No. 20-6128

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

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# BRIEF FOR THE UNITED STATES AS APPELLEE

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## STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to defendant-appellant's request for oral argument.

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## STATEMENT OF JURISDICTION

This is an appeal in a criminal case from resentencing on September 29, 2020, following a remand from this Court. (Amended Judgment, R. 355, PageID# 6344-6350).[1] The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction over this appeal pursuant to 18 U.S.C. 3742 and 28 U.S.C. 1291.

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[1] Citations to "R. __, PageID# ___" are citations to the docket and page number of documents in the district court docket below. Citations to "Br. _" are citations to Appellant's opening brief.

The defendant-appellant, Robert Doggart, timely filed a notice of appeal on September 29, 2020. (Notice of Appeal, R. 354, PageID# 6356).

## STATEMENT OF THE ISSUES

1. Whether, in resentencing Doggart, the district court erred in applying an upward departure under Application Note 4 of Sentencing Guidelines § 3A1.4, the Terrorism Enhancement Guideline, to Doggart's conviction for violating 18 U.S.C. 373 and 18 U.S.C. 247(a)(1) and (d)(3) (solicitation to damage or destroy religious real property through the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire).

2. Whether Doggart's 120-month sentence is procedurally and substantively reasonable.

## STATEMENT OF THE CASE

This case is before this Court for the third time, following two rejections of a plea agreement and Doggart's conviction after a jury trial. See *United States* v. *Doggart*, 906 F.3d 506 (6th Cir. 2018) (*Doggart I*); *United States* v. *Doggart*, 947 F.3d 879 (6th Cir. 2020) (*Doggart II*). In *Doggart II*, this Court affirmed Doggart's conviction for solicitation to damage or destroy religious real property, in violation of 18 U.S.C. 373 and 18 U.S.C. 247(a)(1) and (d)(3), while vacating his conviction, on jurisdictional grounds, for solicitation of arson.

*Doggart II*, 947 F.3d at 883-888. The Court then remanded the case to the district court for resentencing on the remaining solicitation count. *Id.* at 888.

*1. Doggart's Offense Conduct*

While the procedural history in this case is complex, the facts that underlie Doggart's remaining count of conviction are straightforward. As the district court explained at resentencing, "[t]his case involves a defendant who solicited others to commit atrocious crimes." (Transcript, R. 357, PageID# 6447).

a. A jury convicted Robert Doggart "of soliciting others to terrorize the people of a small Islamic community in upstate New York." *Doggart II*, 947 F.3d at 881. The Islamberg community in Hancock, New York, consists of approximately 40 families of practicing Muslims. The community includes homes and other buildings, including a school, a cafeteria, and a mosque. (Transcript, R. 287, PageID# 4842-4844).

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

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

> and psychological. Forward[,] please communicate by way of privacy message.

(Transcript, R. 285, PageID# 4659-4660).

"Doggart's messages drew the attention of the FBI," which tasked a Confidential Source (CS) with communicating with Doggart. *Doggart II*, 947 F.3d at 881. Through Facebook, Doggart began communicating with the CS, who was located in Texas. (Transcript, R. 285, PageID# 4664). At trial, the government introduced numerous recordings of telephone calls between Doggart and the CS (*e.g.*, Transcript, R. 285, PageID# 4605-4626; Transcript of Recorded Call, R. 302-2, PageID# 5737-5745; Transcript of Recorded Call, R. 302-4, PageID# 5756-5760), and later, after a wiretap was put into place, between Doggart and a man in South Carolina, William Tint. (*E.g.*, Transcript, R. 287, PageID# 4889-4890, 4916; Transcript of Recorded Call, R. 302-1, PageID# 5726-5736; Transcript of Recorded Call, R. 302-3, PageID# 5746-5755). Doggart was attempting to recruit both individuals to join in his attack. (*E.g.*, Transcript, R. 287, PageID# 4910-4915).

In a telephone call on March 6, 2015, Doggart told the CS that it was their "duty as citizens" to "check * * * out" whether an attack on New York City was being planned from Islamberg, and stated that they could bring their "AR-15's or M-4's or M-16's." (Transcript of Recorded Call, R. 302-4, PageID# 5756-5758). Doggart told the CS that "those guys, have to be killed. Their buildings need to be

burnt down and if we can get in there and do that and get out with * * * not losing a man, even the better." (Transcript of Recorded Call, R. 302-4, PageID# 5758).

In other recorded telephone calls with the CS and with Tint, Doggart discussed having a team of men attack the community and using Molotov cocktails or a "[d]emolition guy" to burn down the buildings, including the mosque. (Transcript of Recorded Call, R. 302-1, PageID# 5735). They also discussed creating a "flash point" for an uprising against the federal government by burning down the mosque. (Transcript of Recorded Call, R. 302-1, PageID# 5734; Transcript of 03/17/2015 Meeting, R. 302-7, PageID# 5779). Doggart also stated that if he found "bad things" during his surveillance, "people are going to die." (Transcript of Recorded Call, R. 302-6, PageID# 5772). In addition, Doggart discussed manufacturing a homemade bomb or explosive device, and using grenades during the attack. (Transcript, R. 286, PageID# 4790; Transcript, R. 288 PageID# 4964, 4967; Transcript of Recorded Call, R. 302-2, PageID# 5739, 5741).

Doggart discussed his plan with Tint in a March 22, 2015, telephone conversation: "I don't want to kill anybody, but * * * there's our three targets. There's the kitchen, * * * the mosque, * * * then there of course is * * * their school. If we take out those three components, those three buildings, and we can just walk away. And, we will have taken care of that. Now, you know, if they

start laying down fire on us, we are just going to have to take them out." (Transcript of Recorded Call, R. 302-1, PageID# 5726, 5735). Tint replied: "I have a[n] EOD guy * * * I don't know if you know what that is but * * * it's demolition." (Transcript of Recorded Call, R. 302-1, PageID# 5735). Doggart responded: "[I]f we have * * * a demolition device that can * * * do a single explosion to do enough damage to burn a building down, that's the best part. * * * I don't want to have to throw a gallon of gas in there and you know, burn some kind of thing to light it up and hope it * * * burns down. We need to know it has to burn down. Demolition guy, ah, yeah, that, that would do it." (Transcript of Recorded Call, R. 302-1, PageID# 5735).

b. As this Court previously noted, "Doggart did more than talk by phone about his proposed terrorist acts." *Doggart II*, 947 F.3d at 881. Indeed, "[o]n several occasions, [Doggart] traveled to meet with the 'gunners' he enlisted to help him." *Ibid.* (citation omitted). On March 17, 2015, Doggart drove from his home near Chattanooga, Tennessee to the Nashville Airport to pick up the CS, who had flown in from Texas for their meeting. They had lunch and discussed strategies for attacking Islamberg. (Transcript, R. 286, PageID# 4738-4739; Transcript of 03/17/2015 Meeting, R. 302-7, PageID# 5774-5829). Referring to Islamberg, Doggart stated: "[W]e're not going in there to kill people. We're going in there to burn down a mosque, a school and a cafeteria. That's what we're going to do.

We're not going to kill people. Now if they oppose us, that's a different thing. Then we'll have to return fire." (Transcript of 03/17/2015 Meeting, R. 302-7, PageID# 5776). Doggart showed the CS literature on Islamberg, a map identifying the buildings he intended to destroy, and information on New York's gun laws. (Transcript of 03/17/2015 Meeting, R. 302-7, PageID# 5806-5809). Doggart also showed the CS his shotgun, describing it as "a horrible, horrible killing device, it will tear a human being in half," and an M-4 rifle, which he had brought with him in order to show that he was serious. (Transcript of 03/17/2015 Meeting, R. 302-7, PageID# 5784).

On April 9, 2015, Doggart again met in person with the CS and others (including a Facebook contact of Doggart's who had travelled from Illinois for the meeting) over lunch in Chattanooga. Doggart told them that they were "[g]onna blow up the three buildings" and hopefully "no children unless we have to." (Transcript of 04/09/2015 Meeting, R. 302-8, PageID# 5862-5863). Doggart also said that once the attack started, "the action teams can move in on a post until the first bomb goes off and everybody wakes up and once they start coming out of their buildings that's when you hit them. * * * As they're coming out the door. * * * And just kill, kill everybody, but there's children up there, and I don't want * * * us to do that. Don't want to have to kill children, man. But there's always collateral damage." (Transcript of 04/09/2015 Meeting, R. 302-8, PageID# 5873).

At this same meeting, Doggart stated that he planned to travel to Islamberg in two days. (Transcript of 04/09/2015 Meeting, R. 302-8, PageID# 5871). Later that day, Doggart asked Tint about the "specialist fellow that * * * you had mentioned" regarding "fireworks." (Transcript of 04/09/2015 Meeting, R. 302-3, PageID# 5747).

Doggart was arrested the next day. During trial, the government introduced a Sig Sauer M400 rifle (the "M-4"), a Mossburg 500A shotgun, and an estimated five thousand rounds of ammunition, all of which were seized during a search of Doggart's home after his arrest. (Transcript, R. 286, PageID# 4699-4702; Transcript of Recorded Call, R. 302-5, PageID# 5763).

*2. Pretrial Proceedings And The Rejected Plea Agreement*

The government filed a Bill of Information charging Doggart with a single count of transmitting a threat in interstate commerce in violation of 18 U.S.C. 875(c), and the parties filed a proposed plea agreement to that offense. (Plea Agreement, R. 14, PageID# 45-53). The district court, however, rejected the plea agreement, concluding that the factual basis set out in the agreement did not satisfy this Court's test for true threats. (Memorandum & Order, R. 29, PageID# 282-290).

Subsequently, a grand jury indicted Doggart on four counts. (Superseding Indictment, R. 84, PageID# 437-439). Count 1 charged Doggart with solicitation

to damage or destroy religious real property, in violation of 18 U.S.C. 373 and 18 U.S.C. 247(a)(1). (Superseding Indictment, R. 84, PageID# 437). Count 2 charged Doggart with solicitation to commit arson, in violation of 18 U.S.C. 373 and 18 U.S.C. 844(i). (Superseding Indictment, R. 84, PageID# 438). The remaining two counts (Counts 3 and 4) charged Doggart with making 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 pled not guilty and proceeded to trial.

*3. Post-Trial Proceedings And Doggart's Initial 2017 Sentencing*

A jury convicted Doggart on all four counts. The district court, however, granted Doggart's motion for acquittal on the two threat counts for the same reasons that it had rejected the plea agreement. (Memorandum, R. 230, PageID# 3681-3685). The government did not appeal that ruling.

At his 2017 sentencing, Doggart's applicable Guidelines range was 235 to 240 months' imprisonment. (2d Rev. PSR ¶¶ 78-80, R. 232, PageID# 3702). This Guidelines range was driven in substantial part by application of the Terrorism Enhancement Guideline, Section 3A1.4, to his Count 2 conviction for solicitation of arson, which increased his offense level by 12 points and placed Doggart in the

maximum criminal history category of VI. Sentencing Guidelines § 3A1.4guia) and (b).[2]

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

Doggart appealed. (Notice of Appeal, R. 274, PageID# 4317-4318).

*4. Doggart's First Appeal And The Second Rejection Of The Plea Agreement*

In *Doggart I*, this Court agreed with Doggart that the district court had applied the wrong test for true threats in rejecting the plea agreement. The Court

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[2] Section 3A1.4 provides:

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by **12** levels; but if the resulting offense level is less than level **32**, increase to level **32**.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Application Note 1 in the Commentary states: "For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in 18 U.S.C. 2332b(g)(5). Sentencing Guidelines § 3A1.4 comment. (n.1).

Section 2332b(g)(5) defines "[f]ederal crime of terrorism" to mean an offense that (A) "is calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct" and (B) violates one of the specified statutes. 18 U.S.C. 2332b(g)(5).

remanded the case to the district court with instructions that the court "must allow [Doggart] to accept the plea agreement" if it found that Doggart intended to make a true threat under the proper test. *Doggart I*, 906 F.3d at 512. This Court retained jurisdiction and deferred ruling on Doggart's other arguments regarding his convictions and sentence.

On remand, the district court again rejected the plea agreement, but for a different reason. The court explained that, in its view, a plea agreement to a single Section 875(c) violation, with its statutory maximum of five years' imprisonment, was "too lenient * * * and it is not in the public interest" given the extensive, serious, and dangerous conduct committed by Doggart and recounted in his presentence report. (Memorandum & Order, R. 318, PageID# 5981).

Doggart then asked this Court to address the district court's second rejection of the plea agreement, along with the other arguments he had raised in his initial appeal. (Notice of Intent, R. 319, PageID# 5987-5988).

*5. This Court's Decision In Doggart II*

In *Doggart II*, this Court first concluded that the district court did not abuse its discretion in rejecting the plea agreement. 947 F.3d at 882. The Court explained that when deciding whether to accept a Rule 11(c)(1)(A) plea agreement, district courts may properly "consider whether [the agreement] 'reflect[s] the

seriousness of the actual offense behavior.'" *Ibid.* (citing Sentencing Guidelines § 6B1.2(a)).

This Court then turned to Doggart's challenges to his remaining two counts of conviction. The Court affirmed Doggart's conviction on Count 1 for solicitation to damage or destroy religious real property in violation of 18 U.S.C. 373 and 18 U.S.C. 247(a)(1) and (d)(3). *Doggart II*, 947 F.3d at 888. But the Court vacated Doggart's conviction on Count 2 for solicitation of arson in violation of 18 U.S.C. 373 and 18 U.S.C. 844(i), holding that the Islamberg mosque, "is not 'used in' interstate commerce or in any activity affecting interstate commerce" and therefore the offense fails to meet Section 844(i)'s interstate commerce jurisdictional element. *Id.* at 883. The Court remanded the case for resentencing on Count 1. *Id.* at 888.

*6. Doggart's Resentencing*

At Doggart's 2020 resentencing on Count 1, the parties and the court agreed that, with a total offense level of 24 and a criminal history category of I, the initial Guidelines range was 51 to 63 months' imprisonment. (Transcript, R. 357, PageID# 6376); (2d Rev. PSR, R. 232, PageID# 3697-3699). The court then granted the government's motion for an upward departure under Application Note

4 of the Terrorism Enhancement Guideline, Section 3A1.4. [3] (Transcript, R. 357, PageID# 6376).

In granting this motion, the court rejected Doggart's argument that Congress had instructed the Sentencing Commission to limit application of the Section 3A1.4 adjustment only to offenses of conviction that are listed as federal crimes of terrorism in Section 2332b(g)(5)(B). Neither Section 373 nor Section 247(a)(1) is listed in Section 2332b(g)(5)(B).[4] This upward departure increased Doggart's

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[3] Application Note 4 states:

> [T]he adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B) * * * * In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.

Sentencing Guidelines § 3A1.4, comment. (n.4).

[4] At Doggart's 2017 sentencing, the terrorism enhancement was applied to Doggart's conviction for solicitation of arson (Count 2). Federal arson is a listed crime of terrorism under Section 2332b(g), while damage or destruction of religious real property in violation of Section 247(a)(1) is not. Thus, at resentencing on Doggart's conviction for solicitation of a Section 247(a)(1) offense (Count 1), the government moved for an upward departure under Application Note

(continued…)

effective Guidelines range to 120 months' imprisonment, the same as the statutory maximum sentence for Count 1.[5]

Following argument by the parties, allocution by the defendant, extensive consideration of the Section 3553(a) factors, and consideration of excerpts of letters that the court had received from residents of Islamberg, the court sentenced Doggart to 120 months' imprisonment. (Transcript, R. 357, PageID# 6466). In imposing this sentence, the court found that a downward variance was not warranted under the Section 3553(a) factors. (Transcript, R. 357, PageID# 6447-6448, 6409, 6450-6458). The court also concluded that, even if the upward departure under Application Note 4 had not been applied, the court still would have imposed a sentence of 120 months by varying upward under the Section 3553(a) factors. (Transcript, R. 357, PageID# 6458-6459).

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(…continued)
4 of the terrorism enhancement, rather than seeking application of the Section 3A1.4 Guideline adjustment itself.

[5] The upward departure added 12 offense levels and brought Doggart's total offense level to 36. The district court found it unnecessary to decide whether to increase Doggart's criminal history category from Category I to Category VI, as permitted under the upward departure. The Guidelines range with a total offense level of 36 and either criminal history category—188 to 235 months at Category I and 324 to 405 months at Category VI—would have exceeded the 120-month statutory maximum sentence under 18 U.S.C. 373(a) and under 18 U.S.C. 247(a)(1) and (d)(3).

## SUMMARY OF THE ARGUMENT

This appeal solely concerns the sentence given to Doggart on his remaining solicitation conviction (Count 1), which this Court has already affirmed.

In challenging his sentence, Doggart argues: (1) the district court erred in granting the upward departure under Application Note 4 of the Terrorism Enhancement Guideline, and (2) the sentence imposed was procedurally and substantively unreasonable. Neither argument is correct.

1. At the outset, this Court need not decide whether the district court erred in granting an upward departure under Application Note 4 of the Section 3A1.4 terrorism enhancement. The district court explicitly stated that it would have imposed a 120-month sentence through an upward variance under the Section 3553(a) factors if the upward departure had not applied. Thus, any error would be harmless.

But in any event, there was no error. Contrary to Doggart's arguments, Section 3A1.4 can be applied to offenses of conviction, like solicitation, that are not specifically enumerated in Section 2332b(g) and Congress has never instructed the Sentencing Commission otherwise. This Court in *United States* v. *Graham*, 275 F.3d 490 (6th Cir. 2001), has already rejected Doggart's argument that the 3A1.4 Guideline applies only to offenses of conviction listed in Section 2332b(g)

by affirming application of Section 3A1.4 to a conviction for conspiracy, which is not listed in Section 2332b(g). *Id.* at 516.

Doggart is also incorrect to argue that Application Note 4 is itself invalid as a matter of law. The Sentencing Commission was not required to limit application of Section 3A1.4 only to offenses of conviction listed in Section 2332b(g). Section 730 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1303, which Doggart relies upon, simply required the Commission to update Section 3A1.4 to replace an earlier reference to "international terrorism" as defined under 18 U.S.C. 2331, with a reference to Section 2332b, regarding "Federal crimes of terrorism." As the Eleventh Circuit has explained, "[t]he Sentencing Commission did as instructed" by Congress in amending Section 3A1.4 and its commentary to replace the reference to international terrorism with a reference to federal crimes of terrorism. *United States* v. *Jordi*, 418 F.3d 1212, 1216 n.2 (11th Cir. 2005). Thus, Doggart's argument that Application Note 4 conflicts with AEDPA's Section 730 necessarily fails.

Finally, Doggart argues that the district court's fact-finding in applying the upward departure under Application Note 4 "constitute[s] an as-applied Sixth Amendment violation." Br. 49. But under established circuit precedent, as long as the sentence imposed does not exceed the statutory maximum, a sentencing court's

fact-finding does not violate the Sixth Amendment. Here, the applicable statutory maximum sentence is 120 months, the same as the sentence imposed. Accordingly, there was no violation of Doggart's Sixth Amendment rights.

2. Doggart also argues that his 120-month sentence is procedurally and substantively unreasonable. These arguments also fail. His sentence is procedurally reasonable because the district court correctly calculated Doggart's initial and effective Guidelines ranges. The court also explained its reasoning for granting an upward departure under Application Note 4 to Section 3A1.4, and explained why it chose not to give him a downward variance. Doggart's sentence is substantively reasonable because it was based on an individualized consideration of the factors set forth in 18 U.S.C. 3553(a). The district court provided sound reasons for Doggart's sentence, explaining that the seriousness of the offense, the need for general deterrence, and Doggart's potential dangerousness counseled in favor of the sentence imposed.

## ARGUMENT

## I

## THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING AN UPWARD DEPARTURE UNDER APPLICATION NOTE 4 OF THE TERRORISM ENHANCMENT GUIDELINE, SENTENCING GUIDELINES § 3A1.4

Doggart argues (Br. 39-54) that the district court erred in granting an upward departure under Application Note 4 of the Terrorism Enhancement Guideline,

Sentencing Guidelines § 3A1.4, comment. (n.4), to his conviction for soliciting the damage or destruction of religious property in violation of 18 U.S.C. 373 and 18 U.S.C. 247(a)(1) and (d)(3). He makes three arguments. None has merit.

First, he argues (Br. 43-48) that Section 3A1.4 cannot be applied to solicitation offenses because Congress purportedly directed the Sentencing Commission to amend Section 3A1.4 so that it applies only when the offense of conviction is listed as a federal crime of terrorism under 18 U.S.C. 2332b(g)(5)(B), which does not list solicitation. Second, he argues (Br. 48-49) that Application Note 4 is invalid because it too applies to offenses of conviction other than those listed in Section 2332b(g)(5)(B) and therefore conflicts with Congress's instructions to the Sentencing Commission. Third, Doggart argues (Br. 49-54) that the district court's fact-finding in granting the departure caused an as-applied Sixth Amendment violation. Each of these arguments fails.

*A. Standard Of Review*

This Court reviews a district court's decision to depart upward under the Guidelines under the "same standards" that the Court uses "to judge the procedural and substantive reasonableness of a variance from any [g]uidelines range." *United States* v. *Erpenbeck*, 532 F.3d 423, 440 (6th Cir. 2008) (citing *United States* v. *Vowell*, 516 F.3d 510 (6th Cir. 2008) (alteration in original; internal quotation marks omitted)). Thus, imposition of an upward departure is reviewed "under a

deferential abuse-of-discretion standard." *Ibid.* (citation omitted); accord *United States* v. *Potts*, 947 F.3d 357, 370 (6th Cir.), cert. denied, 140 S. Ct. 2754 (2020).

Of course, an error of law constitutes an abuse of discretion. *United States* v. *Kerley*, 784 F.3d 327, 347 (6th Cir. 2015). But any such error in applying an upward departure is harmless and no remand is required when the district court has determined its sentence through independent consideration of the Section 3553(a) sentencing factors. See *United States* v. *O'Georgia*, 569 F.3d 281, 288 (6th Cir. 2009); *United States* v. *Obi*, 542 F.3d 148, 156 (6th Cir. 2008).

*B. Because The District Court Concluded That It Would Have Imposed The Same Sentence Under The Section 3553(a) Sentencing Factors Even Without Using The Application Note 4 Upward Departure, This Court Need Not Decide The Merits Of This Issue*

As a threshold matter, this Court need not decide whether the Application Note 4 upward departure was erroneous under any of Doggart's arguments. The district court explicitly stated at resentencing that had the upward departure not applied, "the Court would have imposed a[n] upward variance" because, considering just the 3553(a) sentencing factors, 120 months "would still have been the appropriate sentence." (Transcript, R. 357, PageID# 6458-6459).

In justifying the imposition of the 120-month sentence, the court highlighted the "major" and "long-lasting" impact of Doggart's offense on "many, many people's lives" in the Islamberg community. (Transcript, R. 357, PageID# 6456). The court further emphasized the dangerousness of Doggart's solicitation

offense, given the possibility of inciting violence by others through his Internet communications. (Transcript, R. 357, PageID# 6457). And the court also highlighted the need to protect the public from any future crimes by the defendant, noting that Doggart's allocution at his initial 2017 sentencing had made clear to the court that Doggart "really did not have any insight into his actions and what he had done." (Transcript, R. 357, PageID# 6458). The court accordingly found that the 120-month sentence was warranted in light of all the relevant sentencing factors. (Transcript, R. 357, PageID# 6459).

Because the "district court independently support[ed] its choice" of Doggart's 120-month sentence through "proper use of the § 3553(a) factors," it rendered any error in granting the upward departure "harmless." *O'Georgia*, 569 F.3d at 288. Thus, even if this Court were to determine that the district court erred by granting the upward departure, "a remand is unnecessary" because "any such error did not affect the district court's selection of the sentence imposed." *Ibid.* (quoting *United States* v. *Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005) (internal quotation marks and additional citation omitted)); accord *Erpenbeck*, 532 F.3d at 441 (affirming a sentence despite an erroneous departure pursuant to Sentencing Guidelines § 5K2.3 "because the sentence was sufficiently justified based upon the 18 U.S.C. § 3553(a) factors alone").

### *C. The District Court Properly Granted An Upward Departure Under Application Note 4 Of The Terrorism Enhancement*

#### *1. The Section 3A1.4 Terrorism Enhancement And The Upward Departure Under Application Note 4 Are Each Available For Offenses Of Conviction Not Specifically Listed In Section 2332b(g)(5)(B)*

a. The text and history of Section 3A1.4 and Application Note 4 show why Doggart's arguments fail. After the 1995 Oklahoma City bombing, Congress, in passing AEDPA, directed the Commission to modify its existing sentencing enhancement for crimes that involved or were intended to promote "international terrorism" with an enhancement directed at "Federal crimes of terrorism, as defined in [newly-enacted] section 2332b(g)." Pub. L. No. 104-132, § 730, 110 Stat. 1303 (1996). The Sentencing Commission did as instructed, so that Section 3A1.4 now applies both to crimes "involv[ing]" as well as crimes "intended to promote" offenses listed in Section 2332b(g)(5)(B). Sentencing Guidelines § 3A1.4.

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

offense qualifies for the enhancement when "a defendant committed, attempted, or conspired to commit" a federal crime of terrorism listed in Section 2332b(g)(5)(B). *Ibid.* Thus, an offense "involves" a federal crime of terrorism "only if the crime of conviction is itself a federal crime of terrorism," *United States* v. *Parr*, 545 F.3d 491, 504 (7th Cir. 2008), or if the "relevant conduct includes such a crime," *United States* v. *Awan*, 607 F.3d 306, 313-314 (2d Cir. 2010).

But under the "intended to promote" prong of Section 3A1.4, "the offense of conviction itself need not be a 'Federal crime of terrorism'" as listed in Section 2332b(g)(5)(B). *Graham*, 275 F.3d at 516. Instead, that phrase "implies that the defendant has as one purpose of his substantive count of conviction or his relevant conduct the intent to promote a federal crime of terrorism." *Ibid.* As this Court explained in *United States* v. *Wright*, 747 F.3d 399 (6th Cir. 2014), "[a] defendant has the requisite intent if he or she acted with the purpose of influencing or affecting," or retaliating against, "government conduct and planned his or her actions with this objective in mind." *Id.* at 408 (citations omitted).

b. Application Note 4 to Section 3A1.4, titled "Upward Departure Provision," allows for an upward departure under limited circumstances where the defendant's conduct does not fit within the express "provisions of Section 3A1.4." *United States* v. *Jordi*, 418 F.3d 1212, 1216 (11th Cir. 2005). When the defendant's offense "was calculated to influence or affect the conduct of

government by intimidation or coercion, or to retaliate against government conduct" an enhancement is "warranted" even if the defendant's offense "involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B)." Sentencing Guidelines § 3A1.4, comment. (n.4).

In other words, Application Note 4 allows for an upward departure in cases where the offense was calculated to affect government conduct through intimidation or coercion, but the offense is neither listed as, nor intended to promote, an enumerated federal crime of terrorism under Section 2332b(g)(5)(B). The Sentencing Commission has explained that Application Note 4 is "an *encouraged, structured upward departure* * * * for offenses that involve terrorism but do not otherwise qualify as offenses that involved or were intended to promote 'federal crimes of terrorism' for purposes of the terrorism adjustment in § 3A1.4." Sentencing Guidelines, App. C, amend. 637 (emphasis added). The Sentencing Commission has further explained that the purpose of the upward departure is to provide courts with "a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis." *Ibid.* This structured departure "makes it possible to impose punishment equal in severity to that which would have been imposed if the § 3A1.4 adjustment actually applied." *Ibid.*

*2. The District Court Made Well-Supported Factual Findings In Granting The Application Note 4 Upward Departure And Those Findings Are Not Challenged In This Appeal*

In resentencing Doggart, the district court found that Doggart's solicitation offense qualified for the Application Note 4 upward departure because it was "calculated to influence or affect the conduct of government through intimidation or coercion." Sentencing Guidelines § 3A1.4, comment. (n.4); (Transcript, R. 293, PageID# 5449). Doggart does not challenge the factual basis for this finding.

Based upon Doggart's own statements, the district court found at Doggart's initial 2017 sentencing that his solicitation of others "to damage or destroy the mosque at Islamberg using explosives" had "the purpose of intimidating or coercing the government." (Transcript, R. 293, PageID# 5450-5451; see also Transcript, R. 293, PageID# 5403-5407). The district court found that Doggart intended to solicit others to destroy the Islamberg mosque not just because of its religious character, but also to incite a civil insurrection against the government. (Transcript, R. 293, PageID# 5452).

The district court highlighted, for example, Doggart's statement "that the government we have was no longer willing or able to protect its citizens, and that patriots and militias need to rise up and take over the government's responsibilities." (Transcript, R. 293, PageID# 5451). The court also found that Doggart "was talking about setting in motion an armed insurrection against the

government of the United States that would force the government of the United States either to respond to the attacks or to give in and capitulate." (Transcript, R. 293, PageID# 5452).

At resentencing, the district court cited these and its other prior factual findings to support the upward departure. (Transcript, R. 357, PageID# 6395).

*3. Doggart's Arguments That Application Note 4 Conflicts With The Underlying Congressional Directive Are Not Correct*

Doggart argues (Br. 39-54) that the Sentencing Commission ignored Congress's instructions in Section 730 of AEDPA by allowing Section 3A1.4 and the upward departure authorized under Application Note 4 to apply in cases where the offense of conviction, such as the one here for solicitation, is not listed in Section 2332b(g)(5)(A). But there is no conflict between Congress's instructions and Application Note 4.

*a. There Is No Conflict Between The Text Of Section 3A1.4 And Congress's Instructions To The Sentencing Commission*

First, Doggart incorrectly maintains that Congress directed the Sentencing Commission to apply Section 3A1.4 "only" to offenses of conviction listed in Section 2332b(g). (Br. 43). But Congress did no such thing, as this Court has already recognized. When Congress passed AEDPA and directed the Sentencing Commission to "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)," it said nothing about restricting application of the enhancement only to *offenses of conviction* listed in Section 2332b(g). See Pub. L. No. 104-132, § 730, 110 Stat. 1303. Thus, both before and after amendment, Section 3A1.4 had an "involved" and an "intended to promote" prong, both of which apply to federal crimes of terrorism. Congress did not suggest or direct the Commission to further restrict application of the enhancement only to offenses of conviction listed in Section 2332b(g)(5)(B), as opposed to offenses that *promote* such crimes. See *Jordi*, 418 F.3d at 1216 n.2 (stating that "[t]he Sentencing Commission did as instructed" by Congress in amending Section 3A1.4 and its commentary to replace the reference to international terrorism with a reference to federal crimes of terrorism).

Moreover, this Court has already rejected Doggart's argument that application of Section 3A1.4 is limited only to offenses of conviction listed in Section 2332b(g)(5)(B). In *Graham*, this Court rejected the defendant's argument that the Section 3A1.4 terrorism enhancement could not apply to his conviction for conspiracy under 18 U.S.C. 371 because that statute is not listed in Section 2332b(g)(5). 275 F.3d at 517. This Court held that the enhancement applies not only to the federal crimes listed in the statute, but also to other offenses "intended to promote" the commission of one of the listed crimes. *Ibid.*

Doggart's argument here is taken not from the majority in *Graham*, but from the dissent, which argued that Congress's directions to the Sentencing Commission in enacting AEDPA should have precluded application of the Section 3A1.4 enhancement to an offense of conviction, such as conspiracy, that is not listed in Section 2332b(g). *Graham*, 275 F.3d at 530-536 (Cohn, D.J., dissenting). But although the majority did not specifically address that argument, it necessarily rejected it in affirming the sentence for conspiracy in *Graham*. Moreover, the argument of both Doggart and the dissenting judge in *Graham*, focusing on the word "only" in Section 730 of AEDPA, reads that word out of context. There is nothing inconsistent with requiring that the enhancement apply "only" to federal crimes of terrorism, and continuing to allow the enhancement to apply whenever the offense involves or promotes such a crime, regardless of whether it is the offense of conviction.

Doggart further argues (Br. 45-47) that this Court is not bound by its decision in *Graham* because that decision conflicts with the Supreme Court's prior decision in *United States* v. *LaBonte*, 520 U.S. 751 (1997). But that is not correct. The Supreme Court in *LaBonte* simply stated that the Sentencing Commission's discretion in implementing the Guidelines "must bow to the specific directives of Congress." *Id.* at 757. But neither *LaBonte* nor the other cases that Doggart cites involve interpretation of Section 3A1.4 or the congressional statutes that initially

authorized and later required amendment to that provision. And none of the cases that Doggart cites supports the predicate of his argument, *i.e.*, that there is actually a conflict between applying the enhancement to solicitation offenses and Congress's instructions to the Sentencing Commission. There is no such conflict.

*b. There Is No Conflict Between Application Note 4 And Congress's Instructions To The Sentencing Commission*

For essentially the same reasons he relies upon to argue that the Section 3A1.4 enhancement itself cannot apply to solicitation offenses, Doggart argues that Application Note 4's upward departure is invalid because it improperly expands the enhancement beyond the underlying congressional directive in AEDPA. This argument is equally unavailing.

Doggart is wrong that Application Note 4 is invalid because it can apply to offenses of conviction, such as solicitation, other than those listed in Section 2332b(g). As discussed above, Section 3A1.4 itself can apply to offenses of conviction other than those listed in 2332b(g)(5)(B) without conflicting with the congressional directive in AEDPA. Of course, by its terms, Application Note 4 applies where there is no relation between the offense of conviction and a listed crime of terrorism under Section 2332b(g). But contrary to Doggart's argument, the Application Note is not an improper attempt to expand Section 3A1.4 beyond Congress's intended reach.

This case is unlike *United States* v. *Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc), where this Court held that the Sentencing Commission improperly used commentary to Section 4B1.2(b) to change the definition of "controlled substance offenses," and thereby automatically increase the base offense level for possession of a firearm by a felon with a prior controlled substance offense, under Section 2K2.1(a)(4) and (a)(6). *Id.* at 387. The upward departure contemplated by Application Note 4 here is discretionary. It does not require the district court to adjust the base offense level, or to "replace or modify" any other Guidelines provision. *Id.* at 386.

Instead, Application Note 4 allows for sentencing courts to assess on a "case-by-case" basis considerations that they would already address under Section 3553(a) in selecting an appropriate sentence. Sentencing Guidelines, App. C, amend. 637; 18 U.S.C. 3553(a)(2)(A). The structured departure is the equivalent of an upward variance that the sentencing court would have full authority to apply in its exercise of discretion under the Section 3553(a) factors.[6] For this reason, the

[6] Application Note 4 was adopted by the Sentencing Commission in 2002, see Sentencing Guidelines, App. C, amend. 637, and thus predates the Supreme Court's decision rendering the Guidelines advisory, rather than mandatory, in *United States* v. *Booker*, 543 U.S. 220 (2005). By styling Application Note 4 as a discretionary departure, in the pre-*Booker*/mandatory Guidelines era, it is clear that, in the post-*Booker*/advisory Guidelines era, the departure is equivalent to an upward variance under the Section 3553(a) sentencing factors. See also *Irizarry* v.

(continued…)

Application Note 4 departure is not inconsistent with congressional directives relating to Section 3A1.4.

*4. The District Court's Fact-Finding At Sentencing Did Not Violate Doggart's Sixth Amendment Rights*

Finally, Doggart argues (Br. 49-54) that the district court's fact-finding in applying the upward departure under Application Note 4 "constitute[s] an as-applied Sixth Amendment violation." Br. 49. He argues that the sentence resulting from the upward departure would be substantively unreasonable in the absence of the district court's "finding that he had the requisite motivation for the terrorism departure" (Br. 52), and therefore that the factual basis for the departure should have been decided by the jury. This argument is foreclosed by circuit precedent. See *United States* v. *White*, 551 F.3d 381, 384-385 (6th Cir. 2008) (en banc).

To apply the upward departure, the district court had to find that Doggart acted with the specific intent to "influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." Sentencing Guidelines § 3A1.4, comment. (n.4). As Doggart acknowledges (Br. 49), the

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(…continued)
*United States*, 553 U.S. 708, 714 (2008) (clarifying the distinction between a departure, "a term of art under the Guidelines [that] refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines," and a Section 3553-supported variance).

district court made this finding by a preponderance of the evidence. (Transcript, R. 293, PageID# 5449-5452). Ample trial evidence supports this conclusion. See pp. 26-27, *supra*.

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." *White*, 551 F.3d at 384-385 (alteration and citation omitted). Thus, as long as the sentence resulting from the sentencing court's fact-finding does not exceed the statutory maximum for the defendant's offense of conviction, there is no Sixth Amendment violation. Here, the applicable statutory maximum sentence for Doggart's solicitation conviction is 120 months, the same as the term of imprisonment the district court imposed. Accordingly, this sentence did not violate Doggart's Sixth Amendment rights. *White*, 551 F.3d at 385 ("So long as the defendant receives a sentence at or below the statutory ceiling set by the jury's verdict, the district court does not abridge the defendant's right to a jury trial by looking to other facts * * * when selecting a sentence within that statutory range.").

Doggart points (Br. 50) to concurrences arguing that a sentence might result in an as-applied violation of the Sixth Amendment where such a sentence would be "reasonable only because of the existence of judge-found facts." *Rita* v. *United States*, 551 U.S. 338, 374 (2007) (Scalia, J., concurring); *United States* v. *Conatser*, 514 F.3d 508, 528 (6th Cir. 2008) (Moore, J., concurring). The theory underlying such an "as-applied" Sixth Amendment challenge is that a defendant might demonstrate that his sentence "would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall* v. *United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring). But, as this Court has recognized, the fact remains that "neither a majority of the Supreme Court nor a majority of this court has recognized an as-applied Sixth Amendment challenge." *United States* v. *Roberts*, 919 F.3d 980, 987 (6th Cir. 2019) (citing *United States* v. *Bonick*, 711 F. App'x 292, 299 (6th Cir. 2017)).

In sum, under the well-established decisions of this Court, there was no Sixth Amendment error. *Mayberry*, 540 F.3d at 516; *White*, 551 F.3d at 384-385.

## II

## DOGGART'S SENTENCE IS PROCEDURALLY AND SUBSTANTIVELY REASONABLE

Doggart argues (Br. 54-69) that his sentence is procedurally and substantively unreasonable because the district court erred in calculating Doggart's initial Guideline range when it applied a structured upward departure under the

Application Note 4 of Section 3A1.4 of the Guidelines, and rejected Doggart's arguments in favor of a downward variance under the 18 U.S.C. 3553(a) sentencing factors. None of Doggart's arguments has merit, and his 120 months' sentence is substantively reasonable in light of the Section 3553(a) factors.

*A. Standard Of Review*

In reviewing a sentencing for procedural reasonableness, this Court ensures that the district court committed no significant procedural errors, such as "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *United States* v. *Brooks*, 628 F.3d 791, 795-796 (6th Cir. 2011) (quoting *Gall* v. *United States*, 552 U.S. 38, 51 (2007)). Legal error in the calculation of a Guidelines range is reviewed *de novo*, while factual findings of the district court are reviewed only for clear error. *United States* v. *Bolds*, 511 F.3d 568, 579 (6th Cir. 2007). The procedural reasonableness of a sentence, and the adequacy of a district court's explanation of any variance from the Guidelines range, including the '"appropriateness of brevity or length, conciseness or detail . . . depends upon circumstances' that are left 'to the judge's own professional judgment,'" *United States* v. *Lanning*, 633 F.3d 469, 474 (6th Cir. 2011) (quoting *Rita* v. *United States*, 551 U.S. 338, 356 (2007)).

After pronouncing the defendant's sentence, the district court must "ask the parties whether they have any objections to the sentence just pronounced that have not previously been raised." *United States* v. *Bostic*, 371 F.3d 865, 872 (6th Cir. 2004). "If a party does not clearly articulate any objection and the grounds upon which the objection is based, when given this final opportunity to speak, then that party * * * will face plain error review on appeal" as to any procedural challenges to the sentence. *Id.* at 872-873. See also *Lanning*, 633 F.3d at 477. Here, because Doggart did not raise below (either before or after the *Bostic* question) several of the procedural reasonableness arguments he now raises, those issues are reviewed for plain error.

Under the plain error standard of review, the defendant must show that: (1) there is error; (2) the error was clear or obvious rather than subject to reasonable dispute; (3) the error affected the defendant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *United States* v. *Massey*, 663 F.3d 852, 856 (6th Cir. 2011) (citing *United States* v. *Marcus*, 560 U.S. 258, 262 (2010)).

If this Court concludes that the sentence is procedurally reasonable, it must then determine whether the sentence is substantively reasonable, *i.e.*, whether "the length of the sentence is reasonable in light of the [18 U.S.C.] § 3553(a) factors."

*United States* v. *Mendez*, 362 F. App'x 484, 486 (6th Cir. 2010) (quoting *United States* v. *Tate*, 516 F.3d 459, 469 (6th Cir. 2008)). All challenges to the substantive reasonableness of a sentence are reviewed for abuse of discretion, regardless of whether the error claimed has been preserved. *United States* v. *Houston*, 529 F.3d 734, 755 (6th Cir. 2008).

The district court's determination that a sentence is substantively reasonable under the Section 3553(a) factors is entitled to deference: "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51. "[I]t is trial judges, not appellate judges, who have considerable discretion in applying the § 3553(a) factors to an individual." *United States* v. *Overmyer*, 663 F.3d 862, 864 (6th Cir. 2011). "Because '[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a),' this Court applies a great deal of deference to a district court's determination that a particular sentence is appropriate." *United States* v. *Mayberry*, 540 F.3d 506, 519 (6th Cir. 2008) (quoting *Gall*, 552 U.S. at 51).

*B. At Resentencing, The District Court Made Extensive Findings Based On The Evidence Before It*

1. Doggart was resentenced in September 2020 on his remaining solicitation conviction. At resentencing, the parties and court agreed a Guidelines range of 51 to 63 months' imprisonment applied. (Transcript, R. 357, PageID# 6376). But the

court also granted the government's motion for an upward departure under Application Note 4 of Section 3A1.4. (Transcript, R. 357, PageID# 6396). Following application of the departure, and its 12-level enhancement to Doggart's total offense level, the parties and the court agreed that Doggart had an effective Guidelines range capped at 120 months' imprisonment – the statutory maximum. (Transcript, R. 357, PageID# 6397-6398).[7]

2. The court then turned to Doggart's request for a downward variance. (Transcript, R. 357, PageID# 6399). Doggart began by making an allocution, stating that he was "deeply sorrowed and contrite," that he was not now and had never been "fixat[ed] or obsess[ed]" with Islamberg, and that separation from his children and grandchildren "has been very painful." (Transcript, R. 357, PageID# 6400-6401).

Defense counsel then argued that the Section 3553(a) factors supported a downward variance to an advisory sentencing range of 51 to 63 months. Counsel argued that: (1) Doggart posed no imminent threat, as his plan was "always contingent on whether there was determined to be an actual threat"; (2) two

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[7] Given the statutory maximum, the court explained that it was "not necessary for the Court to determine whether [Doggart] should be in Criminal History Category 1 or Criminal History Category VI" as a result of the upward departure. (Transcript, R. 357, PageID# 6398).

recidivism studies showed that Doggart had a low risk to reoffend; (3) Doggart's "prosecution and punishment" alone, regardless of sentence length, provided an adequate level of general deterrence; (4) the reasons why the court concluded that Doggart posed a danger to the community at his prior sentencing no longer existed; and (5) Doggart had been changed by his incarceration and the passage of four years from his initial sentencing such that "he's not in the same mental state as he was at the time." (Transcript, R. 357, PageID# 6403-6409).

The defense further argued that while Doggart's communications in this case "particularly early on, were horrible," other facts purportedly later showed that Doggart was not "going to do anything unless there was a specific threat and law enforcement didn't do anything." (Transcript, R. 357, PageID# 6412). Likewise, the defense argued that certain parts of Doggart's conversations with the CS and Tint showed that, before taking any action against Islamberg, he was instead considering forming a lawful militia, or perhaps running again for political office. (Transcript, R. 357, PageID# 6418-6423). Finally, the defense argued that imposition of a sentence of 120 months would "create a huge disparity in these [terrorism-related] cases," given that Doggart's "crime is one of speech." (Transcript, R. 357, PageID# 6428-6429).

3. The court declined to apply a downward variance.

a. First, in discussing the Section 3553 factors, the court made clear that it had considered "both the nature and circumstances of the offense and also the history and characteristics of the defendant" in making its sentencing determination. (Transcript, R. 357, PageID# 6447). The court noted that the underlying offense conduct "ha[s] not changed at all." (Transcript, R. 357, PageID# 6447). The court emphasized that some of "this solicitation took place through electronic means * * * which meant that the defendant was talking to people and soliciting people that he did not know," which increased the dangerousness and potential for harm involved in Doggart's conduct. (Transcript, R. 357, PageID# 6447-6448).

The court also rejected the defense's suggestion that it mattered whether Doggart was going to conduct some further threat assessment before acting, noting that Doggart had plainly convinced himself that the residents of Islamberg posed "a threat so serious and so dangerous that it was necessary for him and the people he talked to go up there and put a stop to it." (Transcript, R. 357, PageID# 6448). Similarly, the court did not credit the argument that Doggart's interest in forming a "legal, well-regulated militia" meant that his actions did not pose a threat. (Transcript, R. 357, PageID# 6449).

The court granted that the tone and substance of Doggart's allocution at resentencing had changed from his earlier allocution at his original 2017 sentencing, and stated that the court will "credit what the defendant has said." (Transcript, R. 357, PageID# 6449). The court specified, however, that Doggart's statements had still not "really capture[d] the effect that the offense had on a number of victims." (Transcript, R. 357, PageID# 6449).

b. The court then read excerpts of seven letters, a "very, very small sample of the letters the Court received," from people with ties to Islamberg describing the impact of Doggart's offense on their lives. (Transcript, R. 357, PageID# 6449-6456). For example, Khadijah Smith's letter stated Doggart's offense was the "most horrifying news that [she had] ever heard in [her] life," and that it "forever shattered" the sense of security that she had enjoyed in living in Islamberg. (Transcript, R. 357, PageID# 6449-6450). Smith explained that Doggart "changed the innocence of our village with his planned attack" and threats of killing "my family and all the other families that reside in our community. * * * As he clearly stated, our children would be collateral damage." (Transcript, R. 357, PageID# 6451).

Yasmin Abdul Atham's letter stated "[e]very aspect of [h]er life [has been] affected by Doggart's plot," including because "[t]here [were] other people who were willing to lay down their life for their cause against Islamberg." (Transcript,

R. 357, PageID# 6451-6452). Atham's "14-year-old daughter remains anxious at the sight of unknown vehicles entering Islamberg." (Transcript, R. 357, PageID# 6452).

Kola Holliston wrote that "Robert Doggart has stolen our sense of safety and security" and that her sense of peace has been "replaced with fear * * * that [she] could be targeted, eliminated, removed off the face of the earth" along with "my entire family and Muslim family, including their children." (Transcript, R. 357, PageID# 6453).

As a final example, Mohamed Yusef wrote that Doggart's plan "touched me in a personal way," given that Islamberg is home to many of his family members. "Although elated that the plot was foiled," Yusef wrote that he was "unfortunately changed forever." (Transcript, R. 357, PageID# 6455-6456). His "young children were fearful. Never having experienced this type of evil, they wondered if someone would do this to their cousin and might have similar plans for them." (Transcript, R. 357, PageID# 6456). As a result, "they've permanently lost some of the innocence of childhood." (Transcript, R. 357, PageID# 6456).

From these letters, the court stressed that "the defendant's crimes had a major impact on many, many people's lives," which was "not a temporary or momentarily impact but was long-lasting." (Transcript, R. 357, PageID# 6456). The court further noted that the seriousness of defendant's crime was enhanced

because Doggart was "reaching out to others, unknown to him, who might have engaged in criminal acts of the type of which he spoke." (Transcript, R. 357, PageID# 6456-6457). The court emphasized that, under the Section 3553 factors, it was required to consider "the impact on the victims in determining the seriousness of the offense and what just punishment for the offense would be." (Transcript, R. 357, PageID# 6457).

c. The court rejected Doggart's argument that "there is little reason to protect the public from future crimes of the defendant." (Transcript, R. 357, PageID# 6457). The court noted that it took "to heart" the defendant's allocution at resentencing, but could not "put completely out of mind what the defendant said at his earlier allocution," where the defendant's statements "indicated to the Court [that] he really did not have any insight into his actions and what he had done." (Transcript, R. 357, PageID# 6457-6458). The court observed that though "not as strong in its views as it was at the earlier sentencing," the Court still believed that "protecting the public from future crimes of the defendant is a relevant consideration." (Transcript, R. 357, PageID# 6458).

d. The court concluded that, "in looking at all of the 3553 factors," it did not think that a downward variance "would serve the 3553 purpose of imposing a sentence that is sufficient but not greater than necessary to comply with the purposes as set forth in the statute." (Transcript, R. 357, PageID# 6458). Thus, the

court stated that it would "stick to the guidelines that the Court decided with the [upward] departure." (Transcript, R. 357, PageID# 6458). The court also stated that, even if the Guidelines range had not included the upward departure for the terrorism enhancement, "the Court would have imposed a[n] upward variance because of the factors the Court has just stated." (Transcript, R. 357, PageID# 6458-6459). "[I]n the Court's mind," a sentence of 120 months "would still have been the appropriate sentence." (Transcript, R. 357, PageID# 6459).

Finally, the court declined to vary downward based on potential sentencing disparity between Doggart and defendants in other terrorism-related cases. (Transcript, R. 357, PageID# 6464). The court again highlighted the letters from residents of Islamberg "talking about the impact that the crime has made on their lives, * * * on their children's lives, [and] * * * on their sense of security in their own homes," including "the fact that they have to look over their shoulder now at all times, the fact that any automobile that comes into their neighborhood causes them anxiety and concern." (Transcript, R. 357, PageID# 6465). The court stated while there "may be other cases" with similarly severe victim impacts, the court was "not aware of them." (Transcript, R. 357, PageID# 6465). For this reason, the court stated, this case "stands on its own feet" and a sentence of 120 months "would not constitute an unwarranted disparity" because the court "has to

take into account the effect this crime has had on the vast number of people whose lives were changed." (Transcript, R. 357, PageID# 6469).

Accordingly, the court sentenced Doggart to a term of 120 months' imprisonment. (Transcript, R. 357, PageID# 6466). The court then asked, in accordance with *Bostic*, 371 F.3d at 872-873, if Doggart had any further objections to the sentence. Doggart did not. (Transcript, R. 357, PageID# 6468).

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

The record demonstrates that the district court, after granting the government's motion for an upward departure under Application Note 4 to Section 3A1.4, correctly calculated Doggart's effective Guidelines range, and carefully heard, considered, and rejected Doggart's arguments for leniency. The district court had a sound basis for selecting Doggart's sentence, which it explained to the parties. As a result, Doggart's sentence satisfies the requirements for procedural reasonableness. *Brooks*, 628 F.3d at 791, 795-796.

Each of the five arguments that Doggart raises (Br. 56-62) in challenging the procedural reasonableness of his sentence fails, for the reasons explained below.

#### *1. The District Court Did Not Use An Incorrect Starting Point In Declining To Grant Doggart A Downward Variance*

Doggart contends (Br. 56) that the district court used the wrong starting point under the Guidelines when declining to give Doggart a downward variance.

Specifically, he asserts that court used his original 235-month sentence from his 2017 sentencing, rather than the 120-months effective Guidelines sentence. Doggart did not raise this argument below, so it is reviewed for plain error. But there is no error, much less plain error.

The district court correctly used the 120-months effective Guidelines range in considering Doggart's request for a downward variance. At each step of Doggart's resentencing, the district court ensured that the parties and the court agreed to the relevant Guidelines calculation, both before and after the upward departure was applied. Doggart misreads the record in asserting that the court somehow reverted to his original 235-month sentence in evaluating his request for a variance. To be sure, the court did state that it believed that a sentence in "th[e] area" of Doggart's original 235-month sentence "would be appropriate" given the severity of the impact of Doggart's offense on the residents of Islamberg. (Transcript, R. 357, PageID# 6458). But the court readily acknowledged that "it [wa]s not legally able" to give Doggart such a sentence. (Transcript, R. 357, PageID# 6458). The court further acknowledged that even if it were able to give the same sentence as it had given him initially, the Court would have "move[d] downward because of [Doggart's] post-sentence conduct and his statement of remorse," but that any such downward variance still would not have resulted in the 53 to 61 months range that counsel was seeking. Instead, "120 months, in the

Court's mind, would still have been the appropriate sentence." (Transcript, R. 357, PageID# 6459).

Thus, the statements that Doggart takes issue with are nothing more than the court putting its current sentencing determinations in context with its prior determinations. Neither the court nor the parties believed that the court's original 235-month sentence was the appropriate starting point when considering Doggart's request for a downward variance. (Transcript, R. 357, PageID# 6397-6398). The starting point, as the record makes clear, was the 120-month effective Guidelines sentence. There was no error in the calculation of that starting point, and certainly no plain error.[8]

*2. The District Court's Finding That Doggart Had Already Decided That Islamberg Was A Threat Was Not Clearly Erroneous*

Doggart argues (Br. 59) that the district court, in considering the seriousness of his offense and his future dangerousness, erred in concluding that, at the time of

[8] Doggart also argues in passing that the district court might have improperly viewed itself as required by the language of Guideline 3A1.4 to depart upward. Br. 57 n.7. But the district court did not improperly view the Application Note 4 upward departure as mandatory. Instead, the district court's comment that it was "bound by the [G]uidelines" in granting the departure was simply a recognition that Application Note 4 involves a Guidelines-based structured departure, not a variance. (See Transcript, R. 357, PageID# 6399) ("The earlier decision the Court made [in applying Application Note 4] was a departure within the guidelines. So the Court was bound by the guidelines themselves to make that decision."); see generally *Irizarry*, 553 U.S. at 714 (clarifying the distinction between a Guidelines-based departure and a Section 3553-supported variance).

his arrest, Doggart had convinced himself "that this community of these people [in Islamberg] constituted a threat." (Transcript, R. 357, PageID# 6448). Doggart points to a March 15, 2015, recording in which he told the CS that he was "still gathering intelligence" to figure out "what the heck is going on." (Br. 29-30). Doggart argues that his talk of destroying the mosque was contingent on first determining that the Islamberg community actually posed a threat. Consequently, Doggart argues that in imposing its sentence the court relied on an improper factual finding as to what Doggart believed about the Islamberg community.

The district court, in considering the seriousness of Doggart's offense and his future dangerousness, did not err in rejecting Doggart's version of the facts. From the beginning to the end of his offense, Doggart's own words make clear that he regarded Islamberg as a threat and, dangerously, that he indiscriminately communicated that view to others, including over the Internet, in soliciting help to plot against Islamberg. It is therefore clear from the outset of the offense in February 2015, when Doggart began soliciting others through Facebook, that he regarded the Islamberg community as a threat, as he wrote a post seeking to recruit "twenty expert gunners" who could inflict "a lot of damage, both physical and psychological." (Transcript, R. 285, PageID# 4659-4660).

Likewise, in a face-to-face meeting on April 9, 2015, with the CS and others on the day before he was arrested, Doggart stated that they could wait for "local

law enforcement" to stop persons from Islamberg "poison[ing] the reservoir" that feeds New York City, or "[o]n the other hand, if a bunch of regular Americans went in there * * * we're not going in there to kill people[, * * * ][w]e're going in there to destroy their buildings so they can't use the site. But if * * * they have armed guards at the gate * * * and they have weapons and they're blowing stuff up, you know, we're going to have to shoot." (Transcript of 04/09/2015 Meeting, R. 302-8, PageID# 5830, 5837). In this same meeting, Doggart also spoke of using a "standoff gunner" with a "silencer," and having "action teams" ready so that when "first bomb goes off and everybody wakes up and once they start coming out of their buildings that's when you hit them" and "just kill, kill everybody." (Transcript of 04/09/2015 Meeting, R. 302-8, PageID# 5873).

Given Doggart's repeated and extensive discussion of the violence that he planned to unleash, there is nothing erroneous about the district court's conclusion that he had already determined that Islamberg was a threat, and that Doggart's actions in plotting with others to attack Islamberg based on that view heightened the seriousness and potential dangerousness of his offense. Nor is that finding inconsistent with Doggart's other statements that he also planned to undertake further investigation in Islamberg. The district court's underlying point is that Doggart, in committing his solicitation offense, had already undertaken many steps

that threatened the safety and security of Islamberg's residents based on false and biased views of the danger that the community posed. Doggart's argument that he had not already determined that Islamberg was a threat, such that his actions involved no real danger or harm, is without support in the record.

*3. The District Court Did Not Ignore The Defense's Evidence Regarding Doggart's Future Dangerousness, Nor Did It Place Improper Weight On Doggart's 2017 Allocution*

Doggart argues that the district court improperly "ignored" two studies he proffered that he claimed shed light on his dangerousness (and lack thereof). Br. 59. But, again, the record at resentencing does not support that argument. The district court listened to counsel's argument about the studies cited, and asked about a more recent Sentencing Commission study on sentence length and recidivism that Doggart had not cited to the court. (Transcript, R. 357, PageID# 6404) (citing U.S. Sentencing Commission, *Length of Incarceration and Recidivism* (April 2020)). The district court's procedural reasonableness obligation at sentencing is "to adequately explain the chosen sentence to allow for meaningful appellate review." *Bolds*, 511 F.3d at 580 (citation omitted). The district court here did so. The court was under no obligation to detail the reasons why it did not find the studies Doggart cited to be more persuasive in this case. See *United States* v. *Vonner*, 516 F.3d 382, 387 (6th Cir. 2008) (noting that courts

are not required to "give the reasons for rejecting any and all arguments by the parties for alternative sentences").

Relatedly, Doggart asserts that the district court placed improper weight on his 2017 allocution at his first sentencing hearing. At that hearing, he repeatedly understated, or simply denied, his role in the offense and asserted that he was: entrapped by the government; targeted because of his "demographic"; not a leader in the scheme; not properly indicted and prosecuted; and the victim of an "elaborate hoax." (Transcript, R. 293, PageID# 5503, 5506-5507, 5513-5514, 5516, 5519). Moreover, at that time, all that Doggart could muster toward the residents of Islamberg was an "apology for any *inconveniences* you may have experienced," (Transcript, R. 293, PageID# 5511) (emphasis added). There was nothing improper with the district court's consideration of Doggart's statements from his 2017 allocution, as one factor among many, in weighing Doggart's dangerousness and potential for reoffending. (Transcript, R. 357, PageID# 6449).

Moreover, contrary to Doggart's arguments, the sentencing determination in this case bears no resemblance to the one in *United States* v. *Jenkins*, 854 F.3d 181 (2d Cir. 2017), where the Second Circuit faulted the district court's "exclusive reliance" on the defendant's conduct at trial and during sentencing proceedings as the justification for "dramatically increasing" his sentence. *Id.* at 191-192. Here, the court did not rely "exclusively" on Doggart's 2017 allocution, nor did it use the

2017 allocution to "increase" Doggart's sentence at all. Doggart's 120-month sentence is the effective Guidelines sentence given the upward departure and the statutory maximum. The district court merely and unremarkably referenced Doggart's 2017 allocution as one factor that confirmed the reasonableness of the sentence imposed. (Transcript, R. 357, PageID# 6449).

The district court committed no error, and certainly no plain error.

*4. The District Court Properly Considered The Victim Impact Letters*

Doggart further argues that the district court's reliance on victim impact letters was somehow improper. Doggart makes this argument without citation to any supporting case law. Victim impact statements are relevant to the court's consideration of Section 3553(a) factors. See *United States* v. *Dean*, 626 F. App'x 586, 587 (6th Cir. 2015). And, contrary to Doggart's assertion, the district court was not obliged to give the letters from residents of Islamberg less weight because they were written in anticipation of his first sentencing, in 2017. Again, Doggart has not established any error, much less plain error.

*5. The District Court's Sentence Did Not Rely On An Unfounded Assumption About Lawful Militias*

Finally, Doggart argues (Br. 62) that the court improperly rejected his argument that Doggart's interest in forming a "lawful militia" meant that there was no imminent threat or danger from his actions, because he had not come close to

forming such a group and this meant that he was unlikely to take any action against Islamberg. The district court again rejected Doggart's attempt to downplay the seriousness of his offense, and noted that there is "no bureau of licensing for legal militias." (Transcript, R. 357, PageID# 6447). Doggart argues that the district court's statement was in error because some militia groups do register as non-profit organizations. (Br. 62).

But the district court did not err, plainly or otherwise, in rejecting Doggart's argument that his interest in forming a purportedly "legal" militia meant that his offense was not dangerous. (Transcript, R. 357, PageID# 6447-6449). That some militia groups may obtain a particular tax status is beside the point. The district court found that the actions that Doggart had already taken in soliciting others to destroy the Islamberg mosque were serious and dangerous, and that the public needed to be protected from potential future crimes by Doggart. Those conclusions are in no way undermined by Doggart's interest in forming a militia, "legal" or not.

*D. Doggart's 120-Month Sentence Is Substantively Reasonable*

Doggart argues that his sentence is substantively unreasonable and longer than necessary to serve sentencing purposes because: (1) the Application Note 4 upward departure overstates his culpability; (2) the court purportedly placed "near-excusive" reliance on his allocution from his original 2017 sentencing; and (3) the

sentence "creates unwarranted sentencing disparities with similarly situated offenders." (Br. 63-69). In reviewing a sentence for substantive reasonableness, the Court must determine, based on the totality of the circumstances, "whether the length of the sentence is greater than necessary to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a)." *United States* v. *Tristan-Madrigal*, 601 F.3d 629, 632-633 (6th Cir. 2010) (internal quotation marks omitted); see also *Gall*, 552 U.S. at 51. A sentence may be substantively unreasonable if the district court "chooses the sentence arbitrarily, grounds the sentence on impermissible factors, or unreasonably weighs a pertinent factor." *Brooks*, 628 F.3d at 796. None of Doggart's arguments establishes that his sentence was substantively unreasonable.

*1. The Application Note 4 Upward Departure Does Not Overstate Doggart's Culpability*

Doggart argues (Br. 63) that, because of the upward departure under Application Note 4, his sentence overstates his actual culpability and therefore is longer than necessary to serve sentencing purposes. But while the Application Note 4 departure did increase Doggart's effective Guidelines range, it did not increase Doggart's sentence, let alone unduly. The district court expressly stated that, even "without the departure, the Court would have imposed a[n] upward variance because of the [Section 3553(a)] factors," which it discussed at length, and would have sentenced Doggart to the same 120-month statutory maximum sentence. (Transcript, R. 357, PageID# 6457-6459).

Moreover, the 120-month sentence is not too severe and does not overstate his culpability given the facts established at trial. Doggart solicited others to commit atrocious crimes, and did so in a manner that could have resulted in others taking horrific, violent actions against a peaceful religious community. As the court recounted, it received dozens of letters describing the trauma that Doggart's offense inflicted on children and adults alike in shattering their sense of physical safety in their own homes and community. And the court determined that, notwithstanding Doggart's expression of remorse at resentencing, there continues to be a need to protect against possible future offenses by this defendant.

Where, as here, the district court "properly considered and weighed the competing reasons for leniency and for a harsh penalty," a district court does not abuse its discretion merely because the sentence imposed is "harsh." *United States* v. *Conatser*, 514 F.3d 508, 527 (6th Cir. 2008).

*2. The District Court Did Not Place Unreasonable Weight On Doggart's 2017 Allocution*

Doggart argues (Br. 65) that his sentence was substantively unreasonable because the court rests "too heavily" on his 2017 allocution at his original sentencing. This argument is rebutted by the record. Doggart received a 120-month sentence because that is what his effective Guidelines range was, as capped by the statutory maximum. The district court considered Doggart's 2017 allocution as one factor in assessing the Section 3553(a) factors and reasonably

concluded that there continues to be a need to "protect the public from future crimes of the defendant." (Transcript, R. 357, PageID# 6457-6458). That is a factual conclusion that the court was entitled to make in the exercise of its judgment and discretion, and given its familiarity with the record in this case. *Mayberry*, 540 F.3d at 519 ("The sentencing judge is in a superior position to find facts and judge their import under § 3553(a)."") (citation omitted).

*3. Doggart's Sentence Is Not Substantively Unreasonable Because Of Any Alleged Sentencing Disparity*

Finally, Doggart argues (Br. 66) that the district court failed to give sufficient weight to the last of the Section 3553(a) factors—the need to avoid unwarranted sentencing disparities. See 18 U.S.C. 3553(a)(6). But the district court's relative weighing of this factor did not result in an abuse of discretion. Instead, the district court correctly observed that offenses under Section 247(a)(1) could involve everything from "throwing out firecrackers to mass murder" and thus considering the range of sentences imposed for this offense does not "add[] too much to the calculus." (Transcript, R. 357, PageID# 6464). In the court's judgment, the significant and widespread victim impact here made clear that "this case stands on its own feet," such that the sentence could "not constitute an unwarranted disparity." (Transcript, R. 357, PageID# 6465).

Moreover, Doggart grossly mischaracterizes the nature of his offense, stating that "at bottom," his offense is "an inchoate property offense." (Br. 68). The court

appropriately rejected Doggart's attempt to minimize the harm caused by his solicitation offense. (Transcript, R. 357, PageID# 6465) (noting that the court is unaware of a similar case in which the offense caused an entire community "to have to look over their shoulder at all times, the fact that any automobile that comes into their neighborhood causes them anxiety and concern").

In sum, Doggart has not shown that his sentence is at odds with those arising in a similar context. Nor has he shown that his sentence was substantively unreasonable. "The issue is not whether some other, lesser sentence * * * would have been reasonable; rather, it is whether the * * * sentence * * * actually received was reasonable." *United States* v. *Hammonds*, 468 F. App'x 593, 599 (6th Cir. 2012). Here, the district court considered all of the evidence and arguments presented by the parties as well as the statutory factors set forth in 18 U.S.C. 3553(a), then concluded that a sentence of 120 months' imprisonment was sufficient, but not greater than necessary, to satisfy those factors. That determination should be affirmed.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure because it contains 12,615 words, excluding the table of contents, table of citations, statement regarding oral argument, 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 2019 in Times New Roman, 14-point font.

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Date: June 2, 2021

## CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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# ADDENDUM

# ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

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

| Record Entry Number | Description | PageID# Range |
|---|---|---|
| 14 | Plea Agreement | 45-53 |
| 29 | Memorandum and Order | 282-290 |
| 84 | Superseding Indictment | 437-439 |
| 230 | Memorandum | 3677-3685 |
| 232 | Second Revised PSR | 3689-3704 |
| 274 | Notice of Appeal | 4317-4318 |
| 285 | Transcript (First Day of Trial) | 4574-4694 |
| 286 | Transcript (Second Day of Trial) | 4695-4835 |
| 287 | Transcript (Third Day of Trial) | 4836-4927 |
| 288 | Transcript (Fourth Day of Trial) | 4948-5044 |
| 293 | Transcript (Sentencing) | 5348-5542 |
| 302 | Notice of Filing of Trial Exhibits | 5724-5874 |
| 318 | Memorandum and Order | 5974-5986 |
| 319 | Notice of Intent | 5987-5988 |
| 354 | Second Notice of Appeal | 6356 |
| 355 | Amended Judgment | 6357-6363 |
| 357 | Transcript (Resentencing) | 6367-6469 |