No. 03-2019

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

RICHARD J. SCHNEIDERHAN
Defendant-Appellant

On Appeal From a Judgment in a Criminal Case
Entered in the
United States District Court
for the District of Massachusetts

Brief for the Appellee

Respectfully submitted,

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231. The Judgment in a Criminal Case was entered on July 10, 2003, and the Clerk entered a timely notice of appeal at the defendant's request on the same day. This Court has jurisdiction over the defendant's appeal from his conviction and sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES

1. Did the district court manifestly abuse its discretion in concluding that the Government did not violate *Brady v. Maryland* or the Jencks Act by failing to disclose pre-trial a letter written by a Government witness, where the essential facts contained in that letter had been otherwise disclosed in pre-trial discovery and the letter did not relate to the witness's trial testimony?

2. Did the district court plainly err, or abuse its discretion, in permitting an FBI agent and a state police officer to testify that an experienced law enforcement agent would be aware that disclosure of confidential pen registers to the targets of such surveillance would compromise an ongoing investigation?

3. Did the district court plainly err in imposing an 18-month sentence in light of *Blakely v. Washington*, where the circuits are presently divided over the applicability of that decision to the U.S. Sentencing Guidelines, and where the district court would have been required in any event to run the defendant's sentences consecutively on his two counts of conviction to achieve the total punishment dictated by the Guidelines?

STATEMENT OF THE CASE

On November 15, 2000, a federal grand jury returned an indictment charging the defendant and others with conspiring to obstruct justice in violation of 18 U.S.C. § 371 (Count 1) and obstruction of justice in violation of 18 U.S.C. § 1503 (Count 2).

On March 10, 2003, a jury trial with respect to the defendant commenced in the United States District Court for the District of Massachusetts (Robert E. Keeton, J.).[1] On March 19, 2003, after brief deliberations, the jury returned guilty verdicts on both counts.

At a sentencing hearing on June 25, 2003, the district court sentenced the defendant to 18 months of imprisonment, to be followed by three years of supervised release, plus a special assessment of $200. *See* A 1-5.[2] Judgment entered on July 10, 2003. At the defendant's request made at the sentencing hearing, the Clerk filed a

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[1]The co-defendants, Edward Duff and Linda Reardon, had already pleaded guilty to obstruction of justice before Senior United States District Judge Edward F. Harrington on July 31, 2001. On October 11 and 30, 2001, respectively, Duff and Reardon were each sentenced to one year of probation.

[2]References are as follows:

Addendum attached to the Defendant's Brief	"A __"
Defendant's Sealed Appendix	"SA __"
Government's Appendix	"GA __"
Trial Transcript	"Tr. [volume]\[page]"
Government's Trial Exhibits	"GE __"
Defendant's Trial Exhibits	"DE __"

timely notice of appeal on July 10, 2003. The defendant remains free on bond.

STATEMENT OF FACTS

This case arose from the efforts of the defendant, former Massachusetts State Police Officer Richard J. Schneiderhan, to obstruct efforts to apprehend fugitive James "Whitey" Bulger, by tipping Bulger's criminal associate that the Federal Bureau of Investigation was engaging in electronic surveillance on the telephones of Bulgers' brothers.

The defendant, a retired officer of the Massachusetts State Police, Tr. 5/26, was a longtime friend of Bulger's criminal associates, Stephen "the Rifleman" Flemmi and John Martorano, who together with Bulger were members of a criminal group known as the Winter Hill Gang. After his retirement, the defendant spent some years working for other law enforcement-related agencies, including an intelligence center called the New England State Police Information Network, and later a purchasing agency known as MassBuy. Tr. 3/166-67; 5/26-28.

In January 10, 1995, a federal grand jury indicted Bulger, Flemmi, and other members of the Gang for a variety of crimes, in a case captioned *United States v. Francis P. Salemme et al.* GE 1. Flemmi was apprehended shortly beforehand on a criminal complaint, but Bulger became (and remains) a fugitive. A fourth superseding indictment issued on July 2, 1996, and added murder charges to those

facing Bulger, Flemmi, and others. GE 3. After Flemmi was imprisoned, the defendant kept in touch with him by letter. At one point, he wrote Flemmi a letter noting that "Things are still very quiet. I did hear that your case wasn't going to come up for another *year*. . . . The reason for the delay in their case is because the 'Other guy' isn't around. Apparently they don't want to make a move until he is available." GA 66 (GE 55). The defendant admitted at trial that the "Other guy" to whom he was referring was James Bulger. Tr. 5/138.

The defendant was also in touch with Kevin Weeks, one of Bulger and Flemmi's criminal associates who was not then in prison. Weeks, now in prison for his activities with the Winter Hill Gang, testified at trial pursuant to a cooperation agreement. Weeks recounted how Bulger and Flemmi used to talk often about a source of theirs in the Massachusetts State Police, whose code name was "Eric." Tr. 3/36. According to Bulger, "Eric" was "Stevie's guy," and "had saved our ass a hundred times." Tr. 3/37. One day in the spring of 1997, while Weeks was visiting Flemmi at the Plymouth jail, Flemmi held up a note through the glass and asked Weeks to contact "Eric" at a specified phone number, to ask for "Dick," and to say he was a friend of "Paul." Tr. 3/41-42. Weeks called the number, and arranged to meet "Eric" at night in a parking lot. Tr. 3/45-46, 3/63. When Weeks arrived that night, he was greeted by the defendant, Richard Schneiderhan. Weeks testified that

the defendant referred to Weeks by the code name "Max," and used the beeper code "131313" to page him. Tr. 3/56-58.

The defendant and Weeks met in the same way perhaps a dozen times over the following year and a half. Tr. 3/52. At these night meetings, Weeks and the defendant discussed Flemmi and Bulger's criminal case, Tr. 3/55-64, and the defendant tried help Flemmi through Weeks. At one point, at a time when Flemmi and his co-defendants were moving to suppress critical wiretap evidence against them, Weeks asked the defendant to find out whether a particular individual had been a confidential informant for law enforcement. Tr. 3/50-51, 3/64. The defendant agreed to contact his counterpart at a Rhode Island law enforcement agency. Tr. 3/51. At another point, again at Weeks' request, the defendant gave Massachusetts State Police letterhead to Weeks. Tr. 3/69-70. Weeks testified that he had sought the letterhead at the behest of a corrupt FBI agent, John Connolly, who would later be convicted of various charges, including obstruction of justice for leaking information about the Bulger indictment. Tr. 3/69. Still, during this time the defendant wrote to Flemmi in prison that "I'm getting a little frustrated because I can't help much." GA 67 (GE 55); Tr. 6/156.

After Bulger became a fugitive, the Government took steps to locate him, so that he could stand trial on his federal charges. In August 1999, the FBI placed

Bulger on its Top Ten Most Wanted List, and adopted a broad investigative strategy aimed at ascertaining his whereabouts. GA 6. As part of this effort, in September 1999, the United States Attorney's Office, working with the FBI, obtained sealed court orders authorizing the installation of pen registers on three telephones listed to two of Bulgers' brothers, William and John Bulger. Tr. 2/47-54, GA 35-51. A pen register records the numbers of all outgoing calls placed from a monitored phone. Tr. 2/44, 2/106. Unlike a wiretap, a pen register does not enable agents to eavesdrop on the content of calls. Tr. 2/45. In order to install the pen registers, the FBI needed the local telephone company to identify particular switch boxes through which the target telephone lines passed. Tr. 2/108-110. A physical pen register device would then be installed in that box, and the intercepted data would be transmitted to the FBI across a separate phone line installed in that box on behalf of the FBI. Tr. 2/110, 115-117. As a matter of course, the FBI transmitted work orders to the local telephone company, seeking installation of telephone lines in switch boxes through which the identified telephone numbers passed. Tr. 2/126.

The defendant's niece, Linda Reardon, worked at the local telephone company in the department that dispatched work orders for the South Boston area, where each of the target telephones was located. Tr. 2/132-33. At trial, the Government produced copies of the work orders that would have been viewed by Reardon at her computer

terminal. GA 52-58 (GE 14, 15). Although those work orders did not specify that they were for "pen registers," they did note the target telephone number, that the person who requested the work was "Ted Baker at FBI," and that the phone company should not notify the subscriber of the identified telephone number about the requested work. Tr. 2/134-38.

While the FBI was working to install the various pen registers between September 23 and October 10, 1999, Tr. 2/118-22, the defendant was leaking their existence to the Bulger brothers. Weeks testified that on a Thursday in late September 1999, he received an envelope that the defendant had dropped off for him at the Rotary Variety store in South Boston, which Weeks was known to frequent. Tr. 3/71. Inside the envelope was a typewritten note, saying that one Tom Baker had put wiretaps on two phones in South Boston the day before, relating to William Bulger and John Bulger, and listing two telephone numbers. Tr. 3/74-75. At the bottom of the note was typed "131313 Max." Tr. 3/76. Weeks immediately tracked down John Bulger, who looked at the note and confirmed the accuracy of the telephone numbers. Tr. 3/81-83. With John Bulger standing nearby, Weeks then placed a call from a nearby pay phone to the defendant, who confirmed that those were the only two numbers he had received. Tr. 3/83-85.

Kevin Weeks was eventually arrested for crimes relating to the Winter Hill

Gang, and entered into a cooperation agreement. Tr. 3/161-163. Based on information provided by Weeks and others, Major (then Captain) Thomas Duffy and Colonel (then Major) Thomas Foley of the Massachusetts State Police went to the defendant's house to interview him on April 11 and 13, 2000. Both Colonel Foley and Major Duffy testified at trial about these conversations.

During the initial interview, the defendant stated emphatically that Stephen Flemmi was his "friend." Tr. 3/167, 4/133-34. He acknowledged corresponding with Flemmi in prison using false names, Tr. 3/172-73, 4/134-35, and meeting Kevin Weeks on several occasions at a golf range, Tr. 3/174. He repeatedly said, "it was over," and anticipated that when he would tell his wife of forty years about the officers' visit, she would ask him to leave. Tr. 4/8, 4/139-41. The officers confronted the defendant with Weeks' accusation that he was the source of wiretap information, but purposely left out specifics. Tr. 4/9-10. Initially, the defendant simply responded, "How would I have had that information? I wouldn't have known that." Tr. 4/9, 4/138-39. At a later point in the conversation, however, the defendant mentioned that the Bulgers had been the subjects of the leaked electronic surveillance — even though the officers had not told him so. Tr. 4/17, 4/138-39. When asked how he knew that the Bulger brothers' phones were the targets, the defendant first responded that the officers had said so, but quickly backtracked and claimed that he

had simply "assumed" that to be true. Tr. 4/17-18, 4/138-39. The officers eventually left that night, parting on cordial terms. Tr. 4/23.

Two days later, Colonel Foley and Major Duffy returned to the defendant's home, and in the presence of his wife, informed him that they regarded his answers during the prior interview as untruthful. Tr. 4/26. His attitude now seemed "defeatist," *id.*, and when his wife asked what sort of charges he might face, it was the defendant who answered first: "obstruction of justice." Tr. 4/28, 4/142-43. After long discussions, and while his wife pleaded with him to just tell the truth, Tr. 4/143, the defendant gradually revealed a portion of the true story. He eventually admitted delivering a typed note to Kevin Weeks at the Rotary Variety store, indicating that the Bulgers' phones were the target of electronic surveillance, and he also admitted that he had signed the note with the name "Max" and the code "1313." Tr. 4/35, 4/147. He further confessed that he had received the telephone information from his brother-in-law, Edward Duff, Tr. 4/41, 4/146, who was Linda Reardon's father, Tr. 4/92-94.

Letters seized from the defendant's house attested to his longstanding friendship with Stephen Flemmi. The defendant would refer to Flemmi by the code names "Paul" or "Sarge" (Flemmi was a Korean War veteran), and signed himself as "Lefty." In a letter to be opened in the event of his death, the defendant commended "Paul" to his son as "one of the few people in this world that you can trust." GA 59.

The defendant warned his son, "when you talk with him, his name is 'Paul,' your name is 'Lefty.' Never use anybody's real name." *Id.* The defendant left a letter for Flemmi himself, confiding that "I have a lot of guys that may feel they are 'friends' but to be honest you and Johnny M. are the only guys that I feel I can really count on." GA 64, 4/151-53. The defendant signed as "Lefty (or Eric or 131313)." *Id.*

The defendant testified. He admitted knowing Flemmi since they were children, and corresponding with him in prison using fake names such as "Richard DeGerman" so that anyone monitoring Flemmi's mail could not identify him. Tr. 5/33-34, 6/58. He admitted that Kevin Weeks had contacted him at Flemmi's behest, and that he had agreed to meet Weeks on a number of occasions in parking lots at a local mall and the golf range. Tr. 5/41-49. The defendant was aware that Weeks had been associated with James Bulger, Tr. 5/44, and admitted using the code name "Max" for Weeks, Tr. 5/143.

He confirmed that he had received the electronic surveillance information from his brother-in-law, Ed Duff; that he had been told it came from his niece Linda Reardon; that he had relayed that information to Kevin Weeks in a typewritten note dropped off at the Rotary Variety, which stated that "they" were tapping the phones of William and John Bulger; and that he both wanted and expected Weeks to pass this information to the Bulger brothers. Tr. 5/49-50, 6/32-33, 6/126-27. The defendant

conceded that his disclosure had been deliberate, not merely accidental or even reckless. Tr. 6/27. He claimed, however, that the note had not contained the name Ted Baker or any particular telephone numbers. Tr. 5/50. The defendant offered a number of reasons for having left the note. Initially, he claimed that he had decided to meet with Weeks, in hopes of learning James Bulger's whereabouts and thereby earn the $1 million reward for Bulger's capture. Tr. 5/45. He later said that he left the note to throw Weeks "a bone" – to string him along. Tr. 5/55. On cross-examination, however, the defendant said that his testimony about the reward had only been "facetious," Tr. 6/15-17, and that his testimony about meeting Weeks in hopes of catching Bulger was only "sarcastic," Tr. 6/129. In fact, as the Government pointed out, the $1 million reward for Bulger's capture was not put into place until *after* the defendant leaked the pen register information in September 1999. Tr. 6/15-18.

The defendant offered two additional, mutually contradictory, reasons for leaving the note. On the one hand, he claimed to have passed it along out of gratitude to William Bulger for his political help ten or fifteen years earlier in preserving an historic Boston church, and because he "didn't want [William Bulger] to get caught up in the foolishness that his brother was involved in." Tr. 5/51-55, 56, 6/35-41. The defendant admitted that he both wanted and expected Weeks to pass along the

information to William and John Bulger. Tr. 6/127. At another point, however, the defendant testified that he had thought the information was worthless "golf course gossip," that he didn't believe there really was electronic surveillance on the Bulgers' phones, that James Bulger didn't talk on phones, and hence that his leak "wasn't going to cause any damage." Tr. 5/56-57, 6/42.

On cross-examination, the defendant admitted that he had repeatedly lied to Colonel Foley and Major Duffy during his interviews regarding the nature and frequency of his visits to the Rotary Variety Store, intending to deceive them. Tr. 6/21-22. He further admitted that he knew exactly what pen registers and wiretaps were, Tr. 5/123, that he had used such electronic surveillance during his career with the state police, Tr. 5/129, and that he had personally been responsible for preparing wiretap applications, Tr. 5/155. He knew from first-hand experience, and in fact had written stories that were introduced into evidence by the defense, that the installation of such surveillance devices entailed a risk of personal safety to the agents. Tr. 5/129-30, DE 10. He admitted knowing the purposes of pen registers and wiretaps, such as identifying intermediaries through whom targets were communicating, or locating where someone might have assets. Tr. 6/25-26. He admitted that police often make their cases by assembling bits and pieces of information gleaned from electronic surveillance. Tr. 6/26. He claimed not to have access to anyone at the state

police to whom he could have spoken about his contact with Weeks and Flemmi, and to have reported the apparent leak of wiretap information from the telephone company. Tr. 6/48. However, a state trooper called as a defense witness later testified on cross-examination that she regularly met with the defendant throughout 1998 and 1999 to discuss the criminal activities of notorious individuals including Flemmi and Martorano from the Boston gangland wars of the 1960s, and that the defendant had never so much as mentioned the fact that he was corresponding with Flemmi, that he was meeting with Weeks, or that he had received information about wiretaps on the phones of James Bulger's brothers. Tr. 7/53-61.

During the defense case, two witnesses with prior law enforcement experience agreed on cross-examination that the leaking of confidential electronic surveillance information — particularly to a target — would seriously compromise an investigation. Tr. 6/172-73, 7/11-12. One of these defense witnesses, who had worked extensively with the defendant during his assignment to the state Attorney General's office, agreed that the defendant was known as an organized crime expert, was regularly the affiant on wiretap applications, and was "very knowledgeable about electronic surveillance, including wiretaps and pen registers." Tr. 7/11-12.

After a few hours of deliberating, the jury convicted the defendant on both counts of the indictment.

SUMMARY OF ARGUMENT

1. The district court did not manifestly abuse its discretion in denying the defendant's new trial motion, based on its claim that a late-disclosed letter by a Government witness was covered by *Brady v. Maryland* and the Jencks Act. The district court properly concluded that the essential facts contained in the letter had already been disclosed in pretrial discovery in the grand jury testimony of William Bulger; that the defendant's failure to use the disclosed information at trial in any way demonstrated the lack of prejudice from the nondisclosure; and that the information in the letter was immaterial to the trial in any event because it only went to the invalid defense of factual impossibility.

2. The district court did not plainly err, or abuse its wide discretion, in permitting an FBI agent and a state police officer to testify that an experienced law enforcement officer would have known that leaking the existence of electronic surveillance to the target of such surveillance would have the effect of compromising the pending investigation. Such testimony does not run afoul of Fed. R. Evid. 704(b), since it relates to the highly relevant, predicate fact of the defendant's knowledge, and does not directly embrace the ultimate issue of his specific intent or purpose to obstruct justice, which is an element of the offenses charged.

3. The district court did not plainly err in determining the defendant's sentence

based on judicial factfinding by a preponderance of the evidence, including a two-level enhancement for committing perjury at trial, in light of *Blakely v. Washington*. *Blakely* should not be held to apply to the U.S. Sentencing Guidelines, and in any event any error is not presently "plain" in light of the sharp circuit split in that regard. Furthermore, even if *Blakely* were held applicable to the Guidelines, and the defendant were subject to a maximum guidelines sentence of 16 months on either count of conviction, his sentences on each of the two counts of conviction would have to run consecutively to the extent necessary to achieve the total Guidelines punishment under U.S.S.G. § 5G1.2, and could do so consistent with the offense-specific Sixth Amendment right to trial by jury.

ARGUMENT

I. The District Court Did Not Manifestly Abuse Its Discretion in Concluding That the Government Did Not Withhold Exculpatory Material in Violation of *Brady v. Maryland*

A. Relevant Facts

One of the Government's witnesses at trial was David Apfel, who had served as an Assistant United States Attorney in Boston from 1994 through 1998, and became involved in the fugitive search for James Bulger. Tr. 2/34-35. Apfel provided basic background testimony about how an indictment commences judicial proceedings, and identified the particular indictments in evidence that charged Bulger and Flemmi with various crimes. Tr. 2/37-42. He also testified that Bulger remained a fugitive, Tr. 2/42, and that Bulger's case had generated extensive publicity, Tr. 2/43-44. He explained the nature of pen registers, described how they are obtained pursuant to court order, explained that they are sealed because maintaining their secrecy is essential to their success, and identified the pen registers at issue in this case, which applied to the telephones of William and John Bulger. Tr. 2/44-54.

On cross-examination, the defense inquired of Apfel about when a criminal complaint was sought for James Bulger's arrest on federal charges, suggested that there was no evidence that Bulger himself was ever made aware of those charges, Tr. 2/58-66, and discussed Bulger and Flemmi's involvement as FBI informants, Tr.

2/69-76. Defense counsel attempted to ask whether the Government had sought pen registers for William Bulger's telephones before September 8, 1999, but the district court excluded those questions as irrelevant. Tr. 2/77-78.

On June 16, 2003, the defendant filed a Motion for New Trial based on what he identified as exculpatory evidence that had not been disclosed to him before trial, and on the claim that it was a "witness statement" discoverable under the Jencks Act. This "evidence" was in the form of a letter written almost a year prior to the events at issue in the instant indictment, which had been sent by then-Assistant United States Attorney Apfel to counsel for William Bulger, Attorney Thomas Kiley. A-26. In that letter, dated October 9, 1998, Apfel advised Attorney Kiley that his client, who was to either give a proffer of information or go before the grand jury, would not be asked questions which were based on information derived from any Title III wiretap, but that questions would be asked based on information obtained from certain unidentified pen register and trap-and-trace devices. *Id.*

It is important to note that irrespective of what William or John Bulger may have known about pen registers, trap-and-trace devices, or other electronic surveillance, Schneiderhan did not claim that *he* had any knowledge in September of 1999 — when he leaked electronic surveillance information to fugitive James Bulger's street lieutenant, Kevin Weeks — of what William or John Bulger knew or

may have known about any of these subjects.

After hearing oral argument, the district court denied the defendant's motion for new trial by memorandum order dated June 27, 2003. A 16. The court began by finding that the Government had provided the defense a complete copy of William Bulger's grand jury testimony before trial, in compliance with Fed. R. Crim. P. 16 and the Local Rules. A 22. The court held that this disclosure "provided the defendant with specific information about the same subject matter as that reflected in the October 9, 1998 letter of former Assistant United States Attorney Apfel," and so "the defendant was not prejudiced in any material way by the nondisclosure of the letter." *Id.* The court also held that the Apfel letter was not material to the defense, in light of the court's holding that factual impossibility was not a valid defense to the obstruction charges, and so the letter "would not have affected the outcome of the trial." A 23-24. Finally, the court noted that its finding of no prejudice was supported by "the defendant's failure to make use of other related and even more significant information that was disclosed pretrial, along with the other relevant circumstances of this case . . . ." A 24. "In particular, the defense neither inquired of Kevin Weeks about the subject matter, nor did it call William Bulger as a witness, even though he had been identified as a potential defense witness." *Id.* For these reasons, the court held that there had been no *Brady* violation.

Finally, the court held that the defense had failed to make "any showing" that the Apfel letter "was a statement about matters material to the testimony given by Apfel at the trial of this case." A 24. Accordingly, the district court found no violation of the Jencks Act.

B. Governing Law and Standard of Review

1. Statutory Elements of Obstruction of Justice

The charges on which the defendant stands convicted arise from 18 U.S.C. § 1503, which provides:

> Whoever corruptly . . . endeavors to influence, intimidate or impede any . . . officer in or of any court of the United States, or . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

The elements of a § 1503 violation are: (1) endeavoring (2) to corruptly (3) influence the due administration of justice. *See United States v. Tedesco*, 635 F.2d 902, 907 (1st Cir. 1980).

The endeavor, regardless of its success, is the heart of the substantive offense. *See United States v. Russell*, 255 U.S. 138 (1921) (upholding conviction under predecessor version of § 1503, where defendant attempted to corrupt a juror who had not yet been selected to serve at trial). To satisfy these elements, the Government was required to prove that (1) there was a pending federal judicial proceeding; (2) the

defendant knew of the proceeding; and (3) the defendant acted corruptly with the specific intent to obstruct or interfere with the proceeding or the due administration of justice. *See United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993); *United States v. Neal*, 951 F.2d 630, 632 (5th Cir. 1992); *United States v. Bucey*, 867 F.2d 1297, 1314 (7th Cir. 1989). As noted, the scope of the obstruction of justice statute extends to any corrupt endeavor or effort to interfere with the due administration of justice. The key word in the statute is "endeavor," and, as used in the statute, endeavor means to make any effort or to do any act, however contrived, to obstruct, impede, or interfere with a judicial proceeding. Indeed, it is this endeavor which is the gist of the crime, and the success of the endeavor is not an element of the offense. *See United States v. Callipari*, 368 F.3d 22, 43 (1st Cir. 2004) (approving jury instruction in obstruction case under similarly worded 18 U.S.C. § 1505), *pet'n for cert. filed*, No. 04-337 (Sept. 7, 2004). Any effort, whether successful or not, that is made for the purpose of corrupting, obstructing, or impeding the proceeding or investigation is a violation of this law. *See, e.g.*, 1L. Sand, et al., *Modern Federal Jury Instructions*, ¶ 46.01, Instruction 46-2. Further, in order to prove the conspiracy to obstruct justice charge, the Government had to prove, beyond a reasonable doubt, *inter alia*, that the defendant specifically intended to obstruct justice. *See United States v. Nelson-Rodriguez*, 319 F.3d 12, 40 (1st Cir.) (holding that conspiracy

conviction requires proof that defendant joined illegal agreement "with the intent to further the unlawful purpose"), *cert. denied*, 539 U.S. 928 (2003).

As the district court properly held, factual impossibility was not a valid defense in this case.[3] It is well established that factual impossibility is no defense to a charge of obstructing justice pursuant to 18 U.S.C. § 1503. *Osborn v. United States*, 385 U.S. 323, 332-33 (1966); *United States v. Fleming*, 215 F.3d 930, 936 (9th Cir. 2000); *United States v. Bucey*, 876 F.2d 1297, 1314 (7th Cir. 1989); *see also Russell*, 255 U.S. at 143 (rejecting impossibility defense to predecessor statute to § 1503, because statute broadly proscribes all corrupt "endeavors" to obstruct or impede justice); *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (one need not succeed in obstructing justice to be convicted of violating § 1503: "an 'endeavor' suffices").

Likewise, factual impossibility is no defense to a conspiracy charge under 18 U.S.C. § 371, since the essence of that offense is an *agreement* to commit a crime (perfected by an overt act taken to effectuate the object of that agreement), regardless of whether the agreement succeeds in its object. *United States v. Jimenez Recio*, 537 U.S. 270, 275-76 (2003) (quoting 2 LaFave & Scott, *Substantive Criminal Law* § 6.5,

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[3]Indeed, the Supreme Court has questioned the validity of an impossibility defense to *any* criminal charge. *See United States v. Aguilar*, 515 U.S. 593, 605 (1995) (noting reservations about validity of impossibility defense in general, and refusing to engraft it onto statute prohibiting disclosure of wiretap information which, like § 1503, punishes "endeavors" rather than "attempts" to obstruct).

at 85 (1986), for proposition that "'[i]mpossibility' does not terminate conspiracy because 'criminal combinations are dangerous apart from the danger of attaining the particular objective'"); *see also United States v. Rabinowich*, 238 U.S. 78, 86 (1915); *United States v. Palmer*, 203 F.3d 55, 64 (1st Cir. 2000) ("a failure to achieve the objective, even if factually impossible, is not a defense" to conspiracy charge) (citing *United States v. Giry*, 818 F.2d 120, 126 (1st Cir.1987)); *United States v. Belardo-Quinones*, 71 F.3d 941, 944 (1st Cir.1995) (conspiracy may exist even if the object of the conspiracy cannot be achieved).[4]

2. *Brady v. Maryland* and Its Progeny

The Government has a constitutional duty to disclose evidence favorable to an accused when such evidence is *material* to guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83 (1963). Favorable evidence includes not only evidence that tends to exculpate the accused, but also impeachment evidence. *See United States v. Ingraldi*, 793 F.2d 408, 411 (1st Cir. 1986). In order to establish a *Brady* violation

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[4] *Accord United States v. Hsu*, 155 F.3d 189, 203 (3d Cir.1998) (impossibility is not a defense to conspiracy); *United States v. Sobrilski*, 127 F.3d 669, 674-75 (8th Cir.1997) (same); *United States v. Clemente*, 22 F.3d 477, 480-81 (2d Cir.1994) (factual impossibility is not a defense to conspiracy); *United States v. LaBudda*, 882 F.2d 244, 248 (7th Cir. 1989) (defendants can be found guilty of conspiracy even if conspiracy's object "is unattainable from the very beginning"); *United States v. Brooklier*, 685 F.2d 1208, 1217 (9th Cir.1982) ("factual impossibility is no defense to an inchoate offense").

and that the suppression of exculpatory or impeachment material deprived defendant of his right to a fair trial, a defendant must demonstrate that: (1) the Government, either willfully or inadvertently, suppressed evidence; (2) the evidence at issue is favorable to the defendant; and (3) the failure to disclose this evidence prejudiced the defendant. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). In *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Supreme Court formulated a uniform standard of materiality for general application in all nondisclosure cases, namely, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995); *see also United States v. Sanchez*, 917 F.2d 607, 617-18 (1st Cir. 1990); *United States v. Gambino*, 59 F.3d 353, 365 (2d Cir. 1995) ("Information not disclosed to the defense creates constitutional error warranting a new trial only when that information is material, *i.e.*, when it creates a reasonable doubt that did not otherwise exist."). Importantly, as noted by the Supreme Court, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler,* 527 U.S. at 281; *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("undisclosed impeachment evidence is not material in the *Brady* sense when, although 'possibly useful to the defense;' it is 'not likely to

have changed the verdict.'").

3. Jencks Act

The Jencks Act, 18 U.S.C. § 3500(b), requires the United States to produce, at the defendant's request, any statement of the witness only if it "relates to the subject matter as to which the witness has testified." The question is whether the information relates "generally to the events and activities testified to" by the witness. *United States v. Ferreira*, 625 F.2d 1030, 1034 (1st Cir. 1980). "The hope is that these statements will afford the defense a basis for effective cross-examination of government witnesses and the possible impeachment of their testimony without overly burdening the government with a duty to disclose all of its investigative material." *United States v. Johnson*, 200 F.3d 529, 534 (7th Cir. 2000). If disclosure could not have materially enhanced defense counsel's cross-examination of the witness, then any error is deemed harmless. *See United States v. Sorrentino*, 726 F.2d 876, 888 (1st Cir. 1984). "In order to succeed on a claimed violation of the Jencks Act, defendants must demonstrate that they have been prejudiced by the failure to disclose." *United States v. Rosario-Peralta*, 175 F.3d 48, 53 (1st Cir. 1999).

4. Standard of Review

Generally, "[t]he denial of a motion for new trial is reviewed only for *manifest abuse of discretion*." *United States v. Tibolt*, 72 F.3d 965, 972 (1st Cir. 1995)

(emphasis added). Likewise, a district court's determination that certain information is not exculpatory for purposes of *Brady* or discoverable under the Jencks Act is reviewed only for abuse of discretion. *See United States v. Rosario-Peralta*, 175 F.3d 48, 55 (1st Cir. 1999); *United States v. Brimage*, 115 F.3d 73, 78 (1st Cir. 1997). The final decision as to production of Jencks Act statements "must rest . . . within the good sense and experience of the district judge . . . ." *Palermo v. United States*, 360 U.S. 343, 353 (1959).

C. Discussion

1. The Government Disclosed the Substance of the October 9, 1998, Letter in Pretrial Discovery, and Hence No Information Was "Suppressed" Within the Meaning of *Brady*

The defendant was aware before trial, based on the Government's disclosures, of the basic information contained in the October 9, 1998, letter from then-AUSA Apfel. Accordingly, he cannot claim that any information was "suppressed" for purposes of *Brady v. Maryland.* "'Evidence is not "suppressed" if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.'" *United States v. Zackson*, 6 F.3d 911, 917 (2d Cir.1993) (quoting *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) (citations omitted)); *see also United States v. Bender*, 304 F.3d 161, 164 (1st Cir.

2002) ("*Brady* applies to material that was known to the prosecution but unknown to the defense."), *cert. denied*, 537 U.S. 1167 (2003).

On July 30, 2002, the Government disclosed to the defense a complete copy of the April 5, 2001, grand jury testimony of William Bulger. The disclosure was made as part of its continuing obligation to provide discovery in accordance with Rule 16 of the Federal Rules of Criminal Procedure and the Local Rules. As the Court can see from its review of this testimony (contained in the Sealed Appendix), the July 30, 2002, disclosure provided the defendant with specific information about the same subject matter reflected in the Apfel letter. SA 32-33. Accordingly, the defendant was not prejudiced in any material way by the nondisclosure of the letter, assuming *arguendo* that the Apfel letter was even discoverable under the rules.

Further, the Government notes that despite its disclosure of the firsthand information contained in the grand jury testimony, the defense never made use of the information at trial. In fact, the defense did not ask Kevin Weeks about the subject matter, and it did not call William Bulger. Having failed to even attempt to make such inquiries at trial, the defendant should not now be heard to complain about the nondisclosure of less direct information in the form of a letter written almost a year prior to the events involved in the underlying prosecution.

2. The Correspondence Was Not Exculpatory or Material Because It Was Not Relevant to Any Issue at Trial

The information contained in the Apfel letter was not relevant to any trial issue, and hence was not material for purposes of *Brady*. The Apfel letter would have been relevant only to show *William Bulger*'s knowledge that some unspecified pen registers and trap-and-trace devices had been used prior to October 1998 in the course of the investigation. The defendant has never suggested, in the district court or on appeal, that he was aware of William Bulger's knowledge in this respect, and accordingly this information could not have had any possible bearing on the central issue in this case: the *defendant*'s intent in leaking the information to Kevin Weeks.

As noted above, the district court properly ruled in limine that factual impossibility was not a valid defense to the obstruction or conspiracy charges. Therefore, the fact that the Government may have been unsuccessful in its earlier attempts to locate James Bulger using electronic surveillance techniques was not relevant and would have been inadmissible at trial.

Although the defendant does not identify precisely how he would have employed the Apfel letter at trial, he nevertheless seems to argue that the information contained in the October 9, 1998, letter could have been used to cross-examine Apfel regarding the need for secrecy in the use of pen registers. Def. Br. at 14-15. The

defendant fails to explain, however, how the fact that a disclosure was made to William Bulger's attorney nearly a year prior to the events at issue in this case about unspecified pen registers and trap & trace devices on unspecified telephones would have changed or affected the testimony of any witnesses in the present case as to the importance of secrecy in the use of pen register devices. Numerous witnesses, including Apfel, testified that disclosure of *ongoing* electronic surveillance — particularly to targets — would have a devastating impact on that surveillance's effectiveness. *See, e.g.,* Tr. 2/54, 100-01, 110-13, 117, 120-21, 123, 4/64-65, 124-25, 6/172-73, 7/11-12. No witness testified that an investigation would be compromised by the mere disclosure that, at some point in the past, law enforcement had used unspecified pen registers or trap-and-trace devices — which is the only thing the Apfel letter disclosed. Absent any inconsistency between the October 9 letter and Apfel's trial testimony, the defendant cannot demonstrate how he was prejudiced by nondisclosure of the letter.

3. The Apfel Letter Was Not Jencks Material, Because It Did Not Relate to Apfel's Trial Testimony

As the district court properly found, the Apfel letter was not a statement "which relates to the subject matter as to which the witness has testified" within the meaning of the Jencks Act, 18 U.S.C. §3500(b). Apfel did not testify about prior efforts to

apprehend Bulger, much less about whether electronic surveillance had been involved in any such efforts. Instead, Apfel's testimony regarding electronic surveillance was limited to (1) a general description of how such surveillance is authorized and used, (2) a description of the particular pen registers which were leaked in the present case, and (3) the purpose of sealing such court orders. In this last regard, Mr. Apfel testified absent objection that the reason why pen register applications and orders are sealed by court order is "so that an investigation, in this instance part of a fugitive investigation, remain secret and not be compromised, because if it becomes public knowledge or if the target of one of these pen registers learns that his or her telephone has a pen register on it, then the very purpose of the pen register is defeated, is undermined. You might as well flush it down the toilet." Tr. 2/54. The October 9 letter did not purport to inform William Bulger that there were presently pen registers or trap-and-trace devices in place, much less that they were on his telephones, but merely stated that some questions that might be posed to him would be based on information that had been obtained from unspecified electronic surveillance of that sort.

Moreover, with respect to both the *Brady* and Jencks Act claims, any hypothetical error could not possibly have prejudiced the defendant, in light of his failure to use the disclosed grand jury testimony of William Bulger at trial, as well as

the consistent and emphatic testimony of so many other witnesses that secrecy is of paramount importance when dealing with electronic surveillance. Moreover, the evidence of the defendant's guilt was simply overwhelming, especially in light of his recantation on cross-examination of one of the professed reasons for his leak, and the mutually contradictory nature of his other two claimed reasons.

II. The District Court Did Not Plainly Err or Abuse Its Wide Discretion in Permitting Testimony That an Experienced Law Enforcement Agent Who Leaked the Existence of Electronic Surveillance to a Target Would Know That He Was Compromising an Investigation

A. Relevant Facts

On appeal, the defendant challenges two questions, each posed to a different witness during the Government's case-in-chief. As its second witness, the Government called Special Agent Thomas Larnard, who testified in general regarding how the FBI's fugitive tracking program works, Tr. 2/93-94. Agent Larnard also testified that he had participated in an investigation aimed at locating fugitive James "Whitey" Bulger on a federal warrant issued by U.S. District Judge Mark Wolf. Tr. 2/94-97. Agent Larnard testified that the FBI had placed Bulger on its highly publicized Top Ten fugitive list in an effort to capture Bulger, and that these efforts included a $1 million reward for information leading to Bulger's apprehension. Tr. 2/96. Agent Larnard explained to the jury what a pen register is, and how it assists

law enforcement agents in locating fugitives. GA 1-4.

In the course of answering questions about pen registers during the direct examination, the following colloquy ensued:

> Q. And based on your experience in law enforcement, is the utility or the importance of keeping such investigative tools or use of the tools confidential important to anybody who has had experience in law enforcement?
>
> A. Of course.
>
> Q. So that if, for example, somebody had been employed as a trooper with the Massachusetts State Police Department for many, many years and continued to keep his hand in things in dealing with old partners, continued to be involved in law enforcement circles, that person would certainly know, would he not, that if he took pen register information and gave it to the targets of the pen register themselves, that he would be compromising, obstructing the investigative effort which is being undertaken pursuant to that court order? Isn't that right?
>
> MR. DUGGAN: Objection.
>
> THE COURT: Overruled.
>
> MR. DUGGAN: May I be heard at the side-bar?
>
> MR. DURHAM: I don't want to delay. I'll withdraw the question, your Honor.
>
> THE COURT: All right, the question is withdrawn.
>
> Q. Would it be fair, sir, that any law enforcement officer who had been involved in, say, organized crime investigations and the like, if he had the information about a pen register and went and gave it to the targets of the investigation itself, the pen registers themselves, would

know, would he not, that he's compromising your investigation?

MR. DUGGAN: Objection.

THE COURT: Overruled.

A. Yes, sir.

GA 4-5.

Another government witness was Major Thomas Duffy of the Massachusetts State Police, who testified primarily about his interviews of the defendant. During cross-examination, defense counsel asked Major Duffy a series of questions regarding his knowledge of the defendant's experience as an intelligence analyst in the state police. GA 12-26. A major thrust of this lengthy colloquy was that the defendant, as a former intelligence analyst, would have been aware of a 1994 news article in the *Boston Globe* that James Bulger regularly sought to avoid electronic surveillance, and therefore would not have believed that such surveillance could possibly have yielded information about Bulger's whereabouts. *See* GA 14 (describing defendant's employment history as intelligence officer, together with his reputation as expert on organized crime in Massachusetts); GA 16-19 (describing news article, and stipulation that the *Globe* was received and read in the Schneiderhan household during that period of time); GA 19-22 (discussing whether an intelligence officer with the state police would rely on news articles); GA 23 (asking whether, "[i]f there's

information in the public record that the bad guy — in this case, Whitey Bulger— takes pains to conduct his business in the open air so as to avoid the possibility that he might be electronically surveyed, is that a useful fact for a police investigator like yourself to know?"). In response, on re-direct examination, the following questions and answers were given, only the last of which the defendant assigns as error[5]:

> Q. Counsel asked you questions about the defendant being in a Massachusetts State Police Department for 25 years, correct?
>
> A. Yes.
>
> Q. And he asked you about him being in the Organized Crime Unit, correct?
>
> A. Yes.
>
> Q. And being an intelligence officer in various capacities at the Attorney General's office, correct?
>
> A. Yes.
>
> Q. And being a resource to others regarding these matters, correct?
>
> A. Yes.
>
> Q. Do you know, sir, whether or not the Attorney General's office of the state of Massachusetts had occasion within its Organized Crime Unit to be involved in any electronic surveillance over the years?
>
> A. Yes. They have been one of the predominant units of the State

[5]At one point, the defendant's brief erroneously identifies this colloquy as having occurred during the testimony of Colonel Foley. Def. Br. at 17.

Police involved in electronic surveillance, then and now.

Q. So if you worked for ten years in the Attorney General's Organized Crime Unit and they were doing organized crime cases and using electronic surveillance, would you know the damage that you were doing to somebody else's investigation if you leaked that electronic surveillance information to the targets of the investigation?

MR. DUGGAN: Objection.

THE COURT: Overruled.

A. I think you would be extremely cognizant of the ramifications of a breach of that nature.

GA 33-34.

Quite apart from these two challenged questions, the Government introduced plentiful evidence that maintaining the confidentiality of electronic surveillance — particularly from the targets — was critical, and that leaks could compromise the integrity of an investigation. The leaked applications and orders themselves were introduced into evidence, GA 35-51, and they included sealing language in which a federal judge expressly directed the service providers not to disclose the existence of the pen registers or the investigation to anyone, particularly the listed subscriber. *See, e.g.,* GA 43. Former FBI Agent Robert Parisien testified about the careful steps taken to maintain secrecy in the course of obtaining and physically installing electronic surveillance devices, because disclosure could jeopardize the investigation and

endanger the installing agent. Tr. 2/110-13, 117, 120-21, 123. Major Duffy testified that electronic surveillance was an "essential tool" during his years investigating organized crime, and that if such tools were discovered by targets, investigative efforts were "doomed to failure." GA 9-10. Colonel Foley testified that he had spent part of his career at the state police installing electronic surveillance devices, and that he was fully aware of the importance of maintaining the integrity of court-ordered surveillance, and that it was very important to him when he was installing wiretaps not to have someone leak that information. Tr. 4/124-25. One former and one present state trooper who were called as defense witnesses likewise attested, based on their experience, that it was critical not to reveal the existence of electronic surveillance to targets. Tr. 6/172-73, 7/11-12. Indeed, the defense itself elicited from former trooper Robert Long a detailed recitation of how, despite his best efforts at maintaining secrecy, a leak of the state police's surveillance efforts at the Winter Hill Gang's Lancaster Street garage defeated months and months of painstaking preparations and tremendous personal risk to officers. Tr. 6/167-68 (discussing need for secrecy).

B. Governing Law and Standard of Review

Rule 704 of the Federal Rules of Evidence provides:

> (a) Except as provided in subdivision (b), testimony in the form

> of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

This Court has held that "Rule 704(b) prohibits all direct expert testimony concerning a criminal defendant's intent, regardless of the witness's field of expertise, so long as intent is an element of the crime charged." *United States v. Valle*, 72 F.3d 210, 215 (1st Cir. 1995). Even so, "[n]o matter how expansively Rule704(b) is read, it is not limitless in its reach. Though Rule 704(b) bars experts from opining on the ultimate issue of a defendant's felonious *intent*, the rule does not prohibit experts from testifying to *predicate facts* from which a jury might infer such intent." *Id.* (emphasis added).

Accordingly, courts "applying Rule 704(b) to the expert testimony of law enforcement officials have found it significant whether the expert *actually referred to the intent of the defendant* or, instead, simply described in general terms the common practices of those who clearly do possess the requisite intent, leaving unstated the inference that the defendant, having been caught engaging in more or less the same practices, also possessed the requisite intent." *United States v.*

Lipscomb, 14 F.3d 1236, 1239 (7th Cir. 1994) (emphasis added). "[S]uch testimony should not be excluded under Rule 704(b) as long as it is made clear, either by the court expressly or in the nature of the examination, that the opinion is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes. Relevant in this regard, though not determinative, is the degree to which the expert refers specifically to the 'intent' of the defendant, *see* [*United States v. Brown*, 7 F.3d 648, 653 n.2 (7th Cir. 1993)], for this may indeed suggest, improperly, that the opinion is based on some special knowledge of the defendant's mental processes." *Lipscomb*, 14 F.3d at 1243.

An appellate court reviews a district court's evidentiary rulings only for abuse of discretion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 141-42 (1997). "This deferential standard is not appellant-friendly." *United States v. Perez-Ruiz*, 353 F.3d 1, 10 (1st Cir. 2003), *cert. denied*, 124 S. Ct. 2058 (2004). "A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules," *United States v. Abel*, 469 U.S. 45, 54 (1984), and so these rulings are subject to reversal only if "manifestly erroneous" or "wholly arbitrary and irrational." *See Joiner*, 522 U.S. at 142 (manifestly erroneous); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational). Specifically with respect to evidentiary rulings under Rule 704, "appellate courts give trial judges a wide berth

in respect to these kinds of discretionary judgments." *Valle*, 72 F.3d at 214.

Furthermore, the defense did not properly preserve its objections to the challenged questions, because it simply called out "objection" without explaining whether it was contesting the relevance, form, foundation, or any other aspect of the questions. *See Microfinancial, Inc. v. Premier Holidays Intern., Inc,* 2004 WL 2222373, *7 (1st Cir. Oct. 5, 2004) (calling out "objection" is insufficient under Rule 103, unless basis for objection is obvious). A party is required by Rule 103 of the Federal Rules of Evidence to "stat[e] the specific ground of objection, if the specific ground was not apparent from the context," in order to preserve an evidentiary objection. Absent a properly preserved objection, an evidentiary challenge is reviewable on appeal only for plain error under Fed. R. Crim. P. 52(b). The Supreme Court has held that "before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Cotton*, 535 U.S. 625, 631 (2002) (quotation marks, citations, and alterations omitted); *Johnson v. United States*, 520 U.S. 461, 469 (1997); *United States v. Olano*, 507 U.S. 725, 734-35 (1993).

C. Discussion

In the present case, the district court did not err, plainly or otherwise, in permitting the two challenged questions and answers. First, there was ample foundation for the agents' responses. It was clear from the context of immediately preceding questions that FBI Agent Larnard was testifying based on his personal experience in fugitive investigations, which made ample use of pen registers and other types of electronic surveillance. *See, e.g.,* GA 4. Likewise, the challenged question to Major Duffy came at the end of his testimony, after he had spoken about his nearly thirty years of experience investigating organized crime with the Massachusetts State Police, during which time he made extensive use of electronic surveillance techniques. *See* GA 7-9.

Second, and most importantly, the questions were aimed not at the defendant's *specific intent* (which was an element of each charge), but rather at the *knowledge* that would be possessed by a law enforcement agent with his background (which was a predicate fact from which, along with other facts, a jury could infer such intent). *See Valle*, 72 F.3d at 215. Although specific intent may be inferred from the totality of circumstances, including a defendant's knowledge, specific intent and knowledge remain analytically distinct concepts. As the Supreme Court has explained, "[i]n a general sense, 'purpose' corresponds loosely with the common-law concept of

specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *United States v. Bailey*, 444 U.S. 394, 403, 405 (1980). "[A] person who causes a particular result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct, while he is said to act knowingly if he is aware that that result is practically certain to follow from his conduct, whatever his desire may be as to that result." *Id.* at 404 (internal quotation marks omitted). In the present case, the defendant was charged with two specific-intent crimes (obstruction and conspiracy), for which mere knowledge of the results that are "practically certain to follow from his conduct" is insufficient to support conviction. Accordingly, questions aimed at proving the defendant's knowledge of the probable consequences of his actions — while highly probative of the defendant's intent and hence relevant and admissible under Rules 402 and 403 — did not embrace "an element of the crime charged" in violation of Rule 704(b).

Indeed, the question put to Agent Larnard was unambiguously framed to elicit what "*any law enforcement officer* who had been involved in, say, organized crime investigations" would "*know*" about the effect of disclosures on an investigation. GA 4-5 (emphasis added). The question put to Major Duffy likewise inquired about the level of knowledge that would be possessed by a Massachusetts state police officer who had been involved in electronic surveillance and organized crime cases for a

number of years. Major Duffy, of course, was eminently qualified to answer such a question, since he had over 29 years of experience in precisely that organization, and in precisely that specialized sort of investigation. At no point did the prosecution ask any witness whether the defendant must have "intended" anything, nor were the questions framed in such a way to suggest that Agent Larnard or Major Duffy had any "special knowledge of the defendant's mental processes." *Lipscomb*, 14 F.3d at 1243. Accordingly, neither the questions nor the answers came even close to exceeding the scope of Rule 704(b).

In any event, even assuming *arguendo* that these two isolated questions were somehow improper under Rule 704(b), any error was undoubtedly harmless. *See United States v. Smart*, 98 F.3d 1379, 1390 (D.C. Cir. 1997). A number of witnesses testified consistently and emphatically that it was critically important to maintain the secrecy of electronic surveillance. Indeed, the defense itself elicited compelling testimony from its own witness, Robert Long, about how an unauthorized leak could undo a months-long covert effort to install a bug in the Lancaster Street garage. Quite apart from the two challenged questions, the remaining testimony left no doubt whatsoever that any law enforcement officer would have known that revealing electronic surveillance to a target would immediately doom it to failure. And as pointed out above, there was overwhelming other evidence of the defendant's intent

to obstruct justice.

III. The District Court's Sentence Did Not Violate the Defendant's Constitutional Rights Under the Sixth Amendment

For the first time on appeal, the defendant claims that the district court's sentence violated his rights under the Sixth Amendment because it was based on facts not found by the jury beyond a reasonable doubt. Specifically, he relies upon the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and argues that the district court committed plain error in (1) enhancing the defendant's sentence by two levels based on his false trial testimony, pursuant to U.S.S.G. § 3C1.1; and (2) by following the cross-reference instructions in U.S.S.G. § 2J1.2 (obstruction of justice) to apply the offense level of 15 applicable under § 2X3.1 (accessory after the fact). The defendant claims that, under *Blakely*, he has a constitutional right to have the two-level enhancement, as well as the cross-reference, established by facts which were proven to a jury under the reasonable doubt standard.

This claim fails for multiple reasons, discussed in detail below. First, *Blakely* does not apply to the United States Sentencing Guidelines. Second, any hypothetical error was not "plain," and hence not reversible under Rule 52(b) of the Federal Rules of Criminal Procedure. Third, the defendant was convicted of *two* counts (obstruction

and conspiracy), and the district court could and should have run his sentences on each count consecutively to achieve the total punishment dictated by the Guidelines, without running afoul of the Sixth Amendment.

1. The Sixth Amendment Does Not Prohibit Imposition of a Sentence Based in Part on Facts Found by a Judge by a Preponderance of the Evidence.

Blakely did not invalidate the United States Sentencing Guidelines; indeed, it specifically refrained from opining as to whether its rule applies to the Guidelines. *See* 124 S. Ct. at 2538 n.9 ("[t]he Federal Guidelines are not before us, and we express no opinion on them"); *see also Apprendi*, 530 U.S. 466, 497 n.21 (2000) (same). In *Apprendi* itself, the Court expressed no view on the Guidelines beyond "what this Court has already held." *Id.* (citing *Edwards v. United States*, 523 U.S. 511, 515 (1998)).

What the Supreme Court has "already held" about the Guidelines therefore continues to provide the governing principle — and Supreme Court rulings have consistently upheld the Guidelines against constitutional attack and underscored their unique status within our constitutional scheme. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989). Indeed, the Supreme Court has found that so long as a sentence does not exceed the statutory maximums established by Congress for the offense of conviction, a Guidelines sentence can (in fact, sometimes must) be based on judge-

found conduct not proved to a jury, *see Edwards v. United States*, 523 U.S. 511, 514-15 (1998); conduct not charged in the indictment, *see Witte v. United States*, 515 U.S. 389, 399-401 (1995); and conduct of which a defendant is acquitted but is established at sentencing by a preponderance of the evidence, *see United States v. Watts*, 519 U.S. 148, 156-57 (1997) (per curiam). Moreover, the Court has explicitly held that lower courts are bound not only by the Guidelines, but by their policy statements and commentary as well. *See Stinson v. United States*, 508 U.S. 36, 42 (1993).

In line with the Supreme Court's consistent pronouncements, this Court (and every other court of appeals with criminal jurisdiction) had held, in the wake of *Apprendi*, that ordinary upward adjustments and departures under the federal Sentencing Guidelines may be made by the sentencing court based on a preponderance of the evidence, provided that these adjustments do not result in a sentence that exceeds that maximum penalty prescribed by Congress. *See, e.g., United States v. Casas,* 356 F.3d 104, 128 (1st Cir.), *cert. denied*, 124 S. Ct. 2405 (2004).

This court is required to follow these binding precedents. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("it is [the Supreme Court's] prerogative alone to overrule one of its precedents"); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (courts of appeals must leave to "this Court the prerogative of overruling its own decisions," even if such a decision "appears to rest on reasons rejected in some other line of

decisions") (quotation marks and citations omitted). Thus, "[i]f a precedent of th[e] Supreme Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Figueroa v. Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998). Moreover, newly constituted panels of the Court are bound by a prior panel decision on point, such as *Casas*. *See United States v. Gilberg*, 75 F.3d 15, 19 (1st Cir. 1996).

Such respect for *stare decisis* is especially appropriate here, because the Supreme Court has already granted *certiorari* in two cases which squarely present the question of whether *Blakely* applies to the United States Sentencing Guidelines, in *United States v. Booker*, 04-104, and *United States v. Fanfan*, 04-105, argument for which was held on October 4, 2004. Thus, whether *Blakely* applies to the United States Sentencing Guidelines at all may soon be resolved by the Supreme Court itself.

In any event, the federal Sentencing Guidelines are different in important respects from the guidelines scheme invalidated in *Blakely*. As in *Apprendi* and *Ring*, the legislative scheme in Blakely created two distinct statutory maximums. The same is not true of the federal Guidelines. Unlike the statutes at issue in the *Apprendi* line of cases, the federal Guidelines simply cannot be said to create a distinct and separate

class of aggravated federal crimes. Congress has only created one set of statutory maximums for federal crimes, in the United States Code. As the Supreme Court has indicated, the federal Guidelines were never intended to operate on the same footing as the statutory maximums. *See Mistretta*, 488 U.S. at 396 (federal Guidelines "do not bind or regulate the primary conduct of the public or . . . establish[] minimum and maximum penalties for every crime.").

Further, as *Mistretta* made clear, the Guidelines and the Sentencing Commission are constitutionally unique. The Commission is not a legislative body but an "independent commission in the judicial branch of the United States," 28 U.S.C. § 991(a), which "enjoys significant discretion" in formulating the Guidelines. *Mistretta*, 488 U.S. at 377. Like Congress's delegation of rulemaking authority to the judicial branch to prescribe rules of procedure and evidence, *see, e.g.,* 28 U.S.C. § 2072, the delegation to the Commission to make sentencing rules is nonlegislative in character and "simply leaves with the Judiciary what long has belonged to it." *Mistretta*, 488 U.S. at 396; *see also United States v. Koch*, -F.3d-, No. 02-6278, 2004 WL 1899930, at *5 (6th Cir. Aug. 26, 2004) (en banc).

The Sixth Amendment right to trial by jury, and the due process right to insist on rigorous proof to establish guilt of an offense, are fully protected when there must be a jury finding beyond a reasonable doubt on the facts that establish the

legislatively prescribed maximum punishment to which a defendant is exposed. In sum, the Supreme Court decisions before *Blakely* uniformly upheld the federal Guidelines system as written: a tightly integrated system of sentencing rules for judges to apply based on their findings of fact. *Blakely* explicitly declined to express a view on the federal Sentencing Guidelines, and this Court is not free to overrule prior Supreme Court precedent.

2. Even If *Blakely* Applies to the Sentencing Guidelines, Any Error Is Not "Plain," in the Sense of "Clear" or "Obvious"

In the district court, the defendant did not challenge the standard of proof or the identity of the factfinder with respect to either the two-level perjury enhancement or the cross-reference to the accessory-after-the-fact guideline, and so this new claim on appeal is reviewable only for plain error. *See United States v. Savarese*, 2004 WL 2106341 (1st Cir. Sept. 22, 2004); *see also United States v. Duncan*, 381 F.3d 1070, 1072 (11th Cir. 2004); *United States v. Ameline*, 376 F.3d 967, 978 (9th Cir.2004). As already argued above, there was no "error" because *Blakely* does not apply to the Sentencing Guidelines.

Moreover, even assuming that the Supreme Court were, in the future, to hold *Blakely* applicable to the federal sentencing guidelines, any error is presently far from "plain." "'[P]lain' is synonymous with 'clear' or, equivalently, 'obvious.'" *Olano*,

507 U.S. at 734. An error is not "plain" under Rule 52(b) unless "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163 (1982). To constitute "plain error," an error must at a minimum be clear and obvious at the time of appellate consideration. *See Johnson*, 520 U.S. at 46. At present, the circuits are divided over whether *Blakely* impacts the federal Guidelines[6] — a fact which this Court has held to preclude a finding of plain error. *See United States v. Cordoza-Estrada*, 2004 WL 2179594, at *4 (1st Cir. Sept. 29, 2004) (per curiam). (the "question of the continuing validity of the Sentencing Guidelines is an issue that has roiled the federal courts, and split circuits," and that "[w]hatever the outcome" of this circuit split, "the answer is neither plain nor obvious at the time of this appeal"); *see also United States v. Carrozza*, 4 F.3d 70, 84 (1st Cir. 1993) (declining to find plain error in light of circuit split).

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[6]In the wake of *Blakely*, five circuits have held the Guidelines constitutional. *See United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (per curiam); *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (en banc), *pet'n for cert. filed*, No. 04-193 (Aug. 4, 2004); *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004), *pet'n for cert. filed*, No. 04-5263 (July 14, 2004); *United States v. Koch*, No. 02-6278, 2004 WL 0284P (6th Cir. Aug. 26, 2004) (en banc); *United States v. Reese*, No. 03-13117, 2004 WL 1946076 (11th Cir. Sept. 2, 2004). Two circuits have held the Guidelines unconstitutional. *See United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 2004 WL 1713654 (Aug. 2, 2004); *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004).

3. Even if *Blakely* Applies to the Guidelines, the District Court Would Have Been Obliged To Run the Sentences Consecutively on the Defendant's Two Counts of Conviction

In the present case, the Court need not decide whether *Blakely* applies to the Guidelines because the jury convicted the defendant on multiple counts and this Court can run those sentences consecutively without exceeding the "statutory maximum" (however that term may be construed) as to any particular count. Again, assuming *arguendo* that *Blakely* were held applicable to the Guidelines, and the defendant's base offense level as to each particular count were 12 rather than 15, the district court still would have been required to impose the same total effective sentence 18 months by running the defendant's sentences consecutively on each of his two counts of conviction.

The Sixth Amendment guarantees criminal defendants certain procedural rights in "criminal prosecutions," such as the right to counsel, the right to a jury trial, and the right to a speedy and public trial. U.S. Const., amend. VI. These rights arise upon the initiation of adversary judicial proceedings against an individual, and so they are "offense specific" — that is, tied to a particular charge of criminal conduct brought against a defendant. For example, the Supreme Court has held that the Sixth Amendment right to counsel "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced," and hence the Sixth Amendment

does not preclude government agents from speaking with a criminal defendant with respect to offenses with which he is not presently charged. *McNeil v. Washington*, 501 U.S. 171, 175 (1991); *see also Texas v. Cobb*, 532 U.S. 162, 168 (2001) (re-affirming that Sixth Amendment right to counsel is offense specific, with no "exception for crimes that are 'factually related' to a charged offense").

In the wake of *Apprendi,* nearly every circuit court of appeals has held that a criminal defendant's Sixth Amendment right to jury trial is likewise offense specific, in that it relates to individual counts of charged criminal conduct. As a result, they have concluded that under the Sixth Amendment, a district court can and should run sentences on multiple counts *consecutively* to achieve the total punishment dictated by the Guidelines, so long as the sentence on any *individual* count does not exceed the statutory maximum for that count.[7]

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[7]*See, e.g., United States v. Feola*, 275 F.3d 216 (2d Cir. 2001); *United States v. Stokes*, 261 F.3d 496, 500-01 (4th Cir. 2001), *cert. denied*, 535 U.S. 990 (2002); *United States v. McWaine*, 290 F.3d 269, 276 (5th Cir.), *cert. denied*, 537 U.S. 921 (2002); *United States v. Page*, 232 F.3d 536, 544-45 (6th Cir. 2000);*United States v. Hernandez*, 330 F.3d 964, 982-84 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1599 (2004); *United States v. Diaz*, 296 F.3d 680, 683-85 (8th Cir.) (en banc), *cert. denied*, 537 U.S. 940 (2002); *United States v. Buckland*, 289 F.3d 558, 570-71 (9th Cir.) (en banc), *cert. denied*, 535 U.S. 1105 (2002); *United States v. Lott*, 310 F.3d 1231, 1242-43 (10th Cir. 2002), *cert. denied*, 538 U.S. 936 (2003); *United States v. Davis*, 329 F.3d 1250, 1253-54 (11th Cir.), *cert. denied*, 124 S. Ct. 330 (2003); *United States v. Lafayette*, 337 F.3d 1043, 1050 (D.C. Cir. 2003).

The Third Circuit has issued conflicting opinions in this regard, but only as to whether stacking is mandatory, not as to whether it is permissible. *Compare United*

For example, in *United States v. White*, 240 F.3d 127, 135-36 (2d Cir. 2001), the district court sentenced a defendant to the statutory maximum on each of multiple counts of drug offenses, and ran those sentences consecutively to the extent necessary to reach the total punishment dictated by the Guidelines. The Court of Appeals affirmed, holding that *Apprendi* principles were not violated because "the district

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States v. Velasquez, 304 F.3d 237, 241 (3d Cir. 2002) (stacking of lower *Apprendi* sentences is within sentencing court's discretion; approving court's decision not to stack sentences on substantive and conspiracy counts), *cert. denied*, 538 U.S. 939 (2003) *with United States v. Jenkins*, 333 F.3d 151, 155 (3d Cir.) (stacking of lower *Apprendi* sentences is mandatory, not citing *Velasquez*), *cert. denied*, 124 S. Ct. 350 (2003).

Although no published decision of this Court has directly addressed this issue, by unpublished decision a panel has endorsed the majority approach, favorably citing the Second and Fifth Circuits' holdings in this regard. Pursuant to this Court's Local Rule 32.3, the Government has therefore included in its appendix at GA 68-74 a copy of *Saccoccia v. United States*, 42 Fed. Appx. 476, 2002 WL 1734169 (1st Cir. July 29, 2002), *cert. denied*, 537 U.S. 1031 (2002). This case is offered only as persuasive authority for a material issue on appeal — that is, that *Apprendi* does not bar the imposition of consecutive sentences under U.S.S.G. § 5G1.2(d), even when the total punishment exceeds the highest statutory maximum on any particular count — in light of the absence of any published opinion from this Court that adequately addresses the issue. *See also United States v. Saccoccia*, 58 F.3d 754, 787 (1995) (published opinion in same case on direct appeal, decided prior to *Apprendi*) ("Because Congress gave the Sentencing Commission expansive authority to promulgate guidelines specifying when sentences should be consecutive or concurrent, and then directed sentencing courts to refer to the guidelines in order to determine whether 'multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively,' 28 U.S.C. § 994(a)(1)(D), the court below possessed the power — *indeed, the responsibility* — to impose a series of consecutive sentences effectuating the clearly expressed command of U.S.S.G. § 5G1.2.") (emphasis added).

court did not exceed the maximum for any individual count. It cannot therefore be said that, as to any individual count, the court's findings resulted in the imposition of a greater punishment than was authorized by the jury's verdict." *Id.* at 135. Furthermore, the Court stated that, "perhaps more important, we are aware of no constitutionally cognizable right to concurrent, rather than consecutive, sentences." *Id.* In essence, the Court of Appeals rejected the notion that "use of section 5G1.2(d) of the Sentencing Guidelines to run [a defendant's] sentences consecutively rather than concurrently 'effectively increased the penalty to which [that defendant] was subject'" for purposes of *Apprendi*. *Id.; see also United States v. McLean*, 287 F.3d 127 (2d Cir. 2002) (declining to remand or modify judgment where defendant failed to preserve *Apprendi* claim that sentence on each individual count exceed statutory maximum, because total effective sentence could have been imposed by running shorter sentences on each count consecutively); *United States v. Blount*, 291 F.3d 201, 213-14 (2d Cir. 2002) (same), *cert. denied*, 537 U.S. 1141 (2003); *United States v. Feola*, 275 F.3d 216, 219-20 & n.1 (2d Cir. 2001) (per curiam).

Because *Blakely* is nothing more than an extension of *Apprendi*'s principles, these cases would remain good law even if *Blakely* were to be found applicable to the federal Sentencing Guidelines. The next step is therefore to determine, under the defendant's interpretation of *Blakely*, what the upper end of the Guidelines range

would be for each of his counts of conviction; to aggregate those upper ends; and then to determine whether such an aggregate statutory maximum exceeds the total punishment called for by the Guidelines.

The defendant asserts that the district court should have determined that he was subject to an offense level of 12 "for the jury finding of obstruction of justice" based on U.S.S.G. § 2J1.2(a). *See* Def. Br. at 19. Such an offense level, coupled with a Criminal History Category I, would yield a sentencing range of 10-16 months as to either count of conviction. Accepting this position *arguendo,* the "statutory maximum" as to either count would be the upper end of this range: 16 months. Because the defendant was convicted of two counts, the Sixth Amendment would have permitted the district court to sentence the defendant to a term of imprisonment not exceeding 32 months. The defendant's actual sentence — 18 months — was well below this hypothetical constitutional maximum, and hence there could be no plain error even if the defendant is correct that *Blakely* applies to the Guidelines.

CONCLUSION

For these reasons, the Government respectfully requests that the Court affirm the judgment.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE WITH
TYPEFACE AND LENGTH LIMITATIONS

Appeals No. 02-2201

UNITED STATES OF AMERICA
Appellee

v.

JOHN J. CONNOLLY, JR.
Defendant-Appellant

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