ORAL ARGUMENT REQUESTED
Nos. 18-4081, 18-4099

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

MARK OLIC PORTER,

Defendant-Appellant/Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
THE HONORABLE DEE BENSON, NO. 2:17-CR-527-DB

BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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STATEMENT OF RELATED CASES

This Court has consolidated the appeal and cross-appeal involving Mark Olic Porter. There are no prior appeals.

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STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. On March 21, 2018, a jury returned a guilty verdict against defendant Mark Olic Porter on the one count for

which he was charged. Vol. I at 128.[1] On May 25, 2018, the district court entered final judgment against Porter. Vol. I at 167-173. On May 31, 2018, Porter timely filed a notice of appeal. Vol. I at 174. On July 2, 2018, the United States timely filed a notice of cross-appeal. Vol. I at 182. This Court has jurisdiction pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742(b).

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports Porter's conviction under 42 U.S.C. 3631 for interfering with Michael Waldvogel's fair housing rights because of Waldvogel's race or color.

2. Whether the district court's instructions to the jury, the evidence presented at trial, and the government's opening statement and closing argument constructively amended the indictment.

3.a. Whether, in sentencing Porter, the district court clearly erred by finding that assault, and not aggravated assault, was the appropriate cross-reference for purposes of determining Porter's base offense level and recommended Guidelines sentence.

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[1] This brief uses the following abbreviations: "Vol. __ at __" refers to the volume and page or exhibit number of the record on appeal filed with this Court and "Br. __" refers to page numbers in Porter's opening brief filed with this Court.

3.b. In the alternative, even if Porter's actions amounted only to assault for purposes of applying the relevant guideline, whether the district court erred by failing to apply a base offense level of at least 10 for Porter's Section 3631 offense.

STATEMENT OF THE CASE

1. Procedural History

On September 13, 2017, a federal grand jury returned a one-count indictment charging Mark Olic Porter with using force and threat of force willfully to injure, intimidate, and interfere with, and attempt to injure, intimidate, and interfere with, Michael Waldvogel, an African-American man, because of his race or color and because of his occupation of a dwelling, in violation of 42 U.S.C. 3631. Vol. I at 15-16. The indictment further charged that Porter's actions involved the use of a dangerous weapon, namely a stun cane, and resulted in bodily injury to Waldvogel, either of which would make the offense a felony punishable by up to ten years in prison. Vol. I at 16; 42 U.S.C. 3631.

The case proceeded to trial. Vol. V at 56-420. After the government's case-in-chief, Porter moved for acquittal under Federal Rule of Criminal Procedure 29, arguing, among other things, that the government failed to prove that Porter acted because of Waldvogel's race or color. Vol. V at 345. The district court denied Porter's motion. Vol. V at 348. Porter then called one defense witness. Vol. V at 349-364. The government did not present evidence in rebuttal. Vol. V at 364.

Porter did not renew his Rule 29 motion at the close of the evidence. Vol. V at 367.

The jury found Porter guilty of violating Section 3631. Vol. I at 128. In so doing, it specifically found that Porter had used a dangerous weapon but failed to find that Porter caused bodily injury to Waldvogel. Vol. I at 128.

The Probation Office prepared a Presentence Investigation Report (PSR) using the 2016 Sentencing Guidelines that recommended a sentence of six to twelve months' imprisonment. Vol. IV at 18. The government objected, arguing that the PSR had applied an incorrect base offense level to determine Porter's advisory sentence. Vol. IV at 24; Vol. I at 154-157. At sentencing, the district court adopted the PSR's calculations over the government's continued objection. Vol. V at 449. The court sentenced Porter to nine months' imprisonment, one year of supervised release, and a $100 special assessment, and entered judgment. Vol. I at 168-169, 172; Vol. V at 450-452.

Porter filed a timely notice of appeal to challenge his conviction. Vol. I at 174. The government filed a timely notice of cross-appeal to challenge Porter's sentence. Vol. I at 184.

2. Facts

a. Porter's Race-Based Attack On Waldvogel At Their Shared Apartment Complex And His Hatred Of African Americans

In November 2015, Porter applied to lease an apartment at the Adagio, an apartment complex in Draper, Utah. At that time, he asked the leasing agent "how many black people lived at" the complex and said that he did not want to live near African Americans or black people. Vol. V at 107-108. After Porter moved in, he asked two maintenance workers fixing up the vacant unit above his not to move any "niggers" into the unit. Vol. V at 130, 135, 139. On another occasion, he told the maintenance team, all of whom were white, that "he had a dream that all niggers were dead," an apparent play on Dr. Martin Luther King Jr.'s "I have a dream" speech. Vol. V at 132; see also Vol. V at 135, 145. Another time, Porter showed staff an electric stun cane he recently had purchased and proudly activated it. Vol. V at 145-146.

On November 3, 2016, Porter was standing outside on his ground-floor patio and began talking with his neighbor, Katelin Adair, who had just gotten home from work. Vol. V at 246, 259. According to Adair, Porter would sometimes tell her that "[h]e didn't like black people," that he was "concerned" that the new "paper boy was black," and that he did not like "interracial relationships," because "you don't know if the person you're talking to is half this or half that." Vol. V at 244-245. On that particular evening, Porter told Adair that "we need to exterminate all

of the motherfucking niggers, but first we need to exterminate all of the motherfucking nigger lovers." Vol. V at 246.

As Porter spoke, Adair noticed "a little boy outside riding his scooter on the sidewalk" and became increasingly uncomfortable. Vol. V at 246. This was Lucas Waldvogel (Lucas), a seven-year old African-American boy who lived at the complex with his father, Michael Waldvogel (Waldvogel), who is African-American and Latino. Vol. V at 115, 165, 167-168. The complex's leasing agent described Lucas as "always polite" and Waldvogel as a "nice guy" who was "[a]lways in a good mood." Vol. V at 115-116.

As Lucas rode his scooter around the courtyard, Porter became agitated and began speaking more loudly. Vol. V at 248. After Lucas twice went inside to tell his father that a man was shouting at him, Waldvogel went onto his balcony to see what was going on. Vol. V at 176-177. As Lucas rode his scooter by Porter's patio, Waldvogel heard Porter yell, "get out of here, nigger." Vol. V at 177.

Upon hearing this, Waldvogel immediately went downstairs to get Lucas "out of the situation" and bring him inside. Vol. V at 178. Adair stopped him and asked if he was Lucas's father. Vol. V at 178, 250. By this time, Porter had returned inside. When Waldvogel answered yes, Adair told him that Porter had been saying "some pretty crazy things" in Lucas's presence. Vol. V at 250. Adair testified that she sought to warn Waldvogel about Porter because Waldvogel

"didn't look white, and so I was concerned that that might cause a problem." Vol. V at 251. Adair thought that given "how [Porter] was acting," Porter might "lash out" or become "violent." Vol. V at 251. As they spoke, Waldvogel could hear Porter shouting from inside his unit. Vol. V at 179-180.

Waldvogel, who "didn't seem threatening" to Adair (Vol. V at 250), then proceeded toward Porter's unit. Vol. V at 180. As Waldvogel approached, Porter returned outside to his patio. Vol. V at 180. Porter, who had never met Waldvogel (Vol. V at 392), believed he was "a half Negro." Vol. III, Gov't Ex. 6-3 (audiotape clip at 1:05). Standing on the grass on the other side of Porter's patio railing, Waldvogel told Porter, "I don't care what you're saying in your house, but, you know, don't yell that stuff at my son." Vol. V at 180-181; see also Vol. V at 252. Waldvogel then noticed that Porter was holding something behind his right leg. Vol. V at 181. Porter responded, "[Y]ou and your nigger son can get out of here." Vol. V at 181. He then immediately lifted up and activated his electric stun cane, reached out over his patio railing, and struck Waldvogel on the neck with the cane. Vol. V at 182-183, 207, 252-253.

Waldvogel felt an electric shock and dropped to the ground. Vol. V at 183. He was in severe pain and momentarily incapacitated. Vol. V at 183-184. He thought that "the only way I'm going to get out of this is if I grab and pull" the stun cane away from Porter. Vol. V at 183. He pulled the stun cane "as hard as [he]

could" out of Porter's hands and fell backwards. The stun cane hit the ground and broke apart. Vol. V at 185, 213.

During the attack, Lucas was "a ways off on the grass." Vol. V at 255. He ran over to his father screaming and crying. Vol. V at 184, 254. Waldvogel was able to get up and grab Lucas to take him home. As Waldvogel left, he told Porter that he would be calling the police. Vol. V at 185, 254. Porter responded, "I am the cops." Vol. V at 254.

Waldvogel returned home with Lucas and called 911. Vol. V at 186. The police responded and arrested Porter, who called the officers "nigger lovers." Vol. V at 193.

For the next few weeks, Lucas slept in Waldvogel's bed and insisted that Waldvogel block the front door with an elliptical machine. Vol. V at 196-197. Lucas also stopped playing outside. Vol. V at 198. For these reasons, Waldvogel asked for and received permission to break his lease and move out of the complex. Vol. V at 198-200. Waldvogel later moved out of the area altogether because Lucas feared running into Porter, even outside the complex. Vol. V at 213-214.

After local police released Porter, he was evicted from the complex and moved to Arizona. Vol. V at 117-118, 199, 228. Following the issuance of federal charges in this case, federal authorities arrested Porter at his home in Arizona and transported him back to Utah. Vol. V at 228-229. During the arrest, Porter

admitted that before he attacked Waldvogel, he told Lucas, "Get out of here, you little stinking nigger." Vol. III, Gov't Ex. 6-3 (audiotape clip at 0:53). He also admitted telling the apartment complex not to move any African Americans near him: "I don't want nothing to do with [African Americans]. I even told 'em when I moved in, I don't want to live next to any of 'em. I told 'em at the complex." Vol. III, Gov't Ex. 6-5 (audiotape clip at 0:35). Finally, he stated his belief that Waldvogel was part African-American, calling him a "half Negro." Vol. III, Gov't Ex. 6-3 (audiotape clip at 1:05).

Porter also confirmed his hatred against African Americans, often in violent terms. He told law enforcement officers, "Hitler had the right idea, [but] [t]he wrong people. Should've gassed niggers." Vol. III, Gov't Ex. 6-1 (videotape clip at 0:10); see also Vol. V at 233-235, 290. Porter continued, "I don't respect them, they're not human, they don't believe in Christ," and asked one of the officers if he was "a white trash nigger lover." Vol. III, Gov't Ex. 6-4 (videotape clip at 0:38); see also Vol. V at 233-236, 290. On the way back to Utah, Porter warned a federal agent "not to put me in a cell with niggers. I might have to kill one while he is sleeping." Vol. V at 290.

b. The District Court's Sentencing Determinations

To calculate Porter's base offense level, the PSR applied Sentencing Guidelines § 2H1.1, which governs offenses involving individual rights. Section

2H1.1 provides that the applicable base offense level is the greatest of several alternatives, including "the offense level from the offense guideline applicable to any underlying offense," Sentencing Guidelines § 2H1.1(a)(1), or 10 if the offense involved "the use or threat of force against a person," Sentencing Guidelines § 2H1.1(a)(3).

The PSR determined that the applicable underlying offense was "assault," Sentencing Guidelines § 2A2.3, which has a base offense level of 7. Vol. IV at 6. The PSR then applied a three-point enhancement under Sentencing Guidelines § 3A1.1(a) because Porter was motivated by his victim's race or color. Vol. IV at 6-7. Porter's total offense level of 10, combined with his criminal history category of I, resulted in a recommended Guidelines sentence of six to twelve months' imprisonment. Vol. IV at 7, 18.

The government objected to this calculation. Vol. IV at 24 (referencing and responding to the government's written objections); Vol. I at 153-158 (United States' Sentencing Mem.). First, the government argued that the appropriate underlying offense was aggravated assault, not assault, because Porter used "a dangerous weapon with intent to cause bodily injury (i.e. not merely to frighten) with that weapon." Vol. I at 155 (quoting Sentencing Guidelines § 2A2.2, comment. (n.1)). Applying the corresponding base offense level of 14, the three-point hate crime enhancement, and an additional four points for Porter's use of a

dangerous weapon, see Sentencing Guidelines § 2A2.2(b)(2)(B), the government calculated Porter's total offense level to be 21, resulting in a recommended sentence of 37 to 46 months' imprisonment. Vol. I at 156, 158.

Second, the government asserted that, even if aggravated assault did not apply, the base offense level should be 10 and not 7 under Section 2H1.1(a)(3). Vol. I at 154, 156-157. The government noted that Section 3631 requires a defendant to act by "force or threat of force," and that the jury necessarily had found as much by convicting Porter. Vol. I at 157. Thus, by applying a base offense level of 7, and not 10, the PSR failed to "[a]pply the [g]reatest" applicable base offense level under Section 2H1.1(a). Vol. I at 157. Using this alternative calculation, and including the three-point hate crime enhancement, Porter's total offense level would be 13, resulting in a recommended sentence of 12 to 18 months' imprisonment. Vol. I at 157. Notwithstanding these objections, the probation office declined to change its sentencing calculation. Vol. IV at 24.

At sentencing, the district court found that the PSR correctly calculated Porter's base offense level, stating that "[t]he beginning number is a seven and I find that simple assault is the appropriate reference under the circumstances." Vol. V at 449. Applying the three-point hate crime enhancement, the court calculated a total offense level of 10 and a recommended Guidelines sentence of six to twelve months' imprisonment. The court imposed a within-Guidelines sentence of nine

months' imprisonment. Vol. I at 168-169; Vol. V at 450-452. With credit for time served, Porter was released approximately three weeks later. Vol. I at 176.

SUMMARY OF ARGUMENT

1. Porter asserts that the evidence was insufficient to support the conclusion that he attacked Waldvogel "because of" Waldvogel's race or color. Because Porter did not renew his Rule 29 motion for judgment of acquittal at the close of evidence, this issue is reviewed for plain error. Here, there was no error, let alone plain error.

Taking the evidence in the light most favorable to the government and drawing all reasonable inferences from the record, a reasonable jury could find beyond a reasonable doubt that Porter attacked Waldvogel "because of" *Waldvogel's* race or color. Ample evidence, including Porter's own words describing Waldvogel as "half Negro" (Vol. III, Gov't Ex. 6-3 (audiotape clip at 1:05)), supported the conclusion that Porter perceived Waldvogel to be at least part African-American. The evidence also supported the conclusion that Porter assaulted Waldvogel because of his race or color. Among other evidence, the jury heard that just before hitting Waldvogel with his stun cane, Porter told Waldvogel, "[Y]ou and your nigger son can get out of here." Vol. V at 181. A reasonable jury could infer from that statement that Porter struck Waldvogel because of his race or color. The jury also heard testimony from Porter's neighbor that she was

concerned that Porter would "lash out" at Waldvogel based on his appearance. Vol. V at 248, 251. Finally, the evidence of Porter's repeated racist remarks, including that he did not want to—and had a right not to—live near African Americans and wished they were all dead, only further reinforced the conclusion that Porter acted because of Waldvogel's race or color.

2. There was no constructive amendment of the indictment. Simply put, Porter was convicted as charged. The indictment charged that Porter "did by force and threat of force, willfully injure, intimidate, and interfere with, and attempt to injure, intimidate, and interfere with, M.W., an African-American man, because of M.W.'s race and color and because M.W. was occupying a dwelling." Vol. I at 15. The indictment specified that Porter "yelled 'nigger,' said get out of here to M.W. and M.W.'s seven-year-old son, and used a stun cane (a Zap Cane) to assault M.W., resulting in bodily injury to M.W. and involving the use of a dangerous weapon, a Zap Cane[,]" all in violation of Section 3631. Vol. I at 16.

Consistent with the indictment, the jury instructions properly identified Waldvogel as the victim of Porter's attack and did not allow the jury to convict Porter by substituting Lucas as the victim. Further, the government's trial evidence closely conformed to the charges in the indictment and did not advance the theory that it was Porter's actions against Lucas that violated Section 3631. Finally, the government did not argue that the jury should convict Porter for his

words or actions against Lucas, however abhorrent, and indeed expressly told the jury not to do so. Accordingly, the district court committed no error, much less plain error, because it did not broaden the potential bases for conviction beyond the charge specified in the indictment.

3.a. Cross-Appeal. At sentencing, the district court clearly erred in declining to use the aggravated-assault guideline to calculate Porter's base offense level and recommended Guidelines sentence. The Guidelines define aggravated assault as a "felonious assault that involved * * * a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon." Sentencing Guidelines § 2A2.2, comment. (n.1). In convicting Porter under Section 3631, the jury found beyond a reasonable doubt that he used a "dangerous weapon"—that is, "any instrument capable of inflicting death or serious bodily injury." See Vol. I at 146 (jury instructions). The jury's finding means that Porter used a "dangerous weapon" under the Guidelines' definition of the term as well, which includes identical language to the jury instructions. Sentencing Guidelines § 1B1.1, comment. (n.1(D)).

Here, the evidence shows that Porter intentionally wielded such a weapon (*i.e.*, a stun cane) in precisely the manner for which it was designed (*i.e.*, to strike, shock, and incapacitate his victim). Accordingly, Porter necessarily used "a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten)"

in satisfaction of Section 2A2.2 even if bodily injury did not actually result. This Court should therefore vacate Porter's sentence and remand to the district court for resentencing with directions to apply aggravated assault as the underlying offense.

b. In the alternative, even if aggravated assault does not apply, the district court erred by not applying the minimum base offense level of 10 under Section 2H1.1(a)(3) for offenses, like those under Section 3631, that involve the use or threatened use of force. By instead applying a base offense level of 7, the court failed to "[a]pply the [g]reatest" base offense level under Section 2H1.1(a). Thus, this Court should vacate Porter's sentence and remand to the district court for resentencing with directions to use a base offense level of at least 10.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO CONVICT DEFENDANT UNDER 42 U.S.C. 3631

A. Standard Of Review

This Court applies a plain-error standard of review where, as here, the defendant moves under Rule 29 for judgment of acquittal based on insufficient evidence at the conclusion of the government's case-in-chief, but then introduces evidence in his defense and fails to renew his motion at the close of the entire case. *United States* v. *Rufai*, 732 F.3d 1175, 1189 (10th Cir. 2013) (citing *United States* v. *Flanders*, 491 F.3d 1197, 1208 (10th Cir. 2007), cert. denied, 558 U.S. 890

(2009)). Given the defendant's heavy burden to show insufficient evidence, however, this Court has described plain-error review in this context as "essentially the same as" sufficiency-of-the-evidence review. *Flanders*, 491 F.3d at 1208; see also *Rufai*, 732 F.3d at 1189. In other words, where the evidence is "sufficient to support [a] conviction—resulting in no error—the challenge would fail at step one of plain error review." *United States* v. *Pickel*, 863 F.3d 1240, 1257 n.16 (10th Cir. 2017); see *Rufai*, 732 F.3d at 1189 (setting forth the steps of plain error review).

Sufficiency-of-the-evidence review "ask[s] only whether, taking the evidence—both direct and circumstantial, together with the reasonable inferences to be drawn therefrom—in the light most favorable to the government, a reasonable jury could find [the defendant] guilty beyond a reasonable doubt." *United States* v. *Kaufman*, 546 F.3d 1242, 1263 (10th Cir. 2008) (brackets in original) (quoting *United States* v. *Allen*, 235 F.3d 482, 492 (10th Cir. 2000)), cert. denied, 558 U.S. 1093 (2009). The reviewing court does not "inquire into the jury's credibility determinations or its conclusions regarding the weight of the evidence." *Ibid.* Moreover, the evidence presented "need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt." *United States* v. *Bowen*, 437 U.S. 1009, 1014 (10th Cir. 2006). The Court "will not overturn a jury's finding unless no reasonable juror could have

reached the disputed verdict." *United States* v. *Whitney*, 229 F.3d 1296, 1300-1301 (10th Cir. 2000) (quotation marks and citation omitted).

B. The Evidence Was Sufficient To Establish That Porter Attacked Waldvogel Because Of His Race Or Color

1. Applicable Legal Framework

To convict Porter of violating Section 3631, the government had to prove that Porter (1) used "force or threat of force[,]" (2) to willfully injure, intimidate, or interfere with Waldvogel, or attempted to do so, (3) "because of [Waldvogel's] race [or] color" and "because [Waldvogel] is or has been * * * occupying * * * any dwelling." 42 U.S.C. 3631(a); see also *United States* v. *Magleby*, 241 F.3d 1306, 1312 (10th Cir. 2001). To establish a felony in this case, the government also had to prove that the offense (a) involved the use of a dangerous weapon, or (b) resulted in bodily injury to Waldvogel. See 42 U.S.C. 3631.

On appeal, Porter challenges the sufficiency of the evidence only with respect to whether Porter attacked Waldvogel because of his race or color. To show that a defendant acted "because of" race or color, the government must prove "that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." *Burrage* v. *United States*, 571 U.S. 204, 211 (2014) (quoting *University of Tex. S.W. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 346-347 (2013) (internal quotations omitted)). This does not mean that the victim's race or color had to be the sole reason that the defendant acted. As long as the jury finds

that the defendant would not have acted but for the victim's race or color, it may convict even if there are "multiple sufficient causes [that] independently, but concurrently, produce a result." *Id.* at 214; see also *United States* v. *Bartley*, 618 F. App'x 439, 444 (10th Cir. 2015) (same), cert. denied, 136 S. Ct. 861 (2016); accord *McDonald* v. *City of Wichita*, 735 F. App'x 529, 532 (10th Cir. 2018) (rejecting the argument that "'the but for cause' is the equivalent of a 'sole cause' standard"); *State* v. *Hennings*, 791 N.W. 2d 828, 835 (Iowa 2010) (in upholding state-court hate crime conviction, stating that "[t]o find a causal connection, the jury need not believe the only motivation for the defendant's acts was the victim's race or other protected status") (cited approvingly in *Burrage*, 571 U.S. at 214).

Further, to act "because of" race or color, the defendant need not have correctly believed that the victim was a particular race or color. Thus, the government need not prove that the victim is, in fact, a member of the protected class the defendant intended to target. Rather, it is sufficient that the government prove that the defendant acted out of a belief that the victim was a particular race or color. See, *e.g.*, *United States* v. *Pospisil*, 186 F.3d 1023 (8th Cir. 1999) (defendants guilty of violating Section 3631 after burning a cross in front of the home of a family they mistakenly believed to be African-American), cert. denied, 529 U.S. 1089 (2000). In other words, liability attaches because the causation standard focuses on the defendant's *motivation*, not the victim's actual race. Cf.

Burrage, 571 U.S. at 212-213 (explaining that "because of," like "results from," refers to causation); accord *EEOC* v. *Abercrombie & Fitch Stores*, 135 S. Ct. 2028, 2033 (2015) (under Title VII of Civil Rights Act, the "intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge") (emphasis in original).

Finally, "[i]n making its determination regarding a defendant's intent [under Section 3631], 'a jury is permitted to draw inferences of subjective intent from a defendant's objective acts.'" *Magleby*, 241 F.3d at 1312 (quoting *Wingfield* v. *Massie*, 122 F.3d 1329, 1333 (10th Cir. 1997), cert. denied, 523 U.S. 1005 (1998)). "The government may also prove intent through circumstantial evidence and surrounding circumstances." *Ibid.* (citing cases).

Because the evidence was more than sufficient for a reasonable jury to conclude beyond a reasonable doubt that Porter attacked Waldvogel because of his race or color, this Court should affirm Porter's conviction.

2. A Reasonable Jury Could Find Beyond A Reasonable Doubt That Porter Attacked Waldvogel Because Of Waldvogel's Race Or Color

Ample evidence permitted the jury to find that Porter would not have attacked Waldvogel but for Waldvogel's actual or perceived race or color.

First, sufficient evidence supported the conclusion that Porter perceived Waldvogel to be at least part African-American. Porter admitted during his arrest on the federal charge that he believed Waldvogel was "half Negro"—that is, at

least part African-American. Vol. III, Gov't Ex. 6-3 (audiotape clip at 1:05). And when local police arrested him immediately following the attack, he angrily called the responding officers "nigger lovers." Vol. V at 193. A reasonable jury could conclude that this statement was a reference to Waldvogel, who had just told Porter that he would be calling the police.[2] Vol. V at 185, 254. The jury could also rely on the observations of Katelin Adair, the neighbor who testified that Waldvogel "didn't look white" and believed—correctly—that Porter would attack him on this basis. Vol. V at 251. Furthermore, the jury could rely on their own observations of Waldvogel's physical appearance at trial, as well as Waldvogel's testimony describing himself as part African-American (Vol. V at 165), and on that basis reach a reasonable inference of how Porter perceived him.[3] Finally, the jury could rely on Porter's perception of Lucas to infer what Porter thought of Waldvogel's race. Porter clearly perceived Lucas to be African-American based on the racial epithets he hurled at him. Indeed, Porter concedes as much. Br. 13-14. Porter also knew that Waldvogel was Lucas's father, and later indicated that he therefore

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[2] Porter used substantially the same epithet against the officers who arrested him on the federal charge, asking one whether he was "a white trash nigger lover." Vol. III, Gov't Ex. 6-4 (audiotape clip at 0:38).

[3] See *United States* v. *Shelton*, 736 F.2d 1397, 1402 (10th Cir.) (in determining sufficiency of the evidence, the jury may "observe[] the appearance and demeanor of the witnesses" and draw "permissible inferences therefrom" to reach "ultimate conclusions of fact"), cert. denied, 469 U.S. 857 (1984).

assumed that Waldvogel was also at least part African American. Vol. III, Gov't Ex. 6-5 (videotape clip at 0:30).

Second, the evidence supports the conclusion that Porter assaulted Waldvogel because of Waldvogel's race or color. Just before hitting Waldvogel with his stun cane, Porter told Waldvogel, "[Y]ou and your nigger son can get out of here." Vol. V at 181. A reasonable jury could infer from that statement that Porter struck Waldvogel because of his race or color. In addition, Adair also saw Porter become visibly agitated as Lucas played nearby and heard him use racial slurs in front of Lucas. Vol. V at 248. She feared that Porter would "lash out" or become "violent" against Waldvogel because of Waldvogel's skin color. Vol. V at 251. Adair's fears were reasonable and well-founded under the circumstances. Right before meeting Waldvogel, Porter told Adair that he wanted to "exterminate all of the motherfucking niggers." Vol. V at 246.

Finally, Porter's virulent hatred of, and calls for violence against, African Americans was undisputed and bolsters the conclusion that Porter acted because of Waldvogel's race or color. The jury heard extensive evidence that Porter repeatedly told staff at the apartment complex that he did not want to live near African Americans and wished "all niggers were dead." Vol. V at 107-108, 132. The jury later heard Porter warn an FBI agent after his arrest "not to put me in a cell with niggers. I might have to kill one while he is sleeping." Vol. V at 290.

The jury also heard Porter's view that "Hitler had the right idea," but "should've gassed niggers." Vol. III, Gov't Ex. 6-1 (videotape clip at 0:09). Finally, the jury heard Porter repeatedly say that African Americans are not "human." See, *e.g.*, Vol. III, Gov't Ex. 6-4 (videotape clip at 0:42). Accordingly, viewing the evidence in the light most favorable to the jury's verdict, a reasonable juror could conclude beyond a reasonable doubt that Porter would not have attacked Waldvogel but for his actual or perceived race or color.

3. Porter's Arguments To The Contrary Are Either Belied By The Record, Legally Irrelevant, Or Both

a. The Evidence Was Sufficient To Show That Porter Perceived Waldvogel To Be Part African-American, And The Government Was Not Required To Prove Waldvogel's Actual Race

Porter argues that he thought Waldvogel was white and, thus, did not attack Waldvogel because of his race or color. Br. 12-13. That assertion is belied by the trial evidence. See pp. 19-20, *supra*. Regardless of how Porter now claims he thought Waldvogel looked, his own words provided the jury with sufficient evidence that Porter believed Waldvogel was at least part African-American. Porter admitted that he believed Waldvogel was "half Negro." It is also undisputed that Porter saw his victim before attacking him, and the jury was able to observe Waldvogel's physical appearance and decide how Porter would have perceived him. Cf. *Magleby*, 241 F.3d at 1309-1313 (finding sufficient evidence that defendant acted because of his victims' race notwithstanding defendant's

testimony that he was unaware of his victims' race). While Porter now speculates that Waldvogel could have been Lucas's adoptive father or stepfather (Br. 13 n.2), nothing in the record suggests that Porter believed, or that the jury had any reason to believe, that this was the case. Accordingly, a reasonable jury could conclude beyond a reasonable doubt that Porter knew or believed that Waldvogel was at least part African-American and attacked him on that basis.

Noting that Waldvogel is mixed race, Porter also asserts that he could not have "constructed a racial profile for Mr. Waldvogel" before the attack. Br. 13 n.2; accord Br. 12, 18, 21. This is of no consequence. To convict Porter under Section 3631, the United States was not required to prove Waldvogel's *actual* race or that Porter had *accurately identified it*. As long as the jury could find that Porter would not have acted but for his perception of Waldvogel's race or color, the jury could find that Porter acted "because of" race or color even if he had been completely wrong about Waldvogel's actual race. See, *e.g.*, *Pospisil*, 186 F.3d at 1027, 1032 (affirming conviction under 42 U.S.C. 3631 where defendants attacked victims based on mistaken belief that they were African-American); *State* v. *Costella*, 103 A.3d 1155, 1162 (N.H. 2014) (under state hate-crimes law, where defendant threatened victims on mistaken belief that they were Jewish, "the State was not required to prove that the victims *are*, in fact, Jewish") (emphasis in original).

Relatedly, Porter "doubt[s] whether [he] had time to form any opinion of Mr. Waldvogel's race before taking action against him." Br. 19. Yet nothing about the immediacy of Porter's attack on Waldvogel undermines the jury's finding that he acted because of Waldvogel's race or color. As one state court aptly noted in upholding a hate-crimes conviction, "[i]t is entirely conceivable that a person could be walking down the street, have a random encounter or confrontation with a member of a group he or she does not like and decide then and there to assault that person because of the victim's membership in the target group." *State* v. *Pollard*, 906 P.2d 976, 979 (Wash. App. 1995), pet. for review denied, 917 P.2d 130 (Wash. 1996); see also *United States* v. *Piekarsky*, 687 F.3d 134, 136-138 (3d Cir.) (defendants convicted under 42 U.S.C. 3631 after encountering and spontaneously attacking a man they believed was "Mexican"), cert. denied, 568 U.S. 889 and 568 U.S. 988 (2012).

Finally, Porter asserts (Br. 21) that because the indictment "charged" that Waldvogel was "an African-American man," the United States was required to prove this fact at trial. Waldvogel, in fact, testified that he is part African-American. Vol. V at 164-165. In any event, the mere fact that the indictment described Waldvogel's race does not mean that the United States was required to prove his actual race—as opposed to his perceived race—beyond a reasonable doubt for the jury to convict. This Court has held that "proof is not required of

everything alleged in the indictment." *United States* v. *Smith*, 838 F.2d 436, 439 (10th Cir. 1988), cert. denied, 490 U.S. 1036 (1989). Rather, "[w]hen the language of the indictment goes beyond alleging the elements of the offense, it is mere surplusage and such surplusage need not be proved." *Ibid*. (quotation marks and citation omitted). Waldvogel's *actual* race is not an element of the offense.

b. A Reasonable Jury Could Infer From Porter's Actions And His Contemporaneous And Repeated Racist Statements That Porter Attacked Waldvogel Because Of His Race Or Color

Porter argues (Br. 13) that, if anything, the evidence shows that he acted out of racial animus toward Lucas, not Waldvogel. But the jury heard this proffered alternative theory of causation (see Vol. V at 399-401 (defense counsel's closing argument)), and rejected it in light of the substantial countervailing evidence that Porter attacked Waldvogel because of Waldvogel's race or color. See pp. 19-22, *supra*. In any event, the fact that Porter also harbored racial animus against Lucas would not preclude the jury from finding that Porter attacked Waldvogel "because of" Waldvogel's race. As explained above, as long as the jury could have found the defendant would not have acted but for the victim's race or color, it does not matter that there were "multiple sufficient causes" for the defendant's conduct. *Burrage*, 571 U.S. at 214.

Porter also argues (Br. 11, 14-16) that his repeated racist remarks and calls for racial violence cannot support a finding that he attacked Waldvogel based on

his race or color. He asserts that his numerous racist statements against African Americans in general were not personally directed at, and did not specifically mention, Waldvogel. He also argues that the probative value of his statements right before he attacked Waldvogel—namely, "Get out of here, you little stinking nigger" and "[Y]ou and your nigger son can get out of here"—is limited to Porter's racial animus against Lucas only. Br. 11, 14-16. According to Porter, the only evidence that could prove he intended to attack Waldvogel because of his race or color would be if Porter himself said he was doing so, or if he directed a racial slur specifically at Waldvogel and no one else. See Br. 18 ("Mr. Porter did not at that moment or any other describe *Mr. Waldvogel* in racist terms.") (emphasis added). This argument fails.

As an initial matter, to prove intent, courts "do not 'require[] the government to produce a "smoking gun" that explicitly reveals the contents of defendant's mind.'" *United States* v. *Camick*, 796 F.3d 1206, 1220 (10th Cir.) (quoting *United States* v. *Ashley*, 606 F.3d 135, 140-141 (4th Cir. 2010) (brackets in original)), cert. denied, 136 S. Ct. 601 (2015). "[E]ven when a defendant, as here, denies having the requisite intent, a jury may disbelieve the defendant 'if [her] words and acts in the light of all the circumstances make [her] explanation seem improbable.'" *Wingfield*, 122 F.3d at 1333 (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 3.5, at 318 (1986) (brackets in original)).

Accordingly, intent under Section 3631, just like in any other case, can be proven from surrounding circumstances. See *Magleby*, 241 F.3d at 1312. For this reason, courts repeatedly have held that evidence of a defendant's racist views, taken together with defendant's specific conduct and surrounding statements, can support the inference that the defendant acted with the requisite intent.

For example, in *Magleby*, this Court held that "a reasonable jury could find beyond a reasonable doubt that Mr. Magleby targeted the [interracial family] because of their race" based on the defendant's "background of racial slurs, racist jokes, racist music, and racist internet sites" as well as his knowledge that a burning cross is a symbol of racial hatred. 241 F.3d at 1313. Similarly, in *United States* v. *Craft*, another Section 3631 case in which the defendant set fire to his victim's house, the Seventh Circuit held that "the jury was free to reject Craft's stated reason for setting the fire," *i.e.*, that the victim owed him money, "in favor of other testimony that indicated that he set the fire because of racial animus." 484 F.3d 922, 926 (7th Cir.), cert. denied, 552 U.S. 910 (2007). This evidence included "numerous racist remarks and vulgar racial epithets" that the defendant made "during the relevant time frame." *Ibid.* Finally, in *United States* v. *McInnis*, 976 F.2d 1226 (9th Cir. 1992), the Ninth Circuit found that racist statements that the defendant made before and after the shooting, as well as racist paraphernalia found in his home, supported the conclusion that the defendant acted because of the

victim's race when he fired two shots into the home of an African-American family. See *id*. at 1228-1232; see also *Hennings*, 791 N.W. 2d at 833-835 (rejecting sufficiency challenge to state hate crimes conviction where the defendant acknowledged his racist views but argued that his "actions were not motivated by those views").

Here, Porter expressed racial hatred against African Americans immediately before, during, and after his assault on Waldvogel. Before the attack, Porter said that all African Americans should be "exterminate[d]" (Vol. V at 246), and yelled, "Get out of here, you little stinking nigger" at Waldvogel's son (Vol. III, Gov't Ex. 6-3 (audiotape clip at 0:53)). During the attack, Porter yelled, "[Y]ou and your nigger son can get out of here" as he struck Waldvogel with his stun cane. Vol. V at 181. And just as in other cases where defendants unsuccessfully challenged the evidence showing that they acted with the requisite intent, Porter was defiant right after the attack, declaring to Waldvogel, "I am the cops" (Vol. V at 254), and calling the responding officers "nigger lovers" (Vol. V at 193). See *Magleby*, 241 F.3d at 1313 ("Ms. Cannon testified that Mr. Magleby appeared excited by what he had done and bragged about it."); *Hennings*, 791 N.W. 2d at 832 (stating that, when questioned by police, the defendant "did not ask about [the victim's] condition or show remorse for his actions"). The jury could permissibly infer from

all of this evidence that Porter perceived Waldvogel to be at least part African-American and attacked him on that basis.

II

THERE WAS NO CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

A. Standard Of Review

Because Porter failed to argue below that the district court constructively amended the indictment, this Court reviews only for plain error. See *United States* v. *Mann*, 786 F.3d 1244, 1249 (10th Cir.), cert. denied, 136 S. Ct. 373 (2015); Br. 19. Thus, Porter must demonstrate that "the district court (1) committed error, (2) the error was plain, and (3) the plain error affected h[is] substantial rights." *United States* v. *Story*, 635 F.3d 1241, 1244 (10th Cir. 2011). If these factors are met, the Court "may exercise discretion to correct the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Ibid.*

B. There Was No Constructive Amendment Of The Indictment

"A constructive amendment results when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." *United States* v. *Edwards*, 782 F.3d 554, 561 (10th Cir.) (quotation marks and citation omitted), cert. denied, 136 S. Ct. 153 (2015).

"In order to rise to this level, the change in the indictment must be more than the addition or deletion of nonessential factual averments. Rather, the amendment must effectively alter the substance of the indictment." *Hunter* v. *New Mexico*, 916 F.2d 595, 599 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991).

Here, the government charged that Porter "did by force and threat of force, willfully injure, intimidate, and interfere with, and attempt to injure, intimidate, and interfere with, M.W., an African-American man, because of M.W.'s race and color and because M.W. was occupying a dwelling[.]" Vol. I at 15. The indictment specified that Porter "yelled 'nigger,' said get out of here to M.W. and M.W.'s seven-year-old son, and used a stun cane (a Zap Cane) to assault M.W., resulting in bodily injury to M.W. and involving the use of a dangerous weapon, a Zap Cane; all in violation of 42 U.S.C. § 3631." Vol. I at 16.

Porter argues (Br. 27) that the district court plainly erred in permitting a constructive amendment of the indictment based on "the possibility" that the jury erroneously convicted Porter for his actions against Lucas, not Waldvogel. Here, the Court need only look to the jury instructions to confirm that Porter was convicted as charged. The evidence presented at trial and the government's opening statement and closing argument also refute Porter's claim. Because there was no error, let alone plain error, this Court should reject Porter's argument.

1. Consistent With The Indictment, The Jury Instructions Clearly Identified Michael Waldvogel As The Victim Of The Offense Charged

In determining whether the "proceedings broadened the possible bases for conviction beyond those found in the" indictment, "[t]he jury instructions are of particular importance" because they provide "assurance" that the jury must "find the conduct charged in the indictment before it may convict." *United States* v. *Miller*, 891 F.3d 1220, 1232 (10th Cir. 2018) (quotation marks and citations omitted). This Court must "presume that the jurors conscientiously observed the instructions and admonitions of the Court." *Id.* at 1231 (quotation marks and citation omitted).

Here, the jury instructions referred to the same conduct as charged in the indictment and likewise named Waldvogel as the victim of Porter's offense. The court's Instruction 15 stated that, to convict Porter, the jury had to find that the government proved the following elements beyond a reasonable doubt:

> First: The defendant used force or threat of force;
>
> Second: The defendant willfully injured, intimidated or interfered with M.W., or willfully attempted to injure, intimidate or interfere with M.W.;
>
> Third: The defendant acted because M.W. was occupying a dwelling and because of M.W.'s race or color; and
>
> Fourth: The defendant's conduct resulted in bodily injury to M.W. or involved the use, attempted use, or threatened use of a dangerous weapon.

Vol. I at 144. In reading this instruction to the jury, the district court clarified, "I'm sure you understand that M.W. refers to Mike Waldvogel." Vol. V at 376.

Lucas's name appears nowhere in the jury instructions.[4] Although Instruction 15 later uses the term "victim" in explaining what each of the elements requires, it is obvious that "victim" is used interchangeably with "M.W." to refer to Michael Waldvogel, and not Lucas. Instruction 15 states that "[t]o prove that the defendant acted 'because' the victim was occupying a dwelling and 'because of' the victim's race or color, the United States must show that the defendant would not have acted but for the victim's occupancy of his home and the victim's race or color." Vol. I at 145. The instruction then goes on to explain:

> This does not mean that the United States must prove that *M.W.'s* occupancy of his home and race or color were the only reasons for the defendant's actions. You may find that the defendant is guilty even if there were other reasons for his actions. The United States must prove, however, that if not for *M.W.'s* occupancy of his home and his race or color, the defendant would not have acted.

Vol. I at 145 (emphasis added). Thus, the court clearly instructed the jury to convict Porter based only on his actions and intent with respect to Waldvogel, not Lucas. There was no "ambiguity" (Br. 30) because the jury could not have

[4] Instruction 14 sets forth the language in the indictment, which refers to "M.W.'s seven-year-old son." Vol. I at 143. This is the only time the instructions mention Waldvogel's son.

reasonably understood "victim" to mean Lucas. Indeed, to do so would be expressly to disregard the jury instructions.

Porter repeatedly cites this Court's decision in *Miller* (see, *e.g.*, Br. 19, 27, 29-30), but that case is easily distinguishable. In *Miller*, the indictment charged that the defendant gave a false answer to a particular question on a federal controlled substance registration form. At trial, however, the government also presented evidence that the defendant had given another false answer to a different question on the same form, which was not charged in the indictment. 891 F.3d at 1232. Critically, the jury instructions failed to distinguish between the charged and uncharged false statements, and "simply instructed [the jury] that it should find Defendant guilty of making a false statement" if it found that the defendant had lied on the form. *Ibid.* "The jury was never instructed that the charged false statement was" the one charged in the indictment, "nor was it instructed that it could only find Defendant guilty if it found that his answer to this question [as charged in the indictment] was false." *Id.* at 1233. Because the government urged the jury to convict based on either of the false statements, the jury instructions raised "the very real possibility that Defendant was convicted on a different set of facts than those alleged in the indictment." *Ibid.*

No such possibility exists in this case. Unlike in *Miller*, here the jury instructions expressly directed the jury to convict Porter only for his actions

against Waldvogel, which were easily distinguishable from his actions against Lucas. No reasonable jury in this case could have believed that it was being instructed to convict Porter for his actions against Lucas.

2. The Evidence Presented At Trial Conformed With The Charges In The Indictment And Did Not Advance An Alternative, Uncharged Basis For Porter's Conviction

The evidence presented at trial also provides no basis to conclude that the jury may have convicted Porter for his actions against Lucas, and not Waldvogel. Indeed, the jury heard no evidence that Porter used or threatened force against Lucas, as would be necessary had the government advanced an alternative, uncharged basis for convicting Porter under Section 3631.

The United States presented extensive evidence that Porter's assault was because of Waldvogel's race or color, see pp. 19-22, *supra*, and his occupancy of a dwelling. This evidence closely tracked and corresponded with the charges in the indictment. The government called two witnesses—Michael Waldvogel and Katelin Adair—who specifically testified as to Porter's attack on Waldvogel. As alleged in the indictment, both witnesses testified that Porter used the word "nigger" during the attack on Waldvogel, with Waldvogel testifying that Porter told him, "[Y]ou and your nigger son can get out of here." The government also presented undisputed evidence of Porter's deep-seated, violent, and

contemporaneous racial animus against African Americans, including his desire not to live near any "niggers" or "black people."[5]

Significantly, the United States presented no evidence that Porter used "force or threat of force" against Lucas or that he assaulted Lucas with a "dangerous weapon," *i.e.*, a stun cane. To the contrary, Adair testified that Lucas was "a ways off on the grass" during Porter's assault on Waldvogel. The jury therefore could not have been confused as to the charges against Porter. Thus, this case is unlike cases in which the government charged one crime, but then introduced and relied on evidence that could also support conviction on a separate, uncharged offense. See, *e.g.*, *Miller*, 891 F.3d at 1232; *United States* v. *Farr*, 536 F.3d 1174, 1183 (10th Cir. 2008).

To be sure, the jury heard evidence that Porter yelled the word "nigger" at Lucas twice before Porter attacked Waldvogel and that the attack had a significant emotional impact on Lucas. Br. 23-24. This evidence was properly admitted as relevant to the charges in the indictment. First, Porter's admission that he yelled, "Get out of here, you stinking little nigger!" at Lucas was the predicate event that caused Waldvogel to confront Porter and provided necessary context and

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[5] With respect to the evidence, Porter simply rehashes his argument that there was insufficient evidence that Porter attacked Waldvogel because of *Waldvogel's* race or color. See Br. 21, 26, 30. Because Porter's sufficiency challenge fails, this argument should also be rejected.

background for the jury to understand Porter's assault on Waldvogel. Furthermore, as explained above, pp. 25-28, *supra*, the relevance of Porter's racial slurs against Lucas is not limited to the question of what Porter thought of Lucas, but also is probative of Porter's intent with respect to Waldvogel.

Second, Lucas's emotional response to the attack was, among other things, admissible and probative of why Waldvogel ultimately moved out of the apartment complex, as well as whether Porter intended to interfere with *Waldvogel's* right to occupy a dwelling. See, *e.g.*, *United States* v. *Magleby*, 241 F.3d 1306, 1314 (10th Cir. 2001) (in affirming conviction under 18 U.S.C. 241, jury properly considered victim's son's testimony that he feared his parents' attackers and slept with a baseball bat); *United States* v. *Pospisil*, 186 F.3d 1023, 1029 (8th Cir. 1999) (in finding sufficient evidence to convict under Section 3631, court considered victim's testimony that "[h]er children had nightmares, stopped sleeping in their rooms, and began checking the house for intruders"), cert. denied, 529 U.S. 1089 (2000). This evidence provides no support for Porter's argument that there was a "very real possibility" that the jury convicted Porter for "his uncharged conduct toward Lucas" (Br. 31).[6]

[6] Notably, although Porter challenged the admission of certain evidence regarding Lucas as irrelevant and unfairly prejudicial, Porter does not challenge on appeal the district court's decision to admit this evidence as relevant to proving the charged conduct.

Porter also notes that Waldvogel testified that he was part African-American, while the indictment identified him as "African-American," and asserts that a constructive amendment occurred because "the government failed to prove that Mr. Waldvogel is an African-American man, as charged in the indictment." Br. 21. This argument is baseless. Even assuming that the term "African-American" could only refer to someone who is 100% African-American or black, this type of minor factual deviation does not give rise to a constructive amendment, given that Waldvogel's actual race was not an element of Porter's 3631 offense. See, *e.g.*, *United States* v. *Teague*, 12 F. App'x 759, 764-765 (10th Cir. 2001) (no constructive amendment where evidence deviated from fact alleged in indictment because government proved elements of offense); *United States* v. *Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014) ("We have declined to find a constructive amendment, however, when the indictment simply contains superfluously specific language describing alleged conduct irrelevant to the defendant's culpability under the applicable statute.").

3. In Its Opening Statement And Closing Argument, The Government Told The Jury To Convict Porter For His Actions Against Michael Waldvogel, Not Waldvogel's Son

Finally, the government repeatedly told the jury, in clear and unambiguous terms, that Porter was on trial for his racially motivated assault on Waldvogel and could only be convicted for that conduct.

In the first sentence of her opening statement, counsel for the United States referred to "the named victim in this case, Michael Waldvogel." Vol. V at 76. She then told the jury, "The defendant has been charged with willfully using force to intimidate and to injure and interfere with the housing rights of Michael Waldvogel." Vol. V at 77. She continued, "You'll learn that this defendant struck Mr. Waldvogel in the neck with his cane, and there in front of Mr. Waldvogel's son he fell to the ground." Vol. V at 78. And, critically, she concluded her opening statement as follows:

> Ladies and gentlemen, it is not against the law to hate black people. The judge will tell you that it is not a crime to use racial slurs. *It is not even illegal to shout them at small children, but this defendant has been charged with using force to willfully intimidate and interfere and injure Mike Waldvogel because Mike Waldvogel was black and because Mike Waldvogel was occupying a home.* After you all have heard this evidence, we're going to come back and we're going to ask you to hold this defendant accountable for what he did that day and we're going to ask you to find him guilty.

Vol. V at 82 (emphasis added). Thus, not only did the government's opening statement repeatedly identify Waldvogel as the victim of Porter's Section 3631 offense, it also explicitly told the jury *not* to convict Porter for his acts against Lucas.

The government's closing argument similarly stated that "[t]he defendant is charged with a hate crime and for having willfully used force to injure, intimidate and interfere with Mike Waldvogel because Mike Waldvogel was occupying a

dwelling and because of Mike Waldvogel's race." Vol. V at 380. Counsel noted that Porter "attacked a seven-year-old African American boy *using words*" (Vol. V at 380 (emphasis added)), but also that "Mr. Porter physically attacked Mr. Waldvogel using an electrified stun cane, hitting him on his neck and causing him to drop to the ground." Vol. V at 380-381. Counsel then described the evidence supporting each of the elements of Section 3631, at all times focusing on Porter's actions against Michael Waldvogel, not his son:

> When Mr. Porter struck *Mr. Waldvogel* in the neck with that cane, he did so to intimidate *Mr. Waldvogel* and to injure him and to get *Mr. Waldvogel* out of his area of the courtyard. Why did he do this, ladies and gentlemen? Well, he told you repeatedly. It is because he does not want black people in his community.

Vol. V at 384 (emphasis added). Counsel even described Waldvogel's physical appearance, noting that Porter "hit Mr. Waldvogel in the neck, a man in his early forties, five nine, 215 pounds, and it took him to the ground." Vol. V at 388. The jury could not have mistaken this as a reference to Lucas, who was seven years old.

The primary reference to Lucas during closing argument was when counsel for the government responded to the specious, self-serving claim that Porter made during his arrest that he hit Waldvogel because Lucas was annoying him. See Vol. V at 389-390. Indeed, Porter continues to rely on this assertion in arguing that this Court should vacate his conviction. See Br. 13-14. The fact that the government

discussed Lucas in responding to Porter's defense does not support any argument that there was a constructive amendment of the indictment.

Accordingly, all facets of this case—the government's opening statement, the trial evidence, the government's closing argument, and the jury instructions—make clear that Porter was convicted as charged. Because there was no error, let alone plain error, this Court should reject Porter's argument as meritless.

III

THE DISTRICT COURT ERRED IN CALCULATING PORTER'S SENTENCING GUIDELINES RANGE FOR HIS CONVICTION (CROSS-APPEAL)

A. Standard Of Review

This Court reviews "de novo the district court's legal conclusions regarding the guidelines and its factual findings for clear error." *United States* v. *Gieswein*, 887 F.3d 1054, 1058 (10th Cir.) (quotation marks and citation omitted), cert. denied, No. 18-5538, 2018 WL 3893022 (Oct. 1, 2018). Under clear-error review, "this court views 'the evidence, and inferences drawn therefrom, in the light most favorable to the district court's determination.'" *United States* v. *Johnson*, 878 F.3d 925, 931 (10th Cir. 2017) (quoting *United States* v. *Brown*, 314 F.3d 1216, 1221 (10th Cir.), cert. denied, 537 U.S. 1223 (2003)). The Court "review[s] the district court's interpretation and application of the Sentencing Guidelines de

novo." *United States* v. *Abeyta*, 877 F.3d 935, 939 (10th Cir. 2017) (quotation marks and citations omitted).

B. In Determining Porter's Base Offense Level, The District Court Clearly Erred By Not Applying The Aggravated-Assault Guideline Where Porter Used A Dangerous Weapon With The Intent To Cause Bodily Injury To Waldvogel

To calculate Porter's sentence, the district court properly relied on Section 2H1.1, the applicable guideline for a violation of 42 U.S.C. 3631. In determining the appropriate base offense level under Section 2H1.1(a), however, the court clearly erred by not applying the aggravated-assault guideline, which is triggered when a defendant has committed "a felonious assault that involved * * * a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon." Sentencing Guidelines § 2A2.2, comment. (n.1). Here, both elements are satisfied. First, the jury's finding that Porter used a dangerous weapon makes clear that his offense "involved * * * a dangerous weapon." Second, the record clearly demonstrates that Porter did not use that weapon merely to frighten, but instead intentionally wielded it against Waldvogel "with intent to cause bodily injury." Accordingly, Porter's actions necessarily constituted aggravated assault, which the district court should have applied as the appropriate underlying offense under Section 2H1.1(a)(1).

As for the first element of aggravated assault, it is beyond dispute that Porter used a dangerous weapon. The jury specifically found as much (Vol. I at 128), and

Porter does not challenge that finding on appeal. The jury instructions defined "dangerous weapon" as an "instrument capable of inflicting death or serious bodily injury." Vol. I at 146. The jury's finding that Porter used a dangerous weapon in committing his Section 3631 offense necessarily means that Porter used a "dangerous weapon" under the Guidelines' definition of the term, which includes identical language, and extends to facsimiles of such weapons as well. Sentencing Guidelines § 1B1.1, comment. (n.1(D)).[7]

As for the second element of aggravated assault, the record here clearly demonstrates that Porter wielded his stun cane "with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon." Porter intentionally hit Waldvogel with an electric stun cane—a device that the jury necessarily found was "capable of inflicting death or serious bodily injury"—in precisely the manner in which it was designed to be used. Porter did not use a facsimile weapon, nor did he simply use his stun cane to frighten Waldvogel. Instead, Porter deliberately pressed the button on his stun cane to activate its electric shock device and then struck Waldvogel on the neck in an apparent attempt to employ the weapon's capability against him. See *United States* v. *Quiver*, 805 F.3d 1269, 1272 (10th Cir. 2015) (explaining that a taser is designed to cause bodily injury and incapacitate its

[7] Additionally, this Court has found that a taser is a "dangerous weapon" capable of inflicting serious bodily injury for purposes of Sentencing Guidelines § 2A2.2(b). *United States* v. *Quiver*, 805 F.3d 1269, 1272 (10th Cir. 2015).

target); *Cavanaugh* v. *Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010) (recognizing that a taser may cause "temporary paralysis and excruciating pain" and "unquestionably 'seizes' the victim in an abrupt and violent manner"). The fact that Porter activated and used a dangerous weapon in precisely the manner in which it was designed to be used necessarily means that he intended to cause bodily injury to Waldvogel. Accordingly, the district court clearly erred in not finding the requisite intent under Section 2A2.2.

The jury's finding that Porter did not cause bodily injury to Waldvogel does not negate Porter's intent. Just like a defendant who swings a sword at another person and misses, someone who deliberately activates and strikes another person with a stun cane intends to employ the weapon's capability against that person. The fact that the weapon's full capability was not realized in this particular instance does not undercut Porter's evident intent to utilize it, and can be attributed to the fact that Waldvogel grabbed the stun cane and threw it away during the attack. For that reason, this Court has found the second element of the aggravated-assault guideline satisfied even when no bodily injury in fact resulted. See, *e.g.*, *United States* v. *Serrata*, 425 F.3d 886, 909 (10th Cir. 2005) (rejecting claim that

defendant did not intend to commit bodily injury because victim did not suffer such injury).[8]

Accordingly, the district court clearly erred by failing to use aggravated assault as the underlying offense when calculating Porter's recommended Guidelines sentence. Had the district court applied a base offense level of 14 for aggravated assault, Sentencing Guidelines § 2A2.2(a); four additional points for use of a dangerous weapon, Sentencing Guidelines § 2A2.2(b)(2)(B);[9] and a three-point hate crime enhancement, Sentencing Guidelines § 3A1.1(a), Porter's total offense level would have been 21. Under criminal history category I, Porter's recommended sentence would have been 37 to 46 months' imprisonment. Instead, the district court used the PSR's recommended sentence of six to twelve months'

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[8] See also *United States* v. *Page*, 84 F.3d 38, 41 (1st Cir. 1996) (under Sentencing Guidelines § 2A2.2, "simple intent to do bodily harm of any kind, without regard to the degree actually suffered, if any, may support a finding of aggravated assault") (footnote omitted); *United States* v. *Bassil*, 932 F.2d 342, 345-346 (4th Cir. 1991) (where defendant threw chair in direction of correctional officers, but it was "uncertain" whether the chair caused specific injury, court "could reasonably conclude that defendant's intent in throwing the chair was to cause harm to the officers rather than merely frighten them"); cf. *United States* v. *Duran*, 127 F.3d 911, 915 (10th Cir. 1997) (holding that the "intent to cause bodily harm" element of the federal assault-with-a-dangerous-weapon statute, 18 U.S.C. 113, "does not require proof of any physical contact"), cert. denied, 523 U.S. 1061 (1998).

[9] The Commentary to the aggravated-assault guideline states that "[i]n a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2)." Sentencing Guidelines § 2A2.2 comment. (n.3).

imprisonment. This Court should vacate Porter's sentence and remand the case to the district court for resentencing with instructions to apply aggravated assault as the underlying offense under 2H1.1(a)(1).

C. In The Alternative, Even Assuming Porter's Conduct Amounted Only To Assault, The District Court Erred By Failing To Use A Base Offense Level Of At Least 10 Under The Applicable Guideline

Alternatively, even if this Court determines that the district court did not clearly err in finding that assault was the appropriate cross-reference, the Court nevertheless should hold that the district court erred by not applying a base offense level of 10 under Section 2H1.1(a)(3).

Section 2H1.1(a) directs the court to "[a]pply the [g]reatest" base offense level of several alternatives, including "the offense level from the offense guideline applicable to any underlying offense," Section 2H1.1(a)(1), and 10 if the offense involved "the use or threat of force against a person," Section 2H1.1(a)(3). In applying Section 2H1.1(a), the PSR and the court used the first of those alternatives. Vol. IV at 6, 24; Vol. V at 449. They, in turn, determined that the "guideline applicable to [the] underlying offense" (Sentencing Guidelines § 2H1.1(a)) was assault, which has a base level of 7. Sentencing Guidelines § 2A2.3.

As the government argued below, however, a base offense level of 10 applies under Section 2H1.1(a) if the offense involved "the use or threat of force

against a person." Sentencing Guidelines § 2H1.1(a)(3)(A); see Vol. I at 154-157; Vol. IV at 24; Vol. V at 454. Under 42 U.S.C. 3631(a), a defendant must act "by force or threat of force" to injure, intimidate, or interfere with the fair housing rights of "any person." The district court therefore instructed the jury that "to find the defendant guilty, you must find that the United States has proven * * * beyond a reasonable doubt [that] [t]he defendant used force or threat of force[.]" Vol. I at 144. Accordingly, in convicting Porter, the jury necessarily found beyond a reasonable doubt that Porter's offense involved "the use or threat of force against a person." Sentencing Guidelines § 2H1.1(a)(3)(A). The "[g]reatest" applicable base offense level was therefore 10. Sentencing Guidelines § 2H1.1(a). The court erred by adopting the PSR's calculations over the government's continued objections and applying a base offense level of 7, as opposed to the base offense level of 10 required under Section 2H1.1(a)'s plain text.

Under this alternative calculation, and after applying the three-point hate crime enhancement, Porter's total offense level should have been at least 13, resulting in a recommended sentence of 12 to 18 months' imprisonment. This Court should vacate Porter's sentence and remand to the district court for resentencing using a minimum base offense level of 10.

CONCLUSION

This Court should affirm Porter's conviction. This Court should vacate Porter's sentence and remand the case to the district court with instructions to recalculate his recommended Guidelines sentence using aggravated assault as the underlying offense. At a minimum, this Court should instruct the district court to recalculate Porter's recommended Guidelines sentence using a base offense level of 10.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose Porter's request for oral argument and agrees that oral argument would assist the Court in the resolution of this case.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 11,114 words according to the word processing program used to prepare the brief.

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman 14-point font.

s/ Max Lapertosa
MAX LAPERTOSA
Attorney

Dated: November 26, 2018

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT, prepared for submission via ECF, complies with all privacy redaction requirements under Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5; has been scanned with the most recent version of Symantec Endpoint Protection (version 14) and is virus-free according to that program; and complies with the applicable type-volume limit in Federal Rule of Appellate Procedure 32(f), in that it contains 11,114 words according to the word-processing program used to prepare the brief.

s/ Max Lapertosa
MAX LAPERTOSA
Attorney

Dated: November 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I electronically filed the foregoing BRIEF OF THE UNITED STATES AS APPELLEE/CROSS-APPELLANT with the United States Court of Appeals for the Tenth Circuit via this Court's CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

I further certify that seven paper copies of the foregoing brief were sent to the Clerk of the Court by overnight mail.

s/ Max Lapertosa
MAX LAPERTOSA
Attorney

ATTACHMENT A

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Utah

UNITED STATES OF AMERICA
v.
Mark Olic Porter

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX 2:17CR00527-001 DB

USM Number: 79943-408

Spencer W. Rice
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) Count 1 - Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
42 U.S.C. § 3631	Interfering with Housing		1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/24/2018
Date of Imposition of Judgment

Dee Benson
Signature of Judge

Dee Benson, U.S. District Judge
Name and Title of Judge

5/24/2018
Date

DEFENDANT: Mark Olic Porter
CASE NUMBER: DUTX 2:17CR00527-001 DB

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

9 months.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Mark Olic Porter
CASE NUMBER: DUTX 2:17CR00527-001 DB

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 12 months.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Mark Olic Porter
CASE NUMBER: DUTX 2:17CR00527-001 DB

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.
14. You must submit your person, residence, office or vehicle to search, conducted by the probation office at a reasonable time and in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; you must warn any other residents that the premises may be subject to searches pursuant to this condition

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Mark Olic Porter
CASE NUMBER: DUTX 2:17CR00527-001 DB

SPECIAL CONDITIONS OF SUPERVISION

NONE

DEFENDANT: Mark Olic Porter
CASE NUMBER: DUTX 2:17CR00527-001 DB

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Mark Olic Porter
CASE NUMBER: DUTX 2:17CR00527-001 DB

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

NO FINE IMPOSED. SAP $100.00 is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.) Case No. 2:17-CR-527DB

MARK OLIC PORTER,)

Defendant.)

_____)

BEFORE THE HONORABLE DEE BENSON

May 24, 2018

Sentencing

from a very -- she is from a very well-off Jewish family, and I am kind of -- you know, I do the cooking. I cook. I like to eat at home and stuff. I cook and I shop and I clean. I do all of that. I do all that stuff for her and stuff. That is what I do full-time now and I have been doing it all these years.

That is all I have got to say. I did not go after that guy. He came to me on the patio. I thought he might start swinging at me. Do you know what I mean? I held the cane out. I never swung it at all at him. I never did that.

Thank you, Your Honor. You know, thank you, and I told my attorney I said we don't need a jury. We have a good Judge right here. Why can't we have one with the Judge? I don't know much about juries. Thank you very much, Your Honor.

THE COURT: All right.

MR. PORTER: Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Porter.

I find that the guidelines are correctly calculated in the presentence report. The beginning number is a seven and I find that simple assault is the appropriate reference under the circumstances. I, of course, sat through the entire trial, and I find that it is appropriate to add three points under the Sentencing Guideline Section

3A1.1A, because I find beyond a reasonable doubt that the defendant intentionally selected a victim or property as the object of the offense of conviction because of the actual or perceived race or color of any person.

I think essentially the jury did that, but I understand the argument Mr. Rice is making in that regard, and I want to make it clear on the record that I also make that finding.

I am following the case that is cited in the addendum to the presentence report in doing it that way. That brings us to an offense level of ten and it yields a sentencing range of six to 12 months, which, under all of the of the circumstances, I find appropriate in this case. I am imposing a sentence of nine months. That should have Mr. Porter serving a few more days. I don't know exactly how much time he has been in jail. I would reach the same sentence under the 3553 factors.

One thing was clear to me from this trial, Mr. Porter is a racist and he has openly declared racist views. They are ugly and despicable and distasteful to most of us. He has views about African American people that are especially ugly in my opinion. He is entitled to have those views in America. We have the First Amendment and it is not against the law to be a racist. It is against the law to act on the basis of those racist views, and to seek out

people and to discriminate against them on the basis of their race, and to prevent them from the quiet enjoyment of housing.

He was found in this case to have done that. That jury verdict stands. That is what the jury found. In hearing all of the facts and one thing that I agree with Mr. Rice on, this was not a case of Mr. Porter going out to seek a minority in order to do something bad to them, other than to the little boy.

I find the most disgusting part of this case is what Mr. Porter did to that little seven-year-old boy and to use the N word on him. I am not your father or your spiritual adviser, Mr. Porter, but you would be well advised to stop using that kind of language around people. It is distasteful and it is disrespectful. I know you have your views about black people, but it is not shared by most people, and it is especially hurtful to a young seven-year-old boy who is riding his scooter. If his scooter riding bothered you, you could tell him or talk to his parent, but to call him the N word in contemporary America is just so wrong.

I am not trying to do a lenient sentence here. I am trying to do a sentence that I think is appropriate and reasonable under all of the circumstances. This was an altercation between two men. There is a federal statute

that makes it clearly against the law to act on the basis of race. This happened the way it happened and we have the record and the jury found him guilty and he should serve a period of time incarcerated. Sometimes we forget how long nine months is in jail. He has served that. He will be on one year of supervised release following his release from custody, during which time he will be required to comply with all the standard conditions of supervised release.

I hope you can do that, Mr. Porter. If not, you'll be back here in front of me, and if there is anything that indicates a violation of those requirements, which includes not violating any state, federal or local laws, and I don't know if you will be able to be supervised in Lake Havasu, Arizona or if you will be required to stay in Utah. I think we can probably transfer it to Arizona, but if there is a violation, you will be back here in front of me. I will not be lenient. I won't. I will put you in jail for as long as it takes to protect the community. You can have your racist views, that is not illegal, but you can't act on them.

I don't see a history of acting on them. I see a string of misdemeanors and a person who just does not handle confrontation well. I don't know if it was your brain injury, and I don't know what is causing you to be so difficult in certain situations with other people, and you

were difficult with the marshals here. We were worried about you being difficult in the courtroom. You mostly behaved yourself. You seem to have a problem with impulse control. Again, if there is anything that violates your supervised release in the next year, you'll be back here before me.

You have 14 days to appeal this sentence if you feel that it is illegal. I am not imposing a fine. I find the defendant does not have the ability to pay a fine. With regard to the requested restitution, I find that inappropriate.

Was it just one count of conviction?

MR. RICE: One.

THE COURT: There will be a $100 special assessment fee which is due immediately.

Anything else?

MR. RICE: I just wanted to clarify, Ms. Porter is here and she could take him back down to Arizona. Is he going to be released today or --

THE COURT: No. It will be nine months. I don't know when the nine months is.

MR. RICE: Okay.

THE COURT: That is simple enough. Nine months.

MR. RICE: Okay.

THE COURT: What does probation have to say about