

# 13-3691

*To Be Argued By:*  
PAUL H. McCONNELL

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 13-3691**

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

EVAN COSSETTE,  
*Defendant-Appellant,*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Statement of Jurisdiction**

The United States District Court for the District of Connecticut (Janet Bond Arterton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 25, 2013. Joint Appendix (“JA”) 12-13, Government Appendix (“GA”) 772-GA774. On September 30, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA34-JA35. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issue  
Presented for Review**

Whether the defendant police officer had “fair warning” that his firm shove of a handcuffed, compliant, and retreating detainee backward into a cement cell—causing the detainee to hit his head on a bench and opening up a large laceration—would violate that detainee’s right to be free from unreasonable force under color of law; and whether the defendant was fairly warned that a false police report regarding such an incident could be punishable as obstruction of justice under 18 U.S.C. § 1519.

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-3691

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

EVAN COSSETTE,  
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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

On May 1, 2010, the defendant, Evan Cossette, then a police officer with the Meriden (Connecticut) Police Department, firmly shoved a handcuffed, compliant, retreating, and profoundly intoxicated arrestee backward into a jail cell, causing the victim to strike his head on a cement bench, which resulted in a large laceration to the victim's head. Although the victim had no memory of the event, video surveillance captured the defendant escorting the subdued victim from his police car into the police station

and into a jail cell, and showed no evidence of any aggressive behavior by the victim that would have justified the defendant's shove. Notwithstanding the video evidence, the defendant falsely claimed in his sworn police report, and then again at trial, that he shoved the victim out of concern for his physical safety.

On June 3, 2013, a trial jury rejected the defendant's claim of self-defense, and returned guilty verdicts on both counts of a two-count indictment: Deprivation of Rights, in violation of 18 U.S.C. § 242, for the use of objectively unreasonable force under color of law; and Obstruction of Justice, in violation of 18 U.S.C. §1519, for false statements in a sworn police report regarding a matter within the jurisdiction of the Federal Bureau of Investigation. On September 23, 2013, the district court (Janet B. Arterton, J.) sentenced the defendant principally to 14 months' imprisonment, or approximately half of the bottom of the range under the Sentencing Guidelines.

On appeal, the defendant challenges the district court's repeated denials of the defendant's claim, made as a pre-trial motion to dismiss and as post-evidence and post-verdict motions for acquittal, that the defendant did not have "fair warning" of the charged offenses. Principally, the defendant claims that in the context of a civil

rights offense, there must exist a prior case that involved behavior closely analogous to the defendant's behavior in order for the defendant to be "on notice" that his conduct could subject him to criminal prosecution. As the district court correctly found below, the law does not require an analogous case in order to conclude that an officer is on notice that he cannot firmly shove a compliant prisoner into a cell without justification.

Similarly, the defendant claims that he was not fairly warned that his police report could be punished as a violation of § 1519, both because—assuming he was not warned his conduct violated § 242—he could not have foreseen a federal investigation into that conduct; and because the law at the time of the defendant's conduct allegedly required a nexus between the defendant's false report and an actual federal proceeding. The former argument fails because, as the district court found, it incorrectly presupposes that the defendant was not on notice of his § 242 violation. The latter argument, made for the first time on appeal, misstates the law of § 1519 at the time of the defendant's conduct and misapprehends the standard for a fair warning challenge.

## Statement of the Case

On November 14, 2012, a grand jury sitting in Hartford, Connecticut, returned an indictment charging the defendant with Deprivation of Rights by Use of Unreasonable Force by a Police Officer, in violation of 18 U.S.C. § 242, and Obstruction of Justice by Filing a False Report, in violation of 18 U.S.C. § 1519. JA4, JA17-JA20. On April 15, 2013, the defendant moved to dismiss the indictment, in part claiming that the defendant was not “on notice” that his alleged actions could be considered a violation of the law. JA6, GA775-GA786.<sup>1</sup> On April 30, 2013, the district court (Janet B. Arterton, J.) denied the defendant’s motion to dismiss. JA7, GA823-GA838.

On May 29, 2013, following the close of the government’s trial evidence, the defendant renewed his “fair notice” claim in the form a motion for a judgment of acquittal under Federal

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<sup>1</sup> The government has included its own appendix to supplement the Joint Appendix, which omitted a number of items that the government had requested that the defendant incorporate, including the judgment and the entire transcript of the trial. Although the defendant included short excerpts of the trial transcript in the Joint Appendix, citations herein to the trial transcript will be to the Government’s Appendix.

Rule of Criminal Procedure 29, which was denied by the district court without prejudice to renew following trial. JA8, GA479-GA486. On June 3, 2013, the defendant was convicted by a jury of both counts of the indictment. JA10. The defendant renewed his “fair notice” argument in a post-verdict Rule 29 motion. JA10, JA115-JA127. The district court denied the Rule 29 motion on September 18, 2013. JA12, JA21-JA33.

On September 23, 2013, the district court sentenced the defendant principally to 14 months’ imprisonment. JA12, GA772-GA774. Judgment entered on September 25, 2013. JA12-JA13, GA772-GA774. On September 30, 2013, the defendant filed a timely notice of appeal. JA13, JA34. On October 21, 2013, the defendant filed a motion to stay his sentence pending appeal. JA13-JA14. The district court denied this motion on November 22, 2013, and ordered the defendant to report to the Bureau of Prisons on January 28, 2014. JA16, JA154-JA159. The defendant is currently serving his sentence.

#### **A. Offense conduct and trial**

On May 1, 2010, Pedro Temich (“Temich”), while driving to a communion party at a co-worker’s house in Meriden, Connecticut, hit the parked car of Elismari Ballester (“Ballester”) and then drove away. GA61-GA63, GA82,

GA400. Ballester, who had been alerted to the incident by a neighbor, called 911. GA63. While on the phone, Ballester saw Temich drive by again and followed him around the corner to the home where the communion party was being held. GA63-GA65, GA81-GA83. Temich had been drinking all day, and was highly, and very visibly, intoxicated. GA66, GA83-84, GA401-GA403, GA414. Temich has no memory of the accident or any of the events that ensued. GA404. According to Ballester, Temich “couldn’t even hardly stand up straight on his own two feet.” GA66. She observed that he was “in la la land. Like happy drunk,” and did not appear to be someone who would get “physical.” GA67.

The defendant, then an officer of the Meriden Police Department (“MPD”), and two other MPD officers each independently responded to the scene. GA441-GA443, GA508-GA509. The defendant, accompanied by the other officers, interviewed Temich. GA444-GA446, GA511-GA512. One of the other officers, Jeffrey Selander, testified that Temich was highly intoxicated, and was using a vehicle to help him stand up. GA444. Andrea De La Luz, a party guest, testified at trial that her husband translated the conversation between Temich (who spoke Spanish) and the defendant (who spoke English and limited Spanish). GA100, GA109. De La Luz tes-

tified that Temich was leaning against a car, appeared intoxicated, and “could hardly stand up.” GA102. The officers repeatedly insisted that Temich produce his keys. GA101-GA102, GA116-GA117. When Temich went into his pockets to retrieve the keys, De La Luz testified that the officers threw Temich to the ground. GA101-GA103, GA116-GA117. De La Luz testified that the officers then began hitting Temich with a stick that may have been a baton or flashlight. GA104. Some in the crowd were asking why the officers were hitting Temich. GA105. De La Luz’s husband attempted to intervene, but De La Luz assisted in restraining him, and pulled him to the rear of the house. GA106.

De La Luz did not see what happened after that, including Temich’s entry into the defendant’s car. GA106, GA117. According to Ballester, who did not observe the entire interaction with the police, Temich may have resisted entry into the defendant’s car, but she maintained that “I don’t remember seeing him get physical or anything. I think he was way too intoxicated to even try to do that.” GA80-GA81.

Both the defendant and Selander testified that it was Temich who became aggressive when he realized he was under arrest, and that he continued that aggression through the point he was forced into the defendant’s police car, in-

cluding banging his head and body off the glass of the passenger compartment. GA449-GA454, GA521-GA527, GA571-GA574. Selander also testified that a crowd was running from the back of the house, responding to entreaties from Temich, who “was yelling something in Latin.” GA451.

The police radio communications related to this incident were introduced at trial, along with transcripts. GA749-GA771, Government Exhibit (“GX”) 24.<sup>2</sup> In one call, Selander asked dispatch to “roll one unit with the flow. We got one under.

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<sup>2</sup> The government has attached as part of its appendix a compact disc that contains GX1A, GX1B, and GX24. GX1A is the surveillance video recording of the defendant and Temich inside the sally port (garage) of the MPD. GX1B is the surveillance video recording of the defendant and Temich inside the MPD holding cell. The relevant portion of GX1B begins when the time stamp reads 22:52:38. GX24 is a series of 19 audio recordings of the police radio communications around the time of the incident, beginning with Ballester’s 911 call. On the compact disc, each recording is labeled sequentially in the order it occurred, *i.e.*, the first recording is GX 24 1, the second is GX 24 2, concluding with GX 24 19. Citations herein will be to the specific call, *i.e.*, the citation to the fourth call will be listed as GX24-4. The recordings correspond with the transcripts in GX24B, which is at pages GA749-GA771.

We got a crowd forming.” GX24-12, GA764. Dispatcher Janet Roller testified that this meant that she should send another police car, but without lights and sirens, *i.e.*, not driving as fast as possible. GA147-GA148. She also explained that “one under” meant that the suspect had already been placed under arrest. GA148. Seland-er’s voice appeared neither excited nor loud. *See* GX24-12.

The defendant transported Temich back to the MPD without assistance. GA528-GA529. When the defendant reached the MPD station, he radioed to dispatch to open the sally port (garage) door, and then to close the door; he did not ask for assistance from any other officer, nor did he warn anyone in the police station of a potentially volatile prisoner. GA767-GA768, GX24-15, GX24-16, GA149-GA150, GA564, GA583-GA585.

There were two time-stamped videos that captured the next set of events. According to surveillance inside the sally port, the defendant escorted a visibly compliant and handcuffed Temich from his police cruiser, through the sally port, and into the MPD. GX1A, GA529-GA531. The same video shows the defendant continuing to escort the compliant and handcuffed Temich to a location immediately in front of the holding cell door. *See* GX1A, GA531.

A separate time-stamped video picked up the defendant and Temich from inside the holding cell. *See* GX1B. That video revealed a subdued and handcuffed Temich slowly walking backward, when the defendant entered the cell and—with no apparent provocation—forcefully shoved him, thereby causing Temich to fall backward and strike his head against a cement bench, resulting in a laceration that took 12 staples to close. GX1B, GA405. Sergeant John Mennone, who was standing within earshot of the holding cell, testified that did not hear any indication of a struggle. GA375-GA377, GA390-GA392. The video showed Temich apparently unconscious on the floor of the cell, while the defendant moved in and out of the cell several times, on some occasions propping up the supine prisoner. GX1B. Dispatcher Roller, who did not see the push but did see Temich hit the bench via real-time surveillance video, immediately called an ambulance. GA138, GA158. The ambulance arrived several minutes later, and transported Temich to the hospital. GA158.

The following day, the defendant submitted an official police report stating as follows: “Pedro remained uncooperative and immediately spun around when I placed him in the cell. Pedro invaded my personal space and I became fearful that he would again attempt to engage me in a

physical altercation and possibly head butt me. I ordered Pedro to get back three or four times, which was witnessed by Ofc. Gibbs. Pedro ignored my verbal commands and advanced on me so I gave him a firm push back.” JA108-JA09.

At trial, the defendant agreed that, under the Constitution, he can only use force that is “reasonable under the circumstances.” GA561. He also acknowledged that “it’s common knowledge amongst police officers that if they use excessive force that the FBI might investigate it.” GA561. Sergeant Mennone, a use-of-force instructor at the MPD, confirmed that “in instruction at the [MPD], officers [are] made aware of the possibility of, specifically, federal criminal liability, among other liability, for civil rights violations.” GA362-GA363. Captain Patrick Gaynor, another MPD supervisor, also testified about training at the Connecticut Police Officer Standards and Training (“POST”) academy that included learning that the use of excessive force could expose an officer to federal or state criminal liability. GA188-GA189. The government introduced the curriculum for a POST course at the time of the defendant’s attendance, which included “identify-federal and state statutes that related to civil and criminal liability of local law enforcement officers.” JA114.

With regard to the events that transpired inside the MPD holding cell, the defendant testified that he firmly pushed Temich out of an imminent concern for his own physical safety, and thus that his police report was principally accurate. GA531-GA539, GA551-GA555, GA582-GA583.

Ultimately, the jury rendered a verdict of guilty on both counts. JA10.

### **B. Relevant motion practice**

On April 15, 2013, the defendant moved to dismiss the indictment, in part claiming that he was not “on notice” that his alleged actions would be considered a violation of the law. JA6, GA775-GA786. The defendant claimed that “there is no law putting him on notice that pushing an intoxicating (sic), violent, and resisting prisoner could give rise to a prosecution under 18 U.S.C. Section 242.” GA783-GA784. The defendant further claimed that if he was not fairly warned that his conduct could amount to a violation of § 242, he could not be prosecuted under § 1519 because he could not have anticipated a future federal proceeding. GA785.

On April 30, 2013, following a hearing on April 29, the district court denied the defendant’s motion to dismiss. JA7, GA910, GA823-GA838. In rejecting the defendant’s fair warning

claim, the district court observed—and the defendant ultimately conceded—that a fair warning challenge is limited to the “language of the indictment,” which excluded reference to any action by Temich that the defendant averred precipitated the shove. GA825, GA832. According to the district court, the indictment reflected that the defendant was charged “with using excessive and unreasonable force against a compliant, handcuffed, intoxicated detainee.” GA832. Thus limited, the district court held that even if “the exact fact pattern is unlikely to have arisen before,”

it is nonetheless a prosecution based on the behavior of a law enforcement official for a Fourth Amendment excessive force claim resulting in injury, such that the indictment’s allegation that the “firm shove” force was unreasonable under the circumstances of a handcuffed, celled, compliant, intoxicated detainee, violates 242.

GA832. The district court made clear that there could not be “much question” that there was fair notice, based on the indictment’s allegation of unreasonableness under the circumstances alleged. GA832.

In denying the motion to dismiss, the district court did not preclude the defendant from challenging the sufficiency of the government’s evi-

dence at the close of trial regarding whether there was sufficient proof of unreasonable force. However, the district court noted that at that point, “we then have moved beyond what is . . . the allegation of constitutional wrong . . . to the factual proof.” GA833.

The district court then similarly rejected the defendant’s § 1519 argument. The defendant agreed with the district court that, under *United States v. Gray*, 642 F.3d 371 (2d Cir. 2011), there is no requirement that there be a “nexus” between the defendant’s obstructive conduct and a “specific investigation or prosecution.” GA836. Indeed, the defendant made clear that his argument was only that if there was no fair warning of a § 242 violation, the defendant could not have anticipated an investigation. GA835. The defendant agreed that if his § 242 fair warning argument failed, his § 1519 argument must also fail. GA836.

On May 29, 2013, following the close of the government’s trial evidence, the defendant renewed his “fair notice” claim in the form a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29, which was denied by the district without prejudice to renew following trial. JA8, GA479-GA486. On June 3, 2013, the defendant was convicted by a jury of both counts of the indictment. JA10.

On June 14, 2013, Cossette filed a timely motion for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. JA10, JA115-JA127. Although captioned as a Rule 29 motion, the defendant essentially renewed his prior motion to dismiss the indictment on “fair warning” grounds. JA117 (“The Defendant hereby renews his Motions to Dismiss the Indictment in this motion for a judgment of acquittal under Rule 29.”). As before, the defendant argued that because “[t]here are no prior cases holding that a single push to an intoxicated arrestee may amount to excessive force,” he was not on fair notice that his use of physical force could subject him to criminal liability under § 242. JA121. Similarly, the defendant renewed his motion to dismiss the § 1519 count on the ground that, because he was not fairly warned of § 242 liability, he could not have “reasonably anticipated” a federal investigation. JA125-JA126.

The district court denied the defendant’s post-trial motion on September 18, 2013. JA21-JA33. The district court bifurcated the first argument in the defendant’s motion into two parts: a renewal of his motion to dismiss on fair warning grounds, and a Rule 29 motion challenging the sufficiency of the government’s trial evidence. JA26-JA27. In again rejecting the defendant’s

motion to dismiss, the district court explained that § 242 does not require “congruity between [the defendant’s] conduct and prior cases in order to put him on notice that forcefully pushing a compliant, submissive arrestee backwards and causing him physical injury could subject a police officer to criminal liability.” JA27.

Although finding that the defendant had only hinted at a sufficiency challenge, the district court nonetheless proceeded to consider the government’s evidence regarding the reasonableness and willfulness of the defendant’s conduct. JA27. Specifically, the district court found that there was sufficient evidence for a reasonable jury to conclude that the defendant “with his push used force against Temich resulting in physical injury that was not justified under the circumstances.” JA31. The district court based that conclusion in large part on “police video footage [that] showed a compliant Temich being pushed seemingly without any provocation.” JA31. The district court summarized the video as showing “that as Defendant walked the handcuffed, compliant, and intoxicated suspect into the police department holding cell, he forcefully pushed the suspect backwards, causing him to fall and strike his head, resulting in injury and temporary unconsciousness.” JA23. Further, the district court noted that “[t]he jurors reasonably

discredited Defendant’s testimony at trial that he acted in self-defense after Temich spun away from him while being placed in the cell, and instead concluded that Defendant willfully used gratuitous and unreasonable force resulting in physical injury in a situation that did not justify it.” JA31.

Finally, the district court also rejected the defendant’s challenge to his § 1519 conviction.<sup>3</sup> The district court held that the defendant’s principal claim—that he could not have reasonably anticipated a federal investigation if he was not fairly warned of a § 242 violation—was foreclosed by *United States v. Gray*, 642 F.3d 371, 378-79 (2d Cir. 2011). JA31-JA32. The district court noted that *Gray* held that the plain language of § 1519 requires neither knowledge of nor even the likelihood of a federal investigation. JA31-JA32.

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<sup>3</sup> The defendant also argued that there was insufficient evidence of his intent to impede, obstruct or influence the “investigation or proper administration” of a matter within the jurisdiction of a governmental agency under 18 U.S.C. § 1519, but he does not press that argument on appeal. *See* JA124-JA125.

## Summary of Argument

The defendant, a trained police officer, had “fair warning” that his unprovoked firm shove of a handcuffed, compliant, and retreating detainee, would expose him to criminal liability for use of unreasonable force. The defendant’s argument that there could only be such fair warning through a “closely analogous” case is contrary to the law of this Court and the United States Supreme Court. Indeed, the Supreme Court has made clear various factors to be considered by an officer in whether to use force, none of which were present in this case. Moreover, the defendant should be limited in his fair warning claim to the facts alleged in the indictment. Any attempt to recast the facts in his favor should be considered, if at all, as a challenge to the sufficiency of the government’s evidence regarding the reasonableness of the defendant’s actions.

The defendant’s argument that he was also not fairly warned of his criminal liability under § 1519 should also be rejected. First, because the defendant had fair warning of the criminality of his use of force, a reasonable jury could conclude that he authored his false police report to cover up that conduct. Second, the defendant was fairly warned from the plain language of §1519 that the statute did not require a nexus between the

defendant's obstructive conduct and an actual federal investigation.

## **Argument**

### **I. The defendant had fair warning that his conduct violated the law.**

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

##### **1. 18 U.S.C. § 242 and fair warning**

18 U.S.C. § 242 criminalizes the willful deprivation of any “rights, privileges, or immunities secured or protected by the Constitution or laws of the United States” under “color of any law, statute, ordinance, regulation, or custom.” In order to prove a violation of § 242, the government must show that: (1) the defendant deprived the victim of a right secured by the Constitution or laws of the United States; (2) the defendant acted willfully to deprive the victim of his or her Constitutional rights; (3) the defendant acted under color of law, that is, while using or misusing power possessed by virtue of law; and (4) the offense must have resulted in bodily injury. *See United States v. Lanier*, 520 U.S. 259, 264 (1997) (“Section 242 is a Reconstruction Era civil rights statute making it criminal to act (1) ‘willfully’ and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of

the United States.”); *United States v. Coté*, 544 F.3d 88, 98 (2d Cir. 2008); *United States v. Livoti*, 196 F.3d 322, 327 (2d Cir. 1999) (“For the jury to convict Livoti of violating Baez’s right to be free from excessive force, it had to find that he: (1) acted under color of law; (2) used unreasonable force; (3) acted willfully; and (4) caused bodily injury to Baez.”).

Section 242 is not, in itself, a source of any substantive rights. Instead, it serves as a vehicle for punishing violations of rights already “made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.” *Screws v. United States*, 325 U.S. 91, 104 (1945); *see also Lanier*, 520 U.S. at 265 (stating, in describing 18 U.S.C. §§ 241 and 242, that “in lieu of describing the specific conduct it forbids, each statute’s general terms incorporate constitutional law by reference”).

It is long settled that “[d]ue process provides a criminal defendant with the right to ‘fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.’” *United States v. Desposito*, 704 F.3d 221, 229 (2d Cir.) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)), *cert. denied*, 133 S. Ct. 2402 (2013). In the context of Section 242, where the right violated

is not expressly part of the statute, a defendant may be held criminally responsible for violating such a right only if that right is “fairly warned of, having been ‘made specific’ by the time of the charged conduct.” *Lanier*, 520 U.S. at 267.

In determining whether a right is fairly warned of, a court uses the same test as it does for “determining whether a constitutional right was ‘clearly established’ in civil litigation under § 1983.” *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002). Thus it is appropriate to look at both Section 242 cases as well as 42 U.S.C. § 1983 actions in assessing whether a right was fairly warned of or clearly established. *Id.* at 740 & n.10 (explaining analogous application of fair warning in § 242 cases and clearly established § 1983 cases). In this circuit, a court looks to “(i) whether the right at issue was defined with reasonable clarity; (ii) whether the Supreme Court or the Second Circuit had affirmed the existence of the right; and (iii) whether reasonable police officers in [the defendant’s] position would have understood from the existing law that [his] conduct was unlawful.” *Townes v. City of New York*, 176 F.3d 138, 144 (2d Cir. 1999).

Applying this standard, the Supreme Court has made clear that there need not be a close factual analogue between the charged conduct and a binding precedent of the Supreme Court or

relevant circuit court. *Lanier*, 520 U.S. at 269 (rejecting Sixth Circuit’s requirement of a “fundamentally similar” precedent, and noting that “we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court”). Indeed, while the *Lanier* Court did state that in some cases a high degree of prior factual particularity may be necessary, it also explained that:

[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though “the very action in question has [not] previously been held unlawful.”

*Id.* at 271 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

In *Hope v. Pelzer*, a case applying the Eighth Amendment in a 42 U.S.C. § 1983 action against a prison guard for affixing an inmate to a hitching post, the Supreme Court likewise rejected the Eleventh Circuit’s requirement of a precedent with “materially similar facts.” 536 U.S. at 739-41. While the Court acknowledged that a “clearly established” right means the law was

sufficiently clear for a reasonable official to understand that he was violating it, *id.* at 739, the Court also explained that “[o]ur opinion in *Lanier* . . . makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances,” *id.* at 741. Indeed, the “‘clearly established’ standard does not mean that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . nor does the standard necessarily require that the facts of the earlier cases be ‘materially similar’ to the case under consideration . . . . The standard is one of ‘fair warning’ such that unlawfulness must be apparent in light of pre-existing law. . . .” *Walczyk v. Rio*, 496 F.3d 139, 166 n.3 (2d Cir. 2007) (Sotomayor, J., concurring) (internal citations and quotations omitted).

This Court has similarly held that individuals may have fair notice even if a court has never directly addressed the issue. *See Ponnepula v. Spitzer*, 297 F.3d 172, 183 (2d Cir. 2002) (noting that “[d]ue process is not . . . violated simply because the issue is a matter of first impression”); *see also United States v. Kinzler*, 55 F.3d 70, 74 (2d Cir. 1995) (“The claimed novelty of this prosecution does not help [the defendant’s fair notice argument], for it is immaterial that there is no

litigated fact pattern precisely in point.”) (internal quotations omitted).

In addition, where a statute contains a “scienter” requirement, a defendant’s fair warning challenge “must be met with some measure of skepticism.” *United States v. Roberts*, 363 F.3d 118, 123 (2d Cir. 2004) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (“[A] scienter requirement [in a criminal statute] may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.”)).

It is well settled that the use of excessive force in the context of an arrest violates the Fourth Amendment prohibition against “unreasonable . . . seizures” of the person. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). All claims that law enforcement officers used excessive force during an arrest or other “seizure” are evaluated under the Fourth Amendment’s “reasonableness” standard. *Id.* at 388. The Fourth Amendment reasonableness standard applies until an individual arrested without a warrant appears before a neutral magistrate for arraignment or for a probable cause hearing, or until the arrestee leaves the joint or sole custody of the arresting or officers. *See Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989).

Whether a particular use of force was reasonable is “not capable of precise definition or mechanical application.” *Id.* at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). Rather, a court looks to whether the officer’s actions were “objectively reasonable’ in light of the facts and circumstances confronting [him]” at the time. *Id.* at 397. “Careful attention” must be paid “to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 396. Unusually rough handling during arrest is often sufficient to have the issue submitted to a jury. *See, e.g., Maxwell v. City of New York*, 380 F.3d 106, 109 (2d Cir. 2004) (allegation that “use of force in making the arrest was sufficient to send pain into [plaintiff’s] arm and lower back and leave her with a post-concussive syndrome”); *Mickle v. Morin*, 297 F.3d 114, 117 (2d Cir. 2002) (Plaintiff testified that officers dislocated her shoulder as they put on handcuffs “and dragged me out to the car and threw me in”); *Robinson v. Via*, 821 F.2d 913, 923-24 (2d Cir. 1987) (sworn statements that plaintiff was “yanked” out of her car and thrown up against fender).

This Court has made clear that the facts and circumstances subject to scrutiny are limited to those existing at, and immediately prior to, the use of force. Under that rationale, courts should confine examination to whether the suspect presented a danger to the officers or others at the moment force was used. *See O’Bert v. Vargo*, 331 F.3d 29, 39-40 (2d Cir. 2003) (holding irrelevant a victim’s threat to police made several minutes earlier, when the police had seen the victim unarmed in intervening time); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (holding that officer’s “actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force”).

## **2. 18 U.S.C. § 1519 and fair warning**

Title 18, United States Code Section 1519 states, in pertinent part:

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 [guilty of a criminal offense].

To prove a violation of this statute, the government must show that (1) the defendant falsified a document; (2) the defendant did so knowingly; and (3) 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 or in relation to or contemplation of any such matter or case. *See* GA729: *United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008) (“This statute rather plainly criminalizes the conduct of an individual who (1) knowingly (2) makes a false entry in a record or document (3) with intent to impede or influence a federal investigation.”).

As discussed in the prior section, it is long settled that “[d]ue process provides a criminal defendant with the right to ‘fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.’” *Desposito*, 704 F.3d at 229 (quoting *McBoyle*, 283 U.S. at 27). This Court has held that “[i]f the statutory language alone provides clear notice that certain conduct is illegal, Due Process is satisfied and the government may prosecute such activity without waiting for every conceivable challenge to a law’s validity.” *Id.* at 230 (internal quotations omitted) (conclud-

ing that the application of 18 U.S.C. § 844(h)(1) was plain from the face of the statute). Indeed, fair warning is implicated only “when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.” *United States v. Velastegui*, 199 F.3d 590, 593 (2d Cir. 1999) (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)).

As applied to § 1519—specifically the third element described above—this Court has held that the plain language of the statute makes clear that the government need not prove that there is a nexus between a false report and an official proceeding of the federal government, that the defendant had knowledge of a pending investigation, or even that an investigation was likely. *Gray*, 642 F.3d at 377-78; *id.* at 378 (“By the plain terms of § 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime.”); *see also Hunt*, 526 F.3d at 743 (rejecting fair warning challenge to § 1519 in light of clarity of § 1519).<sup>4</sup>

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<sup>4</sup> The Supreme Court recently granted certiorari to consider “whether [the defendant] was deprived of fair notice that destruction of fish would fall within the purview of 18 U.S.C. § 1519, where the term ‘tangible object’ is ambiguous and undefined in the statute, and unlike the nouns accompanying ‘tangible object’ in section 1519, possesses no record-

### 3. Standard of review

A “fair warning” challenge is ultimately one of constitutional due process. *See Desposito*, 704 F.3d at 229; *Velastegui*, 199 F.3d at 593 (“Due process requires that a criminal statute ‘give fair warning of the conduct that it makes a crime.’”) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964)). This Court reviews challenges to a statute’s constitutionality *de novo*. *See Desposito*, 704 F.3d at 229 (citing *United States v. Al Kassar*, 660 F.3d 108, 129 (2d Cir. 2011)); *Velastegui*, 199 F.3d at 593.

Conversely, this Court accepts a district court’s factual findings unless they are clearly

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keeping, documentary, or informational content or purpose.” *See United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013), *cert. granted*, \_\_\_ U.S. \_\_\_, 2014 WL 1659863 (April 28, 2014) (No. 13-7451). The government references *Yates* to the extent that the decision may implicate fair warning in § 1519 generally. Indeed, the government in its response to the petition for certiorari argued—as does the government here—that the plain language of § 1519 provides fair notice that the statute covers the conduct in question. Nonetheless, as the defendant here does not contest whether a police report is a “record, document, or tangible object,” or that the defendant was fairly warned of that fact, it is unlikely that the decision in *Yates* will impact this matter.

erroneous. *United States v. Desena*, 287 F.3d 170, 176 (2d Cir. 2002); *United States v. Rajaratnam*, 719 F.3d 139, 153 (2d Cir. 2013) (“It is an axiom of appellate procedure that we review legal questions *de novo* and questions of fact for clear error.”), *petn for cert. filed*, No. 13-1001 (Feb. 18, 2014). In the context of a motion to dismiss the indictment, the Court must consider only the facts alleged in the indictment, and must “draw[] all favorable factual inferences for the government.” *United States v. Walsh*, 194 F.3d 37, 49 (2d Cir. 1999).

Where a particular argument is not raised to the district court, this Court reviews only for plain error. *See United States v. Marcus*, 560 U.S. 258, 262 (2010) (“[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant’s substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”) (citations and internal quotations omitted); *see also United States v. Crandall*, \_\_\_ F.3d \_\_\_, No. 12-3313, 2014 WL 1386650, at \*3 & n.4 (2d Cir. Apr. 10, 2014).

## **B. Discussion**

- 1. The defendant had “fair warning” that his use of excessive force would expose him to criminal liability.**
  - a. The illegality of the defendant’s firm shove was fairly warned of under pre-existing law.**

In firmly shoving a compliant, retreating, and handcuffed prisoner backward into a cement cell, the defendant in this case violated Pedro Temich’s right to be free from unreasonable force. That right was “fairly warned of, having been ‘made specific’ by the time of the charged conduct.” *United States v. Lanier*, 520 U.S. 259, 267 (1997). Indeed, the defendant admitted as much in his trial testimony:

Q. Okay. You would agree that Meriden police officers, like yourself, they can’t use excessive force, right?

A. Yes.

Q. All right. And like any police officer, you’re subject to the Constitution. You agree with that, right?

A. Yes.

Q. You can only use that force, like any other officer, that’s reasonable under the

circumstances. You would agree with that, right?

A. Yes.

Q. And you would agree that it's common knowledge amongst police officers that if they use excessive force that the FBI might investigate it? That's well known to them, right?

A. Yes.

GA560-GA561. The defendant correctly conceded that whether a particular use of force is reasonable depends on the surrounding circumstances. *See Graham v. Connor*, 490 U.S. 386, 397 (1989). On appeal, the defendant goes even further, acknowledging that "*Graham* is known by all municipal officers as it has applied to almost every municipal use of force case since 1989 and has set the standard for every police use of force policy and training." Def. Br. at 13.

In fact, this Court need go no further than *Graham* to find fair warning that the defendant's specific conduct would subject him to criminal liability. Given the defendant's admitted familiarity with *Graham*, this Court can also assume his understanding that his right to use force is cabined by certain considerations. *Graham* makes clear that an officer must pay "careful attention to the facts and circumstances of

each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” 490 U.S. at 396. Thus the defendant can claim neither lack of fair warning of Temich’s right to be free from unreasonable force, nor that he was unaware that his right to use force was limited to those circumstances involving, among other situations, an immediate threat to his safety, or active resistance or flight.

Moreover, following the instruction of *Graham*, the defendant cannot express surprise that a “push or shove” may subject him, in certain circumstances, to criminal liability. In crafting its standard of “reasonableness at the moment,” the Court observed that:

Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

*Id.* at 396-97 (internal quotations and citations omitted). It is self-evident, then, that if “not every push or shove” is unreasonable, there are by extension some pushes and shoves that are. The contours of that distinction are precisely what *Graham* intended to set. As one district court, relied on by the district court here, explained: “Just because a tool has legitimate law enforcement purposes does not mean that it cannot be used in a manner that constitutes excessive force. Context matters.” JA26 (quoting *United States v. Praisner*, No. 3:09CR264 (MRK), 2010 WL 2574103, at \*1 (D. Conn. Apr. 27, 2010) (Mark R. Kravitz, J.)).

Applied to this case, the indictment charged the defendant with conduct that, if true, plainly violated Temich’s Fourth Amendment rights under *Graham*, and thus was fairly warned of by pre-existing law. The indictment alleged that the defendant “firmly shoved” an intoxicated, handcuffed, and compliant Temich backward into a cell. *See* JA17-JA19. The defendant’s actions as charged in the indictment were not in response to any immediate threat or attempt by Temich to flee. JA17-JA19; *Graham*, 490 U.S. at 396. The indictment then further alleged that the defendant falsely claimed on his police report that his shove was in response to an immediate threat from Temich. JA18-JA19. This unprovoked firm

shove, with such force so as to cause a deep cut on Temich's head, was clearly not justified by any of the *Graham* factors; thus the defendant was fairly warned that such conduct would violate Temich's rights.

**b. The defendant's argument misstates fair warning doctrine and inappropriately recasts the facts to his benefit.**

The core of the defendant's argument on appeal appears to be that, viewing the facts most favorably to the defendant, there are no "closely analogous" cases that would have given the defendant fair warning of the illegality of his conduct. *See* Def. Br. at 7 ("The Court should have considered black letter law in closely analogous cases . . . .") and 7-11 (interpreting evidence to credit the defendant's self-defense theory). There are two critical flaws with this argument: it is a misstatement of fair warning doctrine, and it misunderstands the set of facts on which a district court should assess fair warning.

First, although the defendant ostensibly pays homage to *Lanier* and *Hope*, he nonetheless ignores a central aspect of their holdings; that is, that there need be neither a "fundamentally similar," *Lanier*, 520 U.S. at 269, nor a "materially similar," *Hope*, 536 U.S. at 741, precedent in

order for a defendant to be fairly warned of the illegality of his conduct. In a thinly veiled attempt to circumvent the Supreme Court's holdings, the defendant avers that he "is not claiming there must be an 'exact case' but that the fair warning analysis requires consideration of 'closely analogous' case law." Def. Br. at 41-42. The defendant then repeats this new standard several times throughout his brief, calling it error for the district court not to have considered the existence of closely analogous cases. *See, e.g.*, Def. Br. at 7, 14, 17, 42, and 44.

The defendant does not identify any differences between the "closely analogous" standard, which he seemingly adopts by fiat, and the standards conceived of by the Sixth and Eleventh Circuits that were later soundly rejected by the Supreme Court. Moreover, he ignores *Lanier's* allowance that in some cases "general statements of the law" or "a general constitutional rule already identified in the decisional law" may be sufficient to provide fair warning, even where "the very action in question has [not] previously been held unlawful." 520 U.S. at 271.

For ordinary cases, *Graham* provides just such a "general statement of the law" or "general constitutional rule" that puts the defendant on notice that he could not gratuitously shove a handcuffed and compliant prisoner backward in-

to a cell. *Graham* provided the defendant with a clear statement of the factors to consider when deciding to use force; none of those were present here.

The defendant inaptly cites *Saucier v. Katz*, 533 U.S. 194, 208-09 (2001), as a “closely analogous” fact pattern in which the defendant officer was not fairly warned that a violent shove could expose him to prosecution. However, *Saucier* was far from the ordinary case; indeed, the defendant there was a military police officer engaged in a protective detail for the Vice President of the United States, and was facing an uncertain and rapidly evolving situation involving a potential threat against the Vice President. *Id.* This defendant was within a police station with a compliant and defenseless prisoner, and gratuitously shoved him into a cell. This was an obvious violation of the *Graham* standard.

Perhaps aware of the futility of arguing that an officer would not be on notice that he cannot shove a defenseless prisoner backward into a cell without provocation, the defendant on appeal attempts to recast the trial evidence in a manner consistent with his claim of self-defense—a claim that was soundly rejected by the jury. In so doing, he conflates the application of the fair warning doctrine with an analysis of the “reasonableness” of his conduct. The former is a legal analy-

sis of whether, at the time of the defendant's conduct, the law provided notice that his "*alleged* treatment of [the victim] was unconstitutional." *Hope*, 536 U.S. at 741 (emphasis added). The latter, conversely, is an element of the offense to be determined by the jury based upon the trial evidence, that is, whether the defendant's actions were "objectively reasonable" in light of the facts and circumstances confronting him at the time. *Graham*, 490 U.S. at 397.

To further confuse matters, the defendant made his fair warning challenge to the district court both as a motion to dismiss and—at least by its caption—as a Rule 29 motion for acquittal. The district court, noting the incongruity of making a fair warning challenge in a Rule 29 context, split the defendant's post trial motion into two parts: a renewal of the motion to dismiss on grounds of fair warning, and a Rule 29 sufficiency-of-the-evidence challenge on the issue of reasonableness.<sup>5</sup> *See* JA27. On appeal, however, the defendant "appeals from the trial and post trial (sic) rulings . . . denying Defendant's motions for

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<sup>5</sup> Federal Rule of Criminal Procedure 29 requires that "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."

judgment of acquittal based on a lack of “Fair Notice” of the charged offenses.” Def. Br. at 1. Put differently, the defendant re-conflates his post-trial argument.

If, as the defendant claims, his challenge is to the lack of fair warning, it should be interpreted as a motion to dismiss the Indictment on the grounds that the statute, as construed, is unconstitutional. *See Desposito*, 704 F.3d at 229 (interpreting fair warning argument as challenge to a statute’s constitutionality). In that event, the defendant should be limited to the facts set forth in the Indictment or, even more specifically, the Indictment’s description of the alleged right infringed by the defendant. *See Lanier*, 520 U.S. at 267 (“[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.”); *Walsh*, 194 F.3d at 49 (in the context of a motion to dismiss the indictment, the Court must consider only the facts alleged in the indictment, and must “draw[] all favorable factual inferences for the government”). As discussed above, this defendant’s fair warning challenge, limited to the facts of the Indictment, clearly fails in light of the reasonableness factors set out in *Graham*.

Indeed, logic dictates that a fair warning challenge must be limited to the facts in the in-

dictment. To hold otherwise would convert every factual sufficiency challenge into a constitutional issue, *i.e.*, every defendant could claim that because the evidence failed to prove that he violated the law, he could not be on notice that his actions could have violated the law. In fact, this defendant would have this Court take that untenable situation one step further; under this defendant's argument, not only would each defendant be entitled to a constitutional fair warning argument, he would be entitled to interpret the evidence to his benefit. *See* Def. Br. at 7-11. Such a regime would permit the defendant to avoid the "heavy burden" placed on a defendant's sufficiency challenge, *see United States v. Lee*, 723 F.3d 134, 143 (2d Cir. 2013) (internal quotation marks and citations omitted), *cert. denied*, 134 S. Ct. 976 (2014), by instead reframing the issue in due process terms. *See Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (explaining that due process requirements are not "designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited").

If, however, the defendant's principal challenge is to the government's version of the facts,

it should be construed as an attack on the sufficiency of the evidence against him on the element of reasonableness, rather than a challenge to the lack of fair warning. In that case, however, a court credits “every inference that could have been drawn in the government’s favor,” *United States v. Reifler*, 446 F.3d 65, 94 (2d Cir. 2005), such that “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Lee*, 723 F.3d at 143 (internal quotations omitted). In either event—whether made in terms of a fair warning or a sufficiency challenge—the defendant’s restatement of his discredited self-defense argument, *see* Def. Br. at 7-11, is wholly irrelevant to the extent that it draws inferences in the defendant’s favor.

**c. Although not expressly made by the defendant, a sufficiency challenge would fail as well.**

Even if this Court were to follow the district court’s lead and attempt to bifurcate the defendant’s argument into both a fair warning and a sufficiency component, it would find—crediting all inferences in the government’s favor—that there was sufficient evidence to support the jury’s conclusion that the defendant acted unreasonably. In instructing the jury on the element

of reasonableness, the district court specifically enumerated the *Graham* factors:

In this case, if you find beyond a reasonable doubt that the defendant used force against Mr. Temich, you must then determine whether the Government has proved that the force he used was unreasonable. In other words, you must determine whether the defendant used more than an amount of force reasonably necessary to accomplish a legitimate law enforcement purpose such as holding Mr. Temich in custody, preventing his escape, or defending himself or another against bodily harm. In making this determination, you should consider all the circumstances from the point of view of an ordinary and reasonable officer on the scene at that time.

GA724-GA725. At trial, the government argued that the defendant acted violently toward a compliant prisoner without provocation, while the defendant testified that he acted in self-defense. In finding the defendant guilty, the jury necessarily rejected the defendant's claim, that is, that he acted in response to a perceived threat from Temich.

First, the jury could reasonably have concluded that Temich was passive and nonviolent

throughout his initial interaction with the defendant. Elismari Ballester, whose car Temich had apparently just hit, described Temich as visibly intoxicated to the point that he “couldn’t even . . . stand up straight on his own two feet.” GA66. Ballester opined that Temich was a “happy drunk” and did not appear to be someone who would get physical. GA67. Likewise, Andrea De La Luz, whose husband translated the defendant’s conversation with Temich, testified that Temich “could hardly stand up,” GA102, and that it was the defendant and the other officers who threw Temich down and hit him repeatedly without provocation, GA101-GA106, GA116-GA117. Ballester testified that Temich may have resisted entry into the defendant’s car, but she maintained that “I don’t remember seeing him get physical or anything. I think he was too intoxicated to even try to do that.” GA81.

In light of the testimony of Ballester and De La Luz—neither of whom had any particular fealty to Temich or the government—the jury could reasonably have then rejected the version of the same events given by the defendant and Officer Selander. Both the defendant and Selander testified that it was Temich who became aggressive when he realized he was under arrest, and that he continued that aggression through the point he was forced into the defend-

ant's police car, including banging his head and body off the glass of the passenger compartment. GA449-GA454, GA521-GA527, GA571-GA574. In addition to the obvious conflict with the unbiased testimony of Ballester and De La Luz, the officers' testimony was suspect for several other reasons. First, while the defendant's interest in the outcome of the case is self-evident, Selander worked with the defendant, whose father—the Meriden chief of police—was sitting in the audience as Selander testified. GA463. A jury could reasonably have taken such a factor into account in assessing potential bias. Second, a jury could have reasonably discounted Selander's testimony because of an apparent bias against Mexicans. GA467.

Third, and most significantly, the defendant's and Selander's purported concern over Temich's aggression and their own safety was belied by their calm over the police radio. GA763-GA764, GA768-GA769. In one call, Selander asked dispatch to "[r]oll one unit with the flow. We got one under. We got a crowd forming." GA764. Dispatcher Janet Roller testified that this meant that she should send another police car, but without lights and sirens, *i.e.*, not driving as fast as possible. GA147-GA148. She also explained that "one under" meant that the suspect had already been placed under arrest. GA148. Selander-

er's voice appeared neither excited nor loud. *See* GX24-12. Likewise, when the defendant returned to the MPD with Temich, he did not ask for assistance from any other officer, nor did he warn anyone in the police station of a potentially volatile prisoner. GA767-GA768, GX24-15, GX24-16, GA149-GA150, GA564, GA583-GA585. In sum, the jury could reasonably have concluded that when the defendant reached the police station, he had no reason to believe that Temich was inclined in any way to be violent.

Similarly, the jury could have also reasonably concluded that Temich was compliant and passive from the time he exited the defendant's police car until the time that the defendant shoved him into the holding cell. Indeed, the jury had more than ample evidence from which to draw such a conclusion. According to surveillance inside the sally port, the defendant escorted a visibly compliant and handcuffed Temich from his police cruiser, through the sally port, and into the MPD. GX1A. The jury could easily have inferred that any delay in Temich exiting the police car was the result of his profound intoxication, rather than any refusal of the defendant's commands. Indeed, the defendant makes no motion to go inside the police cruiser to retrieve Temich. Moreover, the video shows no aggressive movement by Temich at all as he is escorted

by the defendant toward the door to the police station—in fact the video at that point is notable primarily for the way in which it casts in sharp relief the vast size advantage of the defendant. The same video then shows the defendant continuing to escort the compliant and handcuffed Temich to a location immediately in front of the holding cell door. *See* GX1A.

The jury then had the benefit of a separate time-stamped video that picked up the defendant and Temich from inside the holding cell. *See* GX1B. That video, seen in a light most favorable to the government, revealed a subdued and handcuffed Temich slowly walking backward, when the defendant entered the cell and—with no apparent provocation—forcefully shoved him, thereby causing Temich to fall backward and strike his head. In light of the video, the jury could reasonably have rejected the defendant’s testimony that Temich pulled away from him and spun around; that the defendant ordered him back three or four times; that Temich then invaded the defendant’s personal space, tensed his body, and dropped his head; and that the defendant was in fear for his personal safety. *See* GA536-GA538, GA552-GA555, GA578-GA579.

In addition to being blatantly inconsistent with the events seen on the video, the defendant’s testimony was also contradicted by the vid-

eo's time stamp. Simply put, the defendant could not have done and experienced all of the things alleged—including yelling three or four commands—within the one or two second allowed by the surveillance footage. *See* JA30. Likewise, the jury could reasonably assume that if the defendant were really screaming at Temich in front of the holding cell, Sergeant John Mennone, who was standing in an area not far from the holding cells, would have heard it. GA375-GA377, GA390-GA392.<sup>6</sup> Then, after the shove, the jury could have concluded that the defendant's repeated manipulation of Temich from a supine to a seated position reflected his intention to cover up an act that he knew was wrong.

Finally, the jury could also have reasonably used the defendant's false police report to discredit his testimony and as evidence reflecting a consciousness of his use of unreasonable force. For example, the videotape showed Temich retreating into the cell when the defendant pushed him. The defendant's report claimed that Temich

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<sup>6</sup> As the district court noted, *see* JA30, Sergeant Mennone recanted his grand jury testimony, in which he testified with certainty that he would have heard a dispute outside the holding cell. *See* GA392. The jury could easily have accepted his grand jury testimony, though, over his more equivocal trial testimony.

“advanced on me so I gave him a firm push back.” JA108. At trial, Cossette attempted to resolve this inconsistency by contending that the videotape was at such an angle that the viewer could not appreciate what he saw at the time of the event. GA540. Nonetheless, based on the video, a jury could reasonably have concluded that Temich did not go toward the defendant or ignore his verbal commands. A jury could further have reasonably concluded, based on viewing the video themselves, that it was the defendant, not Temich, who was the aggressor and that his report is a fabrication designed to cover-up his excessive force. The jury could then reasonably draw the inference that since the video did not support the version of events presented by the defendant in his report it was a falsified report. Thus, the report is both consciousness of guilt—that the defendant used excessive force—and obstruction of justice under § 1519.

In sum, viewing the evidence as to reasonableness with “every inference that could have been drawn in the government’s favor,” *Reifler*, 446 F.3d at 94, it is clear that a “rational trier of fact” could have concluded that the defendant used force against Temich without any of the justifications allowed him by the law. The defendant’s claims on appeal to the contrary are nothing more than an attempt to force this Court

to invade the jury's province and to find the facts for itself. See *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999).

**2. The defendant was likewise fairly warned of the illegality of his false police report.**

Section 1519 implicates none of the same fair warning issues that emanate from § 242's reliance on external sources for its content. While it is still true that "[d]ue process requires that a criminal statute give fair warning of the conduct that it makes a crime," *Velastegui*, 199 F.3d at 593 (citations omitted), § 1519 is clearly worded and, in the context of the challenge offered by the defendant here, unambiguous. *Gray*, 642 F.3d at 378 ("By the plain terms of § 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime."). Since the statute is clear on its face, any fair warning challenge must fail. *Desposito*, 704 F.3d at 230 ("[I]f the statutory language alone provides clear notice that certain conduct is illegal, Due Process is satisfied and the government may prosecute such activity without waiting for every conceivable challenge to a law's validity."). Thus the Court need not even proceed to a discussion of the facts to resolve the defendant's claim.

The defendant purports to offer two “fair warning” challenges here. First, the defendant renews his claim, made to the district court on several occasions, that if he was not fairly warned that his use of force would be punishable under § 242, he could not—by extension—be fairly warned that a report documenting that force could be the subject of a federal investigation. *See* Def. Br. at 37. As an initial matter, the defendant has again conflated fair warning with an element of the crime to be proven to the jury. If the defendant were not fairly warned of the criminality of his conduct under § 242—that is, if he could not have known that his conduct was illegal—that would affect the proof that the defendant acted “with intent to impede or influence a federal investigation,” *Hunt*, 526 F.3d at 743, because he could not then have contemplated a federal investigation of supposedly innocent conduct. It does not affect due process, *i.e.*, whether the defendant is on notice of the conduct that falls under § 1519. Ultimately either argument fails because, as discussed at length above, the defendant was amply warned that his unprovoked shove would subject him to criminal liability, and thus a jury could reasonably have concluded that he falsified his report in contemplation of an investigation into such an incident.

The defendant's second argument, made for the first time on appeal, is that the state of the law at the time of the defendant's false report "would not have put [the defendant] on notice that his challenged comments in the paragraph at issue would result in a prosecution under the statute." Def. Br. at 37. The core of the defendant's argument here seems to be that the law prior to this Court's ruling in *Gray* did not put the defendant on notice that § 1519 did not require a nexus to an actual federal investigation. *See id.* Not only did the defendant fail to raise this issue below, he specifically agreed with the district court's pronouncement that "the law in the Second Circuit . . . doesn't require that there be a nexus to a specific investigation or prosecution." GA836. Thus this Court, if it is inclined to consider the argument at all, should do so only for plain error. *See Marcus*, 560 U.S. at 262.

Here, there is no error, much less a "clear and obvious" error. Contrary to the defendant's argument on appeal, *Gray* was not a watershed event that reinterpreted a statute in an unforeseeable manner, but rather an acknowledgement that the plain language of § 1519 neither required a nexus to an actual federal investigation nor even the existence of such an investigation. *Gray*, 642 F.3d at 377-78. Indeed, although this Court engaged in a review of legislative history

on the subject, it did so only after acknowledging that the plain language of the statute made such a review unnecessary. *Id.* at 377. Thus because *Gray* was nothing more than an affirmation of the plain language of the statute, it is irrelevant that it was decided after the defendant’s conduct—the statute itself was sufficient to provide fair warning. *See Desposito*, 704 F.3d at 230.

Nor do the cases offered by the defendant augur for a different result. First, the defendant speciously claims that *United States v. Perez*, 575 F.3d 164 (2d Cir. 2009) reflected the “pertinent law” at the time of the defendant’s conduct and that it required a nexus to an existing case. Def. Br. a 37. Neither the case nor the statute is instructive here. *Perez* involved a sufficiency challenge to a conviction under 18 U.S.C. § 1512(c)(2), not § 1519. Section 1512(c)(2) requires that a defendant “obstruct[], influence[], or impede[] any official proceeding.” *Perez* turned on the definition of “official proceeding,” and specifically whether the Bureau of Prisons’ review panel for use of force qualified as such. 575 F.3d at 169. Critical to this Court’s holding that the review panel was an “official proceeding” was its “quasi-adjudicative” function, *i.e.*, that it was more than simply a “preliminary investigation.” *Id.* While *Perez* did not directly focus on the issue of nexus, the government agrees that it

assumed one was required—indeed, such a nexus requirement in § 1512(c)(2) had been settled by *United States v. Reich*, 479 F.3d 179, 185-86 (2d Cir. 2007).

Although also a part of the Sarbanes-Oxley Act of 2002, the statute violated by the defendant here, § 1519, does not make any reference to an “official proceeding.” Rather, it requires only that the defendant act 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 in relation to or contemplation of any such matter or case . . . .” As this Court explained in *Gray*, unlike with other provisions of Sarbanes-Oxley, “§ 1519 makes no specific reference to a judicial or other proceeding. The defendants’ [nexus] argument therefore conflicts with the plain meaning of § 1519.” 642 F.3d at 376-77 (internal quotations omitted). Likewise, “[b]y the plain terms of § 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime,” and “§ 1519 does not require the existence or likelihood of a federal investigation.” *Id.* at 378-79.

The defendant also inaptly relies on the *dicta* from a 2007 district court case, *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn. 2007).

The defendant cites to *dicta* in *Russell* that there was “little doubt” a nexus requirement applied to § 1519; however, that part of the opinion resolved only whether, assuming the existence of such a requirement, it need to be plead in the indictment (it did not). *Id.* at 234-36. Even if the *dicta* in *Russell* had not been supplanted by this Court in *Gray*, the case would still have provided no support for the defendant’s argument. Indeed, the defendant seemingly ignores the remainder of the *Russell* opinion, which specifically rejected a fair warning challenge and held that the nexus requirement does not imply that a federal investigation must have been underway, but only that such an investigation was “foreseeable” by the defendant. *See Id.* at 239. The court explained:

Based on this common understanding of “in relation to” and “in contemplation of,” a person of ordinary intelligence is given a reasonable opportunity to understand that destroying a tangible object with the intent to obstruct a federal investigation, or doing so with reference to, or with the purpose of effecting, a federal investigation, or in anticipation of, or envisioning, such an investigation, is prohibited, but that doing so coincidentally is not. Thus, because the allegations in the indictment indicate that Russell’s destructive act was

done with the purpose of effecting, or with an expectation that, a federal investigation might ensue, his alleged conduct falls within the prohibitions of the statute and it is not void for vagueness as applied.

*Id.* at 240. Thus whatever “nexus” requirement existed in *Russell*, it certainly did not imply that the defendant had to be aware of an existing federal investigation, but only that he act “in contemplation” of one that “might ensue.” This was consistent with another contemporaneous case from the District of Connecticut. *See United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 329 (D. Conn. 2007) (“In comparison to other obstruction statutes, § 1519 by its terms does not require the defendant to be aware of a federal proceeding, or even that a proceeding be pending.”).

Ultimately, the jury’s guilty verdict reflected a finding that that the defendant acted at least in contemplation of a potential federal investigation. Consistent with the holdings of *Gray*, *Ionia Mgmt S.A.*, and *Russell*, the district court instructed:

The Government is not required to prove that an investigation was ongoing or imminent at the time the defendant acted. The Government is only required to prove that the defendant acted in contemplation

of a potential investigation. The Government also is not required to prove that the defendant knew his conduct would impede, obstruct, or influence an ongoing or potential federal investigation of a matter, or that the defendant knew the matter was within the jurisdiction of a federal agency.

GA730. Among the support offered by the government for this element were the defendant's own words, when he agreed that "it's common knowledge amongst police officers that if they use excessive force that the FBI might investigate it." GA561. Similarly, Sergeant Mennone, a use-of-force instructor at the MPD, agreed that "[i]n instruction at the [MPD], officers [are] made aware of the possibility of, specifically, federal criminal liability, among other liability, for civil rights violations." GA362-GA363. Captain Patrick Gaynor, another MPD supervisor, also testified about training at the Connecticut Police Officer Standards and Training ("POST") academy that included learning that the use of excessive force could expose an officer to federal or state criminal liability. GA188-GA189. This is consistent with Government Exhibit 28, a curriculum for a POST course at the time of the defendant's attendance, which included "[i]dentify federal and state statutes that relate to civil and criminal liability of local law enforcement offic-

ers.” JA114.<sup>7</sup> Thus the jury could reasonably have concluded that when the defendant chose to lie on his police report, he did so with the intent to obstruct or impede a potential federal investigation—in addition to whatever other departmental inquiry he may also have sought to thwart.

Finally, in addition to his two core arguments, the defendant infuses his brief with an unsupported policy argument that “[p]rosecution of Officer Cossette would be contrary to public interest and the purposes of qualified immunity.” Def. Br. at 27. The defendant unconvincingly argues that if we punish him for a “single mistake” or “split second decision,” prospective law enforcement officers will be dissuaded from this career given the alleged risk of federal prosecution. *See* Def. Br. at 44-45. Most vexingly, the defendant avers that “[i]t is fundamentally unfair to impose a grossly disproportionate punishment

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<sup>7</sup> The defendant’s appellate counsel gratuitously inserts himself into this matter by recounting his own role in the creation of the POST curriculum. Def. Br. at 32 n.1. The defendant certainly could have called his counsel to testify at trial, as he did not represent the defendant at the time. Regardless, counsel’s self-serving claim is not part of the record and conflicts with the defendant’s own testimony that he understood the possibility of a federal investigation.

on a police officer than on a citizen for the very same act.” Def. Br. at 34. These arguments not only reflect a self-serving version of the facts of the case, but they also assume that the law should impose a lower burden on law enforcement officers than on the general public. In truth, as the government said in its closing argument:

This case is about holding police officers, with whom we entrust our safety and our liberty, to a high standard, a high standard that says you don’t get to use force without justification, a high standard that says you can’t lie about it afterwards, and a high standard that says you have to treat everybody, no matter who they are, where they’ve come from, with the same amount of respect.

GA614. The defendant did not act in a split second on the street under difficult circumstances. Rather, he gratuitously shoved a defenseless prisoner. No recruit who is worth making a police officer will be deterred by knowing that the defendant’s unjustified actions were found to be criminal.

## Conclusion

For the forgoing reasons, the judgment of the district court should be affirmed.

Dated: May 2, 2014

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,334 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in blue ink, appearing to read "Paul H. McConnell".

PAUL H. McCONNELL  
ASSISTANT U.S. ATTORNEY

## **Addendum**

## 18 U.S.C. § 242

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**

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.

## **U.S. Const. Amend. 4**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.