latino community members and busi-

ness owners in East Haven testified that Spaulding targeted them and their customers for harassment. *See, e.g.,* TR490-96 (III) (Marin: observed Spaulding at or near his restaurant, La Bamba, "[a]lmost every day," stopping customers in front of the restaurant and towing cars); TR316 (II) (Rocha: regularly saw Spaulding on Main Street in East Haven); TR1947 (X) (Mario Marin: in 2008, Spaulding in parking lot for La Bamba or Los Amigos "[e]very day," waiting for customers to leave, stopping the customers, and having cars towed); TR744-46 (V) (Leon: in the fall of 2008, saw Spaulding parked in his police car outside Los Amigos grocery store "[a]lmost every day"; he stopped Latino customers outside the store); TR2034-36 (X) (Chacon: in 2008 into 2009, saw Spaulding parked in front of or behind her store (My Country Store) on an almost daily basis, approaching her customers and in some instances towing their cars or arresting them).

These business owners were so concerned about Spaulding's conduct that they began to meet and collect evidence of Spaulding's harassment. *See, e.g.*, TR493-94 (III) (Marin: meetings between Latino business convened to discuss Spaulding's harassment); TR753-54 (V) (Leon: collected tickets issued by Spaulding to her customers and provided them to owners of La Bamba); TR2036-2039 (X) (Chacon: met with business owners and requested help from Father Manship).

And indeed, by August 2008, Spaulding's conduct was sufficiently well known that even members of the East Haven Police Department were concerned that Spaulding was targeting members of the Latino community for harassment. *See, e.g.*, TR1453-56 (VIII) (Lt. Butler: in August 2008, based on concerns raised by another East Haven police officer, Butler met with and advised Spaulding about the racial profiling laws in Connecticut and made clear to Spaulding that it was illegal to target individuals based on race).

Further, testimony about Spaulding's statements that exhibited his racial animus support the conclusion that he acted willfully to deprive his victims of their Fourth Amendment rights. *See, e.g.*, TR1095-96 (VI) (Alvarracin: Spaulding said, "All you fucking Spanish drivers drive without a license."); TR524 (III) (Marin: while he was being transported to the police station, Spaulding told him, "I have to close all the Spanish business here. I don't want Spanish people here."; "I don't want fucking Spanish people here. You have to close your business."); TR1014-16 (VI) (Segundo Aguayza: Spaulding visited him at his home, harassed him, and told him that he [Spaulding] hates immigrants because they lower property prices); TR747-48 (V) (Leon: Spaulding stopped and frisked her husband outside her store); TR726-28 (IV) (Leon: after

Spaulding saw her videotaping him, he came into store and demanded videotape).

Witnesses also testified about other intimidating encounters with Spaulding and his co-conspirators. For example, Chacon described the events that led up to Father Manship's arrest in her store on February 19, 2009. On that day, Chacon saw Spaulding place her brother in handcuffs, and heard Spaulding and Cari threaten her husband and a friend with arrest. TR2040-51 (X). It was these events that led her to reach out to Father Manship for help. TR2040 (X); TR2477 (XIII). Chacon also testified that after Father Manship was arrested, police officers—including Spaulding, Zullo and Cari—came back into her store and spent a couple hours trying (unsuccessfully) to retrieve a surveillance videotape from the store. TR2107-14 (XI); TR1542-44 (VIII) (Lt. Butler identifying Cari, Zullo and Spaulding in surveillance video from store).

This direct evidence of witnesses who encountered Spaulding and the co-conspirators, as well as the documentary evidence—including the car chats and the false police reports—was more than sufficient to support the jury's finding that a conspiracy existed to violate the rights of individuals in East Haven and that Spaulding was the leader of the conspiracy.

2. There was sufficient evidence to support Spaulding's convictions for the false arrest of Marin and the use of excessive force against Marin (Counts 5 and 6).

a. The false arrest of Marin

The evidence supported the jury's finding that Spaulding falsely arrested Marin on November 21, 2008. On that day, when Marin learned that Spaulding was (again) harassing customers outside La Bamba, he (Marin) walked out of the restaurant and asked Spaulding to stop harassing the customers. TR510-12 (III); TR595-96 (III). Spaulding responded by laughing, and so Marin retrieved his camera from the restaurant and took pictures of Spaulding's car. TR511-12 (III). When Spaulding saw Marin photographing him, Spaulding pushed Marin to the ground and arrested him, saying, among other things, "You don't take a picture of me," and "I'm going to break your fucking face. Fucking Spanish people." TR511-15 (III). Marin's brother, Mario Marin, corroborated Marin's testimony about the arrest. According to Mario Marin, after Marin took pictures of Spaulding's car, Spaulding ran toward Marin saying "[y]ou can't take pictures," and "[y]ou're under arrest" TR1961 (X).

Marin also testified about his conversation with Spaulding on the way to the police station. During that conversation, Spaulding said, "I

have to close all the Spanish business here. I don't want Spanish people here." TR524 (III). He elaborated by saying, "I don't want fucking Spanish people here. You have to close your business." TR524 (III). Once at the police station, Spaulding deleted the photos on Marin's camera and then threw the camera, rendering it inoperable. TR528-29 (III).

This evidence fully supports the jury's conclusion that Spaulding lacked probable cause to arrest Marin on that day. While acting as a police officer, Spaulding arrested Marin when Marin had engaged in no criminal conduct; indeed, Marin had merely taken pictures of Spaulding in his police car.

In response, Spaulding argues that his arrest of Marin was supported by probable cause because Marin had a fraudulent license plate on his car. Spaulding Br. 8. This argument is simply not supported by the record. Marin was not operating a car at the time of his arrest, and there is no evidence that Marin had a fraudulent license plate. The only evidence related to license plates in connection with Marin was Marin's testimony that on the night of his arrest, Marin learned that Spaulding was harassing some of his customers in the parking lot for having out-of-state license plates. TR510-11 (III); TR595-96 (III). The fact that patrons of Marin's restaurant had out-of-state plates cannot and

does not support a conclusion that Spaulding had probable cause to arrest Marin.

b. The use of excessive force against Marin

The evidence also supported the jury's verdict against Spaulding on the use of excessive force claim for the arrest of Marin. Marin testified about Spaulding's conduct during his arrest on November 21, describing how Spaulding pushed him to the ground, kicked him, and then threw him into the police car with some finishing kicks. TR513-15 (III). According to Marin, although he did try to keep himself from being pushed to the ground, he did not resist arrest. TR513-17 (III).

Marin's testimony was corroborated by other evidence at trial. For example, Mario Marin described Spaulding's arrest of his brother. TR1962-70 (X). He described how Spaulding pushed Marin to the ground, and how, after Marin was handcuffed on the ground, Spaulding kicked him in the ribs. TR1964-70 (X). Mario Marin also testified that Marin resisted being pushed to the ground. TR1965 (X). He saw Spaulding push Marin into the police car, and he thought that Spaulding kicked Marin at this time, but he could not see clearly at that point. TR1966 (X).

Marin's sister, Rocha, who went to the East Haven police station to retrieve Marin that night, described Marin's injuries as including a

"broken lip" and "a lot of blood." TR318-21 (II). Indeed, Rocha was sufficiently alarmed by Marin's condition when she saw him that she had another brother call for an ambulance. TR320-21 (II). Rocha took pictures of Marin that night to document his injuries, GA47-61; those pictures, along with Marin's blood-stained clothes from that night, were admitted into evidence, TR506 (III). Finally, the hospital records showed that Marin was assaulted and suffered a lip laceration and contusions. GA21.

Viewing this evidence in the light most favorable to the verdict, the evidence was more than sufficient to show that Spaulding used excessive force in his arrest of Marin. Spaulding, acting under color of law, pushed Marin to the ground and kicked him repeatedly, even though Marin was not resisting arrest and force was not necessary to effectuate the arrest. Further, Marin suffered bodily injury from the use of excessive force.

In response, Spaulding argues, as he did at trial, that there was insufficient evidence because Marin's testimony lacked credibility. According to Spaulding, the evidence showed that Marin resisted arrest, that Marin's hospital records were inconsistent with Marin's testimony about the assault, and that Mario Marin did not see Spaulding kick his brother while he was in the police car. Spaulding Br. 17. But Spaulding made these arguments to the jury and the jury

rejected them. The jury was fully entitled to credit Marin's testimony—as corroborated by the other evidence in the record—and to reject Spaulding's attack on the credibility of the witnesses and the weight of the evidence. *Applins*, 637 F.3d at 76.

In sum, viewing the evidence in the light most favorable to the government, and leaving the interpretation of the medical records to the jury, there was ample evidence for the jury to find that Spaulding used excessive force in his arrest of Marin.

3. There was sufficient evidence to support Spaulding's conviction for the false arrest of Alvarracin (Count 9).

The evidence supported the jury's finding that Spaulding arrested Alvarracin without probable cause on January 21, 2009. As explained by Alvarracin and Espinosa, on the night of January 21, Spaulding stopped their car when it pulled into the La Bamba parking lot and asked the driver (Salinas) for his license and registration. TR811-14 (V). When Salinas could not produce a valid driver's license, and the front seat passenger produced an out-of-state license, TR814-17 (V); TR1095 (VI), Spaulding became verbally abusive, saying "You want to get arrested?" and "all you fucking Spanish drivers drive without a license," TR817-18 (V); TR1095-96

(VI). Alvarracin asked why Spaulding was treating them poorly, and Spaulding responded with "Do you want to get arrested?" TR1096-97 (VI); TR824-25 (V). When Alvarracin responded that they had done nothing wrong, Spaulding arrested him. TR1097-98 (VI); TR825-26 (V).

Based on the testimony of these two witnesses, the jury was entitled to conclude that Spaulding arrested Alvarracin without probable cause. *See George*, 779 F.3d at 120 (question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

In this appeal, Spaulding counters by arguing—without elaboration—that there was a lack of "reliable and competent evidence" to support his conviction on Count 9, "especially in light of the lack of credibility that was demonstrated during the trial." Spaulding Br. 17-18. Even assuming that Spaulding has not waived this argument by failing to develop it in his brief, *see Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998), Spaulding's argument asks this Court to evaluate the credibility of witnesses and weigh the evidence. But it was for the jury, not a reviewing court, to weigh the evidence. And where, as here, two separate witnesses testified about the facts in question, the jury had more than sufficient evidence to support the conviction.

4. There was more than sufficient evidence to support Spaulding's convictions for obstruction of justice in connection with his filing of two false police reports (Counts 7 and 10).

Spaulding was convicted on two counts of obstruction of justice, in violation of 18 U.S.C. § 1519, for the filing of false police reports about the arrests of Marin and Alvarracin. As set forth in detail above, there was more than sufficient evidence for the jury to conclude that the reports filed by Spaulding were false. In the report about the Marin arrest, for example, the jury could easily conclude that the report contained numerous false statements:

- The report states that Marin was accompanied by three people, that Marin "flagged" down Spaulding, and that Marin almost immediately started yelling at Spaulding. GA62. Marin denied that he was accompanied by anyone, denied flagging down Spaulding and denied yelling or making any of the statements that Spaulding's report attributed to him. TR552-53 (III). Mario Marin testified that Marin did not "flag" down Spaulding and that Marin did not yell at Spaulding. TR1972-74 (X).
- The report states that Spaulding got out of his police car to disperse a crowd. GA62. Marin stated that there was no crowd and

that Spaulding only got out of his car to follow Marin after Marin photographed him. TR554-55 (III). Mario Marin, too, testified that there was no crowd to disperse. TR1974-75 (X).

- The report states that Marin resisted arrest and tried to pull away from Spaulding. GA62. Marin denied that he resisted arrest. TR556 (III).

Similarly, the jury could easily have found that the report Spaulding prepared about the arrest of Alvarracin contained numerous false statements:

- The report states that Salinas was the first occupant of the car to be arrested. GA65. Both Espinosa and Alvarracin testified that this was not true. TR875 (V); TR1136 (VI).
- The report states that after Salinas was arrested, Espinosa and Alvarracin became belligerent with Spaulding. GA65. Both men denied this statement. TR875-76 (V); TR1136 (VI).
- The report describes Espinosa and Alvarracin as hanging out of the back window, yelling and using expletives about the officers. GA65-66. Alvarracin and Espinosa denied these allegations. TR876-77 (V); TR1136-37 (VI).

- The report states that "numerous patrons" were outside La Bamba watching as Alvarracin and Espinosa continued to scream and yell. GA66. Although both Alvarracin and Espinosa acknowledged that a few people had come out of the restaurant, both men denied that they screamed or yelled. TR877-78 (V); TR1137 (VI). Their testimony was corroborated by the testimony of then-Officer Anthony Rybaruk, who stated that nobody was yelling or appeared belligerent, or was in any combative. TR1296 (VII). Officer Rybaruk also testified that when Alvarracin was put in his car for transport to the police station, none of the officers on the scene told him to be cautious with him, which they would have done if Alvarracin had been combative with the officers. TR1302 (VII).

On this record, then, the jury was free to conclude that the police reports filed by Spaulding contained false statements. To be sure, to reach this conclusion, the jury had to credit the testimony of Marin, Mario Marin, Alvarracin, Espinosa and Rybaruk, but that decision—on which witnesses, if any, to credit—is a decision committed squarely to the jury. Because the jury credited the testimony of those witnesses, there was ample evidence to conclude that Spaulding obstructed justice by filing false police reports.

II. There was more than sufficient evidence for the jury to find Cari guilty of the false arrest of Father Manship as well as conspiracy and obstruction of justice.

A. Relevant facts

The trial evidence is set forth in the Statement of the Case above, supplemented as necessary in the Discussion below.

At the close of evidence, Cari moved for a Rule 29 judgment of acquittal. TR3074-78 (XVII). With respect to the conspiracy count, Cari argued that there was no evidence that Cari joined any conspiracy. TR3075-76 (XVII). With respect to the false arrest charged in Count 11, Cari argued that he had probable cause to arrest Father Manship because the priest had been instructed to move back while filming police on a previous occasion and had been instructed that he needed to remain a safe distance away from officers just before he began filming in the store. TR3077 (XVII). Cari concluded this argument by saying that "based on [Manship's] testimony *alone*, I think there's enough for this Court to make a determination that there was probable cause for an arrest on February 19th." TR3077 (XVII) (emphasis added). Finally, on the obstruction count, Count 12, Cari argued that there was no evidence of an intent to impede a federal investigation. TR3078 (XVII).

On appeal, Cari's arguments on the conspiracy count and the obstruction count reflect the issues he raised before the district court. With respect to the false arrest count, however, Cari seems to be arguing primarily that he had probable cause to arrest Father Manship because filming an officer in a store from 15 feet away is *per se* illegal under Connecticut law.

B. Governing law and standard of review

The law governing the review of sufficiency claims and the standards for conviction under the statutes of conviction is set forth in Part I.B., *supra*.

This Court has explained that where a defendant, like Cari, makes one argument in his Rule 29 motion before the district court but then shifts to a different argument on appeal, the Court reviews the new argument for plain error. *See United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995). When reviewing for plain error, this Court will reverse only where a defendant can "demonstrate (1) there was error, (2) the error was plain, (3) the error prejudicially affected his substantial rights, and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Tellado v. United States*, 745 F.3d 48, 53 (2d Cir.) (internal citations omitted), *cert. denied*, 135 S. Ct. 125 (2014).

C. Discussion

When viewing the evidence in the light most favorable to the prosecution, the jury's decision to convict Cari of falsely arresting Father Manship, who was merely videotaping police conduct, was amply supported. Thus, the district court did not commit any error, let alone plain error, when it denied Cari's Rule 29 motion below. This Court therefore should affirm Cari's conviction on Count 11, the false arrest count, as well as the conspiracy and obstruction counts because there was more than sufficient evidence to convict Cari of each of these charges.

1. The jury's verdict on the false arrest charge was supported by the evidence.

In this appeal, Cari argues that as a matter of law, there was probable cause to arrest Father Manship the minute he held up his video camera. Cari Br. 14-15. Cari claims that Father Manship's actions interfered with the actions of an officer and disturbed the peace notwithstanding the fact that Father Manship was 15 feet away from a police officer and otherwise did nothing to impede the officer's actions. Cari's argument cannot be reconciled with either the facts or the law.

In fact, Connecticut law does not support Cari's argument. To the contrary, with respect to the charge of interfering with an officer, in

Acevedo v. Sklarz, 553 F. Supp. 2d 164, 168 (D. Conn. 2008), the court refused to hold that, as a matter of Connecticut law, a police officer had probable cause to arrest a student who was videotaping the arrest of a classmate while yelling at the police officer in the midst of a chaotic crowd. The court noted that Connecticut courts typically "find illegal interference with a police officer where the officer makes a direct request, which the defendant refuses to comply with, and it is that *refusal* that hinders or impedes the course of the investigation of the defendant or the performance of the officer's duties." *Id.* The officer argued that he had probable cause to arrest because the student's "filming and loudly yelling in the midst of a chaotic crowd . . . diverted his attention away from [the other] student he was arresting and guiding back to the principal's office." *Id.* But the court concluded that because the student filming the incident and yelling did not physically impede the officer, his conduct could "constitute illegal interference with an officer only if it rises to the level of 'fighting words,'" which it did not. *Id.* (citing *State v. Williams*, 534 A.2d 230 (Conn. 1987)).

By every measure, the conduct at issue in *Acevedo* was more disruptive and distracting than Father Manship's conduct in My Country Store. The scene inside the store was not chaotic, the officers were not in the process of arresting or physically restraining anyone, and Father

Manship was not yelling. Moreover, Father Manship answered Cari's questions and never refused to comply with any police instruction. *See supra*, pp. 18-19; GA115 (videotape of incident). Indeed, even if Father Manship had questioned Cari's authority or protested his action—and the video shows that he did not—that would not have been interference under Connecticut law. See *Acevedo*, 553 F. Supp. 2d at 168 (citing *Williams*, 534 A.2d at 238).

Cari similarly offers no legal support for his claim that the court should have concluded that, as a matter of law, he had probable cause to arrest Father Manship for "disorderly conduct" under Connecticut General Statute § 53a-182(a)(2). Cari Br. 8, 14-15.[5] On its face, the language of that statute is very broad: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (2) by offensive or disorderly conduct, annoys or interferes with another person." But, to avoid a determination that this statute is unconstitutionally vague, the Connecticut Supreme Court has defined its elements more specifically, con-

[5] Cari correctly notes that Father Manship was charged with disorderly conduct, Cari Br. 8; *see also* GA68, but later he describes the offense as "breach of peace," Cari Br. 14-15. The government assumes that the latter reference was meant to be a reference to disorderly conduct.

cluding that a person is guilty of violating Section 53a-182(a)(2) only when (1) the intent to cause inconvenience, annoyance or alarm is the person's "predominant intent," (2) the person's conduct is "grossly offensive under contemporary community standards," and (3) the person "disturbs or impedes the lawful activity of another person." *State v. Scott*, 851 A.2d 353, 356 (Conn. App. 2004) (citing *State v. Indrisano,* 640 A.2d 986 (Conn. 1994)).

Quite simply, applying this standard, a reasonable police officer would not conclude that an otherwise peaceful person filming from 15 feet away, or even 8 feet away, in a convenience store that was open for business, separated from the officer by a shelving unit, had violated this statute. At a minimum, on these facts, the officer could not conclude that the conduct was "grossly offensive." Thus, the district court did not commit error, let alone plain error, in declining to conclude as a matter of law that Section 53a-182(a)(2) gave Cari probable cause to arrest Father Manship.

Finally, Cari suggests that he had probable cause to arrest Father Manship for interfering with a search in violation of Connecticut General Statute § 54-33d because Father Manship "frustrated" his attempt to seize the camera. Cari Br. 8-9, 15. This argument is meritless. Witnesses testified that Cari had already grabbed Father Manship's left hand and was in the process of

bringing his right arm behind his back when the camera was transferred out of the priest's possession. TR1669-71 (VIII). Thus, Father Manship was already under arrest when the camera changed hands. It is axiomatic that an event that occurs after an arrest has already happened cannot retroactively provide probable cause to support the arrest.

Moreover, the evidence viewed (as it must be) in the light most favorable to the prosecution reveals that the camera was taken out of Father Manship's hand by Elio Cruz. TR1669-71 (VIII). A person who has evidence forcibly removed from his possession plainly does not violate Section 54-33d, which provides, in relevant part, that "[a]ny person who forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person authorized . . . to make searches and seizures while engaged in the performance of his duties" shall be criminally liable. In such a case, it is the *third party* who takes the evidence, not the person who initially possessed it and made no effort to withhold the evidence, who has interfered with or impeded a search. So even if—contrary to fact—the arrest had come after the camera left Father Manship's possession, Section 54-33d would not have provided probable cause to arrest Father Manship.

When the evidence is viewed in the light most favorable to the government, there is ample support for the jury's decision to convict Cari of

falsely arresting Father Manship. A rational jury viewing the evidence in this case could easily conclude that Father Manship, who was merely videotaping police activity from a safe distance in a store that was open for business, did absolutely nothing to give a reasonable police officer probable cause to arrest him for any crime. Further, the jury was entitled to conclude that Cari's offer at trial of alternative theories to support Father Manship's arrest was nothing more than an after-the-fact attempt to justify his conduct. Finally, when the jury saw that Cari's police report of the incident contained numerous false statements about the incident, it was certainly entitled to conclude that a false report would not have been necessary if there actually was probable cause to arrest Father Manship for any crime.

2. The jury's verdict on the conspiracy count was supported by the evidence.

Cari argues that he was entitled to a judgment of acquittal on the conspiracy count. Rather than view the evidence in the light most favorable to the government—the controlling standard—Cari ignores the evidence and instead offers a litany of legal principles and case citations. Cari Br. 25-28; Cari Supp. Br. 7-12. Though long, the list leaves out some of the most relevant points—including the fact that a conspiratorial agreement can be proved via circum-

stantial evidence and may be inferred from concerted action. Moreover, Cari's argument ignores the basic fact that the evidence must be viewed in the light most favorable to the verdict. Considered under the correct standard, the evidence before the jury was easily sufficient to sustain Cari's conspiracy conviction.

Cari argues that there was insufficient evidence of agreement and cites cases that say mere association with members of a conspiracy is not enough. But Cari was not convicted because he was associated with Spaulding and Zullo; he was convicted because he played an important part in the conspiracy. The court instructed the jury that in order to convict it must find that Cari was a party to a mutual understanding to cooperate "to interfere with other people's right to be free from unreasonable searches and seizures." TR3284 (XVIII). The court explained that the jury could find that this mutual understanding existed based on "the totality of the circumstances and the conduct of the parties involved, including acts done with a common purpose." TR3285 (XVIII); *see also* TR3289 (XVIII) ("An agreement may be inferred from concerted action."). Cari did not challenge these instructions at trial and has not challenged them here. And for good reason: they are well supported. Indeed, this Court has recently explained that it is "unlikely that the prosecution will be able to prove the formation of [a con-

spiratorial] agreement by direct evidence, and the jury must usually infer its existence from the clear co-operation among the parties." *United States v. Anderson*, 747 F.3d 51, 73 (2d Cir.) (internal citations omitted), *cert. denied,* 135 S. Ct. 122 (2014).

Here, there was ample evidence of cooperation. At My Country Store, Cari was participating with Spaulding in a highly dubious investigation that, much like Spaulding's and Zullo's previous conduct, appeared to be intended to harass and intimidate Latino business owners. Cari then falsely arrested Father Manship because the priest was trying to document his, and Spaulding's, intimidation of the owners of the My Country Store. And then, after learning that Father Manship was a known advocate for Latinos against abusive police practices, he authored a false report to justify charges against him.

Indeed, the evidence of agreement went well beyond those facts: it also established that Cari and Spaulding met immediately after Father Manship's arrest (*see* Dispatch Tape of February 19, 2009, TR1509-1510 (XVIII)) and that at the time of this meeting, Spaulding prepared and filed his own false police report of Father Manship's earlier videotaping activity. GA111. The jury could reasonably have found that Spaulding's report was designed to bolster Cari's arrest of Father Manship. It could also have reasonably concluded that Cari coordinated his false report

with Spaulding. Indeed, Cari knew that Spaulding had told Father Manship that he had a right to videotape from a safe distance, a fact that Cari put in an early draft of his police report of the incident, but that was missing from the final version. *Compare* GA68 with GA78.

Viewed in the light most favorable to the verdict, the jury was entitled to conclude that Cari's false arrest of Father Manship, and his false police report, represented a knowing decision to join the conspiracy to violate Fourth Amendment rights. The jury could easily have concluded that Cari knowingly advanced the goals of the conspiracy by violating Father Manship's rights with the intent to protect his fellow officers. Because a conspiratorial agreement may be proven by circumstantial evidence, and the rational inferences that flow from such evidence, the jury had more than sufficient evidence to find that Cari was a party to a conspiratorial agreement.

Cari's suggestion, *see* Cari Supp. Br. 21-22, that reversal of the conspiracy conviction requires reversal of his other convictions also fails. Most obviously, it fails because (as explained above) there is ample evidence to support the conspiracy conviction. But it also fails because the conspiracy count did not cause the prejudice Cari claims. He claims that "[w]ithout a conspiracy count, much of that evidence would not have been admissible, particularly as to Cari, and Cari likely would have had grounds to move to sev-

er his trial."[6] Cari Supp. Br. 22. Cari was convicted of falsely arresting Father Manship and authoring a false report to justify that arrest. Neither of these convictions required Cari to be charged with, or to be a member of, a conspiracy. The court directed the jury to consider each count separately, TR3523 (XVIII), and there is no reason to believe that the jury could not follow that direction. Thus, even assuming *arguendo* that Cari was not properly convicted of conspiracy, his substantive convictions should not be disturbed.

3. The jury's verdict on the obstruction count was supported by the evidence.

Finally, as to the obstruction count, the jury was justified in concluding that Cari's police report of Father Manship's arrest contained multiple false statements as those statements were inconsistent with the video made by Father Manship and the testimony of numerous witnesses, including Father Manship, Cruz and Chacon, who were eye-witnesses to the arrest. *See, e.g.,* TR1653-74 (VIII) (Cruz); TR2060-73 (X)

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[6] Cari's belated claim of spillover prejudice is baseless as Cari never moved for severance. Indeed, he declined the court's offer of a separate trial when Spaulding's lead counsel passed away shortly before the original April 2013 trial date. *See* GA439 (Docket #299) (Speedy Trial waiver by Cari).

(Chacon). Most significantly, the report repeatedly states that Cari did not know that Father Manship was holding a camera, stating, in fact, that Cari thought the object in Father Manship's hand might be a weapon. GA69. The videotape makes clear, however, that Cari knew from the beginning that the priest was holding a camera. GA115. Father Manship testified to further false statements in the report. *See, e.g.*, TR2950-58 (XV) (disputing statements in report, for example, that he was asked to back up, that he moved aggressively, that he yelled); *see also supra*, pp. 20-21.

Given the multiple false statements in the arrest report, Cari can hardly argue that the report was incapable of influencing the direction of a federal civil rights investigation. Indeed, Cari's decision to depict Father Manship as a weapon toting, obstructionist priest who resisted arrest by purportedly fighting with a police officer was clearly an effort on Cari's part to undermine any potential civil rights probe by making the most effective advocate appear to be a renegade criminal.

Accordingly, there was more than sufficient evidence to uphold the jury's verdict on the conspiracy and obstruction counts. When viewed in the light most favorable to the government, Cari has not, and cannot, demonstrate that the jury that convicted him is the "irrational jury" that would entitle him to any relief.

III. The district court properly excluded privileged information.[7]

A. Relevant facts

During the cross-examination of Father Manship by Cari's counsel, Father Manship was asked whether he thought the East Haven police were "dumb." Father Manship responded, "no." TR2643 (XIV). He was also asked about whether he considered the camera he used to film Cari on the day of his arrest his "favorite video camera." Father Manship responded, "it was my only camera." TR2646 (XIV).

When Spaulding's counsel cross-examined Father Manship, he sought to impeach the testimony that the priest gave in response to Cari's counsel's questions with purportedly prior inconsistent statements made by Father Manship to a YLS student in October 2009. TR2831-32 (XIV). Specifically, Spaulding sought to admit in evidence the complete audio portion of a recording in which Father Manship was speaking to a YLS student while the student was videotaping Spaulding. TR2728-31 (XIV); TR2810-15 (XIV); TR2830-41 (XIV).

At the time of the recording in October 2009, Father Manship was working with the YLS Clinic to address police officers' discriminatory

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[7] This argument, made by Spaulding, was joined by Cari. Cari Supp. Br. 12-14.

treatment of Latinos in East Haven. TR2636 (XIV); TR2728-29 (XIV); TR2824 (XIV). The tape recording (audio and video) was made by the law student while Father Manship and the student were driving home from a meeting in East Haven, the purpose of which was to discuss legal issues regarding the East Haven police department. TR2833-34 (XIV); TR2850-51 (XV). When Spaulding began following Father Manship and the student in his police car, the student began to record Spaulding's actions. TR2636 (XIV); TR2730 (XIV); TR2814 (XIV). The camera also recorded the conversation that took place between Father Manship and the student as Spaulding was following the car. TR2728-29 (XIV); TR2814 (XIV).

Before the return of the indictment against the four East Haven police officers, the YLS Clinic turned over the recording (audio and video) to the FBI. TR2728-29 (XIV). After the indictment was returned, the recording was produced by the government to the defense as part of the required criminal discovery. TR2728 (XIV).

When Spaulding attempted to offer the complete audio portion of the tape (broken into three segments in Exhibits HH, II, and JJ), the government objected on several grounds. TR2728-30 (XIV); TR2833-34 (XIV). First, the government argued that the conversation between Father Manship and the law student was an attorney-

client privileged and work-product privileged communication inadmissible under Rule 501 of the Federal Rules of Evidence. TR2728-30 (XIV); TR2833-34 (XIV). Second, the government argued that the audio recording was inadmissible hearsay and not a prior inconsistent statement being properly offered under Rule 613(b). TR2836-37 (XIV). Third, the government argued that the audio recording, as opposed to the video portion of the recording, was not relevant under Rule 401 and that the audio portion should be excluded as more prejudicial than probative under Rule 403. TR2834 (XIV).

Before Spaulding's cross-examination of Father Manship was finished, the court ruled that the audio recording was inadmissible on privilege grounds and for failure to satisfy Rule 613(b). TR2849-52 (XV). The court also issued a formal written ruling explaining its reasons for denying the admission of these exhibits. *See* SA30-33.

B. Governing law and standard of review

A district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Gupta*, 747 F.3d 111, 132 (2d Cir. 2014), *cert. denied*, __ S. Ct. __, 2015 WL 1757183 (Apr. 20, 2015). "'To find such abuse, [the reviewing court] must conclude that the challenged evidentiary rulings were arbitrary and irrational.'" *Id.* (quot-

ing *United States v. Quinones*, 511 F.3d 289, 307-308 (2d Cir. 2007)). Even if a court abuses its discretion by excluding a particular piece of evidence, the conviction may be vacated only if there has been a violation of a "substantial right," such that the error was not harmless. *See United States v. Ebbers*, 458 F.3d 110, 122 (2d Cir. 2006).

Issues of privilege are governed by Rule 501 of the Federal Rules of Evidence, which provides that courts determine questions of privilege by applying the common law, interpreted "in the light of reason and experience." *See Trammel v. United States*, 445 U.S. 40, 47 (1980). "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reason for seeking representation if the professional mission is to be carried out." *Trammel*, 445 U.S. at 51. "The privilege . . . belongs to the client, not the attorney; and an attorney can neither invoke nor waive the privilege if his client desires the

contrary." *In re Grand Jury Proceedings*, 73 F.R.D. 647, 652 (M.D. Fla. 1977).

As described by the district court, the privilege applies if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) with the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

SA30-31 (quoting *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)); *see also* 8 Wigmore, Evidence Sec. 2292, at 554 (McNaughton rev. 1961) (listing elements of attorney-client privilege).

Rule 613(b) of the Federal Rules of Evidence provides that "[e]xtrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement . . . ." Further, "even if all

the foundational elements of Rule 613 are met, a district court is not unequivocally bound to admit any or all extrinsic evidence of a prior inconsistent statement. Rather, a district court may still exercise its discretion to exclude such evidence . . . .” *United States v. Young,* 248 F.3d 260, 268 (4th Cir. 2001).

C. Discussion

The defendants argue that the district court erred when it ruled that the recording was inadmissible on privilege grounds and inadmissible under Rule 613(b). They are wrong on both claims. Because the district court’s evidentiary rulings were a proper exercise of its broad discretion, neither defendant is entitled to any relief, let alone a reversal of any of their convictions.

1. The district court’s conclusion that the attorney-client communications on Exhibits HH, II, JJ were privileged was correct.

The district court excluded the audio recordings in Exhibits HH, II, JJ because it found that all four elements of the attorney-client privilege were satisfied. SA30-32. On appeal, the defendants do not challenge the court’s conclusion that the statements were made by a client to an attorney. They argue instead that the statements were not made for the purpose of seeking legal

assistance. Spaulding Br. 19-20. They also argue that the privilege was waived when the YLS Clinic produced the audio portion of the recording to the government or when Father Manship testified in the grand jury about his observations of Spaulding following him. Spaulding Br. 23-24. Neither argument has merit.

First, the recorded communications between Father Manship and law student dealt solely with the reason that Father Manship had legal counsel. By the time of the October 2009 recording, Father Manship had already been falsely arrested by Cari and had worked with the YLS Clinic to submit a complaint to the Department of Justice ("DOJ") about the East Haven Police Department. TR2618-19 (XIII); TR2638 (XIV). Both before and after his February 2009 arrest, Father Manship was seeking to videotape police activity to gather evidence that the police were engaged in discriminatory police misconduct toward members of the Latino community. TR2453-56 (XIII). Moreover, with the assistance of the YLS Clinic, Father Manship was gathering video proof to support the complaint filed with the DOJ and to use in a civil rights lawsuit against the East Haven police and Spaulding, a lawsuit that was in fact filed in 2010. TR2452-54 (XIII); TR2418 (XIII).

Father Manship and the law student were in East Haven the night that the recording was made to meet with Latino business owners to

discuss the conduct of the East Haven police. TR2813 (XIV); TR2833 (XIV). The purpose of filming Spaulding that night was to gather potential evidence of his conduct. TR2452-54 (XIII). When Father Manship and the YLS student discussed Spaulding and his actions during the videotaping, the entire conversation concerned Spaulding and his conduct toward Father Manship, the principal advocate for the Latino victims.

Thus, it makes no difference that Father Manship was on his way home—rather than in his attorney's office—when the communications took place. The communications took place because something happened on the way home that required Father Manship and the law student to discuss Spaulding's conduct—conduct that was already the subject of the complaint to the DOJ and conduct that would help in the contemplated civil rights lawsuit against Spaulding and other East Haven police officers. In short, Father Manship and the law student were "discussing the conduct of an adverse party, which conduct was the very type of conduct that was the basis for the claims against the adverse party and was occurring in their presence." SA32. These communications, in other words, "were for the purpose of assistance in a legal proceeding" and thus protected by the attorney-client privilege. SA32.

Second, the court properly concluded that Father Manship, the client, had not waived his attorney-client privilege. SA32. During his testimony, Father Manship stated that he was not intending to disclose communications he had with his criminal and civil attorneys, including students from the YLS clinic. TR2418-20 (XIII). Moreover, the district court properly concluded that Father Manship's attorneys had no authority to waive the privilege when Father Manship had not authorized the waiver. *See* SA32 (citing *In re Grand Jury Proceedings*, 73 F.R.D. 647, 652 (M.D. Fla. 1977) ("The privilege . . . belongs to the client, not the attorney; and an attorney can neither invoke nor waive the privilege if his client desires the contrary.")); *see also Kevlik v. Goldstein*, 724 F.2d 844, 850 (1st Cir. 1984) ("The privilege belongs to and may be waived only by the former client[.]").

Nor was there any type of implicit waiver when Father Manship testified in the grand jury about the night Spaulding followed him and the law student. Father Manship testified that a video had been made and about what he observed that night; he did not testify about the communications between him and the law student. Because the privilege protects communications between a client and his attorney, and not facts, *Upjohn Co.*, 449 U.S. at 395, Father Manship's testimony about facts did not waive the privilege with respect to his communications.

Thus, after the district court reviewed Father Manship's grand jury testimony, it properly concluded that there had not been a waiver of the privilege. TR2850 (XV); SA32.

In sum, the district court's conclusions that the taped communications between Father Manship and the law student were for the purpose of obtaining legal assistance and that the privilege had not been waived were proper and certainly not abuses of discretion.

2. The district court's conclusion that the defense had not satisfied Rule 613(b) was correct.

The district court concluded, alternatively, that the communications in Exhibits HH, II, and JJ were not admissible as prior inconsistent statements because the defense failed to satisfy the requirements of Rule 613(b). SA33. This conclusion was a proper exercise of the court's discretion and should not be disturbed on appeal.

The defendants argue that, at a minimum, they should have been allowed to introduce two statements from the video as prior inconsistent statements: (1) that Father Manship referred to the East Haven police as "dumb;" and (2) that Father Manship described his camera as "his favorite camera." Spaulding Br. 24-26; *see also* TR2830-2841 (XIV). The record shows, however, that the district court properly excluded the pro-

posed evidence because the requirements of Rule 613(b) were not met for either statement.

In particular, the proffered statements were not inconsistent with Father Manship's testimony and he was never confronted with the statements and given the opportunity to explain or deny them. *See* Fed. R. Evid. 613(b). Although Father Manship was asked if he thought that East Haven police officers are "dumb," to which he responded, "no," TR2643 (XIV), he was never asked if he had previously described any East Haven police officer as "dumb." Similarly, while Father Manship was asked if his Casio camera was his "favorite camera," to which he responded that "[i]t was my only camera," TR2646 (XIV), Cari's counsel never asked if he had previously described the camera as "his favorite camera." And although Spaulding's counsel asked Father Manship if he had referred to his camera as his "'special camera' or something along those lines," Father Manship responded by saying, "[s]omething. I don't recall exactly the words." TR2813 (XIV). After this exchange, Spaulding's counsel did not confront the witness with the actual words on the tape or even suggest that Father Manship's trial testimony was in any manner inconsistent with his previous out of court statement. Thereafter, defense counsel failed to confront Father Manship with the purportedly prior inconsistent statements even though the court ruled that the requirements of Rule 613(b)

had not been satisfied before either defendant completed their cross-examination of Father Manship. TR2851 (XV) (court's ruling); TR2855 (XV) (Spaulding cross-examination continues); TR2959 (XV) (Cari re-cross-examination). Thus, not only did defense counsel fail to confront the witness with the allegedly prior inconsistent statements, but also there was nothing inconsistent between Father Manship's testimony and the previously recorded statements.

In short, the defendants are simply mistaken to suggest that Father Manship was asked about the purportedly prior inconsistent statements in the recording. Because Father Manship was never asked if he had made the prior statements—and certainly never given an opportunity to explain or deny them—the statements were not admissible as extrinsic evidence of prior inconsistent statements under Rule 613(b). *See, e.g. United States v. Surdow*, 121 Fed. Appx. 898, 899-900 (2d Cir. 2005) (trial court has broad discretion to exclude extrinsic evidence of prior inconsistent statement where party fails to adhere to Rule 613(b)'s requirement of confronting witness with prior statement to permit witness to explain or deny statement); *United States v. Hyles*, 479 F.3d 958, 970 (8th Cir. 2007) (trial court did not abuse its discretion to exclude prior inconsistent statement made by witness in a recorded conversation when defendant failed to confront the witness with those statements). Ac-

cordingly, the district court properly excluded the two proffered statements as inadmissible extrinsic evidence under Rule 613(b).

3. Any error in exclusion of the evidence did not affect the outcome of the trial.

Finally, even assuming *arguendo* that the court erred in excluding these defense exhibits, the error would be harmless. Significantly, the admission of the exhibits would not have affected the jury's verdict. None of the substantive charges against Spaulding (the false arrest, the excessive force, and the obstruction counts) even involved Father Manship. Indeed, the government argued in closing that Spaulding's interactions with Father Manship on February 13, 2009—when Spaulding asked Father Manship to back up while videotaping him during a traffic stop—was an example of reasonable conduct by a police officer. TR3234-35 (XVII). Similarly, with respect to Cari, neither Father Manship nor the student ever discussed Cari or Cari's arrest of Father Manship in the privileged conversation. Indeed, because the privileged conversation took place almost eight months *after* Cari arrested Father Manship, nothing said during that conversation could have altered the fact that Cari falsely arrested Manship and wrote a false report about that arrest.

Spaulding suggests, nonetheless, that the statements on the audio recording would have revealed "the true Father Manship" to the jury. Spaulding Br. 19-20. Although it is not entirely clear what Spaulding believes was "the true Father Manship," Spaulding seems to suggest that the audio would have shown Father Manship in an unflattering light and as someone who was trying to capture evidence of the East Haven police acting inappropriately. Presumably, this evidence would have been relevant to the conspiracy count.

But there was no dispute at trial that Father Manship (and others in East Haven) were trying to capture documentary evidence of police misconduct in East Haven, and thus to the extent that the victims' motives were even relevant to the conspiracy charge, there was already significant evidence on that point admitted at trial. Futhermore, Spaulding and Cari had hours of cross-examination to demonstrate that Father Manship had an improper motive. Indeed, Spaulding repeatedly examined Father Manship about the fact that he and the law student were laughing during the time that Spaulding was following the car. TR2812-14 (XIV). On this record, then, the defendants were able to make their point to the jury without playing the audio portion of a taped privileged conversation. Thus, there is no basis to the suggestion that the dis-

trict court's evidentiary ruling affected the outcome of the trial.

IV. The court's jury instructions referencing the First Amendment were eminently proper and they neither amended the indictment to allow conviction for violation of the First Amendment nor allowed the jury to employ a heightened or subjective standard of probable cause.

A. Relevant facts

In his appeal, Cari objects to two sentences pulled from the court's 63-page jury instructions. Both sentences were included in the court's general description of Fourth Amendment standards. The first sentence to which Cari objects is: "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." TR3265 (XVIII). During the charge conference, Cari's counsel acknowledged that the sentence was a correct statement of law but said, "I don't think that it informs the jury's deliberation in any way." TR3022 (XVI). The government explained that the sentence was relevant to an incident that was part of the conspiracy but that

did not involve Cari,[8] and Cari did not pursue the matter further. TR3023 (XVI).

The second sentence that Cari objects to is: "Fourth Amendment limitations on law enforcement officers' authority to seize individuals' property must be scrupulously observed when the item seized contains information protected by the First Amendment if you find the basis for the seizure is disapproval of the message contained therein." TR3270 (XVIII). As originally proposed, this sentence used the word "and" instead of "if you find." *See* TR3030 (XVI). During the charge conference, Cari objected to this sentence, not because it was an erroneous statement of law, but because he thought that the phrasing of the instruction suggested that disapproval of the message was in fact the reason for the seizure.[9] TR3030 (XVI). Cari suggested

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[8] As described above, Alvarracin explained he was arrested after he asked Spaulding why he was treating him and his friends with disdain. TR1096-1098 (VI). Espinosa explained that he was arrested after he asked a police officer why the officer was arresting his friend. TR837-39 (V). The instruction regarding verbally challenging police action pertained to this testimony.

[9] While Cari's counsel now takes issue with the supposed ambiguity of the words "scrupulously observed," he had no problem with the meaning of these words below when he used them to agree that this principle of First Amendment law was correct.

that this phrasing problem should be remedied by substituting "if you find" for "and." TR3030 (XVI). The government agreed to this and the court adopted Cari's proposed amendment. TR3031 (XVI); *see also* Doc. 443 at 4.

B. Governing law and standard of review

When challenging jury instructions on appeal, a defendant "must show that he was prejudiced by a charge that misstated the law." *United States v. Ferguson*, 676 F.3d 260, 275 (2d Cir. 2011); *United States v. Goldstein*, 442 F.3d 777, 781 (2d Cir. 2006). No particular form of words is required, so long as "taken as a whole" the instructions correctly convey the required legal principles. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994). Accordingly, a single jury instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *see also United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010). The review of the instructions in their entirety is to determine "whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the

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TR3030 (XVI) ("I agree, again, with the sentiments that seizure of that sort of property must be *scrupulously observed* . . . .") (emphasis added).

applicable law." *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001). Even if a particular instruction, or portion thereof, is deficient, this Court reviews "the entire charge to see if the instructions as a whole correctly comported with the law." *United States v. Jones*, 30 F.3d 276, 283 (2d Cir. 1994).

This Court normally reviews the propriety of jury instructions *de novo*. *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). If there is error, this Court will vacate a criminal conviction only if the error prejudiced the defendant. *Goldstein*, 442 F.3d at 781. "An erroneous instruction is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.*

Here, however, this Court should apply a plain error standard of review because the objections below did not identify for the district court the error that is now raised on appeal. *See United States v. Rossomando*, 144 F.3d 197, 200 (2d Cir. 1998). As set forth above, the objections below were relevance as to the first challenged sentence and invasion of the province of the jury as to the second. And as to the second sentence, which is the main focus of Cari's arguments on appeal, the court altered the sentence in precisely the way in which Cari suggested. In short, Cari's objections below gave no indication whatsoever of the errors he now asserts on appeal and accordingly gave the district court no oppor-

tunity to correct those alleged errors. *See id.* (explaining that, to avoid plain error review, a defendant's objections to the district court's jury instructions should give the trial court the opportunity to correct any error before the jury begins deliberating). The standard for plain error review is set forth in Part II.B., *supra*.

C. Discussion

Cherry picking a few of the court's general instructions, Cari appears to argue that the jury instructions: (a) permitted the jury to convict him for violating the First Amendment, (b) invited the jury to "apply a heightened level of probable cause scrutiny," and (c) allowed the jury to examine his "subjective intent" in order to assess whether he had probable cause to arrest Father Manship. Cari Br. 20-21. The arguments are meritless. Equally meritless is Cari's claim that these two purported errors in the jury charge "thoroughly infected each of the Counts of conviction." Cari Br. 23.

First, Cari's claim that the jury was invited to convict him of violating the First Amendment is easily answered by reference to the charge as given. When instructing the jury on the conspiracy (18 U.S.C. § 241) and abuse of rights (18 U.S.C. § 242) charges, the court made it clear that the only constitutional violations alleged were *violations of the Fourth Amendment.* TR3283 (XVIII); TR3296 (XVIII). And to ensure

that there would not be any confusion on that point, the court also specifically instructed "that the indictment does *not* charge either defendant with violating any person's First Amendment rights." TR3317 (XVIII) (emphasis added). The jury instructions mentioned the First Amendment because the jury heard testimony about what Father Manship had been told about the permissibility of filming police activity[10] and be-

[10] At the start of the trial, the government offered not to introduce the testimony that Father Manship was advised that the right to videotape police conduct was a "First Amendment right." TR4-8 (I). The government requested an opportunity to introduce this testimony by recalling a witness should the defense make it an issue. When the government requested that the defense agree to a stipulation that would explain why the government was recalling Sister Mary Ellen Burns (a YLS graduate providing legal advice to Father Manship) to testify that she advised Father Manship that it was a First Amendment right to videotape the police, Cari refused to agree to any stipulation. TR7 (I). When Sister Mary Ellen testified about the First Amendment, the court gave the jury a limiting instruction. TR83-84 (I) ("The testimony you have just heard as to what a witness told others about a First Amendment right to videotape was not offered to you as a statement of the law. You, the jury, should not use this testimony to conclude what the law is or what the law permits. Only the Court can give you an instruction on what the law is and what the law permits. You may only consider this testimony like you would consider any

cause the defendants' intent to prevent such filming was an object of the conspiracy. ZA39 (par. 13). But taken as a whole the instructions made plain that its brief mentions of the First Amendment were merely intended to provide background information and to help the jury interpret the evidence. In short, the only way the jury could have convicted Cari of violating the First Amendment is by violating the court's clear instructions—instructions that expressly told the jury that it could not convict Cari of violating the First Amendment.

Second, Cari's "heightened scrutiny" argument focuses on the two sentences quoted above. Cari argues that the first sentence, about freedom to verbally oppose police action, indicated that the court was adopting the government's view of the evidence and introduced a heightened probable cause inquiry. But that sentence was taken verbatim from the Supreme Court's

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other piece of evidence offered to you as a fact. You are free to accept it as a fact or reject it. But if you find that the witness told others there was a First Amendment right to videotape so long as they did not interfere with the police, you may only use this testimony when you evaluate the conduct and state of mind of anyone who you decide heard this information. Again, you may not use this testimony as a statement of what the law is and what the law permits.").

decision in *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). As that case has not been overruled, it cannot be an incorrect statement of law.

In any event, this general statement about the importance of protecting individuals from false arrest is not even directly applicable to the arrest of Father Manship. He was not verbally opposing or challenging police action at the time of his arrest; he was merely filming it. Finally, there is no reason to think that this general quote about the importance of protecting individuals from false arrest could be taken to mean that the jury employed a heightened scrutiny standard of probable cause to Cari's arrest of Father Manship. The sentence says nothing about probable cause and it says nothing about heightened scrutiny. And the idea that by including this quote the court adopted the government's view of the evidence conflicts with the court's statement that "[n]othing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is." TR3251-52 (XVIII).

The other sentence Cari focuses on is: "Fourth Amendment limitations on law enforcement officers' authority to seize individuals' property must be scrupulously observed when the items seized contains information protected by the First Amendment if you find the basis for the seizure is disapproval of the message contained therein." TR3270 (XVIII). This sentence was in-

cluded as part of the court's instructions on "Searches and Seizures of Property." TR3269-3270 (XVIII). Perhaps the most obvious reason Cari is unpersuasive in arguing that this sentence invited the jury to apply a heightened probable cause standard to evaluate his arrest of Father Manship is that this portion of the jury instructions focuses on the standard for evaluating whether the search and seizure of *property* is reasonable while Cari was convicted of an unreasonable seizure of a *person*.

Cari was charged, under 18 U.S.C. § 242, with the false arrest of Father Manship, *not* with the seizure without probable cause of any property. Cari was also charged with conspiracy to violate Fourth Amendment rights in violation of 18 U.S.C. § 241. But though unlawful searches and seizures of property were part of the conspiracy, Cari was not directly involved with those illegal searches and seizures. Rather, the conspiracy charge against Cari was principally based on his false arrest of Father Manship and his knowingly false police report of this arrest. The government argued that it was with that arrest and with the false police report that followed that Cari entered into and furthered the goals of the conspiracy with other East Haven officers to injure, oppress, threaten and intimidate members of the East Haven community in the free exercise and enjoyment of their Fourth Amendment rights. What the government did

not argue is that Cari entered into or furthered the conspiracy by depriving individuals of their Fourth Amendment property rights. And specifically, the government did *not* argue that the seizure of Father Manship's camera violated the Fourth Amendment. Indeed, if Cari's arrest of Father Manship had been lawful, then seizure of the camera would arguably have been a valid seizure of property incident to arrest. What all this means is that the jury did not have to find (in fact, was never asked to find) that Cari's seizure of the camera violated the Fourth Amendment in order to convict him on all three counts. Thus, even if—contrary to fact—this general jury instruction about the Fourth Amendment standard for searches and seizures of property was erroneous, it could not possibly have caused any prejudice to Cari.

In any event, the sentence in question is a correct statement of the law. The Supreme Court has explained that "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with scrupulous exactitude." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (internal quotation omitted); *see also Armstrong v. Asselin*, 734 F.3d 984, 993-94 (9th Cir. 2013) (same). This does not mean that courts should use a "heightened" standard. As the Ninth Circuit has observed, enforcing the existing standard with "scrupulous exactitude"

does not "alter the Fourth Amendment analysis." *United States v. Mayer*, 503 F.3d 740, 750 (9th Cir. 2007). The Supreme Court has expressly rejected the idea that a heightened standard of probable cause applies when the materials to be seized are presumptively protected by the First Amendment. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986). Although Cari argues that this sentence allowed for a heightened probable cause standard, the sentence itself demonstrates why this argument lacks merit. Not only does the sentence not set out a heightened standard, but, in fact, it says nothing about probable cause. It instead speaks in general terms about "Fourth Amendment limitations" applicable to searches and seizures of property.

Cari's third argument is that this same sentence—the sentence quoted above that was included in the general description of Fourth Amendment law related to searches and seizures of property—erroneously allowed the jury to examine his "subjective intent" in order to assess whether he had probable cause to arrest Father Manship. This argument fails.

It is true that an officer's "subjective intent" is ordinarily not relevant to determining probable cause. *See Whren v. United States*, 517 U.S. 806, 813 (1996). But that does not help Cari because the jury instructions did not invite the jury to use Cari's subjective intent to assess whether he had probable cause to arrest Father

Manship. Even viewed in isolation, the sentence Cari focuses on: (a) is not about probable cause and (b) is not about seizures of persons. Instead the portion of the sentence that Cari argues allows a subjective inquiry comes from a Supreme Court opinion discussing Fourth Amendment limitations. *Compare Walter v. United States*, 447 U.S. 649, 655 (1980) ("When [items to be searched are] arguably protected by the First Amendment, and when *the basis for the seizure is disapproval of the message contained therein*, it is especially important that [the Fourth Amendment warrant requirement] be scrupulously observed.") (emphasis added) to TR3270 (XVIII) ("Fourth Amendment limitations on law enforcement officers' authority to seize individuals' property must be scrupulously observed when the items seized contains information protected by the First Amendment if you find *the basis for the seizure is disapproval of the message contained therein*.") (emphasis added).

But even if—contrary to its plain language—the sentence Cari focuses on could, when viewed in isolation, have been interpreted to provide a subjective probable cause standard for seizures of persons, that interpretation is not possible when the jury instructions are considered as a whole. The jury instructions discussing probable cause and seizures of persons as well as those specifically discussing the elements of the offenses *repeatedly* stress the objective nature of

the test. Indeed the jury instructions devoted almost a dozen sentences to that topic:

- "To determine whether the search and seizure of a person or property was reasonable, you must evaluate whether the defendant's actions were '*objectively reasonable' in light of the facts and circumstances confronting him at the time of the search or seizure*, balancing the individual's interests in his or her person and property with any countervailing objective governmental interests." TR3262 (XVIII) (emphasis added).
- "[Y]ou must determine the reasonableness of a defendant's actions *based upon the perspective of a reasonable police officer at the scene* who knows the same facts and circumstances as were known to the defendant at the time he acted."). TR3263 (XVIII) (emphasis added).
- "Probable cause is to be assessed *on an objective basis*." TR3266 (XVIII) (emphasis added).
- "An arresting officer's state of mind, except for the facts that he knows, is irrelevant to the existence of probable cause." TR3266 (XVIII).
- "[A]n officer's subjective reason for making the arrest need not be the criminal offense as to which the known facts

provide probable cause. An arrest is not unlawful so long as the officer has knowledge of, or reasonably trustworthy information as to, facts and circumstances sufficient to provide probable cause to believe that the person arrested has committed any crime." TR3266 (XVIII).

- "*Only if you find that an objectively reasonable police officer*, faced with the facts and circumstances facing the defendant at the time of the arrest, *would not have found probable cause to arrest* the individual in question and that probable cause for the individual's arrest would not have existed and that the individual would not have been arrested but for the knowingly false pretenses, *may you find that an arrest was made without probable cause* and based upon false pretenses. TR3268 (XVIII) (emphasis added).
- "[Y]ou must find [for false arrest] not only that the arrest was based upon a false pretense but also that, without that false pretense, *no probable cause existed* for the arrest." TR3268 (XVIII) (emphasis added).
- "[Y]ou must find [for an unconstitutional post-arrest detention] not only that the post-arrest detention was based up-

on a false statement or information, but also that, without that false statement or information, *no probable cause existed* for the post-arrest detention." TR3269 (XVIII) (emphasis added).

- "In determining the reasonableness of the seizure of a person, you must balance any objective governmental interests with the person's interest in their own person, and *use an objective standard based upon the perspective of a reasonable police officer at the scene*, with the known facts and circumstances at the time of the seizure." TR3272 (XVIII) (emphasis added).
- "[Y]ou should use the *objective standard of unreasonable seizures* that I provided earlier, examining all the facts and circumstances surrounding the seizure, from the point of view of a reasonable police officer on the scene . . . ." TR3297 (XVIII) (emphasis added).
- "Remember, with respect to [the false arrest counts], that only if you find that an *objectively reasonable* police officer, faced with the facts and circumstances facing the defendant you are considering at the time of the arrest, would not have found probable cause to arrest the individual in question, and *that probable cause [for] the individual's arrest*

> *would not have existed* and that the individual would not have been arrested but for the knowingly false pretenses, may you find that an arrest was made without probable cause and based upon false pretenses." TR3297-98 (XVIII) (emphasis added).

In light of the court's repeated emphasis and clear explanation of the objective nature of the probable cause standard, this Court has no basis to conclude that the instructions "taken as a whole" invited the jury to consider Cari's subjective intent in evaluating whether he had probable cause to arrest Father Manship.

Finally, Cari fails to explain how his conviction for falsifying a police report in violation of 18 U.S.C. § 1519 could have been "infected" by jury instructions about the First and Fourth Amendments. The elements of that offense do not incorporate or make any reference to the First or Fourth Amendments. Thus assuming *arguendo* that the jury had been given erroneous instructions on the First and Fourth Amendments, that would not have had any impact on its ability to determine whether Cari violated Section 1519.

Cari urges, nonetheless, that "[t]he jury likely found the false statement contained in Count 12 to be the underlying assertion that probable cause existed for the arrest." Cari Br. 22. But the court clearly instructed the jury that, in order to

convict under Section 1519, it had to find that Cari included "within the document at least one particular untrue statement or representation or knowingly omitt[ed] from the document at least one particular fact." TR3307 (XVIII). There is simply no reason to think that the jury defied this instruction and instead based its conviction on an unexpressed "underlying assertion." Given that the government highlighted numerous false statements in the arrest report for the jury during the closing argument, TR3146-51 (XVII), Cari's speculation on why the jury convicted him of obstruction is without merit.

In sum, Cari's belated challenge to two sentences in the jury instructions fails as the instructions were eminently proper. Moreover, contrary to Cari's speculation, the challenged instructions did not amend the indictment or cause him any prejudice.

V. The prosecutors' summations were proper and there was no misconduct of any kind.

A. Relevant facts

During the initial summation, two prosecutors argued that Cari and Spaulding were guilty of all the charges against them. TR3093-3156 (XVII). The two prosecutors argued for 90 minutes with a break midway through the arguments. TR3131 (XVII). Neither Cari nor

Spaulding lodged any objection to the closing arguments.

Cari's and Spaulding's attorneys argued for two hours that the government had failed to prove the guilt of their respective clients on any of the charges. TR3157-3227 (XVII). As relevant here, with respect to the obstruction of justice count (Count 12) relating to the police report regarding Father Manship's arrest, Cari's attorney argued that Cari's police report was the most accurate and contemporaneous recording of the facts concerning Father Manship's arrest. TR3197 (XVII).

After the defendants' closing arguments, one prosecutor gave a 25-minute rebuttal. TR3227-40 (XVII). At no time during, or after, the rebuttal was any objection lodged to any rebuttal statement made by the prosecutor. In his motion for a new trial and a judgment of acquittal, Cari raised numerous trial errors but did not claim that any statement made by the prosecutors in their closing arguments was improper.

B. Governing law and standard of review

A prosecutor enjoys wide latitude in giving his closing argument so long as he does not misstate evidence. *United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003); *United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998). The prosecutor is also given broad range regarding

the inferences he may suggest to the jury during summation. *Edwards*, 342 F.3d at 181; *United States v. Nersesian*, 824 F.2d 1294, 1327 (2d Cir. 1987). While a prosecutor may make arguments which may be reasonably inferred from the evidence presented, the prosecutor may not "convey the impression that evidence not presented to the jury, but known to the prosecutor, supports that charges against the defendant." *United States v. Young,* 470 U.S. 1, 18 (1985). Further, a prosecutor may not comment on the defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 614-15 (1965).

"Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *Young*, 470 U.S. at 11; *accord United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) (per curiam) ("Reversal is an ill-suited remedy for prosecutorial misconduct . . . ."). To warrant reversal, prosecutorial misconduct must "'cause[] the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.'" *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (quoting *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999)); *see also Shareef*, 190 F.3d at 78 ("Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute 'egre-

gious misconduct.'") (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 647 (1974)).

Where, as here, both defendants failed to make any objection, timely or otherwise, to any of the prosecutors' summation comments, the statement will not be deemed a ground for reversal unless it amounted to "flagrant abuse." *Carr*, 424 F.3d at 227; *United States v. Coriaty*, 300 F.3d 244, 255 (2d Cir. 2002); *United States v. Rivera*, 22 F.3d 430, 437 (2d Cir. 1994). In deciding whether the challenged comments meet this test, this Court considers "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent the improper statements." *United States v. Thomas*, 377 F.3d 232, 245 (2d Cir. 2004); *Shareef*, 190 F.3d at 78. "The 'severity of the misconduct is mitigated if the misconduct is an aberration in an otherwise fair proceeding.'" *Thomas*, 377 F.3d at 245 (quoting *United States v. Elias*, 285 F.3d 183, 191 (2d Cir. 2002)).

C. Discussion

Although Cari failed to object during or after the 90-minute initial summations or the 25-minute rebuttal, in the new trial motion, or in his first appellate brief, he now argues in his supplemental brief—apparently without irony—that the prosecutors "made several statements that were too egregious to overlook." Cari Supp. Br. 14. Cari suggests that the prosecutor's initial

closing argument improperly created a weighing contest that infringed on his right to remain silent and improperly shifted the burden of proof. *Id*. at 14-15. He also complains that a prosecutor improperly gave his opinion that the Father Manship video was the "whole truth" when there was supposedly contrary evidence that was not admitted. *Id.* at 16-17. Finally, he suggests that a prosecutor's use of term "you" and "your" was an impermissible attempt to inflame the passions of the jury by placing the jury in the shoes of the victims. *Id.* at 17-18. Cari is mistaken on each of his belated allegations. Because none of these allegations taken separately or together amount to any error, let alone plain error or "flagrant abuse," this Court should affirm.

When evaluating the prosecutors' initial and rebuttal summations as a whole—coupled with Cari's failure to raise any objection during any government summation—the record demonstrates that there was no misconduct of any kind. *United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975) (failure to object not only precludes the consideration of this issue on appeal, but also "indicates counsel's own difficulty in finding any prejudice").

At the outset of the government's summation, the prosecutor explained to the jury the two competing versions of the evidence. She explained that in contrast to the government witness's testimony, "[y]ou have on the other hand

what David Cari and Dennis Spaulding say what happened. And they do that in the police reports that were written. And we submit to you that those police reports, that is the falsehood here." TR3094 (XVII). This comment, far from shifting the burden of proof to the defendants or commenting on the defendants' failure to testify, merely asked the jury to weigh the testimony of government witnesses against the sworn police reports authored by the defendants. This type of argument in closing is eminently proper given the facts of this case. Cari and Spaulding were both charged with obstruction of justice by writing false police reports to justify arrests that were made without probable cause. Those sworn police reports were admitted in evidence. In order for the government to prove that these police reports obstructed justice, the government was required to prove that the reports contained knowingly false statements. To that end, numerous witnesses with first-hand knowledge of the arrests, including the victims who were falsely arrested, testified about the arrests and further that information contained in these police reports was false and inaccurate. Under these circumstances, the government was perfectly entitled to ask the jury to compare these allegedly false police reports with the testimony of the witnesses.

Moreover, this argument—which was necessary to assist the jury in finding the elements of

the obstruction counts—did not shift the burden to the defendants to prove their innocence as Cari belatedly suggests. Given the court's clear instructions on burden of proof and a defendant's right to remain silent, *see* TR3254-55 (XVIII), there can be no credible suggestion that the jury interpreted the prosecutor's comments to require Cari to prove his innocence. Nor was there anything improper in the judge's instruction that the jury was required to "weigh" the disputed facts in the case to render a fair verdict. *United States v. Miller,* 116 F.3d 641, 676 (2d Cir. 1997) ("[W]here there are conflicts in the testimony, we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses . . . ."). Thus, Cari's belated attempt to challenge the court's jury instruction on this point is without merit.

Cari also complains that the prosecutor impermissibly argued that the Father Manship arrest video was the "whole truth." Cari Supp. Br. 16-17. There is nothing improper about this argument as the statement is based on the evidence. First, Father Manship testified that the video depicted his entire encounter with Officer Cari and that he had no interaction with Cari prior to turning on the camera. TR2494 (XIII). Thus, it is a fair comment on the evidence to describe the video as the "whole truth." Second, a supervisory police officer testified that a police report was supposed to describe "the truth, . . .

the whole truth, . . . [and] nothing but the truth." TR456 (II). Given that the government needed to prove that Cari's arrest report was false, there is nothing improper about arguing that Cari's police report was not the truth, not the whole truth and was anything but the truth.

Furthermore, Cari's suggestion that this language was improper because the prosecutor knew there was other evidence that had been precluded is without merit. Cari Supp. Br. 16. Although Cari does not elaborate on this point, he is presumably referring to the audio recording of the conversation between Father Manship and a YLS law student that the district court excluded as a privileged communication. *See* Part III, *supra*. But that evidence had nothing to do with Cari's February 19, 2009 arrest of Father Manship. The precluded evidence was a recorded conversation between Father Manship and his legal representative that took place *eight months after Cari falsely arrested Father Manship*. Accordingly, the prosecutor's statement about the "truth" of the February 19, 2009 video could not be an improper comment on the availability of other, entirely unrelated evidence.

Finally, Cari belatedly complains that the prosecutor improperly put the jurors in the shoes of the victims of Fourth Amendment violations, or perpetrators of Fourth Amendment violations, by using the term "you" and "your" when arguing, for example, that police are not permitted to

arrest "you" (*e.g.*, anyone) without probable cause. Cari Supp. Br. 17-18. Cari did not object to these words during the closing, presumably because, when they were heard in the context of the entire closing, the words "you" and "your" were not asking the jury to imagine themselves as victims or perpetrators. Instead, those words were more naturally understood by the jury—none of whom were police officers or victims of police misconduct—as describing what "any person" could and could not do.

Cari's suggestion that the prosecutors' closing comments might have improperly inflamed the jury to render an unjust or hasty verdict is equally baseless. The closing arguments took place on Wednesday October 16, 2013. Although the jury deliberated for a short period of time on October 17 and all day on October 18, 2013, no verdict was rendered. Not until late afternoon on Monday October 21, 2013, after almost another full day of deliberations, did the jury return guilty verdicts against Cari and Spaulding. Hence, the suggestion that the prosecutors' closing comments were so prejudicial or so inflammatory to create an unjust verdict based on improper emotion is belied by the record. In short, Cari was convicted because the evidence at trial demonstrated his guilt beyond a reasonable doubt, not because of any isolated closing comment.

Under these circumstances, there is no misconduct of any kind in the government's summations and certainly no "flagrant abuse" that would warrant any relief in light of the absence of any objection.

VI. Spaulding's 60-month sentence was procedurally and substantively reasonable and should be affirmed.

A. Relevant facts

The Pre-Sentence Report prepared for sentencing calculated Spaulding's Sentencing Guidelines total offense level as a level 25. PSR ¶ 62. As relevant here, this total included a three-level increase under U.S.S.G. § 2J1.2(b)(2) for conduct that resulted in "substantial interference with the administration of justice" because Spaulding's false reports required Marin and Alvarracin to face criminal charges in state court. PSR ¶¶ 44, 51. With a total offense level of 25, and a Criminal History Category I, the PSR calculated a guidelines range of 57-71 months' incarceration. PSR ¶¶ 62, 64, 85.

In his sentencing memorandum, GA122-23, Spaulding objected to the three-level increase under § 2J1.2(b)(2). According to Spaulding, even assuming the arrests of Marin and Alvarracin were unlawful, they did not result in the "unnecessary expenditure of *substantial government or court resources*" because the cases

against Marin and Alvarracin were pending for only brief periods of time. GA122-23.

Spaulding's sentencing memorandum requested a non-custodial non-Guidelines sentence. GA116; GA139. In support of this request, Spaulding asserted his innocence of the charges against him, *see* GA117-19, and made numerous arguments for downward departures. He argued, for example, that a downward departure was warranted to account for Spaulding's vulnerability to abuse in prison, GA123-25, to account for Spaulding's charitable and community activities and good works, GA125-26, to account for adverse collateral consequences from his convictions (*i.e.*, the loss of his job as a police officer and his inability to associate with his close friends who are police officers), GA126-27, to account for overlapping enhancements, GA127-28, and to account for a combination of all of the departures arguments set forth above, GA128. In addition to these departure arguments, Spaulding highlighted multiple factors under 18 U.S.C. § 3553(a) that he believed warranted a below-Guidelines sentence, including his personal characteristics, the significant personal and professional costs of the prosecution that made a lengthy sentence unnecessary to serve the purposes of deterrence, just punishment, or promoting respect for the law, his low likelihood of recidivism, and the need to avoid unwarranted sentencing disparities. GA129-38. For its part,

the government recommended a prison sentence of at least five years. *See* GA258.

At sentencing, the district court rejected Spaulding's argument on the applicability of the enhancement under § 2J1.2(b)(2). The court noted that Marin was granted "accelerated rehabilitation" under Connecticut law and that this status required two separate judicial determinations and resulted in permanent consequences for Marin even though the charges were ultimately dismissed. GA313-15. Based on this record, the court concluded that Spaulding's false police report resulted in "substantial interference with the administration of justice." GA315. Similarly, the court concluded that Alvarracin's prosecution met the same standard because, even though the charges were nolled, those charges still required a judicial determination that a nolle was appropriate if community service was performed. GA316-17.

With this objection resolved, the court found that Spaulding faced a guidelines range of 57-71 months' imprisonment. GA319. After hearing from victims, counsel, friends and family members of Spaulding, and Spaulding himself, GA299-310; GA319-83, and setting out the available penalties for Spaulding's conduct, GA317-19, the court described the § 3553(a) factors that guided the selection of an appropriate sentence, GA383-85.

After reviewing the PSR, the court's notes from trial, counsel's sentencing submissions and the arguments and statements presented at sentencing, GA385-88, the court identified the facts that influenced its sentencing decision. The court noted, for example, that Spaulding came from a strong family and is a "wonderful family man" and a "wonderful neighbor." GA388-89. While noting that a prison term would impose a hardship on Spaulding's family, the court noted also that Spaulding's offense conduct had had a significant impact on the victims and *their* families. GA389. The court continued to identify several "unfavorable factors that [were] not accounted for by the Guidelines range": (1) Spaulding was aware of concerns about his behavior—from a conversation with his supervisor and awareness of complaints about his behavior, but he was undeterred; and (2) Spaulding's conduct had impacts on individuals beyond the specific victims identified in the offenses of conviction. GA393-94.

After this discussion, the court denied, on the record, Spaulding's various requests for downward departures, finding that Spaulding had not satisfied the criteria for those departures and further, that even if he had, the court would not exercise its discretion to grant the departures. GA395-400. The court then continued to summarize the reasons for the sentence imposed:

> So in my mind it all comes down to the purposes of sentencing. And I think as I've mentioned, in terms of the purposes of sentencing I believe that the recognition to the harm to the administration of justice, which goes to the seriousness of the offense and respect for the law, and the harm to the victims in this case, which goes to just punishment, are factors on which I must put substantial weight.

GA402. On this record, the court sentenced Spaulding to a guidelines sentence of 60 months' imprisonment, to be followed by one year of supervised release. GA403. In addition, the court ordered Spaulding to pay $6,515.77 in restitution to Marin. GA406-407.

B. Governing law and standard of review

Following *United States v. Booker*, 543 U.S. 220 (2005), "appellate review of sentencing decisions is limited to determining whether they are 'reasonable.'" *Gall v. United States*, 552 U.S. 38, 46 (2007). This reasonableness determination turns on "the familiar abuse-of-discretion standard of review." *Id.*

"This form of appellate scrutiny encompasses two components: procedural review and substantive review." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc).

> A district court commits procedural error when it fails to calculate the Guidelines range . . . , makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory. It also errs procedurally if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact. Moreover, a district court errs if it fails adequately to explain its chosen sentence, and must include an explanation for any deviation from the Guidelines range.

Id. at 190 (internal quotation marks and citations omitted).

"[W]hen conducting substantive review, [this Court] take[s] into account the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantages of the district court." *Id.* Indeed, this Court's "review of a sentence for substantive reasonableness is particularly deferential" in part because of "a district court's unique factfinding position, which allows it to hear evidence, make credibility determinations, and interact directly with the defendant (and, often, with his victims), thereby gaining insights not always conveyed by a cold record." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786 (2013).

"The particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge." *Id.* (internal quotation marks omitted). In reviewing for substantive reasonableness, this Court therefore "do[es] not consider what weight [it] would . . . have given a particular factor," but instead "consider[s] whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case." *Cavera*, 550 F.3d at 191. Put another way, "if the ultimate sentence is reasonable and the sentencing judge did not commit procedural error in imposing that sentence, we will not second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor." *United States v. Pope*, 554 F.3d 240, 246-47 (2d Cir. 2009) (internal quotation marks and modifications omitted).

This Court does "not presume that a Guidelines-range sentence is reasonable." *Cavera*, 550 F.3d at 190. But it "recognize[s] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006), *abrogated on other grounds by Rita v. United States*, 551 U.S. 338 (2007).

Ultimately, this Court "will not substitute our own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case. We will instead set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions." *United States v. Norman*, 776 F.3d 67, 86 (2d Cir. 2015) (internal quotation marks, citations, and modifications omitted) (emphasis in original), *petition for cert. filed*, No. 14-9262 (U.S. Apr. 10, 2015). In other words, a sentence is substantively unreasonable only in the "rare case" where the sentence "damage[s] the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

C. Discussion

1. The district court properly applied the enhancement under U.S.S.G. § 2J1.2(b)(2).

Spaulding identifies only one purported procedural error in his sentencing: that the court applied the three-level enhancement under U.S.S.G. § 2J1.2(b)(2). A review of applicable law and the sentencing below demonstrates that Spaulding is not entitled to any relief on this point.

The three-level enhancement under § 2J1.2(b)(2) applies when the "offense resulted in substantial interference with the administration of justice." The application notes explain that a "'[s]ubstantial interference with the administration of justice' includes . . . an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental resources." U.S.S.G. § 2J1.2(b), note (1).

As the district court recognized, GA313-15, Spaulding's conduct fell comfortably within this definition. Here, Spaulding's conduct in arresting Marin, Alvarracin and Espinosa without probable cause and filing false police reports subjected three people to the state criminal justice system. It is of no moment that Marin was granted accelerated rehabilitation and Alvarracin's and Espinosa's charges were nolled. The false charges subjected three individuals to the court system and required the state court to make judicial determinations in each of their cases. As the district court explained, accelerated rehabilitation in the State of Connecticut requires two judicial determinations: (1) that the individual be admitted into the program; and (2) that the individual successfully completed the program. GA314-15. And while Alvarracin's and Espinosa's charges were nolled, that only happened after a judge found that they performed

20 hours of community service. GA316-17. In short, the court recognized that both accelerated rehabilitation and the nolles in this case required a state judge to make judicial determinations. Accordingly, these actions constituted "substantial interference with the administration of justice" under the guidelines and the enhancement was properly applied.

2. Spaulding's sentence was substantively reasonable.

The district court complied with all procedural requirements at sentencing, considered the § 3553(a) factors and the arguments of the parties, and imposed a guidelines sentence. Although this Court does not presume that a guidelines sentence is reasonable, on the record before this Court, the sentence imposed "fall[s] comfortably within the broad range of sentences that would be reasonable." *Fernandez*, 443 F.3d at 27.

As reflected in the district court's comments, Spaulding's 60-month guidelines sentence for six separate civil rights violations was not unreasonable. Spaulding engaged in repeated civil rights violations against members of the Latino community including making false arrests, filing false reports and, in one instance, using unnecessary and excessive force that sent an innocent man to the hospital. Spaulding also created a culture of fear in East Haven for members of the Latino community. He not only targeted Latino

owned businesses and their Latino customers but also, as the district court noted, caused significant invisible harm to the victims and their families that was not accounted for in the guidelines.

Spaulding argues, nonetheless, that the court should have given him a lower sentence. He notes that he presented the court with arguments on the § 3553(a) factors and thus with more than sufficient information to support a non-guidelines sentence. Further, Spaulding points out that he argued below for a below-guidelines sentence to avoid unwarranted sentencing disparities.

To be sure, Spaulding presented information on sentences imposed in other cases. *See* GA136-38. But the press releases Spaulding presented do not establish that the sentence imposed in *this* case was unreasonable. As an initial matter, the summaries included in Spaulding's sentencing memo provided little to no useful information about the details of those cases that would allow a useful comparison to this case. They do not describe, for example, whether the defendant, as here, ignored warnings about his conduct. Accordingly, the vague compilation of press releases provided by Spaulding was simply not helpful to assist the court in avoiding sentencing disparities.

In any event, the court in this case was not moved by those comparisons. The court identi-

fied the factors that it found warranted a guidelines sentence, focusing on the seriousness of the offense conduct—including the harm to the administration of justice and the harm to the victims—and the need to serve the purposes of sentencing, including promoting respect for the law. GA402. In addition, the court noted that while Spaulding had many fine qualities, there were other factors that suggested the need for a significant sentence, such as Spaulding's failure to change his official conduct after being warned about problems with and concerns about that conduct. GA389-94. In short, the court weighed all of the information before it and imposed a sentence it determined was necessary to serve the purposes of sentencing.

There is no doubt that Spaulding would have weighed the § 3553(a) factors differently and would have preferred a shorter sentence. But the fact that he disagrees with the weight afforded to different factors is of no moment. It is well-settled that this Court does not substitute its own judgment for that of the district court when reviewing the substantive reasonableness of a sentence. *See Cavera*, 550 F.3d at 189. "The particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge." *Broxmeyer*, 699 F.3d at 289; *see also Cavera*, 550 F.3d at 191 ("[W]e do not consider what weight we would ourselves have given a particular factor.").

In sum, the district court imposed a reasonable sentence, and Spaulding has identified no reason for this Court to disturb that sentence.

Conclusion

For the foregoing reasons, the Court should affirm the convictions and sentences of defendants Spaulding and Cari.

Dated: May 19, 2015

Respectfully submitted,

DEIRDRE M. DALY
UNITED STATES TTORNEY
DISTRICT OF ONNECTICUT

KRISHNA R. PATEL
ASSISTANT U.S. ATTORNEY

RICHARD J. SCHECHTER
ASSISTANT U.S. ATTORNNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that on May 15, 2015 the Court granted the government permission to file a brief of no more than 28,000 words. This brief contains fewer than the requested number of words, in that the brief is calculated by the word processing program to contain approximately 24,500 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

RICHARD J. SCHECHTER
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. § 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Fed. R. Evidence Rule 501. Privilege in General

The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Fed. R. Evidence Rule 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).