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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE

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* Roman Numerals set forth below correspond to the Roman Numerals that appellant has used in his Supplemental Brief. Issues VI and VII are new issues arising from the district court's proceedings after this Court's remand in the first appeal. Issues II, IV, and V are the same as those issues addressed in the parties' briefs in the first appeal.

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INTRODUCTION

This appeal is before this Court for a second time. This Court previously held that the district court erred in concluding that the factual basis in the plea agreement did not amount to a legally cognizable threat in violation 18 U.S.C. 875(c). In correcting the district court's error, this Court overturned one of its precedents in light of the Supreme Court's decision in *Elonis* v. *United States,* 135 S. Ct. 2001, 2011 (2015), and granted a limited remand to allow the district court to reconsider the plea agreement under the corrected legal standard.

On remand, the district court agreed that the factual basis of the plea agreement satisfied all of the elements of a violation of Section 875(c). But the court concluded that it could not accept the plea agreement for a different reason.

Specifically, the district court referenced its duty under Sentencing Guideline Section 6B1.2(a) to determine whether a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(A), which includes the government's agreement not to bring additional charges, would adequately reflect the severity of the actual offense behavior and would not undermine the statutory purposes of sentencing. The district court concluded that a plea agreement to a single Section 875(c) violation, with its statutory maximum of five years' imprisonment, was too lenient and not in the public interest, given the extensive, serious, and dangerous conduct committed by Doggart and recounted in his presentence report. The court made clear that Doggart could still plead guilty to that offense, but the court would not accept the original plea agreement. Doggart declined to plead guilty without the benefit of the written plea agreement.

Doggart now returns to this Court, reiterating the challenges he previously raised to his jury convictions and sentence, and raising two new issues concerning the district court's rejection of the plea agreement on remand. In his supplemental brief, Doggart largely reiterates the same arguments he has already made. He also argues that the district court erred in again rejecting his plea agreement, and asserts

that his case should be reassigned to a different district court judge. None of Doggart's current arguments establish any reversible error.

SUPPLEMENTAL STATEMENT OF THE CASE

The United States' initial brief more fully recounts the facts proven at trial and found at sentencing regarding Doggart's "plot[] to attack an Islamic community" through soliciting others to damage and destroy the mosque and other buildings in the Islamberg community. *United States* v. *Doggart*, 906 F.3d 506, 508 (6th Cir. 2018). This supplemental statement of the case summarizes the procedural history that led to the first appeal, as well as the procedural history on remand that brings this case to the Court for a second time.

1. The District Court's Initial Rejection Of The Plea Agreement And The Subsequent Trial And Sentencing

a. In April 2015, the government filed a two-count Criminal Complaint against Doggart. One count charged him with transmitting a threat in interstate commerce in violation of 18 U.S.C. 875(c), and the other count charged him with solicitation of a crime of violence, specifically, to damage and destroy religious property (a mosque) because of the religious nature of that property, in violation of 18 U.S.C. 373 and 18 U.S.C. 247(a)(1). (Complaint, R. 1, PageID# 1, 8). The government thereafter filed a Bill of Information charging a single count of violating 18 U.S.C. 875(c), and the parties filed a proposed plea agreement to that offense. (Plea Agreement, R. 14, PageID# 45-53).

Under Rule 11(b)(3), the district court had to ensure that there was a sufficient factual basis for the plea. Fed. R. Crim. P. 11(b)(3). The district court declined to accept the plea agreement because, in its view, the parties had not identified a sufficient factual basis for each element of the offense. (Memorandum Order, R. 29, PageID# 282-290).

To establish a violation of Section 875(c), the government must prove that: "(1) the defendant sent a message in interstate commerce; (2) a reasonable observer would view the message as a threat; and (3) the defendant intended the message as a threat." *Doggart*, 906 F.3d at 510 (citations omitted). The district court concluded that the stipulated facts in the plea agreement did not satisfy the second element of the threat charge. *Id*. at 509. "As the district court saw it, Doggart's admitted conduct—telling the confidential source that he planned to destroy several buildings and kill residents of Islamberg—did not violate the threat statute because his statement did not amount to an objective threat." *Id.* at 510. The district court reached that conclusion relying on the threat standard set forth in *United States* v. *Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). Order, R. 29, PageID# 287 ("[A] communication * * * indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication is also conveyed for the purpose of furthering some goal through the use of intimidation. (emphasis omitted) (quoting *Alkhabaz*, 104 F.3d at 1495)).

b. After the district court 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# 315-316). Doggart declined to plead guilty to this one-count indictment. (Memorandum, R. 218, PageID# 3434).

c. On May 3, 2016, a grand jury returned a four-count Superseding Indictment. (Superseding Indictment, R. 84, PageID# 437-439). 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, respectively, 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, proceeded to trial in 2017, and was convicted by a jury on all counts. (Transcript, R. 292, PageID# 5318). However, the district court granted Doggart's motion for a judgment of acquittal on Counts 3 and 4, holding (again based on *Alkhabaz*) that the communications were not punishable as

"true threats." (Order, R. 230, PageID# 3681-3685). The government did not challenge that ruling.

d. Doggart was sentenced based on his convictions for two counts of soliciting crimes of violence. The presentence report calculated Doggart's 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) and (b).

Following a lengthy sentencing hearing, 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). Doggart appealed.

2. First Appeal

a. Doggart challenged the district court's rejection of the plea agreement, his subsequent jury convictions on two counts of soliciting crimes of violence, the application of the Terrorism Enhancement, and the procedural and substantive reasonableness of his sentence. This Court only considered the first of those issues before remanding the case for further proceedings.

b. This Court held that the district court "wrongly rejected the plea agreement" because *Alkhabaz*, on which the district court relied, had been abrogated by intervening Supreme Court authority. *Doggart*, 906 F.3d at 508. The Court explained that in *Elonis* the Supreme Court held that "to be a true threat, the defendant must subjectively intend his communication to be threatening." *Id.* at 512 (citing *Elonis* v. *United States*, 135 S. Ct. 2001, 2011 (2015)). Because *Elonis* "said nothing about an intimidation requirement," this Court concluded that any such requirement in "*Alkhabaz* is no longer the law of the circuit." *Ibid.* The Court noted that it could not "fault the district court for following one of our precedents," as it had not previously harmonized the law of the circuit with *Elonis*. *Ibid.*

c. Without addressing the other issues raised by Doggart, and while retaining jurisdiction over the appeal, this Court remanded for the district court to "reconsider the [plea] agreement under current law" and "determine whether Doggart intended his statement as a serious expression of an intent to harm." *Doggart*, 906 F.3d at 512. The Court added that "[i]f the [district] court finds that Doggart intended to make a threat, it must allow him to accept the [original] plea

agreement."[1] *Ibid.* The Court further explained that "[i]f he pleads guilty under the terms of the agreement and if no one challenges the plea, we will then vacate Doggart's other convictions." *Ibid*. But if Doggart "decides not to plead guilty or the district court determines that Doggart did not intend his statement as a threat, * * * we will proceed with his appeal as to the remaining issues." *Ibid*.

3. Remand Proceedings In The District Court

a. On remand, the district court asked the parties to address whether the court should accept the plea agreement. (Order, R. 308, PageID# 5891-5892). Doggart asserted that the factual basis in the plea agreement was sufficient to show his intent to communicate a threat, and he asked the court to "allow him to enter a guilty plea under the terms of the plea agreement." (Defendant's Position, R. 309, PageID# 5900, 5902). The United States agreed that "the factual basis in the original plea agreement * * * satisfies the requirements post-*Elonis*," but noted that Doggart's statements in 2017, during sentencing, seemed to "contradict his current assertion that he intended his statements to be threats." Government's Response, R. 311, PageID# 5907-5910); (Transcript, R. 293, PageID# 5511-5521).

[1] As the district court noted, this language is less than precise: the pronoun "him" seems to refer to Doggart. "Defendants do not accept plea agreements, however; courts do." (Memorandum & Order, R. 318, PageID# 5975).

b. The district court held a hearing in February 2019. The court acknowledged that the facts recited in the plea agreement adequately supported a Section 875(c) violation and that Doggart should be given an opportunity to "tender a plea of guilty." (Hr'g Transcript, R. 313, PageID# 5916-5917).

The court then addressed Guideline 6B1.2(a), which directs courts to accept a plea agreement "that includes the dismissal of any charges or an agreement not to pursue potential charges," *i.e.*, a Rule 11(c)(1)(A) plea agreement, "if the court determines * * * that the remaining charges adequately reflect the seriousness of the actual offense behavior and * * * will not undermine the statutory purposes of sentencing." (Hr'g Transcript, R. 313, PageID# 5920 (quoting U.S.S.G. § 6B1.2(a)). The court suggested that the converse was also true: if the court did not make that finding, it should reject the plea agreement, but could accept a plea of guilty. (Hr'g Transcript, R. 313, PageID# 5920-5921).

Although the plea agreement contained no explicit promise by the United States not to pursue additional charges if Doggart pleaded guilty to the Section 875(c) violation, the district court reasoned that this Court's opinion had inferred such a promise because the Court concluded that Doggart had suffered prejudice

from the rejection of the plea agreement.[2] (Hr'g Transcript, R. 313, at PageID# 5922-5927; see also Hr'g Transcript, R. 313, PageID# 5939-5940). The United States had not previously taken into consideration the district court's authority under Guideline 6B1.2(a). (Hr'g Transcript, R. 313, PageID# 5933-5934). As a result, the parties requested and received additional time to brief the district court's discretion to reject the plea agreement under Guideline 6B1.2. (Hr'g Transcript, R. 313, PageID# 5921-5922, 5935-5936, 5938, 5940-5942).

Doggart argued that the district court was obligated to accept the plea agreement. (*E.g.*, Defendant's Supplement, R. 314, PageID# 5951; see also Defendant's Response to Government's Supplement, R. 316, PageID# 5965-5969). Doggart conceded that Guideline 6B1.2 applies to plea agreements such as this one, *i.e.*, that "reflect[] a negotiated charge bargain pursuant to Rule 11(c)(1)(A)" that "no other charges would be brought." (Defendant's Supplement, R. 314,

[2] The agreement stated that, "[n]o representative of the United States has made any promises to the defendant as to what the sentence will be in this case." (Plea Agreement, R. 14, PageID# 49). The agreement is also explicit that "[t]here will be no other counts to dismiss at the time of sentencing." (Plea Agreement, R. 14, PageID# 49). Both parties and the district court agreed that the plea agreement should be read as one containing provisions specified by Rule 11(c)(1)(A). (Memorandum & Order, R. 318, PageID# 5978). While Doggart argued below that the agreement also contained features of a Rule 11(c)(1)(B) agreement, the district court concluded that any such agreement would not affect its analysis and so declined to further address that point. (Memorandum & Order, R. 318, PageID# 5978).

PageID# 5950). But Doggart argued that "the Sixth Circuit has already telegraphed its view that a statutory maximum of five years is sufficient to serve [18 U.S.C.] § 3553(a) purposes" and that the district court would, accordingly, not have a "sound reason" to reject the plea agreement. (Defendant's Supplement, R. 314, PageID# 5951).

The United States argued that the court was required to give Doggart an opportunity to plead guilty, yet retained discretion to reject the plea agreement under Guideline 6B1.2. (Government's Supplement, R. 315, PageID# 5958-5964; Government's Response to Defendant's Supplement, R. 316, PageID# 5970-5973).

c. In a written order, the district court stated that the factual basis in the plea agreement "satisfies the correct definition of a threat and therefore adequately supports a violation of 18 U.S.C. § 875(c)." (Memorandum & Order, R. 318 PageID# 5975). But the court explained that, in its view, the plea agreement as to a single Section 875(c) violation was "too lenient * * * and not in the public interest," given the totality of Doggart's conduct, and that the court should thus reject it under Guideline 6B1.2(a). (Memorandum & Order, R. 318, PageID# 5981). The court explained that it would inform Doggart that, if he pleaded guilty, he would be "doing so outside of his plea agreement," that the government would be able to charge him with other crimes, and that the district court could not

"predict what, if anything, [this] Court * * * would do with his remaining convictions." (Memorandum & Order, R. 318, PageID# 5985).

On July 9, 2019, Doggart notified the district court that he would "not enter a guilty plea * * * at this time." (Notice, R. 319, PageID# 5987-5988). That same day, Doggart asked this Court to proceed with this appeal and allow supplemental briefing. (C.A. Mot. July 9, 2019). This Court granted that motion and Doggart filed his supplemental brief on July 31, 2019. Doggart's supplemental brief provides additional argument on three of his original claims and raises two entirely new claims.[3]

SUMMARY OF SUPPLEMENTAL ARGUMENTS

This Court previously deferred ruling on most of Doggart's arguments so the district court could reconsider whether to accept the original plea agreement, and Doggart now contests the district court's actions on remand. For that reason, the United States has chosen to respond to Doggart's new arguments arising from the remand—ISSUE VI and ISSUE VII—before addressing his other arguments.

ISSUE VI. The district court acted well within its discretion by rejecting the proposed plea agreement based on its determination under Guideline 6B1.2 that the agreement does not adequately reflect the seriousness of Doggart's actual offense

[3] For the Court's ease of reference, United States refers to these arguments by the same Roman Numerals that Doggart uses in his briefs.

behavior and is not in the public interest because it would undermine the statutory purposes of sentencing as set forth in 18 U.S.C. 3553(a). This Court's prior decision in this case did not restrict the wide discretion of the district court under Rule 11 of the Federal Rules of Criminal Procedure to accept or reject a Rule 11(c)(1)(A) plea agreement that precludes the government from bringing other charges.

ISSUE VII. If this Court were to again remand for further proceedings, it should not reassign this case to another district judge. Doggart has not established any basis for the extraordinary remedy of reassignment.

ISSUE II. 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 real property through the use of a dangerous weapon, explosives, or fire (Count 1; 18 U.S.C. 247(a)(1) and (d)(3)), and arson (Count 2; 18 U.S.C. 844(i))—have elements requiring the "use of physical force." See U.S. Br. 30-40.[4]

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[4] Citations to "Supp. Br. __" refer to Doggart's supplemental brief. Citations to "Br. __" refer to Doggart's opening brief as appellant. Citations to "U.S. Br. __" refer to the United States' response brief as appellee. In addition, the text of 18 U.S.C. 373, 18 U.S.C. 247, and 18 U.S.C. 844 is included in an Addendum attached to this brief.

On Count 1, Doggart argues in his supplemental brief that violations of 18 U.S.C. 247(a)(1) do not categorically involve the use of physical force, that it is only the penalty provision in Section 247(d)(3) that makes the offense involve the use of force, and that, even so, not all violations of subsection (d)(3) categorically involve the use of force. Supp. Br. 10-12. These arguments are wrong. As explained below, all violations of 18 U.S.C. 247(a)(1)—which involve "intentionally defac[ing], damag[ing], or destroy[ing] any religious real property"—have as an element the use of physical force. Moreover, the specific predicate offense that Doggart was convicted of soliciting—damaging or destroying religious real property through the use of a dangerous weapon, fire, or explosive in violation of 247(a)(1) and (d)(3)—has an additional and more specific use of force element. The inclusion of the (d)(3) element serves to make the predicate offense a felony for purposes of conviction under 18 U.S.C. 373, and also is another way in which the offense categorically involved "the use of physical force." Accordingly, on Count 1, Doggart was properly charged and convicted of soliciting a felony which has as an element the use of physical force under 18 U.S.C. 373.

On Count 2, Doggart repeats his argument that the predicate offense solicited—arson in violation of 18 U.S.C. 844(i)—does not necessarily involve the use of physical force because it can be committed with a reckless *mens rea*. Supp.

Br. 13. As the United States previously argued, this argument is foreclosed by this Court's decision in *United States* v. *Verwiebe*, 874 F.3d 258 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018). U.S. Br. 38. In his supplemental brief, Doggart argues for the first time that *Verwiebe* cannot be applied retroactively. Supp. Br. 16. This Due Process Clause argument has been forfeited in this case and, in any event, is meritless.

ISSUE IV. The district court properly applied the Terrorism Enhancement of Sentencing Guideline 3A1.4 to Doggart's conviction for solicitation of arson in Count 2. Doggart's supplemental brief largely repeats his previous argument that the Terrorism Enhancement cannot be applied to a Section 373 solicitation conviction because solicitation is not a listed Federal crime of terrorism under 18 U.S.C. 2332b(g)(5)(B). This argument is foreclosed by this Court's decision in *United States* v. *Graham*, 275 F.3d 490 (6th Cir. 2001), cert. denied, 535 U.S. 1026 (2002). *Graham* held that the enhancement can be applied to offenses that are not themselves listed as "Federal crime[s] of terrorism" so long as the defendant has as one purpose of his conduct "the intent to promote a federal crime of terrorism." 275 F.3d at 516.

Doggart's supplemental brief also reiterates his arguments that the district court's factual findings precluded application of the enhancement and that its application here would raise Sixth Amendment concerns. Supp. Br. 30. Contrary

to these arguments, the district court carefully considered the trial evidence and properly applied the Terrorism Enhancement in this case 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). The district court's findings in applying the enhancement raise no Sixth Amendment concerns because Doggart received a within-Guidelines sentence that does not exceed the applicable statutory maximum.

ISSUE V. Doggart's 235-month, 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 January 2019 report of the Sentencing Commission that Doggart cites in his supplemental brief, *Recidivism Among Federal Violent Offenders*, in no way undermines the reasonableness of the sentence that Doggart received.

ARGUMENT

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE RULE 11(C)(1)(A) PLEA AGREEMENT

Doggart argues in his supplemental brief that the district court abused its discretion in rejecting his plea agreement after remand. The district court's rejection of a plea agreement is reviewed for an abuse of discretion. *United States*

v. *Doggart*, 906 F.3d 506, 509 (6th Cir. 2018). A district court must provide a sound reason for rejecting a plea agreement and the district court has provided such a reason here. *United States* v. *Cota-Luna*, 891 F.3d 639, 648 (6th Cir. 2018).

The district court rejected the plea agreement because it concluded that the agreement is "too lenient given the extensive, serious, and dangerous conduct reflected in the presentence report, and it is not in the public interest because it does not adequately promote respect for the law, deter criminal conduct, or protect the public from future crimes of Defendant." (Memorandum & Order, R. 318, PageID# 5981). In reaching this conclusion, the district court did not abuse its discretion.

1. As relevant here, under Federal Rule of Criminal Procedure 11(c)(1)(A), the government and the defendant may reach a plea agreement that provides that the government will "not bring, or will move to dismiss, other charges." Under Federal Rule of Criminal Procedure 11(c)(3)(A), when presented with such a plea agreement, "the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." Fed. R. Crim. P. 11(c)(3)(A). Furthermore, Guideline 6B1.2(a) states that a court may accept "a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges * * * if the court determines * * * that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting

the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." U.S.S.G. § 6B1.2(a). This provision of the Guidelines places "a great responsibility on the sentencing judge to use his or her discretionary authority when examining and inspecting plea agreements pursuant to Rule 11 of the Federal Rules of Criminal Procedure." *United States* v. *Greener*, 979 F.2d 517, 520 (7th Cir. 1992). Under this framework, "[c]riminal defendants have no right to require district courts to accept their guilty pleas." *Doggart*, 906 F.3d at 509 (citing *Santobello* v. *New York*, 404 U.S. 257, 262 (1971)).

It is well-established that, when applying this discretionary authority, the sentencing judge may properly reject a Rule 11(c)(1)(A) plea agreement if the judge determines that the maximum sentence available under the plea agreement is too lenient given the defendant's actual offense conduct. In *United States* v. *Skidmore*, 998 F.2d 372, 376 (6th Cir. 1993), this Court stated that Rule 11 of the Federal Rules of Criminal Procedure "permit[s] a district court to reject a plea agreement either because the proposed agreement is too lenient or because it is too harsh." Other circuits are in accord. See, *e.g.*, *United States* v. *Smith*, 417 F.3d 483, 487 (5th Cir.) ("[A] court is well-advised to reject a plea agreement that dismisses a charge if it finds that the remaining charges do not adequately reflect the seriousness of a defendant's actual offense behavior."), cert. denied, 546 U.S. 102 (2005); *United States* v. *Gamboa*, 166 F.3d 1327, 1331 (11th Cir. 1999) ("It

was * * * well within the district court's discretion to hold that the negotiated guilty plea did not reflect the seriousness of [defendant's] offense behavior."); *United States* v. *Torres-Echavarria*, 129 F.3d 692, 696 (2d Cir. 1997) ("Among the reasons that may justify the exercise of discretion to reject a plea agreement is a concern that the resulting sentence would be too lenient."), cert. denied, 522 U.S. 1153 (1998); *Greener*, 979 F.2d at 520 (finding no abuse its discretion where the district court rejected two different single-count plea agreements when finding that those agreements "would not adequately represent the defendant's criminal conduct and would undermine the sentencing guidelines"); *United States* v. *LeMay*, 952 F.2d 995, 997 (8th Cir. 1991) ("A decision that a plea bargain will result in the defendant's receiving too light a sentence under the circumstances of the case is a sound reason for a judge's refusing to accept the agreement.") (citation omitted).

On remand, the district court concluded that a single charge brought under 18 U.S.C. 875(c) does not "adequately reflect[] the seriousness of the actual offense behavior." (Memorandum & Order, R. 318, PageID# 5981). The district court concluded that given the extensive, serious, and dangerous conduct reflected in the presentence report, the Plea agreement "is too lenient." (Memorandum & Order, R. 318, PageID# 5981). The court also determined that sentencing under this single charge, with its five-year statutory maximum sentence, "is not in the

public interest because it does not adequately promote respect for the law, deter criminal conduct or protect the public from future crimes of Defendant." (Memorandum & Order, R. 318, PageID# 5981). Based on these findings, the district court acted well within its discretion in rejecting the plea agreement. See U.S.S.G. § 6B1.2(a).

2. Doggart does not contest the general principle that "the district court may reject a charge bargain if, in the exercise of its judicial sentencing discretion, it views the charge as carrying too lenient a sentence." Supp. Br. 33. Rather, Doggart argues that in the "unusual circumstances" of this case, "this Court's remand order set the outer limits of the court's sentencing discretion." Supp. Br. 33. Doggart rests this argument on the statement from this Court's prior opinion that, "[i]f the [district] court finds that Doggart intended to make a threat, it must allow him to accept the plea agreement." *Doggart*, 906 F.3d at 512. Doggart's reading of this Court's prior decision is incorrect.

As the district court explained on remand, the most plausible reading of the phrase, "it must allow him to accept the plea agreement," is that the district court was instructed to allow defendant to "tender a guilty plea to the charge addressed in the Plea Agreement and to try to persuade the Court to accept the Plea Agreement." (Memorandum & Order, R. 318, PageID# 5975). This is what the district court did. On remand, the district court concluded that Doggart had

intended to make a threat, and therefore allowed him the opportunity to persuade the Court to accept the plea agreement, or to enter a guilty plea to the Section 875(c) charge outside of the plea agreement. (Memorandum & Order, R. 318, PageID# 5981-5984). In other words, directing the district court to "allow him," *i.e*., Doggart, to accept the plea agreement is not the same as directing the district court to accept the plea agreement if presented to it.

Moreover, as the district court correctly noted, nothing in this Court's prior opinion addressed whether the statutory maximum sentence available under a single 18 U.S.C. 875(c) count would be sufficient and appropriate for the defendant in accordance with the "statutory purposes of sentencing" that courts must consider under Guideline 6B1.2(a). The district court correctly recognized that "[t]he focus of the Opinion was the correct definition of a threat and whether the factual basis within the Plea Agreement satisfied that definition, not on whether the sentence for an 18 U.S.C. § 875(c) violation was sufficient or insufficient." (Memorandum & Order, R. 318, PageID# 5981). Indeed, this Court had explicitly declined to reach Doggart's sentencing arguments. See *Doggart*, 906 F.3d at 512 ("For now, we need not address Doggart's other arguments on appeal."). Further, in its instructions to the district court, this Court was careful not to invade the lower court's fact-finding discretion. See *ibid.* (instructing the district court to

determine in the first instance whether the defendant intended to make a threat, applying the corrected legal framework).

In sum, this Court granted a limited remand "to permit [the district court] to reconsider the [plea] agreement under current law." *Doggart*, 906 F.3d at 512. On remand, the district court did just that. In reconsidering the plea agreement, the district court applied the correct and current legal definition of a threat. (Memorandum & Order, R. 318, PageID# 5975). And then the court also applied the current (and unchanged) law that requires scrutiny of a Rule 11(c)(1)(A) plea agreement to ensure, under Guideline 6B1.2, that the agreement appropriately reflects the defendant's actual offense conduct and the statutory purposes of sentencing as reflected in 18 U.S.C. 3553(a). (Memorandum & Order, R. 318, PageID# 5980-5984). Nothing in this Court's prior opinion purported to upend the responsibility and discretion granted to the district judge under that framework. Therefore, under the circumstance here, the district court did not abuse its discretion in rejecting the plea agreement.

VII

THERE IS NO BASIS FOR REASSIGNMENT TO ANOTHER JUDGE

In his supplemental brief, Doggart asks this Court to reassign this case to a different judge if the case is remanded. Supp. Br. 36-37.

Section 2106 permits this Court to remand a case to a different district court judge. 28 U.S.C. 2106. But this is "an extraordinary power" and "[s]uch reassignments should be made infrequently and with the greatest reluctance." *Armco, Inc.* v. *United Steelworkers of Am., AFL-CIO, Local 169*, 280 F.3d 669, 683 (6th Cir. 2002) (citation omitted).

As this Court has recognized, in determining whether reassignment is necessary, the Court considers: (1) whether the original judge would reasonably be expected to have substantial difficulty in putting out of his mind previously expressed views or findings; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *Sagan* v. *United States*, 342 F.3d 493, 501 (6th Cir. 2003). None of these factors supports the extraordinary remedy Doggart requests here.

First, there is no reason to believe that the district judge would have difficulty putting out of his mind any previously expressed views or findings. The district court fully complied with this Court's instructions on remand. It was well within the district court's discretion to find that the plea agreement does not reflect the seriousness of the actual offense behavior and that accepting the agreement would undermine the statutory purposes of sentencing. Reassignment is warranted under this factor only where the district judge has "unequivocally demonstrated

* * * an unwillingness to entertain alternative viewpoints." *Webb* v. *United States*, 789 F.3d 647, 673 (6th Cir. 2015). The district court here has done no such thing.

Second, the district court has not called into question the appearance of justice simply by twice rejecting the proposed plea agreement. When the district court first held, as a matter of law, that the facts contained in the plea agreement could not constitute a threat in violation of 18 U.S.C. 875(c), it relied on this Court's decision in *United States* v. *Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). In the prior appeal, this Court held for the first time that *Alkhabaz*'s gloss on the requirements for making an objective threat was no longer good law in light of *Elonis*. *Doggart*, 906 F.3d at 512 (citing *Elonis* v. *United States*, 135 S. Ct. 2001, 2011 (2015). But even as this Court corrected the district court's error, it noted that "[w]e cannot fault the district court for following one of our precedents." *Ibid*. When the court rejected the proposed plea agreement the second time, it did so not because of any "predispos[ition]," as Doggart claims (Supp. Br. 37); rather, the court rejected the plea agreement based on its view of the severity of Doggart's actual offense conduct, taking into account the statutory sentencing factors. (Memorandum & Order, R. 318, PageID# 5981-5982).

Finally, in the event that any remand is warranted, reassignment would cause unnecessary waste and duplication. This case included a five-day jury trial and an

extensive sentencing hearing, prior to which the district court "review[ed] the voluminous information" that the parties provided. (Transcript, R. 293, PageID# 5344). In addition, the unusual procedural history of this case has given rise to supplemental briefing and post-trial hearings before the district court. Because there are no well-supported arguments that call into question the district court's basic fairness, there is no reason to require another judge to master this lengthy record in order to carry out any future proceedings.

II

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

Doggart's supplemental brief largely reiterates the arguments he made in his prior briefs challenging his solicitation convictions on Counts 1 and 2. Doggart's core contention is that the predicate offenses that he was convicted of soliciting—intentionally damaging or destroying religious real property in violation of 18 U.S.C. 247(a)(1) and (d)(3), and arson in violation of 18 U.S.C. 844(i)—lack "the requisite element of force" needed for conviction under 18 U.S.C. 373. Supp. Br. 9. As such, Doggart claims that his convictions on both counts must be vacated because neither predicate offense qualifies as a crime of violence as defined by 18 U.S.C. 373. These arguments fail for the reasons that the United States explained at length in its prior brief. U.S. Br. 26-40. And as explained below, nothing in Doggart's supplemental brief changes that conclusion.

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

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.), cert. denied, 526 U.S. 1137 (1999). Therefore, the issue here is whether Section 247(a)(1) and (d)(3) and Section 844(i) categorically include the use of physical force as an element.

The term "physical force" is not defined in 18 U.S.C. 373. In these circumstances, the Supreme Court has instructed that the term is given its ordinary meaning. *Johnson* v. *United States*, 559 U.S. 133, 138 (2010). In construing statutes with similar use of force clauses, the Supreme Court has defined "force" as "[p]ower, violence, or pressure directed against a person or thing" and "physical force" as "[f]orce consisting in a physical act." *Id.* at 139 (citing Black's Law Dictionary 717 (9th ed. 2009) (alterations in original)). Such force may be indirect and involve no actual bodily contact, see *United States* v. *Castleman*, 572 U.S. 157, 170 (2014); it may be applied recklessly, rather than intentionally, see *Voisine* v. *United States*, 136 S. Ct. 2272, 2278-2279 (2016); and it may be applied by someone other than the defendant, see *United States* v. *Reyes-Contreras*, 910 F.3d

169, 182 (5th Cir. 2018) (en banc) (determining that "providing [an]other person with the means or instructions by which he or she commits suicide" qualifies as the use of force).

As the United States previously argued, both predicate offenses underlying Count 1 and Count 2 involve the use of physical force. 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). See U.S. Br. 30-38.

Count 2 charged Doggart with soliciting others to maliciously damage or destroy real property by means of fire or explosive in violation of 18 U.S.C. 373 and 18 U.S.C. 844(i). (Superseding Indictment, R. 84, PageID# 438). This offense likewise categorically involves an element of physical force. See U.S. Br. 38-40.

B. Doggart's Additional Arguments That Violation Of 18 U.S.C. 247(a)(1), (d)(3) Does Not Necessarily Involve The Use Of Physical Force Are Incorrect

In his supplemental brief, Doggart makes five arguments in support of his assertion that violation of 18 U.S.C. 247(a)(1), (d)(3) does not categorically involve the use of physical force. None of these arguments has merit.

First, Doggart argues that Section 247(a)(1) "itself contains no element of force," suggesting that such an element must be "express" in the statutory language. See Supp. Br. 12 n.3 (comparing Section 247(a)(1) with Section 247(a)(2), and noting that only the latter "contains an express element of force"). But a statute need not expressly use the word "force" in order to have use of physical force as an element.[5] For example, the federal offenses for murder and manslaughter plainly involve the use of physical force but do not literally include the phrase "use of force" in their statutory language. See 18 U.S.C. 1111 (murder);

[5] A number of district court decisions have recognized this point. See, *e.g.*, *United States* v. *Roof*, 252 F. Supp. 3d 469, 475 (D.S.C. 2017) (holding "it is not necessary, however, for a statute explicitly to state that the use of violent force is an element of the offense. The elements actually laid out in the statutory text may logically entail the use of violent force, so that it is impossible to violate the statute without 'the use, attempted use, or threatened use of physical force against the person or property of another.'") (citation omitted); *United States* v. *Harris*, 205 F. Supp. 3d 651, 670 (M.D. Pa. 2016) ("We can therefore reject Defendant's argument that merely because the statutory language does not literally use the words 'use of force,' the statute does not qualify under the elements clause as a violent felony.").

18 U.S.C. 1112 (voluntary manslaughter). Cf. *Thompson* v. *United States*, 924 F.3d 1153, 1158-1159 (11th Cir. 2019) ("federal second-degree murder has as an element the use of physical force and categorically qualifies as a crime of violence under § 924(c)'s elements clause").

Doggart also wrongly presupposes that the United States' position is that it is only "the additional punishment provision at subsection (d)(3)" that "transforms the offense into one with the requisite element of force." Supp. Br. 9. Not so. Under 18 U.S.C. 247(a)(1), it is unlawful to "intentionally deface[], damage[], or destroy[] any religious real property, because of the religious character of that property, or attempt to do so." The acts of damaging, defacing, or destroying religious real property all involve physical acts and the application of physical force. It is not possible to deface, damage, or destroy property, or attempt to do so, without the use of physical force. See *Johnson*, 559 U.S. at 138.

Because all violations of Section 247(a)(1) already involve the use of physical force, this Court need not rely on subsection (d)(3) of Section 247 for proof of the force element necessary for conviction under Section 373. Of course, subsection (d)(3)—including both its use-of-a-dangerous-weapon, fire, or explosives element, and its alternative, resulting-in-bodily-injury element—also involve the use of physical force. U.S. Br. 30-33. Here, this simply means that the predicate offense Doggart was convicted of soliciting—violation of Section

247(a)(1) and (d)(3)—contained multiple force elements. The key relevance of subsection (d)(3) to Doggart's conviction on Count 1 is in establishing that the offense Doggart solicited is a felony, as is required under 18 U.S.C. 373.[6] All violations of Section 247(a)(1) already categorically involve the use of physical force.

For this reason, it does not matter whether subsection (d)(3)'s alternative prongs must be treated as elements of different offenses or means of the same offense. Supp. Br. 18. But because Doggart does not concede that all Section 247(a)(1) offenses already categorically involve the use of force, to avoid application of Section 373 here, he argues that subsection (d)(3) is indivisible and that its bodily injury prong does not categorically involve the use of force. Supp. Br. 10-12. That is incorrect. That prong would also satisfy the requisite element of force under 18 U.S.C. 373. See *Castleman*, 572 U.S. at 170 ("[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force.").

Second, Doggart argues, without citation, that the modified categorical approach, *i.e.*, the method of analysis for statutes that list elements in the

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[6] Subsection (d) is the penalty provision for violation of Section 247(a)(1). It defines life-sentence or death-eligible felonies (18 U.S.C. 247(d)(1)); a 40-year felony (18 U.S.C. 247(d)(2)); 20-year felonies (18 U.S.C. 247(d)(3)); a 3-year felony (18 U.S.C. 247(d)(4)); and a misdemeanor offense (18 U.S.C. 247(d)(5)).

alternative and thereby define multiple crimes (see U.S. Br. 28), applies only where a court is construing a state law offense. Supp. Br. 8-9. This Court has made clear, however, that the modified categorical approach applies equally to "state and federal criminal statutes." *United States* v. *Burris*, 912 F.3d 386, 393 (6th Cir. 2019) (en banc) (citing *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), petition for cert. pending, No. 18-9420 (filed May 24, 2019)). Accordingly, under the modified categorical approach, this Court can refer to the superseding indictment and jury instructions in determining which elements are contained in Doggart's offenses of conviction. See *ibid.*

Third, Doggart argues that the rule of lenity requires this Court to vacate his conviction on Count 1. Supp. Br. 11. But "the rule of lenity applies only in cases of genuine ambiguity." See *Voisine*, 136 S. Ct. at 2282 n.6 (declining to apply the rule as to the necessary *mens rea* for violation of 18 U.S.C. 921(a)(33)(A)). The rule of lenity does not apply here because the Section 247(a)(1), (d)(3) offense that Doggart was convicted of soliciting is a felony that unambiguously involves the use of physical force as required under 18 U.S.C. 373. In short, there is no ambiguity to resolve in Doggart's favor.

Fourth, Doggart argues that subsection (d)(3) of Section 247 is overbroad because not all violations of the dangerous weapon, fire, or explosive prong of subsection (d)(3) categorically involve the use of force. Supp. Br. 11-12. Again,

the relevance of the (d)(3) provision is that it establishes that the offense Doggart was charged with soliciting is a felony. But even assuming that Section 247(a)(1) did not already categorically involve the use of physical force, Doggart's argument here would still fail. Specifically, Doggart argues that intentionally damaging or destroying religious property using fire does not necessarily involve physical force. Supp Br. 11-12. Doggart gives an example of a person setting fire to one object (a parked car), and fire spreading from the car to the church or mosque thus damaging or destroying the religious property. But this example also involves the requisite use of force under Section 373.

Under the Section 373 solicitation statute, it does not matter if the force at issue is applied directly or indirectly to the religious property. *Castleman*, 572 U.S. at 171 ("the fact that harm occurs indirectly, rather than directly * * * does not matter"); *United States* v. *Reyes-Contreras*, 910 F.3d 169, 182 (5th Cir. 2018) (en banc) ("for purposes of identifying a conviction as [a crime of violence under U.S.S.G. § 2L1.2(b)], there is no valid distinction between direct and indirect force"). And under Section 247(a)(1) and (d)(3), as long as the defendant intentionally damaged the religious property and his actions included the use of fire, it does not matter if the defendant applied a match directly to the religious property or itself, or to some other object. See *Castleman*, 572 U.S. at 171 (rejecting the argument that "indirect[] force is different from directly applied

force; otherwise, "one could say that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim") (citation omitted).

Fifth, Doggart argues that Section 247(d)(4) confirms that not all violations of Section 247(a)(1) involve sufficient physical force. Section 247(d)(4), enacted in 2018,[7] establishes a three-year maximum sentence for violations of 247(a)(1) that result in damage or destruction of religious property "in an amount that exceeds $5,000," but do not involve the use of a dangerous weapon, fire, or explosive, or resulting bodily injury. 18 U.S.C. 247(d)(4). Doggart argues that this provision "implicitly confirms that a violation of § 247(a)(1) encompasses *de minimis* damage." Supp. Br. 13. This argument is beside the point. The amount of actual physical damage to the religious real property has nothing to do with whether the offense solicited categorically has as an element the use of physical force. Solicitation is an inchoate crime. *United States* v. *Hankins*, 195 F. App'x 295, 300 (6th Cir. 2006). The amount of damage that was intended or actually occurred is irrelevant. U.S. Br. 34-36.

In sum, what matters here is that the crime that Doggart was charged with and convicted of in Count 1 categorically includes the use of physical force as an

[7] See Protecting Religiously Affiliated Institutions Act of 2018, Pub. L. No. 115-249, 132 Stat. 3162.

element because such force is always involved in proving that the defendant intentionally "deface[d], damage[d], or destroy[ed]" religious property in violation of 18 U.S.C. 247(a)(1). Doggart was charged with and convicted of soliciting others to intentionally damage or destroy religious property through use of a dangerous weapon, fire, or explosive, in violation of 18 U.S.C. 247(a)(1) and (d)(3). This predicate offense is a felony, under subsection (d)(3), that includes multiple elements involving the use of physical force, under both subsection (a)(1) and subsection (d)(3). It thus qualifies as a felony crime of violence that involves the use of physical force under 18 U.S.C. 373. Accordingly, this Court should affirm Doggart's conviction on Count 1.

C. Doggart's Additional Arguments That 18 U.S.C. 844(i) Does Not Categorically Involve The Use Of Physical Force Are Incorrect

1. Doggart's supplemental brief reiterates his prior contention 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. 18 U.S.C. 844(i). Doggart asserts that because recklessness can satisfy the *mens rea* requirement of Section 844(i), the statute does not qualify as a crime having as an element the "use of physical force." Supp. Br. 13-15.

As we explained in our initial brief, this Circuit has held that reckless conduct satisfies "the use, attempted use, or threatened use of physical force" requirement in Section 4B1.1 of the Sentencing Guidelines. *United States* v. *Verwiebe*, 874 F.3d 258, 260 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018). This Court's decision in *Verwiebe* correctly applied the Supreme Court's holding in *Voisine* 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. The use of force clause at issue in *Verwiebe* is identical to the use of force clause in 18 U.S.C. 373, and thus dictates the result here: commission of federal arson in violation of 18 U.S.C. 844(i) categorically involves the use of physical force (even when committed with a reckless intent) and is punishable as a crime of violence under 18 U.S.C. 373.

2. While Doggart initially conceded he was raising a *Verwiebe* argument only to preserve it for further appeal (Br. 54), his supplemental brief raises for the first time a new due-process challenge to his conviction on Count 2. Doggart argues that *Verwiebe* cannot apply here because his offense conduct occurred in 2015, prior to the decisions in *Verwiebe* and *Voisine*. Doggart claims that applying *Verwiebe* to his case violates the *ex post facto* principle under the Due Process Clause. Supp. Br. 16-24.

Such a constitutional challenge is normally reviewed *de novo*. *United States* v. *Anderson*, 695 F.3d 390, 398 (6th Cir. 2012). But here, Doggart has forfeited this argument by failing to raise it in his initial brief. Accordingly, this argument may only be reviewed for plain error.[8] Fed. R. Crim. P. 52(b). Regardless, Doggart's argument has no merit under any standard of review. Application of *Verwiebe* and *Voisine* in this case is entirely consistent with *ex post facto* and due process principles.

a. The *Ex Post Facto* Clause, U.S. Const. Art. I § 9, Cl. 3, does not apply to the judicial constructions of criminal laws. "As the text of that Clause makes clear, it 'is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government.'" *Rogers* v. *Tennessee*, 532 U.S. 451, 456 (2001) (citation omitted). Thus, it is well-settled that "the *Ex Post Facto* Clause does not apply to judicial decisionmaking." *Id.* at 462. Instead, the Supreme Court has held that challenges to retroactive applications of judicial

[8] To prevail under the plain error standard, Doggart must show that the district court committed an "(1) error, (2) that is plain, and (3) that affects substantial rights." *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (citation, alterations, and internal quotation marks omitted). If he can show all three conditions, then the Court may "exercise its discretion to notice [the] forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 467 (citation, alterations, and internal quotation marks omitted). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

decisions must proceed under the Due Process Clause. *Id.* at 460-462. Such due process limitations on the retroactivity of judicial decisions "are not coextensive with the limitations placed on legislatures by the Constitution's *Ex Post Facto* Clauses." *Metrish* v. *Lancaster*, 569 U.S. 351, 360 (2013). Indeed, strictly applying *ex post facto* principles to judicial decisionmaking "would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks an evolving legal system." *Rogers*, 532 U.S. at 461.

Where judicial retroactivity is at issue, the relevant due process concerns include "notice, foreseeability, and, in particular, the right to fair warning." *Rogers*, 532 U.S. at 459. Thus, for example, in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), the Supreme Court held that the South Carolina Supreme Court's interpretation of its criminal trespass statute could not apply retroactively to anti-segregation protestors because the state court's construction was (1) "clearly at variance with the statutory language"; (2) had "not the slightest support in prior South Carolina decisions"; (3) was "inconsistent with the law of other States"; (4) was anticipated by "neither the South Carolina Legislature nor the South Carolina police"; and (5) applied to conduct that could not "be deemed improper or immoral." *Id.* at 356, 361-362. Under those circumstances, the Supreme Court held that retroactive application of a judicial construction of a criminal statute

violated the Due Process Clause because the construction was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." *Id*. at 354 (citation omitted). See also *Metrish*, 569 U.S. at 368 (finding no due process violation where state supreme court addressed an issue for the first time, overruled lower courts, and provided a "reasonable interpretation of the language of a controlling statute").

b. Application of the Supreme Court's decision in *Voisine*, and this Court's decision in *Verwiebe* applying *Voisine*, present no similar concerns. *Voisine* did not overrule any prior Supreme Court precedent. Instead, *Voisine* resolved a circuit split regarding whether a misdemeanor conviction for reckless assault involved the requisite "use" of "physical force" under Section 922(g)(9). 136 S. Ct. 2277-2278. *Voisine*'s holding focused on: (1) the text of Section 922(g)(9), including the fact that the definition of a "misdemeanor crime of violence" "contain[ed] no exclusion for convictions based on reckless behavior," *Id*. at 2280; and (2) the "ordinary meaning" of the word "use," as the Court had interpreted that term in *Castleman*. *Id*. at 2279 (citing *Castleman*, 572 U.S. at 170-171).

Moreover, *Voisine*'s holding was consistent with both Section 922(g)'s statutory language and prior Supreme Court precedent. And notably, the Supreme Court in *Voisine* applied the holding of the case to the petitioner-defendants. 136 S. Ct. at 2280. In addition, numerous courts of appeals have applied *Voisine*

retroactively. See, *e.g.*, *United States* v. *Burris*, 920 F.3d 942, 953 (5th Cir. 2019) (applying *Voisine* to an Armed Career Criminal Act (ACCA) predicate offense committed before *Voisine* was decided); *United States* v. *Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (Kavanaugh, J.) (same), cert. denied, 139 S. Ct. 796 (2019); *United States* v. *Pam*, 867 F.3d 1191, 1207-1208 (10th Cir. 2017) (same). In sum, *Voisine*'s construction of the use of force clause in Section 922(g)(9) "is an authoritative statement of what the statute meant before as well as after the decision." Cf. *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994).

Likewise, applying this Court's decision in *Verwiebe* retroactively does not run afoul of the Due Process Clause. *Verwiebe*'s holding was mandated by the Supreme Court's decision in *Voisine*. 874 F.3d at 264 ("[T]he argument that crimes satisfied by reckless conduct categorically do not include the 'use of physical force' simply does not hold water after *Voisine*."). While it is true that *Verwiebe* overruled a prior line of this Court's cases,[9] in doing so *Verwiebe* "merely reconciled [this] circuit['s] precedents with" *Voisine*. *Burris*, 920 F.3d at 953. Because "*Voisine* was neither 'unexpected' nor 'indefensible' and may apply

[9] See, *e.g.*, *United States* v. *Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *United States* v. *McFalls*, 592 F.3d 707, 716 (6th Cir. 2010); *United States* v. *McMurray*, 653 F.3d 367, 374-375 (6th Cir. 2011).

retroactively," *ibid*., the same is true of circuit court cases like *Verwiebe* that follow directly from *Voisine*.

Finally, this Court has already held that there is no due process bar to applying *Verwiebe* retroactively in the sentencing context. See *United States* v. *Ausberry*, No. 18-5418, 2019 WL 3819633, at *3 (6th Cir. Aug. 15, 2019); *Davis* v. *United States*, 900 F.3d 733, 736 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019). Likewise here, the Due Process Clause does not bar this Court from applying *Verwiebe* in upholding Doggart's conviction on Count 2.

3. Doggart's arguments to the contrary fail to show that applying *Verwiebe*'s reasoning to his conviction on Count 2 will result in the "sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Metrish*, 569 U.S. at 360-361 (citation omitted).

First, Doggart cites *Marks* v. *United States*, 430 U.S. 188 (1977). Supp. Br. 17-18. But this case bears no resemblance to *Marks*. In that case, the Supreme Court held that retroactive application of the obscenity standards announced in *Miller* v. *California*, 413 U.S. 15 (1973), violated the Due Process Clause because, at the time that the defendant committed the challenged conduct, the Court's prior decision in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), provided the governing law. As the Court explained in a later case, *Marks* held that, given the construction of the statute in *Memoirs*, the defendant "could not suspect that his

innocent action would later become criminal when [the Court] expanded the range of constitutionally proscribable conduct in *Miller*." See *Osborne* v. *Ohio*, 495 U.S. 103, 117 (1990) (discussing *Marks*, 430 U.S. at 196).

In contrast to *Marks*, this case does not involve a broad prohibition that has been subjected to a constitutionally-mandated narrowing construction, which the Supreme Court then expanded. The statutory text of 18 U.S.C. 373 has never been subject to a judicial narrowing construction. Nor is there any Supreme Court or Sixth Circuit precedent which has previously held that that reckless offenses cannot serve as predicates for violation of 18 U.S.C. 373.

Moreover, *Marks* involved core due process concerns about a lack of notice in making previously innocent conduct criminal. 430 U.S. at 191. In this case, there is no argument that Doggart did not know that the violent offenses that he solicited others to commit were illegal. The notice and fair warning concerns at the heart of the Due Process Clause are simply not at issue here. See, *e.g.*, *United States* v. *Barton*, 455 F.3d 649, 655 (6th Cir.) (rejecting due process retroactivity argument where "defendant was fully aware that robbing a bank was illegal and that doing so would expose him to a significant penalty"), cert. denied, 549 U.S. 1087 (2006).

Second, Doggart cites *Rogers*, but this case also does not help him. *Rogers* involved a second-degree murder conviction under Tennessee state law of a man

whose stabbing victim died 15 months later. 532 U.S. at 454. In upholding the conviction, the Tennessee Supreme Court retroactively abolished the common law defense that a person could not be convicted of homicide if the victim did not die within a year and a day of the original act. *Id*. at 455. The Supreme Court rejected the defendant's argument that this retroactive judicial action violated the Due Process Clause. Among other reasons, the Court explained that the common law defense was not widely observed by courts at the time the state supreme court abolished it. *Id*. at 464.

Doggart emphasizes that, unlike in *Rogers*, this Court's decision in *Verwiebe* "upset" the Court's "established" construction of the use of force clause. Supp. Br. 21-22. But that fact alone is not dispositive. *Rogers* emphasized that changes to a common law doctrine of criminal law would violate due process only where the change was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." 532 U.S. at 462 (citation omitted). The Court's core concern in *Rogers* was the due process principle of "fair warning." *Id*. at 463-464. Retroactive abolishment of an obsolete common law defense raised no due process concerns in *Rogers* because it was not "the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Id*. at 466-467.

This case presents weaker fair warning concerns than *Rogers*. Here, no matter how widespread the prior judicial understanding of the *mens rea* necessary for the "use of physical force," the decisions in *Voisine* and *Verwiebe* are neither "indefensible" nor "arbitrary." *Rogers*, 532 U.S. at 467. Both decisions rest on the ordinary meaning of the statutory term "use." *Voisine*, 136 S. Ct. at 2278; *Verwiebe*, 874 F.3d at 264. That ordinary meaning has not changed. Nor, of course, has the text of the solicitation statute. A higher court has the "responsibility to say what a statute means, and once [it] has spoken, it is the duty of [lower] courts to respect that understanding of the governing rule of law." *Rivers*, 511 U.S. at 312. That is the case here. Accordingly, consistent with this Circuit's binding precedent in *Verwiebe*, which follows from the Supreme Court's decision in *Voisine*, this Court should affirm Doggart's conviction on Count 2.

IV

THE DISTRICT COURT PROPERLY APPLIED THE TERRORISM ENHANCEMENT AT SENTENCING

Doggart's supplemental brief also addresses his argument that the Terrorism Enhancement, U.S.S.G. § 3A1.4, cannot be applied to his conviction on Count 2 for soliciting arson in violation of 18 U.S.C. 373 and 18 U.S.C. 844(i). Supp. Br. 24-27. Doggart's central argument is that Congress issued a "specific directive" that the enhancement must only be applied to offenses that are labeled "federal crimes of terrorism" as listed in 18 U.S.C. 2332b(g)(5)(B). Supp Br. 24. Doggart

asserts that because 18 U.S.C. 373 is not itself listed in 18 U.S.C. 2332b(g)(5), the enhancement cannot be applied to a conviction for solicitation of federal arson. Supp Br. 25. Doggart's supplemental brief cites no new authority addressing application of the Terrorism Enhancement, nor any case that has reached the result he advocates. As the United States previously explained, this Court has already rejected the statutory authorization argument that Doggart makes here. U.S. Br. 54-55 (citing *United States* v. *Graham*, 275 F.3d 490, 517 (6th Cir. 2001), cert. denied, 535 U.S. 1026 (2002)).

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

1. The Terrorism Enhancement states: "If the offense is a felony that involved, *or was intended to promote*, a federal crime of terrorism," a 12-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 (emphasis added). As the United States previously explained (U.S. Br. 53), the enhancement may be applied in two different scenarios: (1) where the offense of conviction "involved * * * a federal crime of terrorism" which is defined to include those offenses listed in 18 U.S.C. 2332b(g)(5)(B); and (2) where the offense of conviction "was intended to promote" such a crime. *Graham*, 275 F.3d at 516. In other words, contrary to Doggart's assertion, application of the Terrorism Enhancement is not limited to

cases where the offense of conviction is enumerated in Section 2332b(g)(5)(B). Arson is a federal crime of terrorism listed in 18 U.S.C. 2332b(g)(5)(B). A defendant who is guilty of solicitation to commit federal arson has, by definition, engaged in conduct "intended to promote" such an offense. See U.S. Br. 53-56.

2. In his supplemental brief, Doggart argues that when the Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, revisiting the Terrorism Enhancement and directing the Sentencing Commission to limit the enhancement to "Federal crimes of terrorism," rather than to "international terrorism," it also intended to restrict its application to offenses of conviction listed in Section 2332b(g)(5)(B). Supp. Br. 27. [10] But this Court rejected exactly that argument in *Graham*, 275 F.3d at 517. See U.S. Br. 55-56 & n.12. *Graham* held that because of the "intended to promote" language in the enhancement, "the offense of conviction itself need not be a 'Federal crime of

[10] Section 730 of AEDPA directs that the Sentencing Commission shall "amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code." Pub. L. No. 104-132, § 730, 110 Stat. 1303. In the prior version of the enhancement, "international terrorism" was defined by reference to 18 U.S.C. 2331. See U.S.S.G. § 3A1.4 (1995). As amended in response to AEDPA, the enhancement addresses only offenses that involved or were intended to promote Federal crimes of terrorism, as listed in 18 U.S.C. 2332b(g)(5)(B). Contrary to Doggart's argument, this is not a case where, as in *United States* v. *LaBonte*, 520 U.S. 751 (1997), the Sentencing Commission failed to implement a directive from Congress.

terrorism,'" and therefore the enhancement could be applied to the defendant's conviction for conspiracy under 18 U.S.C. 371. 275 F.3d at 516 (citation omitted).

Doggart now asserts *Graham* does not resolve this issue because the majority opinion did not squarely address and reject Doggart's argument. Supp. Br. 28. Not so. Although the majority opinion did not specifically address this issue, the dissenting opinion devoted ten pages to it. See *Graham*, 275 F.3d at 529-538 (Cohn, D.J., dissenting). Thus, in holding that the enhancement can be applied to offenses that are intended to promote listed Federal crimes of terrorism, the majority necessarily considered and rejected Doggart's argument. *Graham*, 275 F.3d at 516. This statutory authorization argument was not one which merely "lurk[ed] in the record" and was not "brought to the attention of the court." *Rinard* v. *Luoma*, 440 F.3d 361, 363 (6th Cir. 2006) (citation omitted).

In addition, none of the recent cases that Doggart cites in his supplemental brief have any relevance to the Terrorism Enhancement. Supp. Br. 25-26. In *Arangure* v. *Whitaker*, 911 F.3d 333 (6th Cir. 2018), this Court addressed application of *Chevron* deference to the Board of Immigration Appeals construction of the Immigration and Nationality Act. In *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court reaffirmed its longstanding practice of affording deference to agencies' reasonable readings of genuinely ambiguous regulations. These issues are far afield from the issue here. Further, although *United States* v.

Havis, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam), is a sentencing case, it is not on point. In *Havis*, this Court held that an application note construing the definition of "controlled substance offense" under Guideline 4B1.2(b) cannot "replace or modify" the Guidelines text. *Id*. at 386. But this case does not involve a purported conflict between Guidelines commentary and the Guidelines themselves.

In sum, as the district court found, the Terrorism Enhancement may be properly applied to convictions for solicitation of a listed Federal crime of terrorism. (Transcript, R. 293, PageID# 5450-5451). That conclusion is dictated by *Graham*, which is binding here.

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

Doggart's supplemental brief also reiterates his argument that the district court lacked sufficient evidence to apply the Terrorism Enhancement. Supp. Br. 29. As the United States previously explained (U.S. Br. 59-60), for the enhancement to apply the sentencing court had to specifically find 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). The district court made and amply supported that finding.

The district court found that Doggart's solicitation offense "to damage or destroy the mosque at Islamberg using explosives" was "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 specifically found that Doggart intended to incite a civil insurrection against the government through destroying the Islamberg mosque. (Transcript, R. 293, PageID# 5451-5452).

Doggart continues to assert that the Terrorism Enhancement could not have been properly applied to him given the district court's conclusion that he "did not have the intent to effect some change or achieve a goal through intimidation." Supp. Br. 29. But Doggart is confusing the district court's findings as to the intent underlying his statements to his co-conspirators (relevant to the threat inquiry) with the intent underlying what he wished to accomplish in destroying the mosque (relevant to application of the Terrorism Enhancement). The question of whether Doggart's statements to his co-conspirators were objectively intimidating, for purposes of threat charges brought under Sections 875(c) and 844(e), is distinct from the question of whether Doggart intended the destruction of the Islamberg mosque to intimidate and coerce others, which is the relevant inquiry for the application of the Terrorism Enhancement. Here, the district court properly concluded at sentencing that Doggart's solicitation of others to destroy the

Islamberg mosque was calculated to influence or affect the conduct of government by intimidation or coercion. (Transcript, R. 293, PageID# 5450-5451 (finding that Doggart "intended to promote the federal terrorism crime of arson for the purpose of intimidating or coercing the government")). See U.S. Br. 59-61.

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

Finally, Doggart reiterates his argument that the district court fact-finding in applying the Terrorism Enhancement caused an as-applied violation of the Sixth Amendment. As the United States previously explained (U.S. Br. 57), 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) (emphasis and citation omitted), cert. denied, 556 U.S. 1215 (2009). Because Doggart received a within-Guidelines sentence that did not exceed the statutory maximum, his sentence does not violate his Sixth Amendment rights.

In his supplemental brief, Doggart cites this Court's recent decision in *United States* v. *Roberts*, 919 F.3d 980 (6th Cir. 2019). But this case does not help him. In *Roberts*, the Court addressed a Sixth Amendment challenge to judge-

found facts at sentencing (as to the loss valuation of stolen goods) that increased the defendant's Guidelines range. *Id.* at 987. In rejecting that challenge, this Court reiterated that "[t]he Sixth Amendment includes no prohibition on district courts making factual findings or relying on those findings to impose a sentence below the statutory maximum." *Ibid.*

Moreover, the challenge to judicial fact-finding at sentencing in *Roberts* was subject to plain error review, as is Doggart's challenge here. *Id*. at 987. In *Roberts*, this Court held that even if there were error, it would not be subject to reversal on plain error review. That is so because "neither a majority of the Supreme Court nor a majority of this court has recognized an as-applied Sixth Amendment challenge to [such] fact-finding." *Ibid.* Thus, defendant's argument, "even if * * * credited" by the court, "would be neither obvious nor clear." *Ibid.* Accordingly, this Court's decision in *Roberts* makes clear that Doggart's as-applied Sixth Amendment challenge must fail.

V

DOGGART'S SENTENCE IS SUBSTANTIVELY REASONABLE

In his supplement brief, Doggart cites a 2019 report from the Sentencing Commission in an attempt to bolster his argument that his 235-month, within-Guidelines sentence is substantively unreasonable. Supp. Br. 31-32 (citing U.S. Sent'g Comm'n, *Recidivism Among Federal Violent Offenders* (2019)). Doggart

notes that this report indicates that certain violent offenders sentenced to between "60 and 119 months ha[d] a 65.0% risk of rearrest," while other violent offenders sentenced to "120 months or more ha[d] a 62.2% risk of rearrest." Supp. Br. 32. Based on those figures, Doggart argues that his sentence of "235 months does no better job at protecting the public from the chance that he will reoffend than a shorter sentence." Supp. Br. 32.

Even assuming that Doggart's conclusion was logically sound, the generalized statistics in the Sentencing Commission report do not change the fact that the district court comprehended the severity of the sentence it was imposing and selected it for exactly that reason. The court explained that the need for societal retribution, general deterrence, and a lengthy period of incapacitation for Doggart justified the 235-month sentence. See U.S. Br. 65-66, 69-72. 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# 5541). The court further found that Doggart's allocution "heighten[ed] the Court's concern that [Doggart is] a distinct danger and threat to the citizens of the United States of America." (Transcript, R. 293, PageID# 5542). The district court accordingly found that a lengthy period of incapacitation was necessary and appropriate. (Transcript, R. 293, PageID# 5541-5542). Given the district court's findings about Mr. Doggart's dangerousness, the

statistics Doggart cites here (which appear to show a high risk of rearrest for certain violent offenders regardless of sentence length) only serve to bolster, rather than undermine, the reasonableness of a sentence that Doggart received.

CONCLUSION

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

Respectfully submitted,

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STATEMENT REGARDING TYPE-VOLUME LIMITATION

This brief contains 12,080 words, excluding the table of contents, table of citations, addendum, and the certificate of service.

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 Word 2016 in Times New Roman, 14-point font.

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Date: Sept. 20, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, I electronically filed the foregoing SUPPLEMENTAL 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

18 U.S.C. 373

§ 373. Solicitation to commit a crime of violence

(a) Whoever, with intent that another person 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 in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

18 U.S.C. 247

§ 247. Damage to religious property; obstruction of persons in the free exercise of religious beliefs

(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; or

(2) intentionally obstructs, by force or threat of force, including by threat of force against religious real property, any person in the enjoyment of that person's free exercise of religious beliefs, or attempts to do so;

shall be punished as provided in subsection (d).

(b) The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.

(c) Whoever intentionally defaces, damages, or destroys any religious real property because of the race, color, or ethnic characteristics of any individual associated with that religious property, or attempts to do so, shall be punished as provided in subsection (d).

(d) The punishment for a violation of subsection (a) or (c) of this section shall be—

(1) if death results from acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, a fine in accordance with this title and imprisonment for any term of years or for life, or both, or may be sentenced to death;

(2) if bodily injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section, and the violation is by means of fire or an explosive, a fine under this title or imprisonment for not more that 40 years, or both;

(3) if bodily injury to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section, results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, a fine in accordance with this title and imprisonment for not more than 20 years, or both;

(4) if damage to or destruction of property results from the acts committed in violation of this section, which damage to or destruction of such property is in an amount that exceeds $5,000, a fine in accordance with this title, imprisonment for not more than 3 years, or both; and

(5) in any other case, a fine in accordance with this title and imprisonment for not more than one year, or both.

(e) No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or his designee that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice.

(f) As used in this section, the term “religious real property” means any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship, or real property owned or leased by a nonprofit, religiously affiliated organization.

(g) No person shall be prosecuted, tried, or punished for any noncapital offense under this section unless the indictment is found or the information is instituted not later than 7 years after the date on which the offense was committed.

18 U.S.C. 844

(a) Any person who—

(1) violates any of subsections (a) through (i) or (l) through (o) of section 842 [18 USCS § 842] shall be fined under this title, imprisoned for not more than 10 years, or both; and

(2) violates subsection (p)(2) of section 842 [18 U.S.C. 842], shall be fined under this title, imprisoned not more than 20 years, or both.

(b) Any person who violates any other provision of section 842 of this chapter [18 USCS § 842] shall be fined under this title or imprisoned not more than one year, or both.

(c)

(1) Any explosive materials involved or used or intended to be used in any violation of the provisions of this chapter or any other rule or regulation promulgated thereunder or any violation of any criminal law of the United States shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 [Internal Revenue Code of 1986] relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code [26 U.S.C. 5845(a)], shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter [18 U.S.C. 841 et seq.].

(2) Notwithstanding paragraph (1), in the case of the seizure of any explosive materials for any offense for which the materials would be subject to forfeiture in which it would be impracticable or unsafe to remove the materials to a place of storage or would be unsafe to store them, the seizing officer may destroy the explosive materials forthwith. Any destruction under this paragraph shall be in the presence of at least 1 credible witness. The seizing officer shall make a report of the seizure and take samples as the Attorney General may by regulation prescribe.

(3) Within 60 days after any destruction made pursuant to paragraph (2), the owner of (including any person having an interest in) the property so destroyed may make application to the Attorney General for reimbursement of the value of the property. If the claimant establishes to the satisfaction of the Attorney General that—

(A) the property has not been used or involved in a violation of law; or

(B) any unlawful involvement or use of the property was without the claimant's knowledge, consent, or willful blindness,

the Attorney General shall make an allowance to the claimant not exceeding the value of the property destroyed.

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both.

(f)

(1) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

(2) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct, directly or proximately causes personal injury or creates a substantial risk of injury to any person, including any public safety officer performing duties, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both.

(3) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct directly or proximately causes the death of any person, including any public safety officer performing duties, shall be subject to the death penalty, or imprisoned for not less than 20 years or for life, fined under this title, or both.

(g)

(1) Except as provided in paragraph (2), whoever possesses an explosive in an airport that is subject to the regulatory authority of the Federal Aviation Administration, or in any building in whole or in part owned, possessed, or used by, or leased to, the United States or any department or agency thereof, except with the written consent of the agency, department, or other person responsible for the management of such building or airport, shall be imprisoned for not more than five years, or fined under this title, or both.

(2) The provisions of this subsection shall not be applicable to—

(A) the possession of ammunition (as that term is defined in regulations issued pursuant to this chapter [18 U.S.C. 841 et seq.]) in an airport that is subject to the regulatory authority of the Federal Aviation Administration if such ammunition is either in checked baggage or in a closed container; or

(B) the possession of an explosive in an airport if the packaging and transportation of such explosive is exempt from, or subject to and in accordance with, regulations of the Pipeline and Hazardous Materials Safety Administration for the handling of hazardous materials pursuant to chapter 51 of title 49 [49 U.S.C. 5101 et seq.].

(h) Whoever—

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of

any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

(i) 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; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section and section 842(p) [18 USCS § 842(p)], the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title [18 USCS § 232], and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

(k) A person who steals any explosives materials which are moving as, or are a part of, or which have moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(l) A person who steals any explosive material from a licensed importer, licensed manufacturer, or licensed dealer, or from any permittee shall be fined under this title, imprisoned not more than 10 years, or both.

(m) A person who conspires to commit an offense under subsection (h) shall be imprisoned for any term of years not exceeding 20, fined under this title, or both.

(n) Except as otherwise provided in this section, a person who conspires to commit any offense defined in this chapter [18 USCS §§ 841 et seq.] shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense the commission of which was the object of the conspiracy.

(o) Whoever knowingly transfers any explosive materials, knowing or having reasonable cause to believe that such explosive materials will be used to commit a crime of violence (as defined in section 924(c)(3) [18 USCS § 924(c)(3)]) or drug trafficking crime (as defined in section 924(c)(2) [18 USCS § 924(c)(2)]) shall be subject to the same penalties as may be imposed under subsection (h) for a first conviction for the use or carrying of an explosive material.

(p) Theft reporting requirement.

(1) In general. A holder of a license or permit who knows that explosive materials have been stolen from that licensee or permittee, shall report the theft to the Secretary [Attorney General] not later than 24 hours after the discovery of the theft.

(2) Penalty. A holder of a license or permit who does not report a theft in accordance with paragraph (1), shall be fined not more than $10,000, imprisoned not more than 5 years, or both