No. 17-5813

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROBERT DOGGART,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued) **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

LEGISLATIVE HISTORY: **PAGE**

GUIDELINES:

RULE:

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with appellant that this case warrants oral argument.

STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The court had jurisdiction under 18 U.S.C. 3231 and entered final judgment against

Robert Doggart on June 21, 2017 (Judgment, R. 249, PageID# 3760-3761).[1] Doggart timely filed a Notice of Appeal on July 17, 2017 (Notice of Appeal, R. 274, PageID# 4317), after the district court granted his motion for an extension of time in which to file it. (Order, R. 261, PageID# 4157-4158). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court reasonably exercised its discretion in concluding that Doggart's proposed guilty plea did not contain a sufficient factual basis to sustain a conviction for making a true threat in violation of 18 U.S.C. 875(c).

2. Whether Doggart was properly convicted of two counts of soliciting crimes of violence in violation of 18 U.S.C. 373.

3. Whether there was sufficient evidence for a jury to find that the Islamberg mosque was used in interstate commerce under 18 U.S.C. 844(i).

4. Whether the district court properly applied the Terrorism Enhancement of Section 3A1.4 of the Sentencing Guidelines in sentencing Doggart.

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[1] Citations to "R. __" refer to documents, by number, on the district court docket sheet. Citations to "PageID# __" refer to the page numbers in the paginated electronic record. Citations to "Br. __" refer to the page numbers in Doggart's opening brief.

5. Whether Doggart's 235-month, within-Guidelines sentence is procedurally and substantively reasonable.

STATEMENT OF THE CASE

1. Pretrial Proceedings

a. On April 13, 2015, the government filed a Criminal Complaint charging defendant Robert Doggart with one count of transmitting a threat in interstate commerce in violation of 18 U.S.C. 875(c), and one count of soliciting another to damage and destroy religious property (a mosque) because of the religious nature of the property, in violation of 18 U.S.C. 373 and 18 U.S.C. 247(a)(1). (Complaint, R. 1, PageID# 1).

On April 24, 2015, the government filed a Bill of Indictment charging Doggart with a single count of violating 18 U.S.C. 875(c) in connection with communications made on March 6, 2015. Shortly thereafter, the parties filed a proposed plea agreement. (Plea Agreement, R. 14, PageID# 45-53). The factual basis contained in that agreement stated, in its entirety, as follows:

> In or about February, 2015, agents with the Federal Bureau of Investigation became aware that the defendant was communicating threats concerning an area located outside of Hancock, New York, and the individuals that lived in a community there. This area is known as "Islamberg," a self-named community consisting primarily of individuals of the Islamic faith. Specifically, in a Facebook posting in February 2015, the defendant wrote that "Target 3 [Islamberg] is vulnerable from many approaches and must be utterly destroyed…" The defendant spoke with numerous other individuals (in person and over his cellular telephone) regarding his plan to attack Islamberg.

The defendant justified his attack on Islamberg by claiming that the residents of Islamberg were planning a terrorist attack. The defendant stated on cellular phone communications that he planned to burn three buildings at Islamberg: a mosque, a school, and a cafeteria. The defendant was fully aware of the religious character of the mosque when he identified it as one of the buildings that needed to be burned. Additionally, the defendant suggested on a cellular telephone call that he and his group would kill some residents of Islamberg in order to carry out the plan.

On or about March 6, 2015, the defendant used a cellular phone to call a cooperating source ("CS") with the FBI. At the time of the call, the defendant was located in Sequatchie County, Tennessee (which is within the Eastern District of Tennessee). The CS was located in El Paso, Texas at the time of the call. The defendant made clear his ultimate plan was to injure or kill the inhabitants of Islamberg in Hancock, New York. During the phone call, the defendant told the CS, "those guys [have] to be killed. Their buildings need to be burnt down. If we can get in there and do that not losing a man, even the better." In the same recorded call, the defendant informed the CS that they could not carry pistols from Tennessee to New York because New York does not have carry permit reciprocity, but they could bring their "AR-15s, M-4s or M-16s." The defendant, in the recorded call, informed the CS that he planned to bring his M-4 rifle with four magazines. The defendant then told the CS he could provide the CS with the "meanest shotgun on Earth." When discussing the schedule for the operation, the defendant told the CS that "the drop dead date is April 15 because that's when those guys in OAF say they're gonna start a civil war." OAF is a militia organization with which the defendant had been in contact.

The defendant took numerous steps in furtherance of the threats that he communicated, many of which were discovered by the FBI through its use of [a] wiretap issued pursuant to Title III, and other investigative techniques. At various points during the investigation, the defendant traveled to other locations to meet with individuals the defendant believed would assist him with his plan. The defendant traveled to Nashville, Tennessee, on March 17, 2015, and met with the CS. At that time, the defendant showed to the CS a map of Islamberg. On that map the defendant identified the buildings he

> intended to destroy. Also, the defendant carried firearms with him to Nashville, including an M-4 type weapon as well as a shotgun. Furthermore, the defendant traveled to Greenville, South Carolina, in order to meet with another individual the defendant believed was interested in assisting him. Even though this individual and the defendant did not meet, the defendant spoke with this individual on his cellular telephone and discussed the burning of the buildings, including the mosque, and other topics. These calls were intercepted pursuant to the Court's authorized wiretap interception. In other intercepted phone calls, the defendant stated that his "M-4" was "battle tested" at 350 meters, that he would serve as the stand-off gunner during the assault, and that he would shoot the residents of Islamberg during the attack. The defendant also solicited the help of other "gunners" via Facebook. The investigation of the defendant's threatening communications required significant resources and time by the FBI in both Tennessee and South Carolina.
>
> As part of this plea agreement, the defendant admits that he willfully and knowingly sent a message in interstate commerce containing a true threat to injure the person of another, in violation of 18 U.S.C. § 875(c). Many of the acts listed above occurred in the Eastern District of Tennessee.

(Plea Agreement, R. 14, PageID# 46-48).

In accordance with Federal Rule of Criminal Procedure 11(b)(3), which provides that "before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea," the district court ordered the parties to file briefs addressing whether the facts set forth in the plea agreement constituted a "true threat" as required for a conviction under Section 875(c). Both the government and Doggart did so, arguing that the facts set forth in the plea agreement were sufficient to establish a violation of Section 875(c). (Memorandum, R. 24, PageID# 201; Memorandum. R. 25, PageID# 212).

The district court did not hold a plea hearing, but concluded in a written order that it could not accept the plea agreement. (Order, R. 29, PageID# 282-290). The court explained that, under Sixth Circuit precedent, one element of a true threat is whether "a reasonable person receiving the communication would perceive such expression as being communicated to effect some change or achieve some goal through intimidation." (Order, R. 29, PageID# 285 (internal quotation marks omitted)). In other words, the court stated, "a communication * * * indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat [punishable under Section 875(c)] unless the communication *also is conveyed for the purpose of furthering some goal through the use of intimidation*." (Order, R. 29, PageID# 287 (italics in original), quoting *United States* v. *Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997)). The court concluded that the facts in the plea agreement did not describe a threat that satisfied this standard, *i.e.*, "there is no basis to believe anyone would see the communications as being conveyed to further Defendant's goals through intimidation." (Order, R. 29, PageID# 290).

b. On July 7, 2015, after the court had rejected the plea agreement, a federal grand jury returned a one-count indictment charging Doggart with soliciting another to damage and destroy religious property (a mosque), in violation of 18 U.S.C. 373 and 18 U.S.C. 247(a)(1). (Indictment, R. 37, PageID# 315). The

indictment did not charge Doggart with making illegal threats. Doggart was unwilling to plead guilty to this one-count indictment. (Memorandum, R. 218, PageID# 3434).

On May 3, 2016, a grand jury returned a four-count Superseding Indictment. (Superseding Indictment, R. 84, PageID# 437). Count 1 charged that Doggart, between February and April 2015, solicited another to damage and destroy a mosque because of its religious nature in violation of 18 U.S.C. 373 and 18 U.S.C. 247(a)(1). Count 2 charged that Doggart, during this same period, solicited another to commit arson of a building in violation of 18 U.S.C. 373 and 18 U.S.C. 844(i). Counts 3 and 4 charged that on March 22 and April 9, 2015, Doggart made threats in interstate commerce to destroy property by means of fire and explosives in violation of 18 U.S.C. 844(e). (Superseding Indictment, R. 84, PageID# 438-439).

Doggart pleaded not guilty. A five-day jury trial followed.

2. Facts Established At Trial

The Islamberg community in Hancock, New York, consists of approximately 40 families of practicing Muslims. The community includes homes and other buildings, such as a school, a cafeteria, and a mosque. (Transcript, R. 287, PageID# 4842-4844).

Robert Doggart claimed that he believed the Islamberg community was home to a terrorist training camp, and that its residents were planning an attack on New York City. (Transcript, R. 285, PageID# 4610-4611). In February 2015, Doggart began soliciting others to attack Islamberg. For example, Doggart wrote a Facebook post stating:

> Operation in mind requires but less than 20 expert gunners. Target 3 is vulnerable from many approaches, and must be utterly destroyed in order to get the attention of the American People. If you are volunteering, and can show for a face-to-face meeting of these patriots, then we would welcome your skill set. So what say you * * * Twenty expert gunners can do a lot of damage, both physical and psychological. Forward, please communicate by way of privacy message.

(Transcript, R. 285, PageID# 4659-4660). Through Facebook, Doggart began communicating with a Confidential Source (CS) for the FBI, who was located in Texas. (Transcript, R. 285, PageID# 4664). At trial, the government introduced numerous recordings of telephone calls between the Doggart and the CS (*e.g.*, Transcript, R. 285, PageID# 4605-4626; Notice, R. 302-2, PageID# 5737-5745; Notice, R. 302-4, PageID# 5756-5760), and later, after a wiretap was put into place, between Doggart and a man in South Carolina, William Tint. (*E.g.*, Transcript, R. 287, PageID# 4889-4890, 4916; Notice, R. 302-1, PageID# 5726-5736; Notice, R. 302-3, PageID# 5746-5755). Doggart was attempting to recruit both individuals to join in his attack. (*E.g.*, Transcript, R. 287, PageID# 4910-4915).

In a telephone call on March 6, 2015, Doggart told the CS that it was their "duty as citizens" to "check [] out" whether an attack on New York City was being planned from Islamberg, and stated that they could bring their "AR-15's or M-4's or M-16's." (Notice, R. 302-4, PageID# 5757-5758). Doggart told the CS that "those guys, have to be killed. Their buildings need to be burnt down and if we can get in there and do that and get out with a, not losing a man, even the better." (Notice, R. 302-4, PageID# 5758).

In other recorded telephone calls with the CS and with Tint, Doggart discussed having a team of men attack the community and using Molotov cocktails or a "demolition guy" to burn down the buildings, including the mosque. (Notice, R. 302-1, PageID# 5735). They also discussed creating a "flash point" for an uprising against the federal government by burning down the mosque. (Notice, R. 302-1, PageID# 5734; Notice, R. 302-7, PageID# 5779). Doggart also stated that if he found "bad things" during his surveillance, "people are going to die." (Notice, R. 302-6, PageID# 5772). Doggart also discussed manufacturing a homemade bomb or explosive device, and using grenades during the attack. (Transcript, R. 286 PageID # 4790; Transcript, R. 288 PageID # 4964, 4967; Notice, R. 302-2, PageID# 5739, 5741).

On March 17, 2015, Doggart drove from his home near Chattanooga, Tennessee to the Nashville Airport to pick up the CS, who had flown in from

Texas to meet him. They had lunch and discussed strategies for attacking Islamberg. (Transcript, R. 286, PageID# 4738-4739; Notice, R. 302-7, PageID# 5774-5829). Referring to Islamberg, Doggart stated: "[W]e're not going in there to kill people. We're going in there to burn down a mosque, a school and a cafeteria. That's what we're going to do. We're not going to kill people. Now if they oppose us, that's a different thing. Then we'll have to return fire." (Notice, R. 302-7, PageID# 5776). Doggart showed the CS literature on Islamberg, a map identifying the buildings he intended to destroy, and information on New York's gun laws. (Notice, R. 302-7, PageID# 5806-5809). Doggart also showed the CS his shotgun ("a horrible, horrible killing device, it will tear a human being in half") and M-4 rifle, which he had brought with him in order to show that he was serious. (Notice, R. 302-7, PageID# 5784).

On March 22, 2015, Doggart, in a telephone conversation with Tint, again discussed his plan: "I don't want to kill anybody, but if we burn down their, uh, and there's our three targets. There's the kitchen, there's the, uh, the mosque, and uh, and uh, then there of course is ah, their school. If we take out those three components, those three buildings, and we can just walk away. And, we will have taken care of that. Now, you know, if they start laying down fire on us, we are just going to have to take them out." (Notice, R. 302-1, PageID# 5735). Tint replied: "I have a[n] EOD guy * * * I don't know if you know what that is but * * *

it's demolition." (Notice, R. 302-1, PageID# 5735). Doggart responded: "[I]f we have * * * a demolition device that can just, you know do a single explosion to do enough damage to burn a building down, that's the best part. You know, I don't want to have to throw a gallon of gas in there and you know, burn some kind of thing to light it up and hope it, you know, hope it burns down. We need to know it has to burn down. Demolition guy, ah, yeah, that, that would do it." (Notice, R. 302-1, PageID# 5735).

On April 9, 2015, Doggart met in person with the CS and others (including a Facebook contact of Doggart's who had travelled from Illinois for the meeting) over lunch in Chattanooga. Doggart stated that they were "gonna blow up the three buildings" and hopefully "no children unless we have to." (Notice, R. 302-8, PageID# 5862-5863). One of the last items Doggart discussed with the CS was that once the attack started, "the action teams can move in on a post until the first bomb goes off and everybody wakes up and once they start coming out of their buildings that's when you hit them. * * * As they're coming out the door. * * * And just kill, kill everybody, but there's children up there, and I don't want to do, I don't want, I don't want us to do that. Don't want to have to kill children, man. But there's always collateral damage." (Notice, R. 302-8, PageID# 5873). Doggart stated that he planned to travel to Islamberg in two days. (Notice, R. 302-8, PageID# 5871). Later on April 9, Doggart again conferred with Tint about the

"specialist fellow that * * * you had mentioned" regarding "fireworks." (Notice, R. 302-3, PageID# 5747).

Doggart was arrested the next day. During trial, the government introduced a Sig Sauer M400 rifle (the "M-4"), a Mossburg 500A shotgun, and an estimated five thousand rounds of ammunition, all of which were seized during a search of Doggart's home after his arrest. (Transcript, R. 286, PageID# 4699-4702; Notice, R. 302-5, PageID# 5763). Two residents of the Islamberg community also testified at trial about the use of the mosque in activities affecting interstate commerce. (Transcript, R. 287, PageID# 4846-4854; Transcript, R. 289, PageID# 5095-5107; see pp. 44-48, *infra*).

3. Post-Trial Proceedings

At the close of the government's evidence, and again at the end of trial, Doggart moved for a judgment of acquittal on all counts. The district court denied both motions. (Transcript, R. 289, PageID# 5166, 5281). On February 16, 2017, the jury convicted Doggart on all counts. (Transcript, R. 292, PageID# 5318).

On February 24, 2017, Doggart renewed his motion for judgment of acquittal. (Memorandum, R. 186, PageID# 1467). The district court rejected Doggart's arguments with respect to the sufficiency of the evidence on the two solicitation charges (Counts 1 and 2) concluding, in part, that there was sufficient evidence to establish that the mosque was used in interstate commerce. (Order, R.

230, PageID# 3680-3681). But the court granted Doggart's motion for acquittal on Counts 3 and 4, holding that the alleged threats were not punishable as "true threats." (Order, R. 230, PageID# 3681-3685). The government is not appealing that ruling.

4. Sentencing And Appeal

Doggart was sentenced for his convictions on two counts of soliciting crimes of violence. The probation officer calculated his total offense level as 33 and his criminal history category as VI, which yielded a Sentencing Guidelines range of 235 to 240 months' imprisonment. (PSR ¶¶ 78-80, R. 232, PageID# 3702). Doggart's Guidelines range was driven in substantial part by application of the Terrorism Enhancement of Guideline 3A1.4, which increased the offense level by 12 points and placed Doggart in the maximum criminal history category of VI. U.S.S.G. § 3A1.4(a), (b).

Following a lengthy sentencing hearing, the district court rejected Doggart's requests for a downward departure or variance, and sentenced him to a within-Guidelines term of imprisonment of 235 months—120 months on Count 1, and 115 months on Count 2, to be served consecutively. (Transcript, R. 293, PageID# 5542).

Doggart filed a timely notice of appeal. (Notice of Appeal, R. 274, PageID# 4317; see Order, R. 261, PageID# 4157-4158 (extending time to file notice of appeal)).

SUMMARY OF THE ARGUMENT

Doggart challenges the district court's rejection of his plea agreement, his conviction on two counts of soliciting crimes of violence, application of the Terrorism Enhancement, and the procedural and substantive reasonableness of his sentence. None of his arguments are correct.

1. The district court did not abuse its discretion in rejecting Doggart's attempt to plead guilty to one count of transmitting a threat in interstate commerce in violation of 18 U.S.C. 875(c). Federal Rule of Criminal Procedure 11(b)(3) required the district court to ensure that the factual basis set forth in the plea agreement was sufficient to support a conviction. In this case, the district court correctly applied Sixth Circuit precedent in concluding that the plea agreement did not describe a true threat punishable under Section 875(c). In *United States* v. *Alkhabaz*, 104 F.3d 1492, 1496 (6th Cir. 1997), this Court held that, to constitute a true threat, a statement must be such that a "reasonable person would perceive such communication[] as being conveyed to effect some change or achieve some goal through intimidation." Although the United States argued below that the plea agreement met this requirement, upon further consideration the government

concludes that the district court did not abuse its discretion in determining that the facts contained in the plea agreement did not satisfy this standard.

2. Doggart was properly convicted of two counts of soliciting crimes of violence in violation of 18 U.S.C. 373 because both of the predicate felonies solicited—destruction of religious property through the use of a dangerous weapon, explosives, or fire (Count 1; 18 U.S.C. 247(a)(1) and (d)(3)), and federal arson (Count 2; 18 U.S.C. 844(i))—have elements requiring the "use of physical force."

3. Ample evidence allowed the jury to find that the Islamberg mosque satisfied the interstate commerce element of 18 U.S.C. 844(i). The evidence showed that the mosque was home to a bookstore and printing press and was used in conjunction with an annual summer camp that brought out-of-state youth to Islamberg.

4. The district court carefully considered the trial evidence and properly applied the Terrorism Enhancement of Sentencing Guideline 3A1.4 based on its finding that Doggart's solicitation of arson was undertaken with an intent to "influence or affect the conduct of government by intimidation or coercion." 18 U.S.C. 2332b(g)(5)(A); (Transcript, R. 293, PageID# 5449). Contrary to Doggart's arguments, the enhancement can apply to a Section 373 solicitation offense and such application here raises no Sixth Amendment concerns.

5. Doggart's 235-month, within-Guidelines sentence is procedurally and substantively reasonable. His sentence is procedurally reasonable because the court correctly calculated Doggart's Guidelines range, and explained its reasoning for the sentence imposed, including why it chose not to give him a downward variance. Doggart's within-Guidelines sentence is substantively reasonable because it was based on an individualized consideration of the factors set forth in 18 U.S.C. 3553(a). The district court provided sound reasons for Doggart's sentence, explaining that the seriousness of the offense, the need for deterrence, and the defendant's dangerousness counseled in favor of the sentence imposed.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING DOGGART'S GUILTY PLEA

Doggart argues (Br. 34-42) that the district court erred in holding that the plea agreement does not contain facts sufficient to establish that his statements and telephone calls violated 18 U.S.C. 875(c). Because, under this Court's precedent, the plea agreement does not describe a true threat, the district court did not abuse its discretion in rejecting the agreement.

A. Standard Of Review

A district court's rejection of a plea agreement is reviewed for abuse of discretion. *United States* v. *Smith*, 417 F.3d 483, 487 (5th Cir. 2005); *United*

States v. *Gamboa*, 166 F.3d 1327, 1330 (11th Cir. 1999); see also *Santobello* v. *New York*, 404 U.S. 257, 262 (1971) (noting that a defendant has no absolute right to have a guilty plea accepted and that "[a] court may reject a plea in exercise of sound judicial discretion").

B. 18 U.S.C. 875(c): Interstate Communication Of Threats

A district court cannot accept a plea agreement without first determining whether there is a factual basis for the plea. Fed. R. Crim. P. 11(b)(3); see generally *United States* v. *McCreary-Redd*, 475 F.3d 718, 722 (6th Cir. 2007). The purpose of this rule is to protect a defendant who may attempt to plead guilty without realizing that his conduct does not actually fall within the charge. *United States* v. *Lalonde*, 509 F.3d 750, 762 (6th Cir. 2007).

Doggart sought to plead guilty to one count of violating 18 U.S.C. 875(c), which provides: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another" is guilty of a felony and faces up to five years' imprisonment. 18 U.S.C. 875(c). This Court has explained that, to be punishable under Section 875(c), the First Amendment requires that "the threat be real—a true threat." *United States* v. *Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (citing *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam)). True threats "encompass those statements where the speaker means to communicate a serious expression of

an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 538 U.S. 343, 359 (2003). The prohibition of true threats "protect[s] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur," and therefore places true threats "outside the First Amendment." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992).

To establish a violation of Section 875(c), the government must prove the mens rea set forth by the Supreme Court in *Elonis* v. *United States*, 135 S. Ct. 2001, 2011-2012 (2015), *i.e.*, that the defendant transmitted a communication "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."[2] In this Circuit (but not in others), the government must also prove that "a reasonable person * * * would perceive such expression as being communicated to *effect some change or achieve some goal through intimidation*." *United States* v. *Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) (emphasis added) [3]; accord *United States* v. *Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) [4]; *United*

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[2] The Court left open the question of whether a reckless subjective intent would also satisfy the statute. *Elonis*, 135 S. Ct. at 2013.

[3] This standard—namely, that Section 875(c) requires the government to prove that a threatening statement would be perceived by a reasonable person as designed to achieve a particular purpose or goal—appears to be unique to this Circuit. See *United States* v. *Jongewaard*, 567 F.3d 336, 340 (8th Cir. 2009)

(continued…)

States v. *Houston*, 683 F. App'x 434, 438 (6th Cir.), cert. denied, 138 S. Ct. 286 (2017).

As interpreted by this Court, Section 875(c) does not criminalize the mere act of talking about doing harm to others; instead, it prohibits communications that, themselves, are reasonably perceived as a vehicle for achieving a goal through the use of intimidation. This Court's decision in *Alkhabaz* makes this distinction clear. That case involved two men who were essentially internet pen pals exchanging private email messages that expressed interest in committing sexual violence

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(…continued)
("reject[ing] the premise that a communication qualifies as a threat under § 875(c) only if it is a means to an end other than intimidation for its own sake" and noting that "[n]o other circuit has adopted the Sixth Circuit's narrow interpretation of § 875(c)"); *United States* v. *Francis*, 164 F.3d 120, 121 (2d Cir. 1999) (government need not prove that the threat was intended "to bring about some specific result"). Other circuits do not require that the threatening statement be designed to achieve a particular goal or purpose. See *United States* v. *Nishnianidze*, 342 F.3d 6, 14-15 (1st Cir. 2003) (government must prove that the communication contained a true threat, *i.e.*, "one that a reasonable recipient familiar with the context of the communication would find threatening"); *United States* v. *Morales*, 272 F.3d 284, 287-289 (5th Cir. 2001) ("a communication is a threat under [Section] 875(c) if in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor") (citations omitted); *United States* v. *Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) ("the government bore only the burden of proving that [the defendant's] * * * calls were reasonably perceived as threatening bodily injury").

[4] The portions of *Alkhabaz* and *Jeffries* that dealt with the mens rea required under Section 875(c) were overruled by the Supreme Court's decision in *Elonis* but are not at issue in this case.

against women and girls. 104 F.3d at 1493. This Court affirmed the district court's dismissal of an indictment charging one of the men with violating of Section 875(c). The Court explained that, even if the email messages at issue were understood as "serious expressions of an intention to inflict bodily harm, no reasonable person would perceive such communications as being conveyed to effect some change or achieve some goal through intimidation." *Id*. at 1496. In other words, there was no showing that the statements themselves, which remained private between the two men, were acts of intimidation. In so holding, this Court concluded that, "[a]t their core," true threats prohibited by Section 875(c) "are tools that are employed when one wishes to have some effect, or achieve some goal, through intimidation." *Id.* at 1495. Applying that interpretation of Section 875(c), the Court held that the emails sent by the two men in *Alkhabaz* were not true threats because the men "apparently sent email messages to each other in an attempt to foster a friendship based on shared sexual fantasies." *Id.* at 1496.

The Court in *Alkhabaz* contrasted those emails with statements in other cases that satisfied the Sixth Circuit's requirement that a communication serve as a vehicle for achieving a goal through the use of intimidation. *Alkhabaz*, 104 F.3d at 1495. For example, in *United States* v. *Cox*, 957 F.2d 264, 265 (6th Cir. 1992), the Court upheld the Section 875(c) conviction of a defendant who called a bank and threatened to "hurt people" at the bank unless the bank returned personal property

that it had repossessed. Similarly, in *United States* v. *Schroeder*, 902 F.2d 1469, 1470 (10th Cir. 1990), the court affirmed the Section 875(c) conviction of the defendant who told an Assistant United States Attorney that "people would get hurt" if the government refused to give the defendant money. Both of these cases involved the use of intimidation (in the form of threats to harm others) to coerce the recipients of the communication into turning over property or money.

This Court in *Alkhabaz* also recognized that the intimidation conveyed by a true threat "may be the furtherance of a political objective." 104 F.3d at 1495. The Court cited *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir. 1976), where the defendant, a leader of a Jewish organization, was convicted of violating Section 875(c) by threatening to assassinate Yasser Arafat, the leader of the Palestine Liberation Organization (PLO). At a news conference, a television reporter asked the defendant, who was dressed in military fatigues and brandished a .38 caliber firearm, if his organization was planning to kill Arafat. *Id.* at 1021. The defendant responded that "[w]e are planning to assassinate Mr. Arafat. * * * Everything is planned in detail." *Ibid.* At trial, Kelner argued that his speech was protected by the First Amendment, that there was no assassination plot, and that he had merely intended to show the PLO that "we [as Jews] would defend ourselves and protect ourselves." *Id*. at 1021-1022. The Second Circuit rejected these arguments and affirmed the conviction. *Id.* at 1028. As this Court explained in *Alkhabaz*,

"[a]lthough Kelner's threat was not extortionate, he * * * sought to further the political objectives of his organization by intimidating the PLO with warnings of violence." 104 F.3d at 1495.

Accordingly, under Sixth Circuit precedent, a threat punishable under Section 875(c) must be such that "a reasonable person" would perceive the communication "as being conveyed to effect some change or achieve some goal through intimidation." *Alkhabaz*, 104 F.3d at 1496.

C. Applying This Court's Precedent, The District Court Did Not Abuse Its Discretion In Concluding That Doggart's Statements In The Plea Agreement Were Not True Threats

1. The district court did not abuse its discretion in concluding that the plea agreement did not satisfy the factual basis that this Circuit requires for a true threat under Section 875(c). Under this Court's precedent, a reasonable person could not have construed the statements contained in the plea agreement—those Doggart made in his telephone call with the FBI's confidential source on March 6, 2015—as designed to effect some kind of change or achieve some goal through intimidation. (Order, R. 29, PageID# 289-290).[5] Although the government argued

[5] In assessing whether Doggart made a true threat, the relevant statements in the plea agreement are those made on March 6, 2015, because those were the communications charged in the Information. (See Bill of Information, R. 12, PageID# 41). To be sure, as the district court noted, the plea agreement also mentioned Doggart's February 2015 Facebook posting stating that "Target 3 is

(continued…)

below that the plea agreement met this Circuit's requirements for a true threat, upon further consideration the government agrees with the district court that the facts contained in the plea agreement do not satisfy this standard.

As set forth in the plea agreement, Doggart told the confidential source in the March 6 call that "his ultimate plan was to injure or kill the inhabitants of Islamberg in Hancock, New York." (Plea Agreement, R. 14, PageID# 47). The plea agreement describes Doggart's statements to the confidential source as follows:

> During the phone call, the defendant told the CS, "those guys [have] to be killed. Their buildings need to be burnt down. If we can get in there and do that not losing a man, even the better." In the same recorded call, the defendant informed the CS that they could not carry pistols from Tennessee to New York because New York does not have carry permit reciprocity, but they could bring their "AR-15s, M-4s or M-16s." The defendant, in the recorded call, informed the CS that he planned to bring his M-4 rifle with four magazines. The defendant then told the CS he could provide the CS with the "meanest shotgun on Earth." When discussing the schedule for the operation, the defendant told the CS that "the drop dead date is April 15 because that's when those guys in OAF say they're gonna start a civil war."

(Plea Agreement, R. 14, PageID# 47).

(…continued)
vulnerable from many approaches and must be utterly destroyed." (See Order, R. 29, PageID# 288 n.2). But the agreement did not allege that the Facebook posting violated Section 875(c). Rather, it noted the February 2015 posting to provide context for Doggart's later statements, not to suggest that the posting itself was a true threat. At any rate, the posting did not mention Islamberg by name and would have been too vague to constitute a true threat.

These facts recount some of Doggart's attempts to recruit and solicit others to join in his plan to attack Islamberg. The district court could reasonably conclude that the statements did not amount to true threats under this Circuit's interpretation of Section 875(c) because no reasonable person would perceive the statements themselves as being conveyed to effect some change or achieve some goal through intimidation. Instead, as the district court found, those statements "involved planning attacks and wooing recruits rather than [communicating] intimidation or coercion." (Order, R. 29, PageID# 289).

To be sure, the *act* of damaging or destroying the Islamberg mosque would have been a horrific act of intimidation and violence. But the intimidation to the Islamberg community that would result from that act, *i.e.*, the destruction of the mosque, is not at issue in the Section 875(c) charge. Rather, under this Circuit's precedent, a reasonable person must construe the *communications themselves* as designed to further some goal through the use of intimidation. *Alkhabaz*, 104 F.3d at 1495. The district court did not abuse its discretion in concluding that a reasonable person would not interpret the statements as sending that message.

2. Neither of Doggart's challenges to the district court's holding has merit. He first argues (Br. 37-39) that the statements that the district court found insufficient are indistinguishable from those that the Second Circuit held violated Section 875(c) in *Kelner*. But that is not the case. The statements described in the

plea agreement occurred during a private telephone conversation that Doggart had with a potential recruit. In contrast, *Kelner* involved a publicly televised statement that an assassination had been planned and would be carried out. *Kelner*, 534 F.2d at 1021. *Kelner* might be analogous had Doggart stated that "those guys [have] to be killed[,] [t]heir buildings need to be burnt down," not in a private telephone call with a potential recruit, but during a television or radio interview for public consumption. That kind of public dissemination could convey to a reasonable person that the statement was made for the purpose of intimidating the residents of Islamberg. But making the statement to a potential recruit in a private phone conversation does not communicate the same message.

Doggart also argues (Br. 40) that, in rejecting the plea agreement, the district court ignored his admission that he *intended* that his communications achieve a goal through intimidation. Not so. Doggart conflates different elements of a Section 875(c) violation. The district court did not reject the plea agreement on the ground that Doggart lacked the requisite intent (or mens rea). Instead, the court concluded that the plea agreement failed to cite facts showing that he engaged in the necessary conduct (or actus reus), which, in this Circuit, includes proof that the defendant made a statement that a reasonable person would perceive as being communicated to effect some change or achieve some goal through intimidation. As the district court stated, "questions regarding mens rea are not relevant to the

instant matter because the facts in the plea agreement fail to show that even the actus reus requirement is satisfied." (Order, R. 29, PageID# 285).

Because the facts recited in the plea agreement failed to satisfy the legal standard that this Court requires for Section 875(c) offenses, the district court did not abuse its discretion in rejecting the plea agreement.

II

DOGGART WAS PROPERLY CONVICTED OF TWO COUNTS OF SOLICITING CRIMES OF VIOLENCE IN VIOLATION OF 18 U.S.C. 373

Doggart challenges his solicitation convictions on Counts 1 and 2, arguing (Br. 42) that the underlying felony offenses that he was convicted of soliciting—intentionally damaging or destroying religious property in violation of 18 U.S.C. 247(a)(1) and (d)(3), and federal arson in violation of 18 U.S.C. 844(i)—"lack the requisite element of force" required by 18 U.S.C. 373. Doggart therefore argues (Br. 51) that he was convicted of non-existent federal crimes and his convictions on both counts must be vacated. As discussed below, both of the felony offenses that Doggart was convicted of soliciting include the "use of physical force" as an element. Both offenses can therefore support convictions for solicitation of a crime of violence under 18 U.S.C. 373.

A. Standard Of Review

Whether the predicate offenses charged in Counts 1 and 2 may properly support convictions for soliciting a crime of violence in violation of 18 U.S.C. 373

involves questions of law subject to de novo review. *United States* v. *Coss*, 677 F.3d 278, 283 (6th Cir. 2012); *United States* v. *McMurray*, 653 F.3d 367, 370 (6th Cir. 2011).

B. 18 U.S.C. 373: Soliciting A Crime Of Violence

As relevant here, the federal offense of soliciting a crime of violence requires that the defendant solicit a person to "engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of *physical force* against property or against the person of another." 18 U.S.C. 373(a) (emphasis added); see generally *United States* v. *Talley*, 164 F.3d 989, 996 (6th Cir. 1999). The statute is intended "to reach persons who solicited crimes, but were unsuccessful." *United States* v. *Devorkin*, 159 F.3d 465, 467 (9th Cir. 1998). Accordingly, it is immaterial that the solicited crime, or predicate offense, was not brought to fruition. *Ibid.*

To determine whether a predicate offense satisfies Section 373, courts apply the "categorical approach." *Devorkin*, 159 F.3d at 467 (applying the categorical approach to Section 373). Under that approach, a court assesses whether the statutory elements of the predicate offense being solicited necessarily include "the use, attempted use, or threatened use of physical force" against property or against the person of another as required by Section 373. *Id.* at 466; see generally *Descamps* v. *United States*, 570 U.S. 254, 260-261 (2013) (summarizing

categorical approach); *United States* v. *Verwiebe*, 874 F.3d 258, 260 (6th Cir. 2017), cert. pending, No. 17-8413 (filed Apr. 6, 2018) (same). The court does not apply a "fact-based, case-by-case analysis of the actual result of the solicitation." *Devorkin*, 159 F.3d at 469.

In some cases, courts must apply a "modified categorical approach." *Descamps*, 570 U.S. at 257. Where a statute is "divisible"—*i.e.*, where the statute lists elements in the alternative and thereby defines multiple crimes—a court cannot tell, by looking only at the face of the statute, which elements the defendant is charged with soliciting. *Ibid.*; see also *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016). Accordingly, in these circumstances, a court looks to "a limited class of documents, such as indictments and jury instructions," in order to define what predicate crime, with which particular elements, the defendant has been charged with soliciting. *Descamps*, 570 U.S. at 257.

As discussed below, the predicate offenses underlying Counts 1 and 2 are contained in divisible statutes. Therefore, to determine whether Doggart was properly convicted under Section 373 for soliciting felonies that have as an element the use, attempted use, or threatened use of physical force, the court applies the modified categorical approach.

C. Intentionally Damaging Or Destroying Religious Property In Violation Of Section 247(a)(1) And (d)(3) Through Use Of A Dangerous Weapon, Explosives, Or Fire Necessarily Involves The Use Of Physical Force

1. Count 1 charged Doggart with soliciting a violation of 18 U.S.C. 247(a)(1) and (d)(3)—intentionally damaging or destroying a mosque through the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire. (Superseding Indictment, R. 84, PageID# 437). Section 247(a), "Damage to religious property," provides in relevant part:

> (a) Whoever, in any of the circumstances referred to in subsection (b) of this section--
>
> > (1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so; * * * shall be punished as provided in subsection (d).

18 U.S.C. 247(a).[6] Section 247(d), in turn, sets forth varying maximum statutory penalties depending on the severity of the resulting harm or whether the offense involved the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire. The first three subsections define felonies. Subsection (d)(1) defines a felony where death results. Subsection (d)(2) defines a felony where bodily injury results and the violation included the use of fire or an explosive. Subsection (d)(3) defines a felony where either bodily injury results or the

[6] Subsection (b) requires that "the offense is in or affects interstate or foreign commerce." See Argument III, p. 40, *supra*.

violation included the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire. Finally, subsection (d)(4) defines a misdemeanor offense where the conduct does not fit within one of the other subsections.

Plainly, Section 247 "comprises multiple, alternative versions of the crime," *Descamps*, 570 U.S. at 262, and therefore it is a divisible statute. The subparts of Section 247 set forth multiple elements, each one of which goes toward a separate crime. Thus, the modified categorical approach applies, and the court "may look beyond the statutory elements to the charging paper and jury instructions." *Id.* at 261 (citation and internal quotation marks omitted). In other words, the court determines whether the Section 247 violation charged in the indictment, and defined to the jury, satisfies the statutory language of Section 373(a), *i.e.*, whether the charged conduct necessarily involved "the use, attempted use, or threatened use of physical force against property or against the person of another."

Count 1 charged Doggart with soliciting others, between February and April 2015, to intentionally damage and destroy "through the use, attempted use, and threatened use of a dangerous weapon, explosives, and fire" a mosque "because of the religious character of that property," in violation of 18 U.S.C. 373 and 18 U.S.C. 247(a)(1). (Superseding Indictment, R. 84, PageID# 437). The jury instructions required the jury to find, as relevant here, that: (1) Doggart intended another person or persons to intentionally damage or destroy the Islamberg

mosque; and (2) the damage or destruction would have "involved the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." (Transcript, R. 289, PageID# 5261). Given these elements of the Section 247 violation, Doggart was convicted of soliciting a felony that plainly involves the "use of physical force" under Section 373(a).

One cannot damage or destroy religious property using a dangerous weapon, explosives, or fire *without* using physical force. Physical force is "force consisting in a physical act." *Johnson* v. *United States*, 559 U.S. 133, 139 (2010) (citations and internal quotation marks omitted); see also *United States* v. *Castleman*, 134 S. Ct. 1405, 1414 (2014) ("physical force is simply force exerted by and through concrete bodies") (citations omitted). To use a dangerous weapon, a defendant must employ physical force. *Higdon* v. *United States*, 882 F.3d 605, 607 (6th Cir. 2018) ("pulling a trigger on a gun" is "conduct giving rise to force"). Likewise, detonating an explosive involves the use of physical force. *United States* v. *Hull*, 456 F.3d 133, 140 (3d Cir. 2006). Finally, "fire is a physical force." *Santana* v. *Holder*, 714 F.3d 140, 144 (2d Cir. 2013); see also *id.* at 145 ("Fire is a powerful weapon—easy to wield, capable of overwhelming destruction, and difficult if not impossible to control."). As the Fourth Circuit explained, "[f]ire is nothing if not a force of nature that exerts an influence within the physical world." *Mbea* v. *Gonzales*, 482 F.3d 276, 280 (4th Cir. 2007) (citations and internal quotation

marks omitted); see also *Dickson* v. *Ashcroft*, 346 F.3d 44, 49 (2d Cir. 2003) (Fire is a physical force in the sense that it can impose "physical barriers of forcible restraint."). Accordingly, because each of the means of damaging or destroying the Islamberg mosque under the section 247(a)(1) and (d)(3) offense charged here involves the use of physical force, the Section 247 predicate felony is a qualifying crime of violence under Section 373.

2. Doggart does not dispute that Section 247 is, at least in a general sense, a divisible statute. Rather, he argues (Br. 44-47) that subsection (d)(3) is indivisible. Specifically, he contends that a violation of Section 247(d)(3) does not necessarily require the use of physical force because, even though he was convicted of soliciting a violation of Section 247 that involved the "use of a dangerous weapon, explosive, or fire," a felony violation of subsection (d)(3) can *also* involve "bodily injury to any person." 18 U.S.C. 247(d)(3). In other words, in Doggart's view (Br. 47), because a Section 247(d)(3) violation involving the bodily injury prong may not necessarily entail use of physical force, Section 247(d)(3) cannot be used as a predicate offense for a violation of Section 373.

As the district court noted, Doggart "provides no authority or analysis to support its proposition that section 247(d)(3) is indivisible." (Order, R. 230, Page ID# 3679). And as the district court explained, a "statute is indivisible if it sets out a single set of elements to define a single crime and any alternatives with in the

statute are merely alternative factual means of satisfying the required elements." (Order, R. 230, Page ID# 3679) (citing *Mathis*, 136 S. Ct. at 2248). The district court concluded that it saw "no reasonable way to construe the statute other than as divisible, with one alternative element being bodily injury to any person, and the other being the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." (Order, R. 230, Page ID# 3679). That conclusion is correct.

In any event, the Supreme Court has made clear that where it may be difficult to determine if a statute sets forth elements of multiple offenses or, instead, simply alternate means of committing one offense, the court should resort to the indictment and jury instructions to resolve the issue. *Mathis*, 136 S. Ct. at 2256-2257. In *Mathis*, the Court explained that, in the absence of "clear answers," an "indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime." *Id.* at 2257; see also *Descamps*, 570 U.S. at. 264. Here, as noted above, the indictment and jury instructions made clear that Doggart was charged with soliciting a crime that "involved the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." (Transcript, R. 289, PageID# 5261). Neither mentioned bodily injury. If the "bodily injury" prong and the weapons/explosives/fire prong of Section 247(d)(3) were simply alternative means of committing a single offense, the indictment and jury

instructions would have mentioned both. Accordingly, the bodily injury prong of subsection (d)(3) has no relevance here, and whether "bodily injury" under Section 247(d)(3) will *always* be the result of the use of physical force sufficient to support a Section 373 charge is not a question this Court need decide.

Doggart also argues that the two prongs of subsection (d)(3) must be alternative means of committing a single crime because the maximum statutory penalty for violating Section 247(d)(3) is the same regardless of whether the offense is accomplished through use of a dangerous weapon, explosives, or fire, or whether it results in bodily injury. But while it is true that when "statutory alternatives carry different punishments, then under *Apprendi* [v. *New Jersey*, 530 U.S. 466 (2000),] they must be elements," *Mathis*, 136 S. Ct. at 2256, the converse is not true. No decision of this Court or the Supreme Court (or any other court, as far as we are aware) has ever held that statutory alternatives that carry the same maximum penalty cannot be separate elements.

3. Doggart makes two other arguments in support of his view that Section 247(a)(1) and (d)(3) cannot serve as a predicate offense for solicitation under Section 373. First, he argues that "because the crime solicited is by definition incomplete, there will never be proof of the means employed or resulting damage, and thus no proof upon which to determine the statutory penalty." In other words, Doggart argues that it is impossible to commit the crime of soliciting a violation of

Section 247 because the question whether the Section 247 violation was a felony and involved physical force cannot be answered until the Section 247 offense is actually completed. The district court correctly rejected this argument. (Order, R. 230, PageID# 3677).

Solicitation is an inchoate crime. The nature of a solicitation charge means that "the crime solicited need not be committed." *United States* v. *Hankins*, 195 F. App'x 295, 300 (6th Cir. 2006) (quoting *Devorkin*, 159 F.3d at 468 n.2 (citations and alteration omitted)). In enacting Section 373, the Senate Judiciary Committee explained that the provision was intended to reach persons who solicited the commission of crimes but were unsuccessful, and that other provisions would address situations where the solicited crime was actually committed:

> The Committee believes that a person who makes a serious effort to induce another person to commit a crime of violence is a clearly dangerous person and that his act deserves criminal sanctions whether or not the crime of violence is actually committed. The principal purpose of the new section is to allow law enforcement officials to intervene at an early stage where there has been a clear demonstration of an individual's criminal intent and danger to society. Of course, if the person solicited actually carries out the crime, the solicitor is punishable as an aider and abettor.

S. Rep. No. 98-225, at 308 (1983).

Accordingly, the government must prove "that the defendant had the intent that another person engage in conduct constituting a crime." *Talley*, 164 F.3d at 996 (citation omitted). Therefore, the jury examines "not the result, but the

defendant's intent." *Devorkin*, 159 F.3d at 467; see also *United States* v. *Korab*, 893 F.2d 212, 215 (9th Cir. 1989) (noting that Section 373 "requires a finding, not that a federal offense resulted, but that [the defendant] intended that acts constituting a federal offense result"). The solicitation charge in Count 1 was based on Doggart's intent to induce others to damage or destroy the Islamberg mosque by using a dangerous weapon, an explosive, or fire. Moreover, the jury was instructed that it must find that Doggart had the intent to solicit others to damage or destroy the mosque through use of a dangerous weapon, explosives, or fire. That intent, rather than a particular result, is what is relevant and required here.[7]

Second, Doggart suggests (*e.g.*, Br. 48-49) that Section 373 requires the use of "violent" force and that Section 247(d)(3) does not satisfy that standard. Doggart cites no authority to support this construction of Section 373's "use of physical force" clause, and Section 373 itself does not define the terms "force" or "physical force." But the Court need not decide in this case whether "physical force" must be "violent" to satisfy Section 373 because there is no question that the

[7] For the same reason, there is also no merit to Doggart's argument (Br. 44, 50) that Section 247(a)(1) and (d)(3) cannot meet Section 373's use-of-force requirement because the "amount" of damage to the religious property is unspecified in subsection (d)(3). The amount of damage intended or actually occurring is irrelevant to the solicitation offense.

kind of force prohibited by Section 247(d)(3)—the use of a dangerous weapon, explosive, or fire—is violent in nature.[8] See *Verwiebe*, 874 F.3d at 260 (holding, in the context of the Guidelines enhancement for career offenders, that "if a crime already includes some use or threat of physical force, * * * the use of a dangerous weapon transforms that force into the type of violent force necessary to constitute a crime of violence"). 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. 2009) (internal quotation marks omitted). 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 using fire to violate Section 247 is inherently violent. See *United States* v. *Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999) (holding that

[8] To be sure, in other statutory contexts, the Supreme Court has assigned different meanings to the word "force." See *Johnson*, 559 U.S. at 134 (holding that "physical force" under 18 U.S.C. 924(e)(2)(B)(i) means "violent force"); *Castleman*, 134 S. Ct. at 1410 (holding that "physical force" under 18 U.S.C. 921(a)(33)(A) means "offensive touching" as defined at common law). But *Johnson* and *Castleman* involve statutory use-of-force clauses where the force must be directed "against a person." Section 373 involves use of "physical force against property or against the person of another." Given this difference, it is not clear that either *Johnson* or *Castleman* provides guidance as to the minimum nature of the force required for crimes committed against property under Section 373. Cf. *United States* v. *Hill*, No. 14-3872, 2018 WL 2122417, at *5 n.10 (2d Cir. May 9, 2018). But whatever the minimum threshold may be as to the solicitation of a crime of violence against property, it is satisfied here.

"the use or attempted use of fire" under 18 U.S.C. 3631 qualifies as a crime of violence under 18 U.S.C. 924(c)); see also *United States* v. *Spencer*, 724 F.3d 1133, 1141 (9th Cir. 2013) ("arson is classified as a dangerous felony because we know that fire is generally dangerous to others, * * * and common sense indicates that setting fire to someone's home or a building increases the risk that a person will be injured by the fire").

D. Violation Of 18 U.S.C. 844(i), The Federal Arson Statute, Necessarily Involves The Use Of Physical Force

Doggart also argues (Br. 52-54) that the predicate crime solicited in Count 2—arson in violation of 18 U.S.C. 844(i)—does not necessarily involve the use of physical force as required by Section 373. Section 844(i) states, in relevant part, that "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive" real property used in interstate commerce shall be imprisoned for not less than five years. Doggart asserts that because recklessness can satisfy the mens rea requirement of Section 844(i) (*i.e.*, maliciousness), the statute does not necessarily satisfy the mens rea requirement of Section 373 and therefore does not qualify as a crime having as an element the "use of physical force."

Doggart concedes that this argument is foreclosed by this Court's decision in *United States* v. *Verwiebe*, 874 F.3d 258 (6th Cir. 2017).[9] In that case, the Court held that reckless conduct can satisfy "the use, attempted use, or threatened use of physical force" definition of "crime of violence" in Sentencing Guideline 4B1.1, which raises the base offense level for career offenders. *Id.* at 260. This Court relied upon *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), which held that the reckless commission of a domestic assault offense that has as an element "the use or attempted use of physical force" is sufficient under 18 U.S.C. 922(g)(9) to disqualify an individual from possessing a firearm. *Id.* at 2276. The Court in *Voisine* explained that "[a] person who assaults another recklessly 'use[s]' force, no less than one who carries out that same action knowingly or intentionally." 136 S. Ct. at 2280.

Voisine and *Verwiebe* dictate the result here.[10] The use of physical force clause in Sentencing Guideline 4B1.1 is the same as in Section 373. Therefore, the

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[9] Doggart notes that he is raising this issue to preserve it for further appeal. Br. 54.

[10] The Fifth, Eighth, and Tenth Circuit have all reached the same conclusion in holding recklessness suffices to establish "use of force." See *United States* v. *Pam*, 867 F.3d 1191, 1207-1208 (10th Cir. 2017) (ACCA); *United States* v. *Mendez-Henriquez*, 847 F.3d 214, 221-222 (5th Cir. 2017) (U.S.S.G. 2L1.2(b)); *United States* v. *Howell*, 838 F.3d 489, 500-501 (5th Cir. 2016), cert. denied, 137

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"malicious" damage or destruction of a building prohibited by Section 844(i) necessarily involves sufficient use of physical force for purposes of Section 373. Accordingly, Doggart's challenge to his conviction on Count 2 fails.

III

THERE WAS SUFFICIENT EVIDENCE FOR A JURY TO FIND THAT THE ISLAMBERG MOSQUE WAS USED IN INTERSTATE COMMERCE

Doggart challenges the sufficiency of the evidence on Count 2, his conviction for solicitation to commit arson of the mosque in violation of 18 U.S.C. 373 and 18 U.S.C. 844(i). (Superseding Indictment, R. 84, PageID# 437). Doggart argues (Br. 54-62) that there was insufficient evidence for the jury to find that, during the relevant period charged in the indictment, the mosque was "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 18 U.S.C. 844(i). He does not contest the sufficiency of the evidence as to any other element, and the jury had ample evidence from which to find him guilty.

A. Standard Of Review

This Court reviews *de novo* Doggart's challenge to the sufficiency of the evidence on the interstate commerce element of his conviction for solicitation of

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(…continued)
S. Ct. 1108 (2017) (U.S.S.G. 4B1.2(a)); *United States* v. *Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017) (ACCA).

arson. *United States* v. *Pritchett*, 749 F.3d 417, 430 (6th Cir. 2014). A defendant challenging the sufficiency of the evidence "bears a very heavy burden." *United States* v. *Spearman*, 186 F.3d 743, 746 (6th Cir. 1999). This Court must deny a challenge to the sufficiency of the evidence if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). "[T]he only question under *Jackson* is whether [the jury's] finding was so insupportable as to fall below the threshold of bare rationality." *Coleman* v. *Johnson*, 132 S. Ct. 2060, 2065 (2012) (per curiam).

B. The Interstate Commerce Element Of The Federal Arson Statute Requires That The Building Be Actively Employed For A Commercial Purpose

Section 844(i) provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property *used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce* shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both."

18 U.S.C. 844(i) (emphasis added).

In *Jones* v. *United States*, 529 U.S. 848, 854 (2000), the Supreme Court addressed the interstate commerce element of Section 844(i). The Court held that an owner-occupied private home, not used for any commercial purpose, does not qualify as property "used in" commerce or in an activity affecting commerce under

Section 844(i). The Court explained that, given the statutory phrase "used in" commerce or an activity affecting commerce, there must be "active employment" of the building "for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 855.

In so holding, the Court rejected the argument that an Indiana family home was "used in" interstate commerce because the home had a mortgage from an Oklahoma lender, casualty insurance from a Wisconsin insurer, and received natural gas from out-of-state sources. *Jones*, 529 U.S. at 855. The Court explained that these "trace" connections to interstate commerce could be met by practically any building, and, if sufficient, would render the interstate commerce element of the federal arson statute meaningless. *Id.* at 857. Accordingly, to respect the limits of Congress's Commerce Clause power by ensuring that not every arson is a federal offense, the Court made clear that Section 844(i) "covers only property currently used in commerce or an activity affecting commerce." *Id.* at 859. The "proper inquiry," then, "is into the function of the building itself, and then a determination of whether that function affects interstate commerce." *Id.* at 855.

C. Religious Buildings That Are Also Used For Commercial Purposes Are Covered By The Federal Arson Statute

Applying *Jones*, this Court has held that churches, synagogues, and mosques can have commercial functions that trigger coverage under Section 844(i) as part of, or in addition to, their religious functions. For example, in *United States* v.

Rayborn, 312 F.3d 229, 234 (6th Cir. 2002), the Court held that the federal arson statute protected a church that (1) "drew members" and received donations from across state lines; (2) "hosted free events, to which the public was invited"; (3) served as the site of gospel concerts, "including some featuring out-of-state talent," for which small donations were requested; (4) "engaged in substantial activities in the local market for goods" through spending money on food and flowers for funerals; (5) employed two people and owned several vehicles; and (6) broadcast its sermons on radio stations in surrounding states by paying approximately $17,000 to those stations annually. *Ibid.* This Court held that when "these facts are taken together," there was "sufficient evidence to permit a rational jury to find that the church was actively employed in commercial activities with an effect on interstate commerce." *Id.* at 235; accord *United States* v. *Rayborn*, 495 F.3d 328, 335-337 (6th Cir. 2007).

Other courts of appeals have reached similar conclusions. The Fourth Circuit held that the arson of a church building was covered by Section 844(i) because the church operated a daycare center five days per week, employing teachers and charging a fee of $706 per month. *United States* v. *Terry*, 257 F.3d 366, 369 (4th Cir. 2001). Similarly, the Tenth Circuit concluded that a synagogue that housed a preschool and a gift shop was "a building used in or affecting an activity in interstate commerce within the meaning of 18 U.S.C. 844(i)." *United*

States v. *Gillespie*, 452 F.3d 1183, 1188 (10th Cir. 2006); cf. *United States* v. *Odom*, 252 F.3d 1289, 1296-1298 (11th Cir. 2001) (holding that a church was not covered by the federal arson statute based on the mere facts that the church (1) received donations from two out-of-state donors; (2) used "a handful" of Bibles purchased from an out-of-state source; and (3) made indirect contributions to an out-of-state church organization through membership with an in-state church organization).

Accordingly, although incidental connections to commerce will not suffice to bring a religious building within the scope of Section 844(i), such buildings are covered by the federal arson statute when they serve as the home to a commercial enterprise (such as the daycare centers in *Terry* and *Gillespie*), or otherwise regularly engage in activities that have direct and substantial ties to interstate commerce (as in *Rayborn*).

D. The Evidence Was Sufficient To Support The Finding That The Islamberg Mosque Was Used In Interstate Commerce Or In An Activity Affecting Interstate Commerce

The government presented ample evidence at trial demonstrating that the Islamberg mosque that Doggart targeted for destruction was used in interstate commerce and had "direct, regular, and substantial" connections to activities affecting interstate commerce. *Rayborn*, 312 F.3d at 234. The evidence of the mosque's activities affecting interstate commerce falls into two categories:

First, during the entire period at issue (February 2015 to April 2015), a business called Zavia Books was located in the same building as the mosque. (Transcript, R. 287, PageID# 4846). Owned and operated by two members of the Islamberg community, Zavia Books ran a printing press and bookstore on the second floor of the mosque. (Transcript, R. 288, PageID# 5125; Transcript, R. 287, PageID# 4847). In February 2015, Zavia Books incorporated as an LLC. (Transcript, R. 288, PageID# 5127). Beginning in February or March 2015 through April 2015, the bookstore purchased paper, ink, printers, cutters, and copiers. (Transcript, R. 289, PageID# 5140, 5142; see also Transcript, R. 287, PageID# 4847). Zavia Books printed its first book in May 2015, and sold copies of that book in June or July 2015 to a summer camp in South Carolina. (Transcript, R. 289, PageID# 5127-5128). Zavia Books also bought and resold other books from wholesalers. (Transcript, R. 289, PageID# 5127).

In 2015, Zavia Books had approximately $4000 in sales. (Transcript, R. 289, PageID# 5136). Customers could make purchases from Zavia Books' physical bookstore, which is part of a gift shop on the first floor of the mosque. (Transcript, R. 287, PageID# 4848). Customers could also make purchases through Zavia Books' website and through its 800 number. (Transcript, R. 289, PageID# 5097). On some occasions, customers who lived out of state placed orders and asked the bookstore to hold their books for pick up when they traveled

to the mosque for worship. (Transcript, R. 289, PageID# 5099-5100). The bookstore also mailed books to out-of-state purchasers. (Transcript, R. 289, PageID# 5099, 5107). Those mailings included books sent to members of Zavia Book's book club, which has 250-300 members, the majority of whom reside outside New York State. (Transcript, R. 289, PageID# 5099, 5107).

Second, the jury heard evidence about the annual summer youth camp that has taken place at Islamberg since 1992 and uses the mosque. (Transcript, R. 289, PageID# 5106). Approximately 100 children attend the camp each year, at a cost of between $100 to $150 dollars per camper. (Transcript, R. 289, PageID# 4851-4852, 5105). The camp includes both religious and outdoor-sporting activities; the religious education classes are held in the mosque. (Transcript, R. 289, PageID# 5106). Numerous campers come from out of state. (Transcript, R. 287, PageID# 4852). For example, Noori Brooks, a co-owner of the bookstore, testified that prior to moving to Islamberg as an adult, he travelled from his childhood home in California to attend the summer camp as a student, and that his own children have attended the camp. (Transcript, R. 289, PageID# 5104-5105). Camp activities in 2015 were cancelled because of the threats Doggart made to Islamberg. (Transcript, R. 289, PageID# 5106-5107; Transcript, R. 287, PageID# 4853-4854). Brooks testified that because the camp "bring[s] children from all over the U.S. *

* * [and] it didn't feel right at the time, you know, for safety reasons, to hold a camp that year." (Transcript, R. 289, PageID# 5106).

Taken together, this evidence is more than sufficient to establish that the mosque was used in interstate commerce or in activities affecting interstate commerce. Indeed, the district court relied upon the evidence concerning the activities of Zavia Books alone in denying Doggart's motion for judgment of acquittal and rejecting his argument that there was insufficient evidence that the mosque was used in interstate commerce. (Order, R. 230, PageID# 3680-3681). That conclusion was correct. The mosque was literally home to a commercial enterprise that purchased supplies and goods from other vendors, and printed and sold its own books to customers onsite and by mail across state lines. This evidence more than satisfies the requirement that there be "active employment" of the building in interstate commerce. *Jones*, 529 U.S. at 855. Moreover, the Zavia Books evidence is comparable to the evidence that this Court held sufficient as to the church in *Rayborn*, discussed above.

Of course, this Court need not rely solely on the activities of Zavia Books. Even though not addressed by the district court, the evidence regarding the summer camp also shows that the mosque was used in an activity affecting interstate commerce. The summer camp brought dozens of young people from out of state to the mosque every year at a cost of $100 to $150 per camper. The Supreme Court

has recognized that a non-profit summer camp, where young people come from out-of-state, "necessarily generates the transportation of persons across state lines that has long been recognized as a form of 'commerce.'" *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 573 (1997) (quoting *Edwards* v. *California*, 314 U.S. 160, 172 (1941)). The summer camp at Islamberg is thus a quintessential commercial activity affecting interstate commerce. Indeed, the operation of the summer camp here provides stronger evidence of a connection to interstate commerce than the daycare centers in *Terry* and *Gillespie*, which served local children.

E. Doggart's Argument That The Mosque Was Not Used For Commercial Purposes Ignores Much Of The Evidence Before The Jury

Doggart argues that there was insufficient evidence that the mosque was used in interstate commerce for purposes of Section 844(i). But he does so by addressing only the operations of Zavia Books. Br. 58-61. Doggart makes no mention of the evidence regarding the summer camp, which also shows that the mosque was actively employed in activities affecting interstate commerce.

Doggart attacks the Zavia Books evidence in two ways. First, he argues (Br. 59) that the evidence is insufficient because there was "no documentation" of Zavia Books' "legal status, its purchases, or any sales by cash or credit card." This argument is essentially an attack on the credibility of the two witnesses—Noori Brooks and Mohammed Clark—who testified regarding its operations. These

witnesses—one of whom is a co-owner of the bookstore—did testify about the bookstore's legal status, its purchases, and its sales. Moreover, the evidence before the jury included pictures of the bookstore and the printing equipment it had purchased. (Transcript, R. 287, PageID# 4847, 4849). Of course, there is no requirement that the government prove a connection to interstate commerce through documentary evidence, as opposed to testimony from knowledgeable witnesses. At bottom, Doggart is asking this Court to re-determine, re-weigh, and reject the credibility of the government's witnesses because the facts that they testified to were not also documented on paper. That is plainly improper. See *United States* v. *Barnett*, 398 F.3d 516, 522 (6th Cir. 2005); *United States* v. *Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994).

Second, Doggart argues that there is insufficient evidence of Zavia's Books commercial activities *during the period* set forth in the indictment, *i.e.*, between February and April 2015. Specifically, Doggart argues (Br. 59) that because Zavia Books was only preparing to sell books between February and April 2015, and did not actually sell any books until May, it was not engaged in an activity affecting commerce. These arguments are factually and legally incorrect. The evidence at trial established that the bookstore purchased paper, ink, printers, cutters, and copiers in stages beginning in February or March 2015 through April 2015. (Transcript, R. 289, PageID# 5140, 5142; see also Transcript, R. 287, PageID#

4847). These activities show that, during the relevant period, the mosque was being used in interstate commerce; there is clear evidence of "active employment [of the building] for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Jones*, 529 U.S. at 855.

Moreover, Zavia Books' *preparations* for book printing and sales fall easily within the scope of activities that courts have held affect interstate commerce. For example, in *United States* v. *Iodice*, 525 F.3d 179 (2d Cir. 2008), the Second Circuit held that Section 844(i) covered the arson of a victim's diner six months before it was scheduled to open. The court held that a building will satisfy the "active employment" standard so long as there is evidence of the owner's "plans and arrangements" and "active preparation" to bring the building into commercial use. *Id.* at 184-185; see also *United States* v. *Troy*, 618 F.3d 27, 33 (1st Cir. 2010) (holding that when a commercial building is temporarily vacant, "that building nonetheless continues to be 'used' in interstate commerce for purposes of satisfying Section 844(i) as long as there is sufficient evidence of an intent to return the building to the stream of commerce"); *United States* v. *Williams*, 299 F.3d 250, 252 (3d Cir. 2002) (holding that arson of a building that was available for rent but not actually leased at the time of the fire "sufficiently affects interstate commerce as to constitute a federal crime").

In sum, Doggart's argument that the evidence was insufficient to establish that the mosque satisfied Section 844(i)'s commerce element fails both because he ignores much of the evidence before the jury—which shows that the mosque was actively engaged in interstate commerce in multiple ways—and because his challenge to the evidence regarding Zavia Books is factually and legally incorrect. The evidence at trial made clear that, during the relevant period, the owners of Zavia Books were engaged in "meaningful, definite, and ongoing steps," *Troy*, 618 F.3d at 33, to prepare for and conduct the business of printing and selling books. No more is required to satisfy the interstate commerce element of the federal arson statute. At any rate, even if the government had presented no evidence about Zavia Books, the evidence pertaining to the summer camp would be sufficient, standing alone, to show the requisite connection to interstate commerce.

IV

THE DISTRICT COURT PROPERLY APPLIED THE TERRORISM ENHANCEMENT AT SENTENCING

Doggart argues that the district court erred in applying the Terrorism Enhancement, U.S.S.G. 3A1.4, to his conviction on Count 2 for soliciting arson of a building in violation of 18 U.S.C. 373 and 18 U.S.C. 844(i). Doggart argues that: (1) the enhancement cannot be applied to solicitation under 18 U.S.C. 373; (2) application of the enhancement violates the Sixth Amendment; and (3) there was

insufficient evidence supporting application of the enhancement. Each of these arguments fails.

A. Standard Of Review

This Court reviews the district court's application of the Guidelines *de novo*, but limits its review of factual findings underlying a sentencing enhancement "to determin[ing] whether they were clearly erroneous." *United States* v. *Graham*, 275 F.3d 490, 514 (6th Cir. 2001).

Because Doggart did not raise his Sixth Amendment challenge before the district court, this Court reviews that issue for plain error. *United States* v. *Yancy*, 725 F.3d 596, 600 (6th Cir. 2013). Under the plain error standard, Doggart "must show (1) error (2) that was obvious or clear, (3) that affected his substantial rights, and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *United States* v. *Al-Maliki*, 787 F.3d 784, 791 (6th Cir. 2015) (internal quotation marks, citations, and alterations omitted).

B. The District Court Properly Applied The Terrorism Enhancement To Doggart's Conviction For Solicitation Of Arson

1. Section 3A1.4 of the Sentencing Guidelines states: "If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism," a twelve-level upward adjustment (or an increase to a minimum base offense level of 32) shall be applied and "the defendant's criminal history category * * * shall be Category VI." U.S.S.G. 3A1.4. Following the plain text, courts have recognized

that "the structure of Section 3A1.4 establishes two bases for applying the enhancement." *United States* v. *Fidse*, 862 F.3d 516, 522 (5th Cir. 2017) (citing *United States* v. *Graham*, 275 F.3d 490, 517 (6th Cir. 2001)). The offense must be a felony that either (1) "involved" or (2) "was intended to promote" a federal crime of terrorism. *Graham*, 275 F.3d at 516.

Application note 1 to Section 3A1.4 states that a '"federal crime of terrorism' has the meaning given that term in 18 U.S.C. 2332b(g)(5)." That statute, in turn, sets forth a two-part definition of "Federal crime of terrorism": It is an offense (1) "that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," 18 U.S.C. 2332b(g)(5)(A); and (2) that is a violation of one of a number of enumerated statutory provisions, including the federal arson statute (18 U.S.C. 844(i)), 18 U.S.C. 2332b(g)(5)(B). The list does not include 18 U.S.C. 373, the statute for solicitation of crimes of violence.

2. Under the "involved" prong of Guideline 3A1.4, an offense qualifies for the enhancement when "a defendant committed, attempted, or conspired to commit" a federal crime of terrorism. *Graham*, 275 F.3d at 516; accord *United States* v. *Arnaout*, 431 F.3d 994, 1001 (7th Cir. 2005). Thus, an offense "involves" a federal crime of terrorism "only if the crime of conviction is itself a federal crime of terrorism," *United States* v. *Parr*, 545 F.3d 491, 504 (7th Cir. 2008), or if the

"relevant conduct includes such a crime," *United States* v. *Awan*, 607 F.3d 306, 313-314 (2d Cir. 2010).

But under the "intended to promote" prong of Guideline 3A1.4, "the offense of conviction itself need not be a 'Federal crime of terrorism.'" *Graham*, 275 F.3d at 516. Instead, that phrase "implies that the defendant has as one purpose of his substantive count of conviction or his relevant conduct the intent to promote a federal crime of terrorism." *Ibid.* Thus, what matters is the defendant's purpose, "and if that purpose is to promote a terrorism crime, the enhancement is triggered." *United States* v. *Mandhai*, 375 F.3d 1243, 1248 (11th Cir. 2004). In short, application of Guideline 3A1.4 is not limited to circumstances "where the defendant is convicted of a crime listed in 18 U.S.C. § 2332b(g)(5)(B)." *Ibid.*

This Court's decision in *Graham* makes this point clear. In that case, the defendant argued that Guideline 3A1.4 did not apply to his conviction for conspiracy under 18 U.S.C. 371 because that statute is not among those listed in Section 2332b(g)(5)(B) and therefore cannot constitute a "Federal crime of terrorism." *Graham*, 275 F.3d at 517. This Court rejected that argument, holding that the enhancement applies not only to the federal crimes listed in the statute, but also to other offenses intended to promote the commission of one of the listed crimes. *Ibid*. The Court stated that "the defendant need not have been convicted of a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5) for the district

court to find that he intended his substantive offense of conviction or his relevant conduct to promote such a terrorism crime." *Ibid.* At the same time, the Court held that the district court must "identify which enumerated 'Federal crime of terrorism' the defendant intended to promote * * * and support its conclusions by a preponderance of the evidence with facts from the record." *Ibid.*[11]

This case is legally indistinguishable from this Court's decision in *Graham*. Just as the Terrorism Enhancement of Guideline 3A1.4 can be properly applied to *conspiracy* to commit arson in violation of Section 371 and Section 844(i), the enhancement can be applied to a conviction for *solicitation* to commit arson in violation of Section 373 and Section 844(i). A defendant who is guilty of solicitation to commit federal arson has, by definition, engaged in conduct "intended to promote" such an offense. Moreover, the district court, consistent with *Graham*, identified federal arson under 18 U.S.C. 844(i) as the "Federal crime

[11] Decisions in other circuits have also held that the Terrorism Enhancement of Guideline 3A1.4 may be applied to a conspiracy conviction under Section 371, even though Section 371 is not among the statutes listed in Section 2332(g)(5)(B), because the conspiracies at issue were "intended to promote" specifically-enumerated federal crimes of terrorism. See, *e.g.*, *Mandhai*, 375 F.3d at 1247 (involving a conviction for conspiracy to destroy a building by means of fire or explosives in violation of Section 844(i)); *United States* v. *Meskini*, 319 F.3d 88, 90 (2d Cir. 2003) (applying the enhancement to a conviction for conspiracy under Section 371).

of terrorism" the defendant intended to promote, and Section 844(i) is an offense included in Section 2332b(g)(5)(B). (Transcript, R. 293, PageID# 5450-5451).

Accordingly, *Graham* forecloses Doggart's argument (Br. 66-67) that the Terrorism Enhancement cannot apply because Section 373 is not listed as a "federal crime of terrorism" under Section 2332(g)(5)(B). The district court properly applied Guideline 3A1.4 in this case.[12]

C. Application Of The Terrorism Enhancement Did Not Violate Doggart's Sixth Amendment Rights

Doggart argues (Br. 70-78) that the district court's fact-finding at sentencing in applying the Terrorism Enhancement "constitutes an as-applied Sixth Amendment violation." He argues (Br. 72) that the "severe sentence" resulting from the enhancement would be substantively unreasonable in the absence of this adjustment, and therefore contends that this is a case where the factual basis for the enhancement should have been decided by the jury, not the sentencing court. Doggart did not raise this argument below, so it is reviewed for plain error.

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[12] Doggart's argument to the contrary (Br. 66-68) mirrors the dissent in *Graham*, which relied on an interpretation of the congressional authorizations underlying Guideline 3A1.4. See *Graham*, 275 F.3d at 525-541 (Cohn, D.J., dissenting). The majority in *Graham* implicitly rejected this argument in holding that the Terrorism Enhancement applies to a conviction for conspiracy in violation of 18 U.S.C. 371. For this reason as well, Doggart's discussion (Br. 69-70) of *United States* v. *LaBonte*, 520 U.S. 751 (1997), has no bearing on this issue.

Because this argument is foreclosed by circuit precedent, there is no error, let alone plain error.

To apply the Terrorism Enhancement, the district court had to find that Doggart acted with the specific intent to "influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. 2332b(g)(5)(A). As Doggart acknowledges (Br. 70), the district court made this finding by a preponderance of the evidence. (Transcript, R. 293, PageID# 5449-5452). Ample trial evidence supports this conclusion. See p. 9, *supra*; pp. 59-60, *infra*.

It is "well-established" that no Fifth or Sixth Amendment violation occurs "when a judge makes findings of facts at sentencing under the preponderance of the evidence standard." *United States* v. *Mayberry*, 540 F.3d 506, 516 (6th Cir. 2008). Further, "[f]or Sixth Amendment purposes, the relevant upper sentencing limit established by the jury's finding of guilt is [] the statutory maximum." *United States* v. *White*, 551 F.3d 381, 384-385 (6th Cir. 2008) (en banc) (alteration and citation omitted). Here, Doggart received a within-Guidelines sentence that did not exceed the applicable statutory maximum. Accordingly, the sentence did not violate his Sixth Amendment rights.

To be sure, the sentencing enhancement triggered by Guideline 3A1.4 is steep. Its application increased the offense level by 12 points and placed the

defendant in the maximum criminal history category of VI. U.S.S.G. § 3A1.4(a), (b). But "[s]o long as the defendant receives a sentence at or below the statutory ceiling set by the jury's verdict, the district court does not abridge the defendant's right to a jury trial by looking to other facts * * * when selecting a sentence within that statutory range." *White*, 551 F.3d at 385.

Doggart (Br. 71) points to concurrences in decisions of this Court and the Supreme Court in arguing that a sentence might result in an as-applied violation of the Sixth Amendment where such a sentence would be "reasonable only because of the existence of judge-found facts." *Rita* v. *United States*, 551 U.S. 338, 374 (2007) (Scalia, J., concurring); *United States* v. *Conaster*, 514 F.3d 508, 528 (6th Cir. 2008) (Moore, J., concurring). The theory underlying such an "as-applied" Sixth Amendment challenge is that a defendant might demonstrate that his sentence "would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall* v. *United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring). But as this Court has recognized, "[t]he fact remains that 'neither a majority of the Supreme Court nor a majority of this court has recognized an as-applied Sixth Amendment challenge." *United States* v. *Merriweather*, No. 17-5077, 2018 U.S. App. LEXIS 7727 at *64-*65 (6th Cir. Mar. 28, 2018) (citing *United States* v. *Bonick*, 711 F. App'x 292, 299 (6th Cir. 2017)).

D. The Application Of The Terrorism Enhancement Was Supported By Sufficient Evidence

Finally, Doggart argues (Br. 78-79) that the district court erred in finding that he had the requisite intent to trigger application of the Terrorism Enhancement. As noted above, for the enhancement to apply, the district court had to find that the offense "involved or was intended to promote" a "Federal crime of terrorism" as defined in 18 U.S.C. 2332b(g)(5). Offenses listed in Section 2332b(g)(5)(B) meet this definition only when the sentencing court specifically finds that the defendant's offense was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. 2332b(g)(5)(A).

Based upon Doggart's own statements, the district court found that Doggart's solicitation of others "to damage or destroy the mosque at Islamberg using explosives intended to promote the federal terrorism crime of arson for the purpose of intimidating or coercing the government." (Transcript, R. 293, PageID# 5450-5451; see also Transcript, R. 293, PageID# 5403-5407). The district court found that Doggart intended to solicit others to destroy the Islamberg mosque not just because of its religious character, but also to incite a civil insurrection against the government. (Transcript, R. 293, PageID# 5452). The district court noted, for example, Doggart's statement "that the government we have was no longer willing or able to protect its citizens, and that patriots and

militias need to rise up and take over the government's responsibilities." (Transcript, R. 293, PageID# 5451). The court also found that Doggart "was talking about setting in motion an armed insurrection against the government of the United States that would force the government of the United States either to respond to the attacks or to give in and capitulate." (Transcript, R. 293, PageID# 5452).

Doggart does not argue that the district court's intent finding is clearly erroneous. And any such argument would fail in light of Doggart's uncontroverted statements. Rather, Doggart argues that the specific intent finding is legally irreconcilable with the district court's prior findings in rejecting his guilty plea for the Section 875(c) threat charge. That is not so. To be a "true treat" under Section 875(c), the defendant's words themselves—not any acts that may result from those words—must be such that a reasonable person would perceive the statements as designed to effect some change or achieve some goal through intimidation. See pp. 19-22, *supra*. For purposes of the Terrorism Enhancement, the focus is not on any intimidation that resulted from Doggart's words, but rather on the intimidation or coercion of the government that Doggart intended to result from the act of destroying the Islamberg mosque. Accordingly, there is no conflict between the district court's findings in rejecting Doggart's proposed plea and the application of the Terrorism Enhancement here.

V

DOGGART'S SENTENCE IS PROCEDURALLY AND SUBSTANTIVELY REASONABLE

Contrary to Doggart's arguments (Br. 79-83) he cannot show that the district court committed any error, much less plain error, in rejecting the grounds that he raised in favor of a downward variance. Nor can Doggart show that the district court abused its discretion in concluding that the within-Guidelines sentence that he received is substantively reasonable in light of the 18 U.S.C. 3553(a) sentencing factors.

A. Standard Of Review

After pronouncing the defendant's sentence, the district court must "ask the parties whether they have any objections to the sentence just pronounced that have not previously been raised." *United States* v. *Bostic*, 371 F.3d 865, 872 (6th Cir. 2004). "If a party does not clearly articulate any objection and the grounds upon which the objection is based, when given this final opportunity to speak, then that party * * * will face plain error review on appeal" as to any procedural challenges to the sentence. *Id.* at 873. Doggart does not contest (Br. 92) that plain error review applies to his procedural reasonableness challenge here.

Procedural reasonableness encompasses the issue of whether the court has "adequately explain[ed] the chosen sentence." *United States* v. *Brooks*, 628 F.3d 791, 795-796 (6th Cir. 2011). In cases challenging the procedural reasonableness

of within-Guidelines sentences on plain-error review, this Court need only determine whether '"[t]he record makes clear that the sentencing judge listened to each argument,' 'considered the supporting evidence,' was 'fully aware' of the defendant's circumstances and took 'them into account' in sentencing him." *United States* v. *Vonner*, 516 F.3d 382, 387 (6th Cir. 2008) (en banc) (quoting *Rita* v. *United States*, 551 U.S. 338, 356 (2007)).

If this Court concludes that the sentence is procedurally reasonable, it must then determine whether the sentence is substantively reasonable, *i.e.*, whether '"the length of the sentence is reasonable in light of the [18 U.S.C.] § 3553(a) factors.'" *United States* v. *Mendez*, 362 F. App'x 484, 486 (6th Cir. 2010) (quoting *United States* v. *Tate*, 516 F.3d 459, 469 (6th Cir. 2008)). All challenges to the substantive reasonableness of a sentence are reviewed for abuse of discretion, regardless of whether the error claimed has been preserved. *United States* v. *Houston*, 529 F.3d 742, 755 (6th Cir. 2008).

The district court's determination as to whether a sentence is substantively reasonable under the Section 3553(a) factors is entitled to deference: "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall* v. *United States*, 552 U.S. 38, 51 (2007). "[I]t is trial judges, not appellate judges, who have considerable discretion in applying the § 3553(a) factors to an

individual." *United States* v. *Overmyer*, 663 F.3d 862, 864 (6th Cir. 2011). "Because '[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a),' this Court applies a great deal of deference to a district court's determination that a particular sentence is appropriate." *United States* v. *Mayberry*, 540 F.3d 506, 519 (6th Cir. 2008) (quoting *Gall*, 552 U.S. at 51).

Moreover, this Court applies a rebuttable presumption of reasonableness to sentences that fall within a properly calculated Guidelines range. See *Vonner*, 516 F.3d at 389. Rebutting that presumption is "no small burden" and this Court "will not generally 'second guess' sentences on substantive grounds when they fall in the range prescribed by the Guidelines." *United States* v. *Simmons*, 587 F.3d 348, 365 (6th Cir. 2009) (citation omitted).

B. The District Court's Sentencing Determination

Doggart was sentenced based on his convictions on Counts 1 and 2 for soliciting crimes of violence. The probation officer calculated his total offense level as 33 and his criminal history category as VI, which yielded a Guidelines range of 235 to 240 months of imprisonment. (PSR ¶¶ 78-80, R. 232, PageID# 3702).

Before the sentencing hearing, the government and Doggart each filed sentencing memoranda, and the court received dozens of letters both from

residents of Islamberg and from Doggart's family and friends. Doggart also submitted materials about his mental health and other medical conditions. The district court noted that it had "review[ed] the voluminous information" that the parties provided. (Transcript, R. 293, PageID# 5344).

At the sentencing hearing, Doggart's counsel raised several objections to the proposed Guidelines calculation in the PSR. After hearing nearly three hours of defense witness testimony and argument (Transcript, R. 293, PageID # 5462), the district court rejected each of Doggart's objections and adopted the Guidelines calculation set out in the PSR.[13] The district court then heard argument on Doggart's motion for a downward departure and variance. The district court denied Doggart's request for a downward departure (under U.S.S.G. 5K2.13 or 5H1.3) or variance based upon his mental health and alleged diminished capacity. In so doing, the court found that "there is a need in this case to protect the public from the defendant and the defendant's efforts," (Transcript, R. 293, PageID# 5482), and noted that it was not inclined to vary from the Guidelines

[13] See Transcript, R. 293, PageID# 5384-5389 (rejecting objection to base offense level calculation); Transcript, R. 293, PageID# 5395-5396 (rejecting objection to application of U.S.S.G. 3A1.1(a) hate crime enhancement); Transcript, R. 293, PageID# 5444-5452 (rejecting objection to application of U.S.S.G. 3A1.4 terrorism enhancement); Transcript, R. 293, PageID# 5457-5462 (rejecting objection to denial of acceptance of responsibility adjustment under U.S.S.G. 3E1.1).

range when taking account of the Section 3553(a) factors. (Transcript, R. 293, PageID# 5484).

The defense then raised additional grounds for a variance, including: (1) Doggart's age and heart condition; (2) his character; (3) the fact that the Guidelines called for his sentence to run consecutively; and (4) the fact that Doggart would have received a lesser sentence had his initial guilty plea been accepted. (Transcript, R. 293, PageID# 5485-5490).

After hearing from a resident of Islamberg about the impact of Doggart's offenses on the community, and after a lengthy statement by Doggart, the district court explained in detail why it was denying the motion for the variance. (Transcript, R. 293, PageID# 5500-5524). The court stated that it "considered" all the reasons Doggart raised in his motion for a variance, and "decided to deny that request" because this "is not an appropriate case" for the Court to impose a variance. (Transcript, R. 293, PageID# 5534). The court stated that it "made this decision after hearing all of the arguments, reading the presentence report, reflecting back on the evidence presented at trial, and also after hearing [Doggart's] allocution." (Transcript, R. 293, PageID# 5534).

Specifically, the district court explained that a within-Guidelines sentence was warranted in light of the Section 3553(a) factors, including the nature of the offense; Doggart's background, history, and character; and the need for

"retribution, general deterrence, incapacitation, and rehabilitation." (Transcript, R. 293, PageID# 5533). The court concluded that a "very tough sentence" was necessary to address "the defendant's breach of societal laws." (Transcript, R. 293, PageID# 5541). The court also found that general deterrence was important because there are others like Doggart who "would like to do harm to certain segments of [the country's] population" and that they need to understand that, if prosecuted and convicted, "the punishment will be such [that] you will not be able to carry out such a deed in the future." (Transcript, R. 293, PageID# 5541). The court further found that Doggart's allocution, which "heighten[ed] the Court's concern that [Doggart is] a distinct danger and threat to the citizens of the United States of America," favored denying a variance. (Transcript, R. 293, PageID# 5542).

Thus, after considering Doggart's "background, [] history, [] character, [] characteristics, [] family, [] work history, [] friends, the nature and circumstances of the offense, the advisory guideline range, as well as all of the 3553 factors," the district court sentenced Doggart to a within-Guidelines term of imprisonment of 235 months—120 months on Count 1, and 115 months on Count 2, to be served consecutively. (Transcript, R. 293, PageID# 5542). The court then asked, in accordance with *Bostic*, 371 F.3d at 872-873, if the defense had any further objections to the sentence. Doggart, through counsel, did not assert that the court

had failed to adequately explain its reasons for denying a downward variance. (Transcript, R. 293, PageID# 5545). Plain-error review thus applies to Doggart's procedural challenge under the rule announced in *Bostic*. 371 F.3d at 872-873.

C. Doggart's Sentence Is Procedurally Reasonable: The District Court Properly Considered The Relevant Section 3553(a) Factors And Adequately Explained Its Reasoning

The record demonstrates that the district court heard, considered, and rejected Doggart's arguments for leniency and had a sound basis for selecting his sentence, which it explained to the parties. As a result, the district court did not commit plain error in sentencing Doggart.

As noted above, Section 3553(a) lists several factors that a district court should consider in imposing a sentence. 18 U.S.C. 3553(a). But a "court need not explicitly consider each of the § 3553(a) factors; a sentence is procedurally reasonable if the record demonstrates that the sentencing court addressed the relevant factors in reaching its conclusion." *United States* v. *Dexta*, 470 F.3d 612, 614-615 (6th Cir. 2006). Moreover, in discussing the relevant factors, a district court is not required to "engag[e] in a rote listing or some other ritualistic incantation." *Id.* at 615. The touchstone of reasonableness is whether "the district court explains its reasoning to a sufficient degree to allow for meaningful appellate review." *United States* v. *Trejo-Martinez*, 481 F.3d 409, 412-413 (6th Cir. 2007).

The sentencing hearing in this case was lengthy, detailed, and substantive. Indeed, the transcript of that hearing is more than 200 pages long, and shows a court deeply engaged with the facts of the case and the arguments presented by the parties. The record reflects that, in sentencing Doggart, the district court properly considered the relevant Section 3553(a) factors and adequately explained its reasoning. The court's extensive discussion of why a "very tough" within-Guidelines sentence was appropriate for a defendant that it found posed a "distinct danger and threat to the citizens of the United States of America" is more than sufficient for meaningful appellate review. (Transcript, R. 293, PageID# 5541-5542).

Doggart argues (Br. 80-81) that the district court committed plain error by not specifically discussing the reasons why it rejected each of the asserted bases for a downward variance. But there is no such requirement given the grounds for a variance that Doggart raised. A district court commits no error—much less plain error—when it does not discuss each proposed basis for a downward variance when the issues raised "are conceptually straightforward." *United States* v. *Simmons*, 587 F.3d 348, 361 (6th Cir. 2009) (citation and internal quotation marks omitted). A ground for variance is "conceptually straightforward" where there is "no dispute for the district court to have ruled on" but instead "merely an argument in mitigation of [the defendant's] sentence." *Vonner*, 516 F.3d at 389 (citations

omitted). A sentencing court "rule[s]" on such arguments simply by "declining to give [the defendant] a lower sentence." *Id*. at 388.

This "exception to the requirement of explicit discussion" applies to all of the grounds for downward variance that Doggart raised (see pp. 64-65, *supra*) and that were necessarily rejected by the district court. *Simmons*, 587 F.3d at 361. Moreover, "[n]othing in the record, or the context of the hearing, suggests that the court did not listen to, consider and understand every argument [Doggart] made." *Vonner*, 516 F.3d at 388 (internal quotation marks and alterations omitted).

D. Doggart's Within-Guidelines Sentence Is Substantively Reasonable

In reviewing a sentence for substantive reasonableness, the Court must determine, based on the totality of the circumstances, "whether the length of the sentence is greater than necessary to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a)." *United States* v. *Tristan-Madrigal*, 601 F.3d 629, 632-633 (6th Cir. 2010) (internal quotation marks omitted); see also *Gall*, 552 U.S. at 51. A sentence may be substantively unreasonable if the district court "chooses the sentence arbitrarily, grounds the sentence on impermissible factors, or unreasonably weighs a pertinent factor." *Brooks*, 628 F.3d at 796.

Doggart argues (Br. 81-83) that his sentence is substantively unreasonable because it is allegedly "longer than necessary to serve sentencing purposes" and is an "effective life sentence" for a person of his age. But the district court

comprehended the severity of Doggart's sentence, and selected it precisely for that reason. (Transcript, R. 293, PageID# 5541-5542). The court explained that the need for societal retribution, general deterrence, and a lengthy period of incapacitation for Doggart justified the 235-month sentence. The court also explained that a "very tough sentence" was necessary and that "there is a need in this case to protect the public from the defendant and the defendant's efforts." (Transcript, R. 293, PageID# 5482, 5541). Where the district court "properly considered and weighed the competing reasons for leniency and for a harsh penalty," a district court does not abuse its discretion merely because the sentence imposed is "harsh." *Conaster*, 514 F.3d at 527.

Additionally, the fact that a defendant "claims he is statistically likely to die in jail does not render his sentence substantively unreasonable." *United States* v. *Bell*, 385 F. App'x 448, 453 (6th Cir. 2010); see also *United States* v. *Lamb*, 431 F. App'x 421, 427 (6th Cir. 2011) (explicitly rejecting an argument that implied that "being nearer the grave [should] confer * * * a discount on the consequences" for criminal activity); *United States* v. *McNeal*, 364 F. App'x 214, 217 (6th Cir. 2010) (collecting cases and holding that a sentence is not unconstitutional just because it exceeds a defendant's "reasonable life expectancy").

Doggart also suggests that his sentence is substantively unreasonable by pointing to the sentence of probation that William Tint received for pleading guilty to making a false statement to the FBI in connection with the same underlying matter. Br. 82; (Transcript, R. 293, PageID# 5348-5355). But as the Government noted at sentencing, the United States decided against charging Tint with other substantive offenses not only because he agreed to plead guilty to making a false statement, but also because Doggart was "far more culpable than * * * Tint." (Transcript, R. 293, PageID# 5354). Accordingly, there is no basis for questioning the reasonableness of Doggart's sentence by comparison with Tint. Cf. *United States* v. *Greco*, 734 F.3d 441, 450-451 (6th Cir. 2013) ("[A] number of factors might result in legitimate co-defendant disparities, including differences in criminal histories, the offenses of conviction, or one coconspirator's decision to plead guilty and cooperate with the government.") (citations and internal quotation marks omitted).

Further, although Section 3553(a)(6) requires a district court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," that provision does not suggest that Doggart's sentence was unreasonable. Tint was not found guilty of "similar conduct," and, at any rate, Section 3553(a)(6) pertains to *nationwide* sentence disparities, not to differences among co-defendants' sentences. See, *e.g.*,

United States v. *Sierra-Villegas*, 774 F.3d 1093, 1103 (6th Cir. 2014) (stating that a court, in its discretion, may consider a defendant's sentence as compared to his co-defendants' sentences, but Section 3553(a)(6) is concerned with limiting nationwide disparities among similarly situated defendants). Moreover, this Court has explained that national uniformity "is generally taken into account by the Sentencing Guidelines, which are almost certainly the best indication of ordinary practice"; therefore, challenges to the substantive reasonableness of a sentence are generally more appropriately brought as a challenge to the reasonableness of the sentence, not as a sentencing disparity challenge. *United States* v. *Rossi*, 422 F. App'x 425, 434-435 (6th Cir. 2011).

In sum, Doggart has not shown that his sentence is at odds with those arising in a similar context. Nor has he shown that his sentence was substantively unreasonable. "The issue is not whether some other, lesser sentence * * * would have been reasonable; rather, it is whether the * * * sentence actually received was reasonable." *United States* v. *Hammonds*, 468 F. App'x 593, 600 (6th Cir. 2012). Here, the district court considered all of the evidence and arguments presented by the parties as well as the statutory factors set forth in 18 U.S.C. 3553(a), then concluded that an aggregate within-Guidelines sentence of 235 months' imprisonment was sufficient, but not greater than necessary, to satisfy those factors. That determination should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's conviction and sentence.

Respectfully submitted,

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STATEMENT REGARDING TYPE-VOLUME LIMITATION

On May 24, 2018, the undersigned filed a motion requesting leave to file a brief in excess of the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure. This brief contains 17,420 words, excluding the table of contents, table of citations, statement in support of oral argument, addendum, and the certificate of counsel.

This brief 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word2016 in Times New Roman, 14-point font.

s/ Anna M. Baldwin
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Date: May 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Anna M. Baldwin
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ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

Appellee United States designates the following documents from the electronic record in the district court:

Record Entry Number	Description	PageID# Range
1	Complaint	1-9
14	Plea Agreement	45-53
24	United States' Memorandum in Support of Plea Agreement	201-211
25	Defendant's Memorandum in Support of Plea Agreement	212-223
29	Order	282-290
37	Indictment	315-317
84	Superseding Indictment	437-439
186	Defendant's Memorandum for Judgment of Acquittal	1467-1479
218	Defendant's Sentencing Memorandum	3432-3452
230	Memorandum Order	3677-3685
249	Judgment	3760-3765
261	Order	4157-4158
274	Notice of Appeal	4317-4318
285	Transcript (First Day of Trial)	4574-4694
286	Transcript (Second Day of Trial)	4695-4835
287	Transcript (Third Day of Trial)	4836-4927
288	Transcript (Fourth Day of Trial)	4928-5044
289	Transcript (Fifth Day of Trial)	5045-5282
292	Transcript (Verdict)	5315-5339
293	Transcript (Sentencing)	5348-5542
302	Notice of Filing of Trial Exhibits	5724-5874