No. 17-10163

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JUSTIN WHITTINGTON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

This appeal is from a judgment of conviction and sentence under the laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. The court sentenced defendant Justin Whittington to 180 months' imprisonment and entered final judgment on April 10, 2017. E.R. 4-10. Whittington timely appealed on April 13, 2017. E.R. 3. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether defendant's conviction for felony deprivation of housing rights under 42 U.S.C. 3631 constitutes a crime of violence under 18 U.S.C. 924(c).

2. Whether the district court properly sentenced defendant for his Section 924(c) violation.

STATEMENT OF THE CASE

1. Statement Of Facts

On December 19, 2012, Joe Nuno and his family returned home to Oildale, California, after a long day trip to Long Beach. S.E.R. 117-119, 178, 189.[1] Nuno's wife unloaded the car, his teenage daughter carried supplies into the house, his teenage son locked the front gate for the night, and Nuno closed the driveway gate to fence in the family's dogs. S.E.R. 122, 180. As Nuno neared the driveway gate, he noticed a purple PT Cruiser driving slowly down the street. S.E.R. 73, 122. The Cruiser crawled by their house and suddenly pulled over to the curb. S.E.R. 124.

Defendant Justin Whittington rode in the front passenger seat of the PT Cruiser while his brother, Jesse Lamb, drove. S.E.R. 256, 258, 312. The two had been drinking all day and had stocked the Cruiser with a sawed-off shotgun, an ax,

[1] S.E.R. refers to the government's supplemental excerpts of record, which provide the transcripts and jury instructions omitted from appellant's excerpts.

and a large wrench before venturing out that evening. S.E.R. 254-255, 304, 387, 390, 394-395, 562. The two also were members of a local white supremacist gang called the Oildale Peckerwoods. S.E.R. 245, 452-456, 461, 523-524, 532-533. Oildale had once been a stronghold of the Ku Klux Klan, and the Peckerwoods sought to drive out from the area any individuals perceived to be non-white. S.E.R. 525-527. Whittington in particular often walked around shirtless to display a large white supremacist tattoo on his stomach and frequently used the word "nigger," even in front of his neighbors' mixed-race children. S.E.R. 239-241, 247-248.

As Lamb pulled the PT Cruiser over to the curb, Whittington grabbed the sawed-off shotgun, loaded it, and jumped out of the vehicle. S.E.R. 106-107, 144-145, 184-185. Whittington approached Nuno, who is Latino, and called him a "fucking nigger." S.E.R. 163, 182, 562-563; see also S.E.R. 76. Whittington then pointed the shotgun at Nuno and, from 15 yards away, pulled the trigger. S.E.R. 125, 141, 163, 182, 569-570, 577. Shotgun pellets flew by Nuno's head. S.E.R. 81, 127. Nuno's wife screamed for her son to get inside and called 911. S.E.R. 183, 186, 199, 205. Whittington got back in the PT Cruiser and yelled at Nuno and his family to "get the fuck out of Oildale!" S.E.R. 128, 186; see also S.E.R. 76. A few blocks over, the shotgun blew out the glass door of a neighborhood

convenience store owned by a man of Middle Eastern descent. S.E.R. 129, 187, 211-217, 220, 223-231, 562-563.

Whittington and Lamb returned to Whittington's apartment complex. S.E.R. 257-258, 311-312. Whittington wrapped the shotgun in work clothing and stowed it in the trunk of his car, a white Crown Victoria. S.E.R. 258-259, 311, 416-418, 438, 444-446, 448, 553-554, 563. Whittington then grabbed two beers out of the Cruiser, cracked them open, and told Lamb: "Just be cool. We didn't do anything." S.E.R. 259, 313.

A police car on the lookout for a dark-colored PT Cruiser spotted Whittington and Lamb drinking next to the purple Cruiser. S.E.R. 382-384. Whittington and Lamb told the officer that they had been drinking at the apartment complex most of the evening and knew nothing about the purple Cruiser. S.E.R. 387, 389. The officer felt that the hood of the Cruiser was still warm. S.E.R. 388-389, 393. Once backup arrived, a second officer obtained Whittington's consent to search his apartment and Crown Victoria. S.E.R. 411, 416, 433-434, 438. That officer found a used shotgun shell on Whittington's bedroom dresser and two live shotgun shells in a container under his bed. S.E.R. 444-446. A third officer found the shotgun in the trunk of Whittington's car as well as a second used shotgun shell under a bush in the parking lot. S.E.R. 414-418, 448.

The officer who had responded to the Nuno residence drove Nuno over to Whittington's apartment complex for a possible in-field identification. S.E.R. 83-84, 131. First shown Lamb, Nuno said that he did not recognize him. S.E.R. 86-87, 132. Then shown Whittington, Nuno immediately exclaimed "that's him! That's him!" S.E.R. 88, 133-134. Nuno told the officer that he recognized Whittington's dark hoodie, khaki pants, facial features, shaved head, and forehead tattoo. S.E.R. 88, 108, 110, 133-134.

Officers took Whittington in for questioning. S.E.R. 450. They observed a blue bandana hanging out of his back pocket—the gang color for the Oildale Peckerwoods. S.E.R. 453-454. Whittington once again told the officers that he had nothing to do with the PT Cruiser. S.E.R. 455. He said that he and Lamb had been drinking when a man by the name of "Charlie" pulled up in the PT Cruiser with a masked man riding in the passenger seat and asked to store something in the trunk of Whittington's car, to which Whittington had agreed. S.E.R. 455-456. Officers held Whittington for a day and then released him. S.E.R. 263, 459.

After being released, Whittington told his upstairs neighbor that he was leaving town because he did not want to "go down" for the previous night's events. S.E.R. 263. He told her that he had merely fired off a couple of shots for "target practice." S.E.R. 264-265. He then fled to Michigan with his girlfriend. S.E.R.

265-266. Within a few months, Nuno and his family moved to a different house across town out of fear. S.E.R. 170, 175, 187-188; see also E.R. 22.

By April 2014, Whittington had returned to Oildale, and an FBI agent interviewed him about the events on December 19, 2012. S.E.R. 550-551. Whittington first told the agent that he and Lamb had been drinking when "Charlie" drove up in the PT Cruiser. S.E.R. 552-553. He then said that "Charlie and Bubba" had been in the PT Cruiser. S.E.R. 553. He also said that "Charlie" had offered him $1000 to store the shotgun in the trunk of his car. S.E.R. 553-554.

The FBI ultimately arrested Whittington on September 28, 2015. S.E.R. 560, 801. When agents again questioned him, Whittington admitted that he had lied to the FBI in April 2014, as "Charlie" never existed. S.E.R. 560-561. He also admitted to most of the events of that evening but denied shooting the shotgun. S.E.R. 562-563.

2. Procedural History

On September 24, 2015, a federal grand jury returned an indictment charging Whittington with four felonies. E.R. 97-100. Count 1 charged that Whittington, "by force and threat of force," willfully intimidated and interfered with Nuno's housing rights by "shouting racist slurs" and "fir[ing] a shotgun" while Nuno and his family stood outside their home, in violation of 42 U.S.C. 3631(a). E.R. 98. Count 2 charged that Whittington used, discharged, carried, and

brandished a short-barreled shotgun during Count 1, a crime of violence, in violation of 18 U.S.C. 924(c). E.R. 98. Count 3 charged that Whittington knowingly possessed an unregistered short-barreled shotgun in violation of 26 U.S.C. 5861(d). E.R. 98. And Count 4 charged that Whittington willfully made material false statements to an FBI agent about receiving the short-barreled shotgun from "Charlie," in violation of 18 U.S.C. 1001. E.R. 99.

On the first day of trial, Whittington pleaded guilty to Count 3, possession of an unregistered sawed-off shotgun. S.E.R. 20. He proceeded to trial on Counts 1, 2, and 4. S.E.R. 4-6, 21-22. The jury convicted Whittington of all three counts, specifically finding for Count 2 that the firearm was a short-barreled shotgun, that Whittington brandished the shotgun, and that Whittington discharged the shotgun. E.R. 11-12; S.E.R. 717-718.

On March 13, 2017, the district court held an initial sentencing hearing. S.E.R. 723-754. For Counts 1, 3, and 4, which were grouped together for sentencing purposes, the Presentence Investigation Report recommended a total offense level of 32: a base offense level of 27 for attempted murder, a 3-level hate crime enhancement for targeting Nuno because of his perceived race and color, and a 2-level obstruction of justice enhancement for attempted witness intimidation. S.E.R. 728; PSR ¶¶ 34, 37-48. The Section 924(c) conviction on Count 2 separately carried a mandatory ten-year term of imprisonment to run consecutively

to any other sentence imposed. S.E.R. 728; PSR ¶ 39; 18 U.S.C. 924(c)(1)(A)(iii) & (B)(i). Neither party objected to the calculations. S.E.R. 728. The district court, however, questioned whether Whittington's efforts "to intimidate, frighten, scare, and drive out" Nuno and his family most closely resembled attempted murder for purposes of identifying the relevant underlying conduct for sentencing on Counts 1, 3, and 4. S.E.R. 748. The court requested a supplemental PSR setting forth an alternative guidelines calculation and sentencing recommendation. S.E.R. 748-751.

On April 10, 2017, the district court held a second sentencing hearing. E.R. 13-32. The probation officer had submitted a supplemental memorandum that recommended, in the alternative, a total offense level of 27 for Counts 1, 3, and 4: a base offense level of 18 for unlawful possession of a sawed-off shotgun, a 4-level enhancement for possessing the shotgun in connection with another felony, a 3-level hate crime enhancement, and a 2-level obstruction of justice enhancement. E.R. 15; Supplemental PSR ¶¶ 1-12. Once again, neither party objected to the calculations. E.R. 18-19.

The court adopted the alternative sentencing recommendation for unlawful possession of a sawed-off shotgun. E.R. 19-20. This resulted in an advisory guidelines range of 87 to 108 months' imprisonment on Counts 1, 3, and 4. E.R. 20. In light of Count 2's mandatory term of 120 months' imprisonment,

Whittington's relatively young age of 21 at the time of the offense, and the court's perception of how much Whittington had matured as a result of the trial, the court granted a downward variance to 60 months' imprisonment on Counts 1, 3, and 4, to be served concurrently. E.R. 27-29. The court also imposed the mandatory, consecutive 120 months' imprisonment on Count 2, for a total term of 180 months' imprisonment. E.R. 29.

SUMMARY OF THE ARGUMENT

Whittington raises no challenge to his conviction and sentence on Counts 1, 3, and 4. Instead, he raises two arguments under Count 2, neither of which he raised below, and neither of which has merit. First, he argues that his Count 2 conviction for use of a firearm during a crime of violence, in violation of 18 U.S.C. 924(c), cannot stand because his predicate felony conviction in Count 1 for interfering with housing rights, in violation of 42 U.S.C. 3631, is not a crime of violence under this Court's categorical approach. Whittington is wrong.

As an initial matter, courts use a "categorical approach" to determine whether an offense qualifies as a crime of violence under Section 924(c): they compare the statutory elements of the predicate offense with the text of Section 924(c)(3) to determine whether the former necessarily satisfies the latter. If a statute lists elements in the alternative, courts use a "modified categorical approach" to determine of what crime, with what elements, a defendant was

charged and convicted. That crime is then compared with the text of Section 924(c)(3) as the categorical approach commands.

Here, determining whether a violation of Section 3631 constitutes a "crime of violence" for purposes of Section 924(c) requires use of the modified categorical approach, as Section 3631 lists alternative elements that define different crimes with different punishments, including misdemeanor and felony offenses. Under that approach, Whittington was charged with and convicted of the statutory elements of interfering with housing rights with "force or threat of force" that "include[d] the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." See 42 U.S.C. 3631; see also E.R. 98; S.E.R. 785-786.

Whittington's conviction under Section 3631 easily satisfies both clauses of Section 924(c)—the use-of-force clause and the risk-of-force clause—either of which is sufficient for this Court to affirm his Section 924(c) conviction. Under the use-of-force clause, Whittington's use of force and of a dangerous weapon, explosives, or fire necessarily required "the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Alternatively, under the risk-of-force clause, Whittington's use of a dangerous weapon, explosives, or fire, "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B).

Whittington challenges the risk-of-force clause as unconstitutionally vague in light of *United States* v. *Johnson* (*Johnson II*), 135 S. Ct. 2551 (2015). This Court need not, and should not, reach that constitutional question. As discussed above, this Court can affirm Whittington's Count 2 conviction under the use-of-force clause, Section 924(c)(3)(A). In addition, Whittington cannot satisfy his onerous burden under the plain-error standard of review. In *Johnson II*, the Supreme Court struck down the residual clause of the Armed Career Criminal Act as unconstitutionally vague. Neither the Supreme Court nor this Court has yet decided whether *Johnson II* applies to the risk-of-force clause in Section 924(c)(3)(B). Whittington therefore cannot demonstrate any error that was plain. Finally, even if Whittington had preserved his constitutional challenge for appeal, it is meritless. The combination of factors that conspired to render the residual clause void-for-vagueness under that statute are all absent from Section 924(c)(3)(B).

Second, Whittington argues that the district court erred in sentencing him to a consecutive term of 120 months' imprisonment on Count 2. Whittington is mistaken. Section 924(c) mandates a consecutive minimum term of imprisonment of ten years if the defendant discharges any firearm or possesses a short-barreled shotgun. Here, the jury specifically found Whittington guilty of both elements.

The district court thus properly applied the statute, and no basis exists to disturb Whittington's sentence.

STANDARD OF REVIEW

This Court reviews Whittington's arguments, raised for the first time on appeal, for plain error. Br. 8, 15, 19; *United States* v. *Castillo-Marin*, 684 F.3d 914, 918 (9th Cir. 2012). Whittington must demonstrate "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States* v. *Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc). If those factors are met, this Court "may exercise its discretion to notice a forfeited error that (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (internal quotation marks omitted).

In examining whether error occurred, this Court reviews de novo whether a predicate offense constitutes a crime of violence under 18 U.S.C. 924(c). *United States* v. *Andrews*, 75 F.3d 552, 557 (9th Cir.), cert. denied, 517 U.S. 1239 (1996); see also *United States* v. *Gasca-Ruiz*, 852 F.3d 1167, 1174 (9th Cir.) (en banc), cert. denied, 2017 WL 3071946 (2017). An error is plain if it is "clear and obvious," *United States* v. *Shields*, 844 F.3d 819, 823 (9th Cir. 2016) (citation omitted), "at the time of appeal," *Ameline*, 409 F.3d at 1078 (internal quotation marks omitted). An error affects substantial rights if the defendant can "show a reasonable probability that, but for the error, the outcome of the proceedings would

have been different." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1343 (2016) (citation omitted).

ARGUMENT

I

WHITTINGTON WAS CONVICTED OF A CRIME OF VIOLENCE UNDER SECTION 3631 IN VIOLATION OF SECTION 924(c)

Whittington challenges his Count 2 conviction for discharging a short-barreled shotgun during a crime of violence in violation of 18 U.S.C. 924(c). Br. 8-19. He argues that his predicate felony offense in Count 1, using force and threat of force to interfere with housing rights in violation of 42 U.S.C. 3631, is not a crime of violence. Br. 8-19. He therefore contends that the district court erred in instructing otherwise and that his conviction must be vacated.[2] See Br. 9-10, 15. This argument, which Whittington failed to raise below, is subject to review only for plain error. The district court committed no error, much less plain error.

Section 924(c)(1)(A) imposes a mandatory consecutive term of imprisonment when a defendant uses or carries a firearm during a crime of violence, or possesses a firearm in furtherance of a crime of violence. A predicate offense qualifies as a crime of violence if it is a felony that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

[2] Jury Instruction 18 stated: "I instruct you that Interference with Housing Rights, as charged in Count One, is a federal crime of violence." S.E.R. 789.

> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 924(c)(3).

As a general matter, courts use a "categorical approach" to determine whether an offense qualifies as a crime of violence under Section 924(c). *United States* v. *Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995), cert. denied, 516 U.S. 1164 (1996). Under the categorical approach, a court compares the elements of the predicate offense with the text of Section 924(c)(3) to determine whether the former necessarily satisfies the latter. See *Descamps* v. *United States*, 133 S. Ct. 2276, 2281 (2013); *United States* v. *Sahagun-Gallegos*, 782 F.3d 1094, 1098 (9th Cir. 2015). A court "may look only to 'the elements of the [offense], not to the facts of [the] defendant's conduct.'" *Mathis* v. *United States*, 136 S. Ct. 2243, 2251 (2016) (alteration in original) (quoting *Taylor* v. *United States*, 495 U.S. 575, 601 (1990)).

Courts use a "modified categorical approach" when a single statute "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Mathis*, 136 S. Ct. at 2249; see *Sahagun-Gallegos*, 782 F.3d at 1098. Such a statute is considered "divisible" because it "renders opaque which element played a part in the defendant's conviction." *Descamps*, 133 S. Ct. at 2283. In that case, a court "looks to a limited class of documents (for example, the indictment, jury

instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. A court "then compare[s] that crime, as the categorical approach commands," with the text of Section 924(c)(3). See *ibid.*

Whittington's predicate offense was his Count 1 conviction for using force to interfere with housing rights in violation of 42 U.S.C. 3631(a). E.R. 98; S.E.R. 788-789. For the reasons discussed below, Section 3631 is a divisible statute that defines multiple crimes, both misdemeanors and felonies. The statute therefore requires use of the modified categorical approach. Under the modified categorical approach, Whittington was charged with and convicted of felony interference with housing rights with "force or threat of force" that "include[d] the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." 42 U.S.C. 3631. Such a crime satisfies Section 924(c)'s use-of-force clause, 18 U.S.C. 924(c)(3)(A), as well as its risk-of-force clause, 18 U.S.C. 924(c)(3)(B), either of which provides an independent basis for affirmance.

A. Section 3631 Requires Use Of The Modified Categorical Approach

A criminal statute is divisible for purposes of the categorical approach when it "comprises multiple, alternative versions of the crime." *Descamps*, 133 S. Ct. at 2284. For example, a statute may list multiple elements disjunctively, or different statutory alternatives may carry different punishments. See *Mathis*, 136 S. Ct. at

2249, 2256. When that is so, courts use the modified categorical approach to determine which elements comprised the defendant's crime. *Mathis*, 136 S. Ct. at 2249; *Descamps*, 133 S. Ct. at 2284.

The Fair Housing Act, 42 U.S.C. 3631, "describes both protected and prohibited activities" to further the goal of providing fair housing throughout the country. *United States* v. *Gilbert*, 813 F.2d 1523, 1526-1527 (9th Cir.), cert. denied, 484 U.S. 860 (1987). As relevant here, the statute provides that:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--
>
> (a) any person because of his race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling * * *
>
> * * * *
>
> shall be fined under Title 18 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 Title 18 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 Title 18 or imprisoned for any term of years or for life, or both.

42 U.S.C. 3631.

As the face of the statute shows, Section 3631 always prohibits the use of "force or threat of force" to interfere with housing rights. In doing so, Section 3631 creates a myriad of different crimes, each with its own set of elements.[3] Most pertinent to this appeal, the statute also provides a number of aggravating factors that elevate any of the enumerated crimes from a misdemeanor to a felony. Specifically, the offense becomes a felony if the use of "force or threat of force" results in "bodily injury"; "include[s] the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire"; results in "death"; or "include[s] kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill." 42 U.S.C. 3631. An aggravating factor elevates the maximum punishment under the statute from one year's imprisonment to ten years' or life imprisonment, depending on which factor element is charged and found by the jury. See *ibid.*

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[3] In addition to the conduct prohibited under Section 3631(a), the statute, set forth in its entirety in the Addendum, criminalizes further conduct under Sections 3631(b) and (c). See, *e.g.*, 42 U.S.C. 3631(b)(1) (prohibiting intimidating someone from occupying a dwelling on account of race); 42 U.S.C. 3631(b)(2) (prohibiting intimidating someone from affording another person an opportunity to occupy a dwelling on account of race); 42 U.S.C. 3631(c) (prohibiting discouraging someone from aiding another to occupy a dwelling on account of race).

Because Section 3631 defines multiple crimes with different statutory alternatives that carry different punishments, the statute is divisible. See *Mathis*, 136 S. Ct. at 2256; see also *United States* v. *Colvin*, 353 F.3d 569, 575 (7th Cir. 2003) (en banc) ("[Section] 3631, we think, describes separate offenses, and not one offense with varying punishments."), cert. denied, 543 U.S. 925 (2004). It thus requires use of the modified categorical approach to determine which elements comprised Whittington's felony predicate offense. *Mathis*, 136 S. Ct. at 2249; *Descamps*, 133 S. Ct. at 2284. This is particularly so where a violation of Section 3631 constitutes a felony, and can serve as a predicate offense under Section 924(c), only if a jury finds one of the aggravating-factor elements.

Here, Whittington's predicate felony offense in Count 1 required the jury to find, as separate elements, that Whittington: "used force or threat of force"; "willfully intimidated or interfered with J.N., or attempted to injure, intimidate or interfere with J.N."; "acted because J.N. was occupying a dwelling and because of race, color, or national origin"; and engaged in conduct that "involved the use, attempted use, or threatened use of a dangerous weapon." S.E.R. 786-787; see E.R. 98; see also 42 U.S.C. 3631. A jury therefore found Whittington guilty of the statutory elements of interfering with housing rights "by force or threat of force" with "the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." See 42 U.S.C. 3631.

Whittington argues, without any support or analysis, that "[t]here is no need to use a modified categorical approach to determine the elements." Br. 19. He acknowledges that statutory alternatives that carry different punishments are considered different statutory elements under the categorical approach. Br. 19 (citing *Mathis*, 136 S. Ct. at 2256). But he fails to recognize that, as a result, this Court must look beyond the face of the statute "to a limited class of documents * * * to determine what crime, with what elements" he was convicted of in order to ascertain whether the offense is categorically a crime of violence. *Mathis*, 136 S. Ct. at 2249.

B. Whittington's Section 3631 Conviction Satisfies The Use-Of-Force Clause

Section 924(c)'s use-of-force clause defines a crime of violence as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Congress used similar statutory text to define a violent felony under the Armed Career Criminal Act, omitting only the phrase "or property." See 18 U.S.C. 924(e)(2)(B)(i) ("the use, attempted use, or threatened use of physical force against the person of another"). In that context, the Supreme Court has interpreted physical force against a person to require a showing of "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson* v. *United States* (*Johnson I*), 559 U.S. 133, 140 (2010) (citation omitted). For example, "a slap in

the face" meets the standard as a "degree of force necessary to inflict pain," but the "merest touch" does not. *Id.* at 143.

All circuits to have addressed the issue have adopted the *Johnson I* definition of physical force under Section 924(e)(2)(B)(i) to determine the level of force required against a person to qualify as a crime of violence under the use-of-force clause, Section 924(c)(3)(A). See *United States* v. *Taylor*, 848 F.3d 476, 491 (1st Cir.), cert. denied, 137 S. Ct. 2255 (2017); *United States* v. *Evans*, 848 F.3d 242, 245 (4th Cir.), cert. denied, 137 S. Ct. 2253 (2017); *United States* v. *Rafidi*, 829 F.3d 437, 445 (6th Cir. 2016); *In re Hernandez*, 857 F.3d 1162, 1166 (11th Cir. 2017); see also *United States* v. *Hill*, 832 F.3d 135, 142 & n.9 (2d Cir. 2016) (assuming without deciding that *Johnson I* applied to the use-of-force clause). Courts thus have required a showing of the use, attempted use, or threatened use of "physical force" that is "capable of causing physical pain or injury to another person."[4] See *Johnson I*, 559 U.S. at 140.

Here, Whittington's conviction under Section 3631 satisfies the use-of-force clause because the plain text of the statute requires the use of "force or threat of

[4] This case does not present the question of what level of physical force is required against the *property* of another to qualify as a crime of violence under Section 924(c)(3)(A), a question on which the United States takes no position in this appeal. See *Hill*, 832 F.3d at 142 n.9 (leaving open the question of *Johnson I*'s implication on the use-of-force clause in light of the "or property" phrase of Section 924(c)(3)(A)).

force." 42 U.S.C. 3631. In addition, his conviction easily meets the *Johnson I* standard, should that level of force be required under Section 924(c)(3)(A). As discussed above, Whittington was convicted of the statutory elements of using "force or threat of force" that "include[d] the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." 42 U.S.C. 3631. The applicable aggravating-factor element lists three means, each of which is physical force capable of causing physical pain or injury—indeed, significant pain or injury. A dangerous weapon is a weapon that is "inherently dangerous or otherwise used in a manner likely to endanger life or inflict great bodily harm." *United States* v. *Smith*, 561 F.3d 934, 939 (9th Cir.) (internal quotation marks omitted), cert. denied, 558 U.S. 956 (2009). Explosives can "potentially kill, maim, or injure scores of people." *Graves* v. *City of Coeur D'Alene*, 339 F.3d 828, 843 n.19 (9th Cir. 2003). And "fire is generally dangerous to others." *United States* v. *Spencer*, 724 F.3d 1133, 1141 (9th Cir. 2013), cert. denied, 135 S. Ct. 51 (2014); see also *United States* v. *Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999) (holding that "the use or attempted use of fire" under Section 3631 qualifies as a crime of violence under Section 924(c)), cert. denied, 529 U.S. 1089 (2000).

Whittington essentially argues that a basic offense under Section 3631, without any aggravating factor, is not categorically a crime of violence. See Br. 11-15, 17-18. His argument is inapposite: for the reasons discussed in Argument

I.A, *supra*, Section 3631 requires the modified categorical approach, which examines *all* of the elements of Whittington's conviction, including his aggravating-factor element. He also ignores the plain text of the statute, which criminalizes "force or threat of force." 42 U.S.C. 3631. Regardless, a basic offense would fail to satisfy the definition of a crime of violence for the simple reason that a violation of Section 3631, absent an aggravating factor, is a misdemeanor. See 18 U.S.C. 924(c)(3) ("the term 'crime of violence' means an offense that is a felony").

In short, using "force or threat of force" that "include[s] the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire" is necessarily the use, attempted use, or threatened use of physical force capable of causing physical pain or injury. The elements of Whittington's felony conviction under Section 3631 therefore qualify as a crime of violence under the use-of-force clause in Section 924(c)(3)(A).[5] The district court thus did not err, much less plainly err, in instructing the jury that Count 1, "as charged," constituted a crime of violence.

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[5] Indeed, *all* felony violations of Section 3631 satisfy the categorical approach, as each of the statute's enumerated aggravating factors necessarily involves the use, attempted use, or threatened use of physical force capable of causing physical pain or injury. See 42 U.S.C. 3631 (elevating an offense to a felony only if a "force or threat of force" results in "bodily injury"; "include[s] the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire"; results in "death"; or "include[s] kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill").

See S.E.R. 789. As a result, this Court can and should affirm Whittington's Count 2 conviction under the use-of-force clause without having to reach his constitutional challenge to the risk-of-force clause.

C. Whittington's Section 3631 Conviction Satisfies The Risk-Of-Force Clause

Section 924(c)'s risk-of-force clause alternately defines a crime of violence as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). Whittington does not argue that his Section 3631 conviction fails to satisfy the risk-of-force clause, nor could he, as discussed below in Argument I.C.2, *infra*. Instead, he attacks the risk-of-force clause itself as unconstitutionally vague in light of *Johnson* v. *United States* (*Johnson II*), 135 S. Ct. 2551 (2015). See Br. 10-11, 15-17. Because Whittington's felony conviction under Section 3631 constitutes a crime of violence under Section 924(c)'s use-of-force clause, this Court need not, and should not, reach his argument under the risk-of-force clause. Regardless, Whittington is mistaken.

1. Johnson II *Did Not Invalidate The Risk-Of-Force Clause*

In *Johnson II*, the Supreme Court held that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. See 135 S. Ct. at 2563. The ACCA is a federal recidivist statute that enhances the mandatory minimum sentence for felons who commit crimes with

firearms and who have "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). Section 924(e)(2)(B)(ii) defines violent felonies to include an offense that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The four specified offenses are commonly referred to as the enumerated clause. The rest of the statute—"otherwise involves conduct that presents a serious potential risk of physical injury to another"—is the residual clause that *Johnson II* struck down as unconstitutionally vague.

A near unanimity of circuits has rejected calls to extend *Johnson II* to strike down Section 924(c)'s risk-of-force clause. The Second, Sixth, Eighth, Eleventh, and D.C. Circuits have held that the combination of factors that conspired to render the ACCA's residual clause void-for-vagueness are all absent from Section 924(c)(3)(B). See *United States* v. *Hill*, 832 F.3d 135, 145-150 (2d Cir. 2016); *United States* v. *Taylor*, 814 F.3d 340, 375-379 (6th Cir. 2016); *United States* v. *Prickett*, 839 F.3d 697, 698-700 (8th Cir. 2016); *Ovalles* v. *United States*, 861 F.3d 1257, 1263-1267 (11th Cir. 2017); *United States* v. *Eshetu*, 863 F.3d 946, 954-955 (D.C. Cir. 2017). But see *United States* v. *Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (striking down the risk-of-force clause by summarily citing to a decision invalidating a different statute in the immigration context, 18 U.S.C. 16(b)).

This Court has not yet decided what impact, if any, *Johnson II* has on Section 924(c)'s risk-of-force clause. This Court's decision in *Dimaya* v. *Lynch*, 803 F.3d 1110, cert. granted, 137 S. Ct. 31 (2016) (argued Oct. 2, 2017), is inapposite. In *Dimaya*, this Court held that 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's definition of aggravated felony, 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague under *Johnson II*. 803 F.3d at 1120. To be sure, Section 16(b), the U.S. Code's general statutory definition for a crime of violence, uses text identical to Section 924(c)(3)(B) to define a risk of force. But this Court in *Dimaya* explicitly limited its holding to the vague operation of Section 16(b) as incorporated into Section 1101(a)(43)(F). *Id.* at 1120 n.17. *Dimaya* thus did not decide the constitutionality of Section 16(b)'s application to other statutes, much less the constitutionality of Section 924(c)(3)(B). See *ibid.* Contrary to Whittington's bare assertion (Br. 16), *Dimaya* does not control here. Cf. *United States* v. *Benally*, 843 F.3d 350, 352-354 (9th Cir. 2016) (using the categorical approach to analyze a crime under Section 924(c)(3)(B) without citing or applying *Dimaya* or *Johnson II*).

Because this Court has not yet decided whether *Johnson II* implicates Section 924(c)(3)(B), any error in this case was not plain, and Whittington's challenge must fail. See *United States* v. *Thompson*, 82 F.3d 849, 855-856 (9th Cir. 1996) (holding that this Court cannot correct an error under plain error review

"unless the error is clear under current law") (quoting *United States* v. *Olano*, 507 U.S. 725, 734 (1993)); see also *United States* v. *Ponzo*, 853 F.3d 558, 585-586 (1st Cir. 2017) (rejecting a vagueness challenge to Section 924(c)(3)(B) under plain error review); *United States* v. *Graham*, 824 F.3d 421, 424 n.1 (4th Cir. 2016) (en banc) (same).

Should this Court nevertheless reach the question whether *Johnson II* renders the risk-of-force clause unconstitutionally vague, it should join the Second, Sixth, Eighth, Eleventh, and D.C. Circuits and decline to extend *Johnson II* or *Dimaya* to strike down the risk-of-force clause in Section 924(c)(3)(B). The Supreme Court struck down the ACCA's residual clause based on a combination of factors that conspired to render the clause unconstitutionally vague. *Johnson II*, 135 S. Ct. at 2560 ("Each of the uncertainties in the residual clause may be tolerable in isolation, but their sum makes a task for us which at best could be only guesswork.") (internal quotation marks omitted). As discussed below, each of those factors is absent here. First, the contemporaneous risk-of-force inquiry under Section 924(c)(3)(B) is narrower than the historical risk-of-injury inquiry under the ACCA's residual clause. Second, the risk-of-force inquiry is not tied to a confusing list of enumerated offenses. And third, the Supreme Court has not repeatedly failed to craft a workable standard for the risk-of-force inquiry.

Accordingly, this Court should hold that Section 924(c)'s risk-of-force clause is not unconstitutionally vague under *Johnson II*.[6]

a. The risk-of-force inquiry under Section 924(c)(3)(B) is narrower than the risk-of-injury inquiry under the ACCA's residual clause

The Supreme Court in *Johnson II* found problematic the ACCA's requirement, under Section 924(e)'s residual clause, that a court assess the potential risk of injury from a previous predicate offense. See 135 S. Ct. at 2557. Such an inquiry required courts to "go[] beyond evaluating the chances that the physical acts that make up the crime will injure someone" and, instead, evaluate the risk for injury even after completion of the offense. *Ibid.* By requiring a court to consider post-offense conduct in assessing potential risk, the ACCA created an

[6] The Seventh Circuit's decision in *United States* v. *Cardena* holds little persuasive weight. In *Cardena*, the Seventh Circuit extended *Johnson II* to strike down the risk-of-force clause in Section 924(c)(3)(B) by summarily citing to that court's prior decision invalidating Section 16(b)'s incorporation into Section 1101(a)(43)(F), without analyzing or even identifying the differences between the two statutes. See 842 F.3d at 996 (citing *United States* v. *Vivas-Ceja*, 808 F.3d 719, 721 (7th Cir. 2015)); see also *Ovalles*, 861 F.3d at 1267 (criticizing *Cardena*). Section 16(b), in the immigration context, operates as a recidivist statute that "requires the federal court to look back at prior criminal history and evaluate, often under divergent state laws, whether a prior conviction was an aggravated felony." *Ovalles*, 861 F.3d at 1267. Section 924(c)(3)(B), by contrast, requires a court to make a contemporaneous assessment of the nexus and risk of force between the firearm offense and a predicate crime of violence. *Ibid.* This specific assessment is central to Section 924(c)(3)(B)'s constitutionality, as discussed *infra*.

"indetermina[te]," "wide-ranging inquiry" that "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." *Ibid.*

Section 924(c)(3)(B), on the other hand, focuses on the risk of the use of *force*, not a broader risk of *injury*. This distinction is critical. It narrows the inquiry to "more concrete conduct" by asking whether force might arise "*in the course of committing the offense*," rather than asking whether "actions may produce a potential risk of physical injury in a more tangential or attenuated way." *Ovalles*, 861 F.3d at 1266; see *Eshetu*, 863 F.3d at 954-955. It also provides "a temporal restriction on the scope of the risk analysis" by confining a court's analysis to the offense itself. *Ovalles*, 861 F.3d at 1266; see *Taylor*, 814 F.3d at 377; *Eshetu*, 863 F.3d at 955. Under the risk-of-force clause, "the force must be used and the risk must arise in order to effectuate the crime." *Taylor*, 814 F.3d at 377; see *Prickett*, 839 F.3d at 699 (quoting *Taylor*). "Determining whether the offense *itself* involves force is far easier than puzzling over a crime's epilogue." *Eshetu*, 863 F.3d at 955. As a result, Section 924(c)'s risk-of-force clause "is both narrower *and* easier to construe" than the ACCA's residual clause. *Hill*, 832 F.3d at 148.

In addition, unlike the ACCA, Section 924(c)(3)(B) does not identify predicate convictions for the purpose of a recidivist enhancement. Rather, a crime of violence, if committed with sufficient nexus to a firearm, is a new offense under

Section 924(c)(3)(B). The statute therefore narrows the type of offenses that might serve as predicate crimes of violence to those that could be committed with sufficient nexus to a firearm. *Ovalles*, 816 F.3d at 1266. This nexus requirement provides context for the categorical inquiry, which "makes the crime of violence determination more precise," "sharpen[s] its focus[,] and make[s] its application more predictable." *Id.* at 1265-1266.

b. The risk-of-force inquiry is not tied to a confusing list of enumerated offenses

In *Johnson II*, the Supreme Court also found challenging the residual clause's requirement under Section 924(e) that a court assess potential risk of injury relative to the four enumerated offenses, each of which varied in its own indeterminate level of risk. See 135 S. Ct. at 2558; 18 U.S.C. 924(e)(2)(B)(ii). "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson II*, 135 S. Ct. at 2558; see also *id.* at 2559 ("The inclusion of burglary and extortion among the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers."). The Court explicitly stated that its holding did not threaten most laws involving the assessment of risk,

because most laws do not "link[] a phrase such as 'substantial risk' to a confusing list of examples." *Id.* at 2561.

Here, the risk-of-force clause in Section 924(c)(3)(B) "contains no mystifying list of offenses and no indeterminate 'otherwise' phraseology." *Hill*, 832 F.3d at 146; see *Ovalles*, 861 F.3d at 1265 (quoting *Hill*); *Eshetu*, 863 F.3d at 954. As a result, a court does not have to "analogiz[e] the level of risk involved in a defendant's conduct to burglary, arson, extortion, or the use of explosives." *Taylor*, 814 F.3d at 377; see *Prickett*, 839 F.3d at 700 (quoting *Taylor*); *Eshetu*, 863 F.3d at 954. Instead, "a court's analysis of whether there is a risk of force is confined to the offense itself." *Taylor*, 814 F.3d at 377; see *Eshetu*, 863 F.3d at 954. The risk-of-force clause under Section 924(c)(3)(B) therefore involves a more concrete and less attenuated inquiry than the residual clause under Section 924(e).

c. The Supreme Court has not repeatedly failed to craft a workable standard for the risk-of-force inquiry

The Supreme Court in *Johnson II* further found determinative its own "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause." 135 S. Ct. at 2558. The case was the Supreme Court's "fifth about the meaning of the residual clause," *id.* at 2559, and lower courts had "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider," *id.* at 2560. The Court

concluded that "[n]ine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise." *Id.* at 2560.

By contrast, the Supreme Court has never had occasion to resolve a disputed question about the meaning of Section 924(c)(3)(B), and no broad conflict exists among the lower courts over what constitutes a crime of violence under it. See *Ovalles*, 861 F.3d at 1266; *Prickett*; 839 F.3d at 700; *Hill*, 832 F.3d at 148; *Taylor*, 814 F.3d at 377-378; *Eshetu*, 863 F.3d at 955. Indeed, as discussed above, "much of the confusion in the ACCA cases concerned the four enumerated crimes that were linked to the residual clause," which are absent from the risk-of-force clause. *Taylor*, 814 F.3d at 378; see also *Prickett*, 839 F.3d at 700 (quoting *Taylor*). No judicial morass over Section 924(c)(3)(B)'s meaning exists to evince a "failed enterprise."

Moreover, the Court in *Johnson II* took pains to limit its holding to the ACCA's residual clause. To be sure, the Court noted difficulties associated with applying the categorical approach to a substantial-risk inquiry. See *Johnson II*, 135 S. Ct. at 2557, 2561; see also *Eshetu*, 863 F.3d at 955. But the Court found particular fault with the temporal breadth of the ACCA's injury inquiry and its link to the four enumerated crimes, neither of which is present here. See *id.* at 2557-2558. The Court also explicitly rejected the dissent's suggestion to "jettison" the categorical inquiry for all substantial-risk clauses. See *id.* at 2562; *Taylor*, 814

F.3d at 378; *Eshetu*, 863 F.3d at 955. In short, the Court did not strike down the categorical approach for all substantial-risk clauses. And, for all the reasons discussed above, the risk-of-force clause in Section 924(c)(3)(B) has none of the uncertainties found intolerable in toto by the Court in the residual clause.

2. Whittington's Section 3631 Conviction Naturally Involves A Substantial Risk Of Physical Force

Whittington does not challenge that his Section 3631 conviction qualifies as a crime of violence under the risk-of-force clause, should the clause survive *Johnson II*. He thus has waived any argument to the contrary. See *Brown* v. *Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148 (9th Cir. 2016). Regardless, such a claim would have no merit. Whittington's conviction easily satisfies the risk-of-force clause for the same reasons it satisfies the use-of-force clause. Using the modified categorical approach, Whittington was convicted of the statutory elements of using "force or threat of force" with "the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." By their nature, a dangerous weapon, explosives, and fire each entail physical force that is capable of causing physical pain or injury to another person. See *Smith*, 561 F.3d at 939; *Graves*, 339 F.3d at 843 n.19; *Pospisil*, 186 F.3d at 1031. Accordingly, Whittington's felony conviction under Section 3631 involved, "by its nature,

* * * substantial risk that physical force * * * may be used in the course of committing the offense," in satisfaction of Section 924(c)(3)(B).

II

THE DISTRICT COURT PROPERLY SENTENCED WHITTINGTON

Whittington challenges his 180-month sentence, in particular, the district court's imposition of a 120-month sentence for his Count 2 conviction for using a firearm during a crime of violence. Br. 20-25. He argues that the district court's "wrongful jury instruction and the wrong resultant charge and guideline resulted in the prejudicial application of the 120 month enhanced sentence." Br. 22. In addition, he argues that "the ten-year mandatory minimum cannot stand" because "[Section] 3631 is not categorically a crime of violence." Br. 25. In sum, Whittington argues that he was improperly convicted of Count 2 and, thus, should not have been sentenced on Count 2. Whittington is mistaken. The district court committed no error, much less plain error.

As discussed above, Whittington's Section 3631 felony conviction constituted a crime of violence under the modified categorical approach. The district court therefore properly instructed the jury that Count 1 as charged constituted a crime of violence. S.E.R. 789. There is no error, much less plain error, in the jury's guilty verdict. See Argument I, *supra*.

The district court properly sentenced Whittington for his Count 2 conviction for using a firearm during a crime of violence. As relevant here, Section 924(c) mandates a consecutive minimum term of imprisonment of ten years "if the firearm is discharged," 18 U.S.C. 924(c)(1)(A)(iii), or if the firearm is a "short-barreled shotgun," 18 U.S.C. 924(c)(1)(B)(i). The jury rendered a special verdict finding Whittington guilty of both elements. E.R. 12. His sentence on Count 2 was therefore mandated by federal statute, which the district court properly followed.[7]

[7] To the extent Whittington also attempts to challenge the district court's offense level calculations for the first time on appeal (Br. 23), he waived any such challenge for failing to advance any legal argument in his opening brief. See *Independent Towers of Wash.* v. *Washington*, 350 F.3d 925, 929 (9th Cir. 2003). Regardless, such a claim would have no merit. The district court properly applied the greatest base offense level from Whittington's applicable offense guidelines, see U.S. Sentencing Guidelines § 2H1.1(a)(1), and no double counting occurred because Whittington's unlawful possession of a sawed-off shotgun was a separate offense from his shooting of the shotgun at Joe Nuno, see *United States* v. *Valenzuela*, 495 F.3d 1127, 1132-1133 (9th Cir. 2007); *United States* v. *Collins*, 109 F.3d 1413, 1419-1420 (9th Cir. 1997).

CONCLUSION

This Court should affirm defendant's conviction and sentence.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The government is aware of the following cases that raise vagueness challenges to 18 U.S.C. 924(c)(3)(B):

United States v. *Begay*, No. 14-10080 (9th Cir.)

United States v. *Gaytan*, No. 14-10167 (9th Cir.)

United States v. *Andrade*, No. 14-10226 (9th Cir.)

United States v. *Dominguez*, No. 14-10268 (9th Cir.)

United States v. *Robertson*, No. 15-10351 (9th Cir.)

United States v. *Watson*, No. 16-15357 (9th Cir.)

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the length requirements of Federal Rule of Appellate Procedure 32(a)(7) because it contains 8024 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in 14-point Times New Roman font.

s/ Robert A. Koch
ROBERT A. KOCH
Attorney

Dated: October 16, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Robert A. Koch
ROBERT A. KOCH
Attorney

ADDENDUM

Title 42 - The Public Health and Welfare
Chapter 45 - Fair Housing
Subchapter II - Prevention of Intimidation

§ 3631. Violations; penalties

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--

(a) any person because of his race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(1) participating, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate--

shall be fined under Title 18 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 Title 18 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 Title 18 or imprisoned for any term of years or for life, or both.

Title 18 - Crimes and Criminal Procedure
Part I - Crimes
Chapter 44 - Firearms

§ 924. Penalties

(a) * * *

(b) * * *

(c)

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d) * * *

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) * * *

(g) * * *

(h) * * *

(i) * * *

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