Nos. 15-3212, 15-3231, 15-3232, 15-3237, 15-3246, 15-3247, 15-3249, 15-3250, 15-3267, 15-3268, 15-3269, 15-3270, 15-3273, 15-3275, 15-3277

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LOVINA MILLER, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 15-3212, 15-3231, 15-3232, 15-3237, 15-3246, 15-3247, 15-3249, 15-3250, 15-3267, 15-3268, 15-3269, 15-3270, 15-3273, 15-3275, 15-3277

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LOVINA MILLER, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that this Court can resolve these issues without oral argument.

JURISDICTIONAL STATEMENT

This is a consolidated appeal in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. After guilty verdicts in a jury trial, the court entered final judgments against defendants on February 14-15, and 19, 2013.

(Judgments, R. 391-396, 404-413, Page ID# 4474-4503, 4516-4565).[1] Defendants appealed, and on August 27, 2014, this Court reversed in part and remanded. *United States* v. *Miller*, 767 F.3d 585 (6th Cir. 2014). On March 2, 2015, defendants were resentenced. (Tr., R. 732, Page ID# 9167-9251). Fifteen of the 16 defendants filed timely notices of appeal on March 9 and 11-18, 2015.[2] (Notices of Appeal, R. 668, 682, 684-685, 688, 692-698, 700, 703, 705, 707, Page ID# 9002, 9061-9062, 9064-9067, 9072-9073, 9077-9093, 9097-9098, 9104-9105, 9110-9111, 9113-9114). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

This brief responds to 15 separate briefs filed by the defendants-appellants. Seven of these briefs raise substantive issues. The eight other briefs incorporate arguments made by other defendants. Taken together, the defendants raise the following issues[3]:

---

[1] Citations to "R. __" refer to documents, by number, on the district court docket sheet. Citations to "Page ID# ___" refer to the page numbers in the consecutively paginated electronic record. Citations to "GX __" refer to government exhibits admitted at trial. Citations to "__ Br. __" refer to the named defendant's opening brief and page numbers in the brief.

[2] Freeman Burkholder did not file a notice of appeal. He was one of the eight defendants who had completed his or her sentence at the time of resentencing, and was resentenced to time served.

[3] Attachment A is a chart listing each defendant-appellant and those issues he or she raises on appeal, either directly or by incorporation.

1. Whether the district court abused its discretion in resentencing defendants rather than proceeding to retry defendants on the vacated counts first.

2. Whether the remaining obstruction-related counts on which defendants are convicted must be dismissed for lack of jurisdiction because 18 U.S.C. 249(a)(2), a provision of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, is purportedly unconstitutional.

3. Whether defendants remain convicted on Count 1 for conspiracy to obstruct justice even though this Court vacated defendants' convictions for violating 18 U.S.C. 249(a)(2).

4. Whether the evidence was sufficient to support defendants' convictions for conspiracy to obstruct justice.

5. Whether the district court abused its discretion in resentencing defendants as it did.

STATEMENT OF THE CASE

1. Procedural History

a. On March 28, 2012, the government filed a ten-count Superseding Indictment charging 16 defendants in connection with five religiously motivated assaults. (Indictment, R. 87, Page ID# 1184-1204).[4] The indictment alleged that

[4] The charges in the indictment are summarized in Attachments B and C. Attachment B is a list by *defendants*, indicating the counts under which each was

(continued…)

defendants, members of a community near Bergholz, Ohio, assaulted nine practitioners of the Amish religion because of the victims' religious practices. More specifically, the indictment alleged that, between September 2011 and March 2012, in a series of five separate attacks, defendants willfully caused bodily injury to the victims by restraining and assaulting them and forcibly cutting off their beards (and in some cases also their head hair), because of their religion, in violation of 18 U.S.C. 249(a)(2), a provision of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (Shepard-Byrd Act).[5] The indictment also alleged related counts of conspiracy, 18 U.S.C. 371; obstruction of justice, 18 U.S.C. 1519; and making false statements, 18 U.S.C. 1001. (Indictment, R. 87, Page ID# 1184-1204).

Count 1 charged all 16 defendants with conspiracy in violation of 18 U.S.C. 371. Count 1 alleged three distinct objects of the conspiracy: (1) to cause bodily

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(…continued)
indicted, the verdict as to each count, their original sentences, and their sentences after resentencing. Attachment C is a list by *counts charged*, indicating the defendants charged in each count, the verdict as to each charge, and other information relating to the charge. A more detailed summary of the procedural history of this case is contained in the Brief for the United States as Appellee, *United States* v. *Miller*, Nos. 13-3177 *et al.* (6th Cir. Feb. 28, 2014) (U.S. Br.).

[5] As relevant here, Section 249(a)(2) makes it a crime to "willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[] to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person."

injury to nine victims by assaulting them and forcibly removing their beards or head hair because of their religion, in violation of 18 U.S.C. 249(a)(2); (2) to obstruct justice, in violation of 18 U.S.C. 1519; and (3) to make materially false statements to federal law enforcement authorities, in violation of 18 U.S.C. 1001. Count 1 also alleged numerous overt acts in furtherance of the conspiracy. (Indictment, R. 87, Page ID# 1186-1196).

Counts 2 through 6 alleged violations of 18 U.S.C. 249(a)(2), and 18 U.S.C. 2; one count for each of the five religiously motivated attacks. These counts also alleged that defendants' conduct included kidnapping. (Indictment, R. 87, Page ID# 1197-1202).

Counts 7 through 9 alleged violations of 18 U.S.C. 1519, obstruction of justice, and 18 U.S.C. 2. Count 7 alleged that defendant Samuel Mullet, Sr., violated Section 1519 by "burning a bag which contained [Marty Miller's] head and beard hair and [Barbara Miller's] head hair and bonnet." (Indictment, R. 87, Page ID# 1202). Count 8 alleged that four defendants (Samuel Mullet, Sr., Levi Miller, Eli Miller, and Lester Mullet) violated Section 1519 by concealing "the Fuji disposable camera which was used * * * to memorialize the appearance of certain victims." (Indictment, R. 87, Page ID# 1202-1203). Count 9 alleged that Lester Miller violated Section 1519 by concealing "the 8" horse mane shears used

in certain of the beard and head hair cutting attacks." (Indictment, R. 87, Page ID# 1203).

Finally, Count 10 alleged that Samuel Mullet, Sr., violated 18 U.S.C. 1001 on November 22, 2011, by falsely "stating to investigating agents with the [FBI] that he had no knowledge that members of the Community were considering stopping at the [Hershbergers'] home * * * on October 4, 2011." (Indictment, R. 87, Page ID# 1204).

b. Defendants moved to dismiss the indictment, arguing that 18 U.S.C. 249(a)(2) is unconstitutional on its face because it exceeds Congress's Commerce Clause power, and as applied because defendants' conduct lacks a sufficient nexus to interstate commerce. (*E.g.*, Motion to Dismiss, R. 73, Page ID# 1129-1147; Motion to Dismiss, R. 79, Page ID# 1159-1169). The district court denied the motions. The court concluded that the indictment satisfied the "jurisdictional nexus" requirement in Section 249(a)(2) by alleging that defendants used motor vehicles to facilitate the assaults, used scissors or other objects that had traveled in interstate commerce to cut the victims' hair, and lured one victim to the place of assault by using the United States mail. (Opinion and Order, R. 145, Page ID# 1497; *United States* v. *Mullet*, 868 F. Supp. 2d 618, 623 (N.D. Ohio 2012)).

c. In September 2012, a jury found all 16 defendants guilty of conspiracy (Count 1). The jury also found each defendant guilty of one or more counts of

violating 18 U.S.C. 249(a)(2) in connection with four of the five religion-based attacks (Counts 2, 4-6). Samuel Mullet, Sr., Levi Miller, Eli Miller, and Lester Mullet were also convicted on Count 8 (obstruction of justice), and Samuel Mullet, Sr., was convicted on Count 10 (false statements). (Attachment B; Verdict Form, R. 230, Page ID# 2036-2133).

The special verdict form specifically provided that, for Count 1, if the jury found that the conspiracy was proven, it should indicate one or more "objects" of the conspiracy it unanimously found, which included: (1) willfully causing bodily injury to the victims because of religion; (2) knowingly and intentionally obstructing justice; and (3) making false official statements. The jury specifically found and indicated that there were *two* objects of the conspiracy – violating Section 249(a)(2) *and* obstructing justice in violation of Section 1519. For each guilty verdict on the Section 249(a)(2) charge, the jury found that the offense included kidnapping. (*E.g.*, Verdict Form, R. 230, Page ID# 2036-2037, 2056, 2059, 2061, 2063).

d. The court entered final judgments as to the defendants on February 14-15 and 19, 2013. (Judgments, R. 391-396, 404-413, Page ID# 4474-4503, 4516-4565). Defendants were sentenced according to five groups, based on the district judge's assessment of each individual defendant's conduct, background, and culpability, as follows:

Samuel Mullet, Sr.:	180 months' imprisonment
Lester S. Mullet, Johnny S. Mullet, Levi Miller, Eli M. Miller:	84 months' imprisonment
Danny S. Mullet, Emanuel Schrock, Lester Miller:	60 months' imprisonment
Raymond Miller, Linda Schrock:	24 months' imprisonment
Freeman Burkholder, Anna Miller, Lovina Miller, Kathryn Miller, Emma Miller, Elizabeth Miller:	12 months' and 1 day's imprisonment

Every defendant received significant downward variance below the applicable advisory Sentencing Guidelines range. See Attachment B.

e. Defendants appealed. On August 27, 2014, this Court reversed defendants' convictions (Counts 2, 4-6) for violating Section U.S.C. 249(a)(2). *United States* v. *Miller*, 767 F.3d 585 (6th Cir. 2014). The Court concluded that the jury instructions on the causation element of the offense – *i.e.*, the meaning of "because of" religion – were incorrect and the error was not harmless. The Court did not address other issues raised by defendants, and did not disturb defendants' convictions on Counts 1, 8, and 10.[6] The Court remanded the case for further proceedings.

[6] As this Court noted, none of the defendants appealed his conviction on Count 8 (obstruction of justice) (Samuel Mullet, Sr., Levi Miller, Eli Miller, Lester Mullet), and Samuel Mullet, Sr., did not appeal his conviction on Count 10 (false statements). *Miller*, 767 F.3d at 591.

The United States filed a motion for rehearing or rehearing en banc, which this Court denied. (Order, *United States* v. *Miller*, Nos. 13-3177 *et al.* (Nov. 20, 2014)). This Court also denied defendant Anna Miller's motion asking this Court to either clarify that its decision reversing her Section 249(a)(2) conviction also reversed her Count 1 conspiracy conviction, or grant panel rehearing to address this issue. (Order, *United States* v. *Miller*, No. 13-3183 (Sept. 24, 2014)).

f. After the mandate was issued, the district court scheduled a resentencing hearing for defendants' remaining convictions on Count 1 (all defendants), Count 8 (Samuel Mullet, Sr., Levi Miller, Eli Miller, and Lester Mullet), and Count 10 (Samuel Mullet, Sr.). (*E.g.*, Scheduling Order, R. 568, Page ID# 7962-7963). Before the hearing, several of the defendants filed motions challenging their convictions on these counts, or asserting that the case should be set for retrial, not resentencing.

Samuel Mullet, Sr., filed a motion to dismiss his indictment on Counts 1, 8, and 10, for the first time, for lack of jurisdiction. He argued that the Shepard-Byrd Act is unconstitutional, and therefore the district court lacked jurisdiction over the conspiracy, obstruction, and false statement counts. (Motion to Dismiss, R. 607, Page ID# 8571-8581).[7] The district court denied the motion, concluding that he

[7] This motion was joined by Lester Miller, Anna Miller, Levi Miller, Elizabeth Miller, and Emanuel Schrock. (Motions, R. 605, 613, 621-622, 624,

(continued…)

waived this argument by not raising it before trial or on direct appeal, and that it was untimely. (Opinion and Order, R. 639, Page ID# 8881-8887). The court also concluded that the argument failed because Section 249(a)(2) "is not unconstitutional and has never been held unconstitutional" and, even if the statute "is held to be unconstitutional at some future date, it would still be a crime for defendants to obstruct the federal investigation that was undertaken pursuant to this statute." (Opinion and Order, R. 639, Page ID# 8885-8887).

Levi Miller filed a motion requesting that the case be reset for retrial, not for resentencing, citing to language in this Court's opinion stating that, with respect to the Section 249(a)(2) counts, "the erroneous jury instructions require a new trial." (Motion to Conform Proceedings, R. 604, Page ID# 8552-8555). The district court denied the motion, stating that this Court "did not reverse the defendants' conviction for conspiracy to obstruct justice" and, because those convictions still stand, "the Court will proceed with re-sentencing." (Opinion and Order, R. 618, Page ID# 8656-8657).

Finally, Daniel Mullet filed a motion to dismiss his indictment on Count 1 (Motion to Dismiss, R. 625, Page ID# 8671-8676) and a motion to vacate Count 1

(…continued)
Page ID# 8556-8564, 8635-8638, 8662-8665, 8668-8670). Lovina Miller, Lester Mullet, Kathryn Miller, and Levi Miller filed motions to join all motions filed by co-defendants after the case was remanded to the district court. (Motions, R. 623, 627, 629, 635, Page ID# 8666-8667, 8686-8687, 8694, 8815-8816).

and terminate the pending resentencing (Motion to Vacate, R. 626, Page ID# 8677-8685). These motions were predicated on the argument that the reversal of the Section 249(a)(2) convictions necessarily vacated his conspiracy conviction because it is impossible to determine the basis for the conspiracy conviction. The district court denied both motions, stating that the "jury unanimously found all the defendants guilty of conspiring to commit hate crimes and to obstruct justice as asserted in Count 1, and expressly found that Daniel Mullet knowingly and voluntarily joined the conspiracy." (Opinion and Order, R. 642, Page ID# 8899). The court also found that "[a]ny objection Daniel Mullet raises * * * to his indictment or his conviction for conspiracy to obstruct justice has been waived. He did not raise this objection before or at the time of trial. He never objected to the indictment, the jury instructions or the verdict forms. And he did not raise these objections on appeal." (Opinion and Order, R. 642, Page ID# 8900-8901).[8]

g. On March 2, 2015, the district court held a resentencing hearing. (Tr., R. 732, Page ID# 9167-9251). Consistent with the recommendation of the United States, the eight defendants who had completed their sentences were resentenced to time served (Raymond Miller, Linda Schrock, Freeman Burkholder, Anna Miller,

[8] Linda Schrock and Daniel Mullet also filed motions to dismiss Count 1 (Motions to Dismiss, R. 606, 625, Page ID# 8565-8570, 8671-8676), which the court denied (unnumbered docket entry dated Feb. 23, 2015; Opinion and Order, R. 639, Page ID# 8887 n.4).

Elizabeth Miller, Emma Miller, Kathyrn Miller, and Lovina Miller). (United States Sentencing Memorandum, R. 603, Page ID# 8548; Amended Judgments, R. 672-678, 680, Page ID# 9018-9052, 9055-9059).

The other eight defendants were given reduced sentences (and sentences again well below the advisory Sentencing Guidelines ranges) as follows:

Samuel Mullet, Sr.:	129 months' imprisonment
Lester S. Mullet, Johnny S. Mullet, Levi Miller, Eli M. Miller:	60 months' imprisonment
Danny S. Mullet, Emanuel Schrock, Lester Miller:	43 months' imprisonment

See Attachment B. In resentencing the defendants, the trial court noted that although its original sentences still largely fell within the newly calculated guideline ranges and that defendants' relevant conduct was unchanged, it was appropriate to reduce the sentences in order to properly respect this Court's reversal of the hate crimes counts. On March 9-10, 2015, the court entered amended judgments for each defendant. (Amended Judgments, R. 663-667, 669-678, 680, Page ID# 8977-9001, 9003-9052, 9055-9059).

After resentencing, the United States promptly notified the district court that it would not retry the defendants on the Section 249(a)(2) counts and filed a motion to dismiss these counts (Counts 2, 4-6). (Notice to Court, R. 645, Page ID#

8940-8942; Motion to Dismiss, R. 728, Page ID# 9155-9159). The district court granted the motion. (Order, R. 729, Page ID# 9160-9161).

h. Fifteen of the 16 defendants filed timely notices of appeal. See p. 2, *supra*.

2. Statement Of The Facts

The facts of this case are set forth in the government's brief in the initial appeal in the case, and in this Court's decision in that appeal. See U.S. Br. 12-56; *Miller*, 767 F.3d at 589-591, 594-600. A short overview follows.

a. This case arises from defendants' convictions in connection with four of the five religiously-motivated, violent attacks that occurred over a two-month period against practitioners of the Amish religion. In these attacks, defendants either invaded the victims' homes, often at night, or lured the victims to their house, and then forcibly cut the victims' beards and head hair because of their religious practices. During some of the attacks, defendants also injured individuals who lived with the targeted victims. After the assaults, some of the defendants concealed a camera used to record their acts, and Samuel Mullet, Sr. (Mullet), made false statements to a federal investigator.

The defendants are members of a community in Bergholz, Ohio, a village in central eastern Ohio consisting of approximately 18 families. (Tr., R. 529, Page ID# 5575, 5582-5583, 5627-5628, 5702). They are all related by either blood or

marriage to Mullet, who in 2001 became the self-appointed Bishop and church leader of the Bergholz community. (Tr., R. 528, Page ID# 5415-5416; Tr., R. 529, Page ID# 5575-5581; Tr., R. 540, Page ID# 6788-6792, 6923, and exhibits addressed therein). As Bishop, Mullet excommunicated several families from Bergholz for not obeying or questioning church rules. (Tr., R. 541, Page ID# 7052-7053). After these excommunications were reversed by a committee of other bishops, Mullet and other defendants and members of the Bergholz community began discussing cutting the beards and hair of people who they believed were "Amish hypocrites." (Tr., R. 537, Page ID# 5980-5981, 6039; Tr., R. 539, Page ID# 6403; Tr., R. 540, Page ID# 6695-6697).

Five separate beard-cutting attacks ensued. See Attachment B (Counts 2-6). Although Mullet was not present at any of the attacks, he directed, assisted, encouraged, and oversaw the assaults committed by the other defendants, including providing directions to the home of the victims in one of the attacks. The assaults involved the use of horse shears, scissors, and battery operated hair clippers. (*E.g.*, Tr., R. 528, Page ID# 5276, 5457, 5488; Tr., R. 537, Page ID# 6004-6007). As a result of the assaults, many of the victims were left bleeding and bruised. (*E.g.*, Tr., R. 528, Page ID# 5286, 5454).

After their arrests, certain defendants gave statements to law enforcement authorities. Johnny Mullet, for example, admitted that he and others assaulted the

Hershbergers (the victims of the third assault) because of disagreements over excommunications, and that they had discussed doing so with other defendants that morning. (Tr., R. 538, Page ID# 6222-6232; Tr., R. 556-13, Page ID# 7900-7901 (written statements)). Also, some of the defendants placed recorded telephone calls to Mullet from the county jail discussing the assaults. (Tr., R. 538, Page ID# 6114-6116, 6165; Tr., R. 539, Page ID# 6432-6454, 6533). In one telephone call, after it was suggested that defendant Lester Mullet would be "raring to go again" once he was released from jail, Mullet stated: "[T]he men are ready to do it again, should I say [so]." (GX 16-9 (transcript), R. 556-9, Page ID# 7837; GX 15-5, 15-6 (audio recordings); Tr., R. 539, Page ID# 6438-6439).

b. Following the beard-cutting assaults, the defendants concealed evidence of their actions. Eli Miller had obtained a disposable camera to take pictures of some of the victims and record images of the beard and hair cuttings. (Tr., R. 529, Page ID# 5716-5717, 5724-5725; Tr., R. 537, Page ID# 5986; Tr., R. 539, Page ID# 6416-6417, 6425; Tr., R. 540, Page ID# 6656-6657). In the telephone calls taped while several of the defendants were in custody, Lester Mullet and Levi Miller agreed with Mullet to conceal the camera and the film inside it. (GX 16-6 (transcript), R. 556-9, Page ID# 7834; GX 15-4 (audio recording); Tr., R. 539, Page ID# 6436); see U.S. Br. 52-53.

Ultimately, Daniel Schrock retrieved the camera from Eli Miller's bedroom and gave it to Johnny Mast (one of Mullet's grandsons), telling Mast to either hide or dispose of it so that the FBI could not find it in the house. (Tr., R. 537, Page ID# 6013-6017, 6047-6049; Tr., R. 539, Page ID# 6429-6430, 6539). According to Daniel Schrock, it was no secret that Eli Miller wanted the camera hidden; Mast, in turn, understood that the FBI was interested in the camera and the pictures it had recorded. (Tr., R. 537, Page ID# 6016; Tr., R. 539, Page ID# 6539). Mast took the camera, put it in a bag, and buried it under leaves next to a tree in the woods on Mullet's property. (Tr., R. 539, Page ID# 6431; Tr., R. 540, Page ID# 6656-6657).

Subsequently, Mast gave the camera to the FBI. (Tr., R. 539, Page ID# 6430-6431; Tr., R. 540, Page ID# 6764; GX 5 (the camera)). Mullet admitted to the FBI that he knew of the camera's use in connection with the assaults. (Tr., R. 540, Page ID# 6754). The concealment of the camera formed the basis of the Count 8 obstruction of justice charge, and the images it recorded were used as evidence at the trial.

c. When the FBI agents interviewed Mullet on November 23, 2011, they asked him about the October 4, 2011, attacks on the Hershbergers and Myron Miller. (Tr., R. 540, Page ID# 6747, 6752-6753). Mullet lied, falsely stating that he had no prior knowledge that there was a plan to attack other Amish Bishops and practitioners on October 4, 2011. (Tr., R. 540, Page ID# 6752-6753, 6876-6877).

That statement was contradicted, *inter alia*, by the testimony of Barbara Yoder (one of Mullet's daughters) and Christ Mullet (one of Mullet's sons), and formed the basis of Count 10 (false statement). Barbara Yoder testified that Mullet spoke of the attacks before they occurred, and Christ Mullet testified that Mullet even gave his followers directions to the Hershberger home. (Tr., R. 529, Page ID# 5715; Tr., R. 540, Page ID# 6653-6654); see U.S. Br. 54.

SUMMARY OF THE ARGUMENT

After this Court vacated defendants' Section 249(a)(2) convictions, defendants were resentenced on their remaining convictions for conspiracy to obstruct justice and, for some of the defendants, obstruction of justice and making false statements. Eight defendants were resentenced to time served. The remaining defendants were resentenced to terms of imprisonment substantially below both their original sentences *and* the recalculated advisory Sentencing Guidelines ranges.

In this appeal, defendants challenge the district court's refusal to dismiss their remaining convictions, as well as their downwardly revised sentences. Several defendants also challenge the sufficiency of the evidence on the conspiracy to obstruct justice count. As this Court recognized in the first appeal, and as the defense conceded at oral argument, some of these arguments were not raised below or in the initial appeal, *United States* v. *Miller*, 767 F.3d 585, 591 (6th Cir. 2014)

("None of the defendants challenges their convictions for concealing evidence and lying to the FBI."); therefore, they are waived. None of the arguments has merit.

1. Levi Miller argues that the district court should have set the case for a new trial on the vacated Section 249(a)(2) counts, rather than resentence defendants on their remaining convictions first. This is a curious argument. The government has now dismissed the Section 249(a)(2) counts; presumably, Miller does not want this Court to somehow compel the government to retry them. In any event, his argument rests solely on the language in this Court's opinion stating that the erroneous Section 249(a)(2) jury instructions "require a new trial." The Court, however, was simply noting that defendants' other arguments directed at their hate crimes convictions need not be addressed because the government would first have to retry them on those counts and obtain convictions. That language did not obligate the district court to order that those counts be retried before resentencing. Accordingly, the district court did not abuse its discretion in denying Miller's motion.

2. Mullet argues that his remaining obstruction-related convictions must be vacated because he claims that 18 U.S.C. 249(a)(2) is unconstitutional and the United States lacks jurisdiction to investigate the violation of an unconstitutional statute. In so doing, he resurrects the argument that Section 249(a)(2) exceeds Congress's Commerce Clause power. This argument is waived because defendants

did not challenge their obstruction-related convictions in the first appeal. Mullet's attempt to get around this fact by characterizing the argument as jurisdictional fails because the government had the authority to investigate the attacks even if the federal hate crimes statute were later found to be unconstitutional. In any event, the premise of the argument fails. Section 249(a)(2) is not unconstitutional and has never been held to be unconstitutional. See U.S. Br. 64-101.

3. The district court correctly rejected defendants' argument that their convictions for conspiracy to obstruct justice (Count 1) must be vacated because this Court vacated their hate crimes convictions. Defendants were charged with a single conspiracy that had three objects. The special verdict form required the jury, first, to find whether they unanimously found that there was a conspiracy; second (assuming the jury found that there was a conspiracy), to specify the object(s) of the conspiracy; and, finally, to find whether each defendant joined the conspiracy. In these circumstances, a multi-object conspiracy conviction stands if the objects are charged conjunctively, and the evidence is sufficient with respect to any one of the objects of the conspiracy. That is the case here. Therefore, defendants' conviction for conspiracy *to obstruct justice* is not affected by this Court's vacating the Section 249(a)(2) convictions.

4. Anna Miller, Levi Miller, and Linda Schrock challenge the sufficiency of the evidence to support their convictions for conspiracy to obstruct justice. Anna

Miller and Levi Miller waived this argument because they did not raise it in the first appeal. Although they challenged the sufficiency of the evidence for their conspiracy convictions in the first appeal, their arguments were directed at their involvement in the hair and beard-cutting assaults in violation of Section 249(a)(2), not at obstructing justice. In any event, substantial evidence reflects that: (1) there was a common agreement among the defendants, under Mullet's leadership, to attack the victims and cut their beard and head-hair as punishment for defying Mullet and to conceal the evidence of the attacks; (2) Anna Miller and Levi Miller voluntarily joined this conspiracy with both of these objectives; and (3) some of their co-conspirators took steps to conceal evidence of the attacks by burning the hair and hiding the camera and photographs memorializing the attacks. Because an overt act by one member of the conspiracy in furtherance of an object of the conspiracy is attributable to all members of the conspiracy, Anna Miller and Levi Miller are equally culpable for this conduct. Further, the evidence shows that both Anna Miller and Levi Miller participated in the conspiracy to obstruct justice.

Linda Schrock makes a different sufficiency argument, asserting that the evidence was insufficient to establish that: (1) the scissors used in the attack on her parents traveled in interstate commerce, and (2) she caused bodily injury to her parents in the attack. These arguments are directed at her conviction of violating Section 249(a)(2) (Count 6), which this Court vacated. The fact that this Court

vacated the Section 249(a)(2) convictions, however, does not affect her conviction for conspiracy *to obstruct justice*.

5. Defendants make numerous arguments concerning their revised sentences. The two principal arguments are that the court: (1) inappropriately applied the kidnapping guideline in determining their base offense level for conspiracy to obstruct justice, and (2) arbitrarily used a "mathematical formula" of a 28% reduction to determine defendants' revised sentences. These arguments are not correct. First, the court correctly considered, as relevant conduct, each defendant's personal actions in connection with the beard and hair-cutting attacks, even though this Court vacated the hate crimes convictions. That conduct included kidnapping, as specifically found by the unanimous jury in the Section 249(a)(2) convictions, and as also specifically found by the district court by a preponderance of the evidence in resentencing defendants.

Second, the district court did not abuse its discretion in resentencing defendants to reduced sentences according to the same five-tier culpability groupings it used in originally sentencing them. The court carefully considered each defendant's appropriate sentence under the guidelines and the Section 3553(a) factors, and concluded that each still warranted substantial but reduced sentences that would reflect both the seriousness of their conduct and the fact that this Court vacated the Section 249(a)(2) convictions. And in determining the revised

sentences, the court emphasized that in originally sentencing defendants it was "very careful" to group and rank the defendants according to individual culpability, and that remained an "important" goal in resentencing. The only way to do that was to reduce each defendant's sentence by the same proportion. In the unique context of this multi-defendant case, which rests on multiple acts by various combinations of defendants and coordinated efforts to obstruct justice, all under the control and authority of a central ring leader, the district court did not abuse its discretion in again crafting sentencing groups for comparatively situated defendants based on its firsthand analysis of voluminous evidence.

Finally, defendants' other sentencing arguments – concerning enhancements for vulnerable victims and leadership role, the requirements of Section 3553(a) and Federal Rule of Criminal Procedure 32, and sentencing disparities (both compared to others convicted of conspiracy to obstruct justice, and compared to their co-defendants) – are also without merit.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RESENTENCING DEFENDANTS RATHER THAN FIRST PROCEEDING TO RETRY THEM ON THE VACATED COUNTS

A. Standard Of Review

The district court's denial of Levi Miller's motion to retry defendants on the vacated counts, rather than resentence them on the remaining counts, is reviewed for abuse of discretion. See, *e.g.*, *United States* v. *Obi*, 542 F.3d 148, 155 (6th Cir. 2008).

B. The District Court Did Not Abuse Its Discretion By Resentencing Defendants

After this Court vacated defendants' Section 249(a)(2) convictions, and remanded the case for further proceedings, the district court scheduled a resentencing hearing. Subsequently, Levi Miller filed a motion requesting that the case be reset for retrial, not resentencing. (Motion to Conform Proceedings, R. 604, Page ID# 8552-8555). He relied upon language in this Court's opinion stating that "the erroneous jury instructions require a new trial." *United States* v. *Miller*, 767 F.3d 585, 602 (6th Cir. 2014). That language related only to the Section 249(a)(2) counts, the only counts as to which this Court held the instructions to be erroneous. The district court denied the motion, stating that this Court "did not reverse the defendants' conviction for conspiracy to obstruct justice" and, because

those convictions still stand, "the Court will proceed with the re-sentencing." (Opinion and Order, R. 618, Page ID# 8656-8657). On March 2, 2015, the district court held the resentencing hearing. (Tr., R. 732, Page ID# 9167-9251).

Levi Miller now makes this argument in this Court. Levi Miller Br. 9-11. He does not explain why it would have been to his benefit first to have a new trial on the Section 249(a)(2) counts instead of resentencing on the remaining counts, or why he *now* seeks retrial on counts that the court has, on the government's motion, dismissed. (Order, R. 729, Page ID# 9160-9161). Indeed, the possibility of reinstating the Section 249(a)(2) counts can only hurt his cause. In any event, he asserts that the court was somehow required to retry the vacated counts because this Court stated in its opinion that the erroneous Section 249(a)(2) jury instructions "require a new trial." Levi Miller Br. 10. Miller, however, misunderstands this language by ignoring its context. This Court was noting the other arguments defendants raised in challenging their hate crimes convictions, and correctly stated that it need not address them unless the government retried those counts and obtained convictions. That language did not obligate the district court to order that those counts be retried – a matter, in any event, up to the government's, not the court's, discretion. In short, because defendants remained

convicted on other counts, the district court did not abuse its discretion in resentencing them on those counts before any retrial.[9]

II

DEFENDANTS' ARGUMENT THAT 18 U.S.C. 249(a)(2) IS UNCONSTITUTIONAL, AND THEREFORE COUNTS 1, 8, AND 10 MUST BE DISMISSED FOR LACK OF JURISDICTION, IS BASELESS

A. Standard Of Review

Because Mullet did not challenge his convictions for conspiracy to obstruct justice, obstruction of justice, and making false statements in his initial appeal, he cannot do so now. See, *e.g.*, *United States* v. *Adesida*, 129 F.3d 846, 850 (6th Cir. 1997) ("[a] party who could have sought review of an issue or a ruling during a prior appeal is deemed to have waived the right to challenge that decision thereafter"); *United States* v. *Procter*, 215 F. App'x 409, 411 (6th Cir. 2007) (defendant waived appellate review of those issues he could have raised in his first appeal); *United States* v. *Randolph*, 47 F. App'x 729, 730 (6th Cir. 2002) (same); see generally *United States* v. *Traxler*, 517 F. App'x 472, 474 (6th Cir. 2013) (same; this waiver doctrine exists to discourage "perpetual litigation" and promote finality in criminal proceedings) (citation omitted). If this issue is properly before

[9] This Court's Mandate reversed defendants' hate crimes convictions and "remand[ed] for further proceedings" (Mandate, R. 564, Page ID# 7951), and therefore was not a "limited remand" creating "a narrow framework within which the district court must operate." *Obi*, 542 F.3d at 154.

this Court, whether the district court had jurisdiction over Counts 1, 8, and 10, and the constitutionality of 18 U.S.C 249 (a)(2), are questions of law subject to *de novo* review. See, *e.g.*, *United States* v. *Rose*, 522 F.3d 710, 716 (6th Cir. 2008).

B. Even If This Argument Has Not Been Waived, Defendants' Convictions On Counts 1, 8, And 10 Are Not Dependent On The Constitutionality Of Section 249(a)(2), Which, In Any Event, Is Constitutional On Its Face And As Applied

Mullet argues that Section 249(a)(2) is unconstitutional because it exceeds Congress's power under the Commerce Clause, and therefore he cannot be convicted of conspiracy to obstruct justice (Count 1), obstructing justice (Count 8), or making false statements (Count 10). See, *e.g.*, Mullet Br. 15-25. The crux of this argument is that the United States lacks jurisdiction to investigate the violation of a statute that a court later finds is unconstitutional. It also assumes that there was no other lawful basis to investigate the defendants' actions. This argument fails on every level.

1. This Argument Is Waived

After this case was remanded to the district court, defendants moved pursuant to Federal Rule of Criminal Procedure 12(b)(2) to dismiss Counts 1, 8, and 10 for lack of jurisdiction. (Motion to Dismiss, R. 607, Page ID# 8571-8581). This motion marked the first time during the more than three-year pendency of this case that defendants raised any legal challenges to the obstruction-related charges; indeed, Mullet's counsel conceded at oral argument in the first appeal that he was

not challenging his obstruction conviction. Accordingly, the district court correctly concluded that the argument was waived because it was not raised before trial or on direct appeal. See, *e.g.*, *Adesida*, 129 F.3d at 849-850; *Traxler*, 517 F. App'x at 474; *Procter*, 215 F. App'x at 411; *Randolph*, 47 F. App'x at 730. Therefore, this Court should not address this issue.

Mullet attempts to get around the waiver issue by characterizing the challenge as jurisdictional, *i.e.*, as a challenge to the district court's subject matter jurisdiction. See Mullet Br. 16. But it is not. As discussed below, the government had the authority to investigate the beard and hair-cutting attacks as federal hate crimes violating 18 U.S.C. 249(a)(2), regardless whether the hate crimes statute is later challenged as unconstitutional, or even found to be unconstitutional. And if during that investigation, or an investigation for false statements or obstruction of justice, a defendant lies to the government, or obstructs the investigation by concealing evidence, the district court has jurisdiction over a prosecution under Sections 1001 and 1519.

2. Section 249(a)(2) Is A Valid Exercise Of Congress's Power Under The Commerce Clause On Its Face And As Applied

Even if defendants' challenge to Counts 1, 8, and 10 has not been waived, the premise of the argument fails. Section 249(a)(2) is not unconstitutional, and has never been held to be unconstitutional. We addressed this issue at length in our brief in the first appeal in this case, and incorporate those arguments here. See

U.S. Br. 64-101. The district court also correctly rejected this argument. (Opinion and Order, R. 639, Page ID# 8885 (also citing other cases)). In short, a facial challenge to the statute is foreclosed by the statute's jurisdictional elements, which ensure on a case-by-case basis that the defendant's conduct has a sufficient connection to interstate commerce. With respect to an as-applied challenge, the jurisdictional elements are met in a number of ways, including that, in connection with an assault, the defendants used a weapon that traveled in interstate commerce; the defendants used the mail to facilitate an assault; or the defendants or victims traveled using an instrumentality of interstate commerce (a motor vehicle). Because Congress has broad power to regulate instrumentalities of interstate commerce and things in interstate commerce, Section 249(a)(2) is constitutional as applied to each count in this case.

3. Defendants' Convictions For Conspiracy To Obstruct Justice, Obstruction Of Justice, And Making False Statements Are Not Dependant On The Constitutionality Of Section 249(a)(2)

Even if Section 249(a)(2) were to be held unconstitutional at some future date, defendants could be still be prosecuted for, and convicted of, obstruction of justice[10] and making false statements[11] in connection with the federal investigation

[10] As relevant here, 18 U.S.C. 1519 (obstruction of justice) makes it a crime to conceal or destroy evidence "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any

(continued…)

of possible violations of that statute. Mullet's argument to the contrary – that the phrase "any matter within the jurisdiction" in Sections 1519 and 1001 must be narrowly read to nullify convictions under these statutes if the statute driving the investigation is later found to unconstitutional – both defies common sense and is flatly inconsistent with Supreme Court precedent. See Mullet Br. 25.

In *Bryson* v. *United States*, 396 U.S. 64 (1969), the Supreme Court addressed, and rejected, a similar argument in the context of Section 1001. In that case, the defendant sought to vacate his conviction for submitting a false affidavit required by the National Labor Relations Act (NLRA). He argued that because the statutory provision had been found to be unconstitutional, his conviction for making a false statement pursuant to the provision could not stand. The Court rejected that argument, stating that the "governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit." *Id*. at 68. The Court explained that "[o]ne who elects such a course * * * may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is

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(…continued)
department or agency of the United States * * * or [in] contemplation of any such matter."

[11] As relevant here, 18 U.S.C. 1001 (false statements) makes it a crime to make a false statement in "any matter within the jurisdiction of the executive * * * branch of the Government."

unconstitutional. This is a prosecution directed at petitioner's fraud. It is not an action to enforce the statute claimed to be unconstitutional." *Ibid.* (citation omitted). The Court therefore held that "the question of whether [the NLRA provision] was constitutional or not is legally irrelevant to the validity of petitioner's conviction under § 1001, the general criminal provision punishing the making of fraudulent statements to the government." *Ibid.*

The Court in *Bryson* also rejected the argument that a defendant could not be convicted for making false statements pursuant to a statute later found to be unconstitutional because Section 1001 requires the statement to have been made in a matter "within the jurisdiction * * * of the United States." The Court stated that "[b]ecause there is a valid legislative interest in protecting the integrity of official inquiries, * * * the term 'jurisdiction' should not be given a narrow or technical meaning. * * * A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001." *Bryson*, 396 U.S. at 70-71 (footnote, citations, and internal quotation marks omitted); see also *United States* v. *Knox*, 396 U.S. 77, 79 (1969) (explaining that in *Bryson* the Court held that "one who furnishes false information to the Government * * * cannot defend against prosecution for his fraud by challenging the validity of the requirement itself"); *Dennis* v. *United States*, 384 U.S. 855 (1966).

Bryson both makes good sense and settles this issue. A defendant challenging his conviction for making a false statement cannot excuse his conduct by arguing that the underlying statute is unconstitutional. If the defendant believes that he or she is being targeted for investigation under an unconstitutional statute, the proper course it to challenge the law itself, not to conceal evidence and make false statements to federal investigators. See *Bryson*, 396 U.S. at 72 ("Our legal system provides methods for challenging the Government's right to ask questions – lying is not one of them."); *Rodriguez* v. *Seamans*, 463 F.2d 837, 841 (D.C. Cir. 1972) (party cannot raise the constitutionality of the statute as a defense to charges of making false statements on federal form; his constitutional attack could have been founded in a refusal to answer the questions presented). As the district court correctly noted, any other conclusion "would defeat the purpose of federal laws prohibiting obstruction, which is to ensure the proper administration of justice." (Opinion and Order, R. 639, Page ID# 8885-8886); see also *Dennis*, 384 U.S. at 866 ("There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law they now seek to challenge."); cf. *United States* v. *Ronda*, 455 F.3d 1273, 1286-1287 (11th Cir. 2006) (federal jurisdiction under 18 U.S.C. 1512(b)(3) is based on "federal interest of protecting the integrity of *potential* federal investigations by ensuring that transfers of

information to federal law enforcement officers and judges relating to the *possible* commission of federal offenses be truthful and unimpeded") (citation omitted)).[12]

Mullet attempts to distinguish *Bryson* by arguing that that case involved a First Amendment challenge to the underlying statute and, here, the constitutional challenge is to the power of Congress to enact a statute in the first place. Mullet Br. 24-25. But that argument reads *Bryson*, and its underlying principles, far too narrowly. Again, statutes like Sections 1001 and 1519 protect the fair administration of justice, and if a defendant is concerned about the lawfulness of a federal investigation, he must challenge the underlying law itself, not lie to federal investigators or conceal evidence.

Mullet also cites cases where a prosecution for violating Section 1001 or Section 1519 fails because the government was investigating a matter outside the scope of a potential violation of federal law. See Mullet Br. 23-24. But these cases, rather than undermining the validity of defendants' convictions here, simply confirm the threshold question – was the government investigating a matter that may violate federal law? If so, Sections 1001 and 1519 apply regardless whether the underlying federal statute is later challenged as, or found to be, unconstitutional. Cf. *United States* v. *Ford*, 639 F.3d 718, 721 (6th Cir. 2011)

[12] Also, 18 U.S.C. 249(a)(2) is not the only federal hate crimes statute that may have applied in this case. See 18 U.S.C. 245 and 247.

(reversing Section 1001 conviction because defendant's failure to disclose financial interests concerned obligations "owed only to state entities outside of federal jurisdiction"); *United States* v. *Craig*, 3 F. Supp. 3d 756 (E.D. Ark. 2014) (vacating Section 1519 conviction because "the statute does not criminalize the act of falsifying a document if, at the time the document [was] falsified, it has no relation to any then-foreseeable federal matter"). In sum, the district court correctly denied Mullet's motion to dismiss his remaining convictions.

III

THE REVERSAL OF DEFENDANTS' HATE CRIMES CONVICTIONS DOES NOT AFFECT THEIR CONVICTIONS FOR CONSPIRACY TO OBSTRUCT JUSTICE

A. Standard Of Review

Defendants argue that the reversal of defendants' convictions for violating 18 U.S.C. 249(a)(2) necessarily invalidates defendants' convictions for conspiracy to obstruct justice. That issue is a legal question subject to *de novo* review. See generally *United States* v. *Kushmaul*, 147 F.3d 498, 500 (6th Cir. 1998).

B. All Defendants Remain Convicted Of Count 1, Conspiracy To Obstruct Justice In Violation Of 18 U.S.C. 1519

1. Background

All defendants were charged with conspiracy in violation of 18 U.S.C. 371 (Count 1) and at least one count of violating Section 249(a)(2). Count 1 alleged three distinct objects of the conspiracy: (1) violation of Section 249(a)(2); (2)

obstruction of justice, in violation of 18 U.S.C. 1519; and (3) making false official statements, in violation of 18 U.S.C. 1001. (Indictment, R. 87, Page ID# 1186-1196). The special verdict form for Count 1 specifically provided that if the jury found that the conspiracy was proven, it should indicate one or more objects of the conspiracy, which, mirroring the indictment, included: (1) willfully causing bodily injury to the victims because of religion; (2) knowingly and intentionally obstructing justice; and (3) making false official statements. (Verdict Form, R. 230, Page ID# 2036-2037).

The jury specifically and unanimously found that there were *two* objects of the conspiracy – violating Section 249(a)(2) *and* obstructing justice in violation of Section 1519. (Verdict Form, R. 230, Page ID# 2036-2037). The jury also specifically found that each of the 16 defendants knowingly and voluntarily joined the conspiracy. (Verdict Form, R. 230, Page ID# 2038-2053).

On August 27, 2014, this Court vacated defendants' convictions on the Section 249(a)(2) counts, concluding that the jury instruction on the meaning of "because of" in Section 249(a)(2) was incorrect, and that the error was not harmless. The Court did not disturb defendants' convictions on Count 1 (conspiracy), or the convictions of some of the defendants for obstruction of justice and making false official statements, correctly stating that "[n]one of the

defendants challenges [his] conviction[] for concealing evidence and lying to the FBI." *Miller*, 767 F.3d at 591.

2. All Defendants Remain Convicted Of Conspiracy To Obstruct Justice

Defendants argue that this Court's reversal of their Section 249(a)(2) convictions necessarily vacated their convictions for conspiracy under Count 1. See, *e.g.*, Anna Miller Br. 12-14. The crux of their argument is that the conspiracy convictions cannot stand because the jury was not asked to identify, and therefore did not identify, which defendants conspired to commit which of the objects of the conspiracy. This is not accurate, and the district court twice correctly rejected this argument; this Court should, too.

a. Defendants are often charged with a single conspiracy that has two or more objects. Indeed, "[i]t is well-established that a single conspiracy may have multiple objectives, including the violation of several criminal laws." *United States* v. *LaPointe*, 690 F.3d 434, 441 (6th Cir. 2012); see also *United States* v. *Collins*, 78 F.3d 1021, 1037 (6th Cir. 1996) (same); *United States* v. *Broce*, 488 U.S. 563, 570-571 (1989) ("A single agreement to commit several crimes constitutes one conspiracy."). In these circumstances, a special verdict form is encouraged so that the jury can indicate which object(s) of the conspiracy were proven, and which defendants joined the conspiracy. See, *e.g.*, *United States* v. *Neuhausser*, 241 F.3d 460, 471 n.8 (6th Cir. 2001) (encouraging use of special

verdict forms in cases involving multi-object conspiracies so that the resulting verdict is susceptible of only one interpretation). Where a special verdict form lists multiple objects of the conspiracy, a finding of not guilty as to one object of the conspiracy does not affect a conviction on the others. See, *e.g.*, *United States* v. *Corrales-Quintero*, 171 F. App'x 33, 34-35 (9th Cir. 2006) (noting that special verdict form presented one conspiracy with two objectives, and "acquittal of one objective does not affect conviction on the other objective"); *United States* v. *Nelson*, 321 F. App'x 904, 907 (11th Cir. 2009) (special verdict form used; evidence must only be sufficient to sustain a conviction on any one of the charged objects); *United States* v. *Coriaty*, 300 F.3d 244, 250 (2d Cir. 2002) (government need only prove agreement on one of the objects of the conspiracy charged in the indictment).

That was the case here. The special verdict form first required the jury to indicate whether a conspiracy was proven with one or more of the three listed objects. (Verdict Form, R. 230, Page ID# 2036-2037). The jury found that a conspiracy with two objects was proven – violating Section 249(a)(2) and obstruction of justice. Importantly, at the same time, the jury did not find the conspiracy involved false statements to the FBI. The jury was then asked to indicate, *for each defendant*, whether the defendant knowingly and voluntarily joined "that conspiracy." (*E.g.*, Verdict Form, R. 230, Page ID# 2038-2053).

"[T]hat conspiracy" refers to the conspiracy found by the jury which, again, included conspiracy to commit a hate crime *and* conspiracy to obstruct justice. Therefore, the jury found that each defendant joined a conspiracy with two objects, and even if one of the objects is disallowed, each defendant is still guilty of joining a conspiracy to commit the other, unchallenged, object of the conspiracy. *Corrales-Quintero*, 171 F. App'x at 34-35.

Moreover, contrary to defendants' suggestion (Anna Miller Br. 13-14), the court correctly charged the jury concerning a conspiracy to commit one or more of three separate objects. The court first instructed that the jury must find that there was an agreement between two or more of the defendants to commit one of the three listed offenses. (Jury Instructions, R. 542, Page ID# 7243). The court explained that the government "does not have to prove that the Defendants agreed to commit each of these crimes, but you must unanimously agree that the Government has proved an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge." (Jury Instructions, R. 542, Page ID# 7245). The court further instructed that "[i]n order to find a Defendant guilty of Count 1, you need only unanimously find that he or she entered into an agreement to bring about a religiously-motivated assault, or that he or she entered into an agreement to obstruct justice, or that he or she entered into an agreement to make false statements to the FBI." (Jury Instructions, R. 542, Page ID# 7248).

Finally, the court instructed the jury that Count 1 "accuses the Defendants of committing the crime of conspiracy in more than one possible way. * * * The Government does not have to prove all three objects for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these offenses is enough. However, in order to return a guilty verdict, all 12 of you must unanimously agree upon which one or more of the three offenses was the object of the conspiracy and indicate such finding on the appropriate verdict form. If you cannot agree on at least one of these offenses in that manner, you must find the Defendant not guilty." (Jury Instructions, R. 542, Page ID# 7249). Therefore, the court's instructions required the jury to unanimously agree with respect to *each* of the objects of the conspiracy alleged in the indictment, and with respect to *each* individual defendant.

The validity of conspiracy convictions in multi-object cases often arises where a special verdict form is *not* used, but these cases prove our point. In *United States* v. *Palazzolo*, 71 F.3d 1233 (6th Cir. 1995), for example, defendants were charged with conspiracy to commit three offenses. The jury was instructed that it was sufficient for the government to prove that defendants were involved in a conspiracy to commit "any one or more" of three listed offenses. *Id.* at 1234-1235. The jury found defendants guilty of conspiracy, but the district court granted a motion for new trial on one of the substantive offenses that was an object of the

conspiracy because of an improper jury instruction. *Ibid.* On appeal, this Court reversed the conspiracy conviction. *Id.* at 1238. The Court stated that a "one-is-enough" conspiracy charge "makes it impossible to know if the jury found an agreement for the commission of all, some or only one of the target crimes," and "nullifies the argument that the jury 'necessarily' based its verdict on a finding that the defendants conspired to commit one of the offenses properly defined in the instructions." *Id.* at 1237. See also *United States* v. *Manarite*, 44 F.3d 1407, 1413-1414 (9th Cir. 1995) (reversing conspiracy conviction where indictment charged multiple objects, one of the objects was invalidated, and the general verdict form gave no indication of which object or objects formed the basis of the conspiracy conviction). But there *was* a special verdict form here.

b. There is no basis for defendants' argument that the jury was given an impermissible "all-or-nothing choice," or that the jury was not asked to determine "which defendant intended which object." Anna Miller Br. 10, 13. That argument misunderstands how conspiracies are charged and proven. It also ignores that the jury did not find the third object of the conspiracy—false statements. Again, defendants were charged with one conspiracy with multiple objects. It was not "impossible to tell" the objects of the conspiracy of which a defendant was convicted (see Anna Miller Br. 14) because the verdict form makes clear that each defendant knowingly joined a conspiracy with two objects (of the three objects

charged). And as the cases cited above make clear, a multi-object conspiracy conviction stands if the objects are charged conjunctively and the evidence is sufficient with respect to any one of the objects of the conspiracy. See *Palazzolo*, 71 F.3d at 1237 ("If we could be certain that the jurors relied on the conjunctive version of the instructions, * * * the jury would have found the requisite agreement as to all the charged objectives in convicting the defendants of conspiracy, necessarily including the two valid charges."). In short, there is one conspiracy, and once the jury finds the existence of the conspiracy and the object(s) of the conspiracy, the only question is whether the defendant joined *that* conspiracy.[13]

c. The district court correctly reached the same conclusion. First, in denying Levi Miller's motion to retry the defendants rather than resentence them, the court concluded that defendants' "conviction[s] for conspiracy to obstruct justice still stands." (Opinion and Order, R. 618, Page ID# 8657). The court noted that the "jury found, for each defendant, that there were <u>two</u> objects of the

[13] The cases cited by Anna Miller are inapposite. See Anna Miller Br. 14. *Stromberg* v. *California*, 283 U.S. 359, 367-368 (1931), and *Street* v. *New York*, 394 U.S. 576, 588 (1969), do not involve a conspiracy charge. Rather, in these cases, the defendant was charged with desecrating or unlawfully displaying the flag in several ways, some of which involved speech and therefore could not be the basis for a conviction. In *Yates* v. *United States*, 354 U.S. 298, 312 (1957), the Court found that the jury instructions on conspiracy were insufficiently clear to determine whether the verdict rested on the valid or invalid overt act.

conspiracy – violation of Section 249(a)(2) and obstructing justice in violation of Section 1519." (Opinion and Order, R. 618, Page ID# 8656). The court then explained that "[h]ad the jury found that Count One encompassed only a conspiracy to commit hate-crimes, Count One would have been reversed by implication as well. However, the jury found the conspiracy encompassed obstruction of justice, which was not even challenged on appeal, let alone addressed in the Sixth Circuit's decision." (Opinion and Order, R. 618, Page ID# 8656).

The district court again rejected this argument in denying defendant Daniel Mullet's motions to dismiss or vacate Count 1. The court stated that Mullet "misrepresents the record" in arguing that it is "impossible to tell which ground the jury selected" in finding defendants guilty of conspiracy. (Opinion and Order, R. 642, Page ID# 8899) (citation omitted). The court explained that the "jury unanimously found all the defendants guilty of conspiring to commit hate crimes and to obstruct justice as asserted in Count 1, and expressly found that Daniel Mullet knowingly and voluntarily joined the conspiracy. * * * The fact that the Sixth Circuit reversed the hate-crime[s] convictions has no impact whatsoever on the conspiracy to obstruct justice charge, and no one – let alone Daniel Mullet – challenged that charge on appeal." (Opinion and Order, R. 642, Page ID# 8899).

IV

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANTS' CONVICTIONS FOR CONSPIRACY TO OBSTRUCT JUSTICE

A. Standard Of Review

Anna Miller, Levi Miller, and Linda Schrock argue that the evidence is insufficient to support their convictions on Count 1 for conspiracy to obstruct justice. Because Anna Miller and Levi Miller did not challenge the sufficiency of the evidence to support their convictions for conspiracy to obstruct justice in their first appeal, this issue is waived. See p. 25, *supra* (citing cases). The merits of a sufficiency of the evidence argument are reviewed to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). Defendants claiming insufficiency have a "very heavy burden." *United States* v. *Graham*, 622 F.3d 445, 448 (6th Cir. 2010) (citation omitted).

B. Defendants' Sufficiency Of The Evidence Arguments Are Without Merit

1. Anna Miller

Anna Miller argues that there was insufficient evidence to support her conviction for conspiracy to obstruct justice because the evidence establishes only her presence at the beard and hair-cutting attack on her in-laws, Barbara and

Marty Miller, and does not support the conclusion that she took "any overt action in furtherance of a conspiracy to destroy the bag of hair." Anna Miller Br. 15-18.

First, this argument is waived because she did not raise it in her first appeal. Although Anna Miller challenged the sufficiency of the evidence for her conspiracy conviction, her arguments were directed only at her involvement in the hair and beard-cutting assaults in violation of Section 249(a)(2), not at obstructing justice. See U.S. Br. 154-155. Accordingly, this Court should not address this issue.

a. In any event, the evidence was sufficient to sustain her conviction. The essence of a conspiracy is an agreement between two or more persons to commit a crime. *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975). To establish a violation of Section 371, the government must prove: (1) the existence of an agreement to violate the law; (2) that the defendant willfully became a member of the conspiracy; (3) that one of the co-conspirators committed at least one overt act in furtherance of the conspiracy; and (4) that the overt act was knowingly done in furtherance of some object or purpose of the conspiracy. See, *e.g.*, *United States* v. *Kraig*, 99 F.3d 1361, 1368 (6th Cir. 1996). Proof of a formal agreement is unnecessary; a "simple understanding between the parties will suffice." *United States* v. *Beverly*, 369 F.3d 516, 532 (6th Cir. 2004); see also *United States* v.

Pugh, 404 F. App'x 21, 24 (6th Cir. 2010) (a tacit agreement among the parties is sufficient, and may be inferred from circumstantial evidence).

The government must prove only that some member of the conspiracy committed an overt act charged in the indictment. As this Court has explained, it was not necessary for the government to prove that defendant "committed one of the charged overt acts because even when proof on an overt act is required – as is the case for conviction under 18 U.S.C. 371 – that burden is satisfied by proof that *at least one* of the alleged overt acts was committed by *any one* of the coconspirators." *United States* v. *Conatser*, 514 F.3d 508, 519 (6th Cir. 2008); see also *United States* v. *Younes*, 194 F. App'x 302, 309 (6th Cir. 2006) (same); *Webb* v. *United States*, 789 F.3d 647, 671 (6th Cir. 2015) (rejecting argument that overt acts were not attributable to particular individuals; "the overt-act element requires only that at least one of the alleged conspirators committed on overt act * * * in furtherance of the conspiracy"). And once a conspiracy is established, a particular defendant's connection to the conspiracy need only be slight. *United States* v. *Warman*, 578 F.3d 320, 332-333 (6th Cir. 2009). Every member of the conspiracy need not be an active participant in every phase of the conspiracy. *Beverly*, 369 F.3d at 532.

b. The offenses for which defendants were charged stem from their collective actions, under the leadership of Mullet, the self-appointed Bishop and

leader of the Bergholz community, to punish various family members and others for disobeying Mullet and failing to lead a "proper" Amish life. These so-called "Amish hypocrites" included Barbara and Marty Miller, the victims of the first assault and Anna Miller's in-laws. See U.S. Brief 19-24.

Barbara Miller is Mullet's sister. Several of her children, including her son Alan Miller and his wife Anna Miller, moved to Bergholz after Mullet moved there. Barbara came to believe that Bergholz was a "cult," and the Millers and their children became estranged. Eventually, Barbara and Marty Miller decided to move to Bergholz to try to reconcile with their children. But a few months later they decided to leave because they did not agree with Mullet's religious views and his authority. When their children learned that they were leaving, one of them told Barbara that she was "going straight to hell." (Tr., R. 528, Page ID# 5429, 5460). As a result of these conflicts, and the general discussions in the Bergholz community about cutting the hair of Amish hypocrites as punishment, Millers' children and their spouses, including Anna Miller, discussed cutting their parents' hair. They also discussed it with Mullet, who agreed they should do so and that it might make the Millers see where they had gone wrong spiritually. U.S. Br. 27.

This attack occurred on September 6, 2011. Anna Miller has conceded that she participated in a conspiracy to cut Barbara Miller's hair, and the evidence makes clear that she personally participated in cutting Barbara's hair. See U.S.

Brief 30, 154. She was also one of the defendants who collected the beard and hair clippings, along with Barbara's prayer cap that Anna mutilated, and put them in a bag to take to Mullet. After the assaults, Anna and the other participants in the attack went directly to Mullet's house, told him what they had done, and presented him with the bag of hair. See generally U.S. 27-32. Anna Miller was present when Mullet directed that the bag be burned. (Tr., R. 540, Page ID# 6649, 6700). She was also part of the group discussions relating to concealing the camera and film from authorities. (*E.g.*, Tr., R. 539, Page ID# 6533).[14]

c. Based on the evidence, a reasonable jury, viewing the evidence in the light most favorable to the government, could conclude that (1) there was a common agreement among the defendants, under Mullet's leadership, not only to attack the victims and cut their beard and head-hair, but also to conceal the evidence of the attacks; (2) Anna Miller voluntarily joined the conspiracy with both of these objects; and (3) Anna Miller and some of her co-conspirators took steps to conceal evidence of the attacks by collecting and burning the cut hair, and hiding the camera and photographs memorializing the attacks. See U.S. Br. 52-54. Anna Miller took action in furtherance of a conspiracy to obstruct justice by

[14] We acknowledge that in our brief in the initial appeal we stated that Mullet told one of his grandsons that the bag should be burned "[a]fter the group left." U.S. Br. 31. But the citations to the record cited above support the conclusion that the defendants involved in the attack on the Millers, including Anna Miller, were then present.

gathering up the Millers' cut hair, presenting it to Mullet, and standing by when Mullet ordered that the hair be destroyed. She was also present at Mullet's house when Lester Mullet called from jail and discussed hiding the camera that had been used to memorialize some of the hair and beard-cuttings. (Tr., R. 539, Page ID# 6533-6534; GX 15 (transcript of telephone call)). In all events, because an overt act by one co-conspirator in furtherance of one of the objects of the conspiracy is attributable to all members of the conspiracy, Anna Miller is equally culpable for the conduct of the other defendants in obstructing justice.

In sum, Anna Miller cannot escape culpability for her participation in the objects of the conspiracy by pretending that each charged object took place in a vacuum, particularly where Mullet and the other defendants acted in furtherance of an overarching plan to "punish" the victims by attacking them and cutting their hair and then concealing evidence of their actions. As this Court has explained, "[a] conspirator need not have agreed to commit every crime within the scope of the conspiracy, so long as it is reasonable to infer that each crime was intended to further the enterprise's affairs. Moreover, it is not necessary for each conspirator to participate in every phase of the criminal venture, provided there is assent to contribute to a common enterprise." *United States* v. *Hughes*, 895 F.2d 1135, 1140 (6th Cir. 1990).

2. Levi Miller

In arguing that there was insufficient evidence to support his conviction for conspiracy to obstruct justice, Levi Miller challenges only the evidence of his knowledge of, and involvement with, hiding the camera that contained photographs memorializing the assaults. Levi Miller Br. 22-23. This argument has also been waived because it was not raised in the first appeal. Although Levi Miller challenged the sufficiency of the evidence for his conspiracy conviction, his arguments concerned only his involvement in the hair and beard-cutting attack, which he asserted were unrelated incidents and not part of a common criminal agreement. See U.S. Br. 152-153. Accordingly, this Court should not address this issue.

In any event, Levi Miller's sufficiency argument fails for the same reasons as Anna Miller's: the evidence was sufficient to establish that his actions were part of the defendants' collective actions to punish the victims for disobeying Mullet and conceal the evidence of the attacks; he voluntarily joined the conspiracy with both of these objects; and he and some of his co-conspirators acted to conceal evidence by arranging to hide the camera and photographs used to memorialize the attacks, burning the cut hair, or both. Levi Miller participated in both of the October 4, 2011, attacks. He was one of the five defendants who entered the Hershbergers' home to attack them; he was present when the photographs were

taken to record the assaults and their aftermath; he participated in attacking Myron Miller the same evening; and he, along with several of the other defendants, reported back to Mullet after the attacks. See U.S. Br. 32-42. Levi Miller was also one of the four defendants arrested on state charges a few days after the October 4 attacks. Most notably, in a recorded telephone call from jail, Levi Miller agreed with Mullet to conceal the camera and film used to record pictures of the victims. See U.S. Br. 47, 52-53.

Levi Miller asserts that he cannot be convicted for conspiracy to obstruct justice because the evidence shows that Johnny Mast acted alone in physically burying the camera. Levi Miller Br. 22-23. That argument ignores the law of conspiracy; who actually buried the camera is beside the point. The evidence shows that Levi Miller was member of the conspiracy to obstruct justice by concealing evidence of the attacks. He was also part of the discussions that led to hiding the camera. See U.S. Br. 52-53.

3. Linda Schrock

Linda Schrock argues that the evidence was insufficient to convict her "of either conspiracy or a hate crime" because there was no evidence that (1) the scissors used in the attack on her parents traveled in interstate commerce, and (2) she caused bodily injury to her parents in the attack. Linda Schrock Br. 5-10. These arguments challenge her conviction for violating Section 249(a)(2) (Count

6), which this Court already vacated. As discussed above (pp. 33-41), vacating the Section 249(a)(2) count does not affect her conviction for conspiracy *to obstruct justice*. Accordingly, the entirety of her arguments – addressing only elements of a Section 249(a)(2) conviction – has no bearing on her remaining conviction for conspiracy to obstruct justice.[15] Indeed, it would be ironic, to say the least, for a defendant to seek to conceal evidence of a crime and then challenge the obstruction conviction by arguing that there was not enough evidence of that underlying crime. In any event, Daniel Schrock testified that his mother – Linda Schrock – told him that Eli Miller wanted the camera hidden, and that as a result of her request he gave the camera to Johnny Mast. (Tr., R. 537, Page ID# 6014-6015).

V

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING DEFENDANTS

A. Standard Of Review

The Court reviews a district court's application and interpretation of the Sentencing Guidelines *de novo*. *United States* v. *Jeross*, 521 F.3d 562, 569 (6th Cir. 2008). The Court reviews a district court's factual findings for clear error. *Ibid.* The district court's final sentencing determination is reviewed for

[15] We addressed her arguments concerning the travel of the scissors in interstate commerce, and Melvin Schrock's bodily injury, in our brief in the initial appeal. See U.S. Br. 162 (scissors), 156-161 (bodily injury).

reasonableness under an abuse of discretion standard. See, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 46 (2007). Reasonableness review has both a procedural and substantive component. *United States* v. *Gunter*, 620 F.3d 642, 645 (6th Cir. 2010).

First, the Court reviews the sentence for procedural error. A district court commits significant procedural error if it improperly calculates the guideline range, fails to consider the factors in 18 U.S.C. 3553(a), rests the sentence on clearly erroneous facts, or fails to adequately articulate its reasoning. See, *e.g.*, *United States* v. *Adkins*, 729 F.3d 559, 570-571 (6th Cir. 2013). If the sentence is procedurally sound, the Court reviews the sentence for substantive reasonableness. "A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States* v. *Conatser*, 514 F.3d 508, 520 (6th Cir. 2008).

A sentence imposed within a properly-calculated guidelines range carries with it a "rebuttable presumption of reasonableness, thereby placing the onus on the defendant to demonstrate otherwise." *Adkins*, 729 F.3d at 570-571 (citation and internal quotation marks omitted). And where, as here, a defendant appeals a below-guidelines sentence, "simple logic compels the conclusion that * * *

defendant's task of persuading us that the more lenient sentence * * * is unreasonably long is even more demanding." *United States* v. *Curry*, 536 F.3d 571, 573 (6th Cir. 2008); *United States* v. *Devault*, 608 F. App'x 386, 386 (6th Cir. 2015) (same).

B. The District Court Did Not Abuse Its Discretion In Sentencing Defendants

1. Background

In initially sentencing defendants, the district court imposed sentences significantly below the advisory Sentencing Guidelines ranges. See Attachment B. During resentencing, the court stated that it would not consider imposing higher sentences, so the only issue is "what, if any, reductions are appropriate given that the Court of Appeals has * * * reversed the substantive hate crimes convictions." (Tr., R. 732, Page ID# 9239).

Because eight defendants had completed their sentences (Raymond Miller, Linda Schrock, Freeman Burkholder, Anna Miller, Elizabeth Miller, Emma Miller, Kathyrn Miller, and Lovina Miller), the court found that "the only appropriate thing to do is resentence them to time served." (Tr., R. 732, Page ID# 9179). The United States agreed with that determination. (Tr., R. 732, Page ID# 9185).

For the other eight defendants, the district court determined that the offense level for Count 1 (conspiracy) for each defendant was at least 30, which has a guidelines range of 97 to 121 months. This determination, which was consistent

with defendants' presentence reports, rested in part on the trial court's detailed, defendant-specific consideration of defendants' conduct in the beard and hair-cutting attacks, including kidnapping, as "relevant conduct" under the Sentencing Guidelines. (Tr., R. 732, Page ID# 9239-9240).[16]

Because, for each defendant, the advisory guidelines ranges on the remaining counts were still well above the sentences originally imposed, and

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[16] The district court calculated the offense level as follows: The advisory guideline for conspiracy, 18 U.S.C. 371, is Section 2X1.1, which applies the base offense level applicable to the underlying substantive offense. The underlying offense for the conspiracy is obstruction of justice, 18 U.S.C. 1519. The guideline for Section 1519, Section 2J1.2, provides for a base offense level of 14. It further provides, however, that if the offense "involved obstructing the investigation * * * of a criminal offense," apply Section 2X3.1 "in respect to that criminal offense." See Section 2J1.2(c)(1). Under Section 2X3.1, the base offense level is 6 levels lower than the underlying criminal offense *being investigated*, which here is a hate crime in violation of 18 U.S.C. 249(a)(2).

The guideline for a violation of Section 249(a)(2) is Section 2H1.1, which, as applicable here, applies "the offense level from the offense guideline applicable to any underlying offense." Because the jury determined that the hate crimes being investigated involved kidnapping, Section 2A4.1 applies, which has a base offense level of 32. Pursuant to Section 2X3.1, this base level is reduced by 6 levels, which results in a base offense level of 26.

Because the hate crimes being investigated involved the use of a dangerous weapon (the scissors and electric clippers), the court increased the offense level by 2 pursuant to Section 2A4.1(b)(3). The court also increased the offense level by 2 pursuant to Section 3A1.1(b) because it found that the victims were vulnerable. These calculations result in a base level of 30 (32-6+2+2). For Criminal History Category I (applicable to all defendants), the guidelines range is 97 to 121 months. (Tr., R. 732, Page ID# 9177-9178, 9189).

because the court was not considering imposing higher sentences, the court noted that the advisory ranges were not "all that important." (Tr., R. 732, Page ID# 9178-9179). The court also stated that in originally sentencing defendants, it "was very careful * * * to group and rank the defendants according to culpability," and that was an objective the court "want[ed] to accomplish on resentencing." (Tr., R. 732, Page ID# 9242).

Defendants (with the exception of Johnny Mullet) generally sought sentences of time served, which at that time ranged from 29 to 39 months. (*E.g.*, Tr., R. 732, Page ID# 9191, 9193-9194, 9203).[17] The court recognized that the "touchstone of sentencing" is the 18 U.S.C. 3553(a) factors, which, as the court summarized, require the court to "give a sentence to each defendant that is sufficient but not greater than necessary to meet the statutory purposes of sentencing which are punishment, deterrence, protecting the community, and rehabilitation." (Tr., R. 732, Page ID# 9238-9239). The court stated that it "gave sentences way below the advisory range two years ago, and [the court] obviously still feel[s] sentences below the advisory range are what [the court] should do," because "sentences within the range are longer than necessary to accomplish the statutory purposes of sentencing." (Tr., R. 732, Page ID# 9239).

[17] Johnny Mullet asserted that his appropriate sentencing range was 41 to 51 months. (Tr., R. 732, Page ID# 9210).

The court concluded that, notwithstanding that the hate crimes convictions had been vacated, the eight defendants "still warrant substantial prison sentences." (Tr., R. 732, Page ID# 9243). The court, which had presided over a month long trial, explained that the attacks "terrorized and traumatized the victims" and the method of attack (beard cuttings) "was particularly calculated to inflict trauma on [the victims] because they were Amish." (Tr., R. 732, Page ID# 9243). The court also noted that there was a conspiracy to obstruct justice – to "hopefully conceal * * * some of the most compelling evidence" (the photographs of the victims) – and "obstruction of justice goes to the heart of our system and should be punished." (Tr., R. 732, Page ID# 9243). The court concluded that it would "resentence all eight defendants in a manner that, one, reflects the seriousness of their conduct and the harm that each of [them] caused; two, respects the decision of the Court of Appeals; and, three, maintains the groupings and rankings [the court] made two years ago." (Tr., R. 732, Page ID# 9244). This approach was not only reasonable, it was correct.

Applying this framework, the court first noted that two defendants (Johnny Mullet and Levi Miller) originally received 84 months' imprisonment, but on resentencing were subject to a statutory maximum of 60 months' imprisonment

because they remain convicted only on Count 1.[18] (Tr., R. 732, Page ID# 9242); see Attachment B. The court, therefore, reduced their sentences to 60 months as was compelled by law. To maintain the groupings used in originally sentencing defendants, the court then explained that "the fairest and most appropriate thing to do is to use the same factor and reduce the sentences of the other six defendants by the same ratio, approximately 28%." (Tr., R. 732, Page ID# 9244). In other words, although their sentences could have been higher, the court permissively balanced the need to avoid unwarranted disparities among the defendants and therefore gave all of the co-defendants the benefit of proportional reductions. See 18 U.S.C. 3553(a). Accordingly, Lester Mullet and Eli Miller, who had also been sentenced to 84 months, were also sentenced to 60 months. The three defendants who had been sentenced to 60 months (Daniel Mullet, Lester Miller, and Emanuel Schrock) were given reduced sentences of 43 months. And finally, Mullet, who had been sentenced to 180 months, was given a reduced sentence of 129 months. (Tr., R. 732, Page ID# 9244-9245, 9250).[19]

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[18] The maximum statutory sentence for conspiracy to commit a felony is 60 months. 18 U.S.C. 371.

[19] For Lester Mullet and Eli Miller, who also remained convicted on Count 8 (obstruction of justice), the court imposed the same sentence of 60 months on both Counts 1 and 8, to run concurrently. For Mullet, who also remained convicted on Counts 8 and 10 (false statements), the court imposed 60 months on

(continued…)

2. The District Court Did Not Abuse Its Discretion In Resentencing Defendants

Defendants, collectively, make six arguments, asserting that the court: (1) inappropriately applied the kidnapping guideline; (2) arbitrarily used a "mathematical formula" of a 28% reduction to determine the final sentences; (3) improperly applied the vulnerable victim and leadership role enhancements; (4) violated 18 U.S.C. 3553(a) by failing to justify its sentence, address mitigating factors and new information, or address disparities in the sentences; (5) failed to make an independent finding of guilt pursuant to Sentencing Guidelines 1B1.2(d); and (6) failed to follow Federal Rule of Criminal Procedure 32. We address these arguments in turn. None has merit.

a. The District Court Properly Applied The Kidnapping Guideline In Determining The Base Offense Level

Defendants first assert that the court improperly applied the kidnapping guideline of Section 2A4.1 in determining defendants' base offense level. Mullet Br. 25-37; J. Mullet Br. 14; D. Mullet Br. 13; Levi Miller Br. 12-14. They make four arguments: (1) the conduct underlying the Section 249(a)(2) counts cannot be considered because this Court vacated those counts; (2) the kidnapping cross-reference (Section 2A4.1) does not apply as the underlying offense because

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(…continued)
Count 1, 129 months on Count 8, and 60 months on Count 10, to run concurrently. All defendants were given credit for time served. (Tr., R. 732, Page ID# 9247).

defendants' conduct must satisfy the definition of the federal offense for kidnapping, 18 U.S.C. 1201; (3) the kidnapping guideline should not be applied here because it renders the "Restraint of Victim" guideline (Section 3A1.3), which results in a two-level enhancement, meaningless; and (4) the definition used by the district court used cannot be correct because, otherwise, nearly every assault or robbery could also be charged as kidnapping. These arguments are not correct.

i. First, Mullet argues that, although the jury specifically found beyond a reasonable doubt that each of the Section 249(a)(2) violations involved kidnapping, because those counts were vacated the district court could not properly apply a cross-reference enhancement based on kidnapping. Mullet Br. 27-29. Levi Miller similarly argues that because "there are no underlying offenses of conviction," and "no verdict of kidnap[p]ing," the base offense level should be 14 pursuant to the guideline for Section 1519 (Section 2J1.2) where no "[s]pecial [o]ffense [c]haracteristics" or cross reference applies. Levi Miller Br. 12-14.

These arguments ignore the Sentencing Guideline on "Relevant Conduct," Section 1B1.3(a)(1). That section states that the applicability of a cross reference in the Guidelines to determine an offense level "shall be determined on the basis of * * * all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant * * * that occurred during the commission of the offense of conviction, in preparation for that offense,

or in the course of attempting to avoid detection or responsibility for that offense." As the Commentary explains, under this subsection "the focus is on the specific facts and omissions for which the defendant is to be held accountable in determining the applicable guideline ranges, rather than on whether the defendant is criminally liable for an offense." U.S.S.G. § 1B1.3 comment. (n.1). "The goal of the relevant conduct provision is to allow a court to impose sentences commensurate with the gravity of the offense." *United States* v. *Kappes*, 936 F.2d 227, 229 (6th Cir. 1991). Therefore, a defendant's base offense level is calculated using "both offense conduct and all relevant conduct." *United States* v. *Howse*, 478 F.3d 729, 732 (6th Cir. 2007); see also *United States* v. *Sanchez*, 527 F. App'x 488, 492 (6th Cir. 2013).

"The district court has wide discretion in what it may consider as relevant conduct." *United States* v. *Four Pillars Enter. Co.*, 253 F. App'x 502, 510 (6th Cir. 2007); see also *United States* v. *Perkins*, 207 F. App'x 559, 562 (6th Cir. 2006). And it is clear that charged but vacated conduct – like, *e.g.*, acquitted conduct, uncharged conduct, charged but dismissed conduct, and conduct that cannot be prosecuted under the applicable statute of limitations – may be considered as relevant conduct. See *United States* v. *Franklin*, 235 F.3d 1165, 1168 (9th Cir. 2000) (court may consider conduct underlying vacated conviction as relevant conduct); see generally *United States* v. *Watts*, 519 U.S. 148 (1997) (jury

acquittal does not preclude sentencing court from considering conduct underlying the acquitted charge); *United States* v. *White*, 551 F.3d 381, 384-386 (6th Cir. 2008) (en banc) (same; acquitted conduct); *United States* v. *Dunlap*, 209 F.3d 472, 477 n.10 (6th Cir. 2000) (criminal activities linked to the crime of conviction may be punished as relevant conduct even if such misconduct was uncharged, or charged in a count of dismissal); *United States* v. *Pierce*, 17 F.3d 146, 150 (6th Cir. 1994) (upholding sentence enhancement based upon conduct that could not be prosecuted under the applicable statute of limitations). Here, of course, the conduct in question was not acquitted but was reversed and remanded based upon instructional error.

There are two principal limitations on considering relevant conduct in sentencing: (1) considering the conduct cannot increase the sentence beyond the statutory maximum for the convicted conduct, and (2) the trial court must find that the conduct has been proved by a preponderance of the evidence. As this Court explained in *United States* v. *Cook*, 550 F. App'x 265, 273 (6th Cir. 2014), "the district court may rely on acquitted conduct to enhance a guidelines sentence if that relevant conduct is proved by a preponderance of the evidence. * * * No Sixth Amendment violation occurs so long as the defendant receives a sentence at or

below the statutory ceiling set by the jury's verdict." (brackets and internal quotation marks omitted); see also *White*, 551 F.3d at 385.[20]

Therefore, even though this Court vacated the Section 249(a)(2) convictions, the district court did not err in considering defendants' conduct in the attacks in calculating their advisory Sentencing Guidelines ranges. At the resentencing hearing, the court explained that it could "consider as relevant conduct for sentencing uncharged conduct and even acquitted conduct if [it] found by a preponderance of the evidence that the defendants committed the acts in question." (Tr., R. 732, Page ID# 9239). The court further explained that "[t]his is easy to do in this case because * * * none of the defendants contested or challenged that they participated in the hair and beard-cutting attacks." (Tr., R. 732, Page ID# 9239-9240). Further, the "jury found beyond a reasonable doubt that all of the

[20] This Court has acknowledged that "it may be troubling to some that the Guidelines Manual instructs sentencing courts to substitute the cross-referenced offense for the conduct actually charged, effectively resulting in an enhanced sentence for a completely different offense," but reaffirmed "that a sentencing court may determine an offense level by cross-referencing a guideline for an uncharged offense." *United States* v. *James*, 575 F. App'x 588, 595 (6th Cir. 2014). Moreover, in *White*, the Court explained that this principle is cabined by the fact that "a factual presentation that fails to persuade a jury beyond a reasonable doubt may well fail to persuade the judge by a preponderance of the evidence," and that if the district court "concludes that the sentence produced in part by these relevant conduct enhancements fails to properly reflect § 3553(a) considerations * * * the judge may impose a lower sentence, including, if reasonable, a lower sentence that effectively negates the acquitted-conduct enhancement." 551 F.3d at 386 (internal quotation marks omitted). That is, of course, in part what happened here.

attacks involved kidnapping," and the court "certainly find[s] by a preponderance of the evidence that they did." (Tr., R. 732, Page ID# 9240).

Mullet does not challenge these conclusions as clearly erroneous; indeed, substantial evidence elicited during the entire trial supports them. See, *e.g.*, U.S. Br. 29-30, 35-36, 40, 45 (describing restraint of victims during the attacks). Levi Miller, however, argues that defendants' conduct in connection with the Section 249(a)(2) counts cannot be considered at resentencing because the evidence fails to establish by a preponderance of the evidence that defendants acted "because of" the victims' religion under the "but for" causation standard adopted by this Court in the initial appeal. Levi Miller Br. 15-17; see *United States* v. *Miller*, 767 F.3d 585, 593-594 (6th Cir. 2014). Levi Miller did not make this argument at resentencing, and therefore it is forfeited.[21] See, *e.g.*, *United States* v. *Bright*, 3 F. App'x 232, 235-236 (6th Cir. 2001) (where sentencing issues not initially raised before sentencing judge, review limited to plain error). In any event, the district court expressly addressed this issue at resentencing, stating: "The jury found by unanimous verdict that the attacks were substantially or significantly motivated by the victims' religion, and I find by a preponderance of the evidence that the

[21] Mullet alluded to this argument at resentencing, suggesting the district court had to find by a preponderance of the evidence that a hate crime occurred. (Tr., R. 732, Page ID# 9216-9219).

defendants' acts were because of the victims' religion under the heightened standard * * * that the Sixth Circuit mandates that I use in the event there's a retrial." (Tr. R. 732, Page ID# 9240). Because overwhelming evidence supports the judge's conclusion, it is not clearly erroneous and therefore not plain error.[22] Therefore, the court properly considered defendants' conduct in the hair-cutting attacks, including kidnapping, in applying the Sentencing Guidelines cross-references and determining the appropriate base offense level.

ii. Next, Mullet argues that, in applying the Sentencing Guidelines for conspiracy to obstruct justice, the kidnapping cross-reference (Section 2A4.1) does not apply as the underlying offense because defendants' conduct must satisfy the definition of the federal offense for kidnapping, 18 U.S.C. 1201, and the "brief restraint" that occurred during the attacks does not constitute such kidnapping.

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[22] For example, Samuel Mullet described the attacks as a "religious degrading," that it was "all religion," and that he should be allowed to punish people who break the laws of the church. See U.S. Br. 50-51. And with respect to the individual attacks, Raymond Hershberger, for example, was attacked only because he was a leading member of the group of 300 Amish bishops who overturned Mullet's excommunications because they were not properly based on scripture – indeed, before the attacks, he had never even met the defendants. See U.S. Br. 34-35, 113 n.33. Even the so-called interpersonal and intra-family conflicts between the other victims and the defendants were based upon disagreements about how the Amish faith should be practiced. See U.S. Br. 111-114. Finally, the evidence was overwhelming and unrebutted that the defendants inflicted the particular bodily injuries here "because of" religion. The bodily injuries here were the cutting of beards and hair and lacerations and bruising that occurred during those violent attacks. If the victims were not Amish, these bodily injuries would never have occurred and indeed would make no sense.

Mullet Br. 29-37; see also Levi Miller Br. 14. Defendants, however, are not correct that kidnapping cannot be used as the underlying offense unless the defendants' conduct satisfies the definition of kidnapping in Section 1201. In any event, defendants' conduct satisfies that definition.

As applied here, the guideline for conspiracy (18 U.S.C. 371) cross references the underlying substantive offense (18 U.S.C. 1519, obstruction of justice), which cross references the criminal matter being investigated (18 U.S.C. 249(a)(2), the hate crime). See note 16, *supra*. Section 2H1.1, the guideline for Section 249(a)(2), applies the base offense level for the "offense guideline applicable to any *underlying offense*" (emphasis added). Application Note 1 to Section 2H1.1 explains that the quoted phrase means "the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law." U.S.S.G. §2H1.1, comment. (n.1). Because defendants' underlying conduct constitutes kidnapping as used in Section 249(a)(2), kidnapping is the appropriate underlying offense that was the object of defendants' conspiracy to obstruct justice of the investigation of a criminal matter.

Mullet argues that kidnapping cannot be used as the underlying offense unless defendant's conduct satisfies either its common law definition or the definition of kidnapping in 18 U.S.C. 1201. Mullet Br. 30. The common law definition of kidnapping requires transportation of the victim across state lines.

See U.S. Br. 117-118. Section 1201 provides that "[w]hoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person" may be convicted of a crime. But kidnapping is applied as the relevant conduct here because the guideline for Section 249(a)(2) directs the sentencing court to the conduct underlying the Section 249(a)(2) offense. Here, that conduct is kidnapping, as found by the jury and as found by the district court in resentencing by a preponderance of the evidence. Accordingly, the district court correctly applied the kidnapping guideline to defendants' conspiracy to obstruct justice convictions.

Mullet seeks to avoid this conclusion by resurrecting his argument the jury instructions on the meaning of kidnapping as used in Section 249(a)(2) were incorrect. At trial, the district court rejected both of the alternatives proposed by Mullet, and defined kidnapping according to its common, contemporary meaning, *i.e.*, "to restrain and confine a person by force, intimidation, or deception with the intent to terrorize or cause bodily injury to that person or to restrain a person's liberty in circumstances that create a substantial risk of bodily harm to that person." (Tr., R. 542, Page ID# 7255); see U.S. Br. 117-118. As we argued in our initial brief, the district court's jury instruction on the element of kidnapping was correct. See U.S. Br. 118-128. The definition used by the trial court is consistent with the definition of kidnapping that courts have used in the similar provision in

18 U.S.C. 242,[23] another federal criminal civil rights statute, and that this Court has used in addressing the Sentencing Guidelines.

Moreover, where the guidelines reference kidnapping without defining it, this Court, and others, have applied the precise generic definition used by the trial court in addressing the application of the Sentencing Guidelines. In *United States* v. *Soto-Sanchez*, 623 F.3d 317, 319 (6th Cir. 2010), the Court squarely addressed whether defendant's previous state law kidnapping conviction satisfied the definition of kidnapping in the guideline applicable to convictions for illegally entering the United States (U.S.S.G. § 2L1.2). Under that provision, a 16-level enhancement applies if the defendant had previously been deported for a "crime of violence"; among the listed crimes of violence is kidnapping, but kidnapping is not defined. The Court used the generic, contemporary meaning of kidnapping for the guidelines' definition, which, it concluded, "requires restraint plus the presence of some aggravating factor, such as circumstances that create a risk of physical harm to the victim, or movement of the victim from one place to another." *Id.* at 323[24];

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[23] See *United States* v. *Guidry*, 456 F.3d 493, 509-511 (5th Cir. 2006) (rejecting argument that the definition of kidnapping in the sentencing enhancement provision of 18 U.S.C. 242 requires that the victim be carried out of state, and applying the "generic, contemporary" meaning of kidnapping).

[24] Citing *Taylor* v. *United States*, 495 U.S. 575, 592-596 (1990) (applying generic, contemporary meaning of burglary, rather than common law meaning, as used in sentencing enhancement provision of 18 U.S.C. 924(e)).

see also *United States* v. *De Jesus Ventura*, 565 F.3d 870, 876 (D.C. Cir. 2009) (using the generic definition for kidnapping as used in the guidelines and noting that "nearly every state kidnapping statute includes two common elements: (1) an act of restraining, removing, or confining another; and (2) an unlawful means of accomplishing that act"); see also *United States* v. *Marquez-Lobos*, 697 F.3d 759, 764 (9th Cir. 2012) (using generic definition of "kidnapping" as used in Sentencing Guidelines in comparing it to state law definition); *United States* v. *Jenkins*, 680 F.3d 101, 108-109 (1st Cir. 2012) (same). Under this reasoning, the district court correctly applied the kidnapping guideline to defendants' conspiracy to obstruct justice convictions.

Mullet also relies upon this Court's decision in *United States* v. *Epley*, 52 F.3d 571 (6th Cir. 1995). Mullet Br. 31-32; see also Levi Miller Br. 14. In that case, this Court addressed the appropriate "underlying offense" under the Sentencing Guidelines for a conviction under 18 U.S.C. 241 and 242 (conspiracy to violate civil rights and deprivation of rights under color of law, respectively). The defendant police officers planted drugs and a weapon in the victim's car, who they suspected was reporting their illegal activities, so that they could stop the victim, have reasons to arrest him, and therefore discredit him. When the defendants were charged with violating Sections 241 and 242, those statutes did not contain a sentencing enhancement for kidnapping, and unlike this case, the jury

was not specifically asked to make a kidnapping finding. In that context, the Court rejected the argument that, under Sentencing Guidelines § 2H1.1, the underlying offense was kidnapping simply because restraint was involved. *Epley*, 52 F.3d at 580-582. The Court stated that defendants "did not commit an offense that would be sentenced at this level under federal law" because their conduct would not support a conviction for any of the federal crimes that are sentenced under Sentencing Guidelines § 2A4.1, including the federal kidnapping statute. *Id.* at 582. The Court also found that defendants' conduct would not satisfy the definition of kidnapping in Kentucky, where the offense occurred. *Ibid.* Rather, the Court stated, the underlying offense was more analogous to obstruction of justice. *Id.* at 581.

Epley stands for the proposition that the guidelines for kidnapping should not be used where defendants' conduct involved some restraint but (1) they are charged under a federal statute that does not include kidnapping as an element of the offense, and (2) the conduct does not satisfy the federal offense of kidnapping, as referenced in the guidelines, or the definition under state law where the offense occurred. This reasoning has no bearing here. In the instant case, defendants were charged with a federal crime that included kidnapping as a specific statutory sentencing enhancement. And, as discussed above (p. 66), this Court in *Soto-Sanchez* has recognized that the correct definition of kidnapping here is not the

definition of kidnapping in 18 U.S.C. 1201. Moreover, the jury found this element, as correctly defined, beyond a reasonable doubt. Although this Court vacated the Section 249(a)(2) convictions, the district court found as relevant conduct that the defendants' conduct included kidnapping.

In any event, even if the federal definition of kidnapping in Section 1201 applied in this case, defendants' conduct would satisfy that definition. In relevant part, Section 1201 makes it a crime to unlawfully "confine[] * * * and hold[] for ransom or reward or otherwise" any person. The "or otherwise" language is to be interpreted broadly; Congress intended the statute to apply to persons who had been held "not only for reward, but for any other reason." *United States* v. *Sensmeier*, 2 F. App'x 473, 476 (6th Cir. 2001) (citation omitted) (victim held so she could be assaulted without detection). In other words, "otherwise" includes "any objective of a kidnapping which the defendant may find of sufficient benefit to induce him to commit the kidnapping." *Ibid.*; see also *United States* v. *Zuni*, 273 F. App'x 733, 741 (10th Cir. 2008) (Section 1201 requires "that the victim be (1) held against his or her will (2) for some benefit to the captor" (citation omitted)); U.S. Br. 123. As noted above, the district court instructed the jury that

kidnapping includes "restrain[ing] and confin[ing] a person" with "the intent to terrorize or cause bodily injury." (Tr., R. 542, Page ID# 7255).[25]

iii. Mullet next asserts that the kidnapping guideline should not be applied here because it renders the "Restraint of Victim" guideline (Section 3A1.3), which results in a two-level enhancement, meaningless. Mullet Br. 36. But that enhancement was not applied here. As the Application Notes to Section 3A1.3 explain, the restraint of victim adjustment does not apply "where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself (*e.g.*, this adjustment does not apply to offenses covered by [Section] 2A4.1 (Kidnapping, Abduction, Unlawful Restraint.))." U.S.S.G. §3A1.3, comment. (n.2). In other words, the "Restraint of Victim" adjustment can only apply where the underlying conduct does *not* involve kidnapping. Therefore, the guidelines were followed, not circumvented.[26]

iv. Finally, Mullet suggests that the definition the district court used cannot be correct because, otherwise, nearly every assault or robbery could also be

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[25] The district also court found that defendants' conduct would constitute kidnapping under Ohio law. (Tr., R. 314, Page ID# 3500; Tr., R. 732, Page ID# 9190).

[26] Mullet cites *United States* v. *Gray*, 692 F.3d 514, 517, 521-522 (6th Cir. 2012), applying the two-level enhancement for "Restraint of Victim" for a conviction under 18 U.S.C. 242. Mullet Br. 36. But in that case, the underlying offense was not kidnapping, and therefore Section 2A4.1 did not apply.

charged as kidnapping. Mullet Br. 35-37. He relies upon *Government of the Virgin Islands* v. *Berry*, 604 F.2d 221 (3d Cir. 1979). In that case, the court addressed whether the defendant could be convicted for aggravated kidnapping, *in addition to robbery*, under the Virgin Islands kidnapping statute, where the victim was told to go in the water at a beach during a robbery and extortion. *Id.* at 223. The court stated that the "literal" language of the statute applied because defendants "entice[d]" the victim to go to the beach with the intent to detain, and did so to "extract * * * money" and commit extortion. *Id.* at 225, 229. The court, however, noting that a conviction for aggravated kidnapping resulted in a *mandatory* life sentence and the "inequity inherent in permitting kidnapping prosecutions of those who in reality committed lesser or different offenses," interpreted the aggravated kidnapping statute to require something more than the "limited confinement or asportation" that is "[n]ecessarily implicit" in the offenses of robbery and assault. *Id.* at 226, 228.

Berry is similar to cases addressing whether a defendant convicted of a federal offense such as murder, sexual assault, or robbery can also be convicted of the separate offense of kidnapping (*i.e.*, Section 1201). See, *e.g.*, *United States* v. *Gabaldon*, 389 F.3d 1090 (10th Cir. 2004) (second degree murder and kidnapping; affirming kidnapping conviction); *United States* v. *Peden*, 961 F.2d 517 (5th Cir. 1992) (aggravated sexual battery and kidnapping; affirming kidnapping

conviction); *United States* v. *Howard*, 918 F.2d 1529 (11th Cir. 1991) (robbery and kidnapping; court overturned kidnapping conviction). These cases suggest that the question whether the defendant can be convicted of kidnapping *in addition to* another substantive offense turns on whether the confinement or detention is a necessary element of, or is inherent or implicit in, the underlying crime. The underlying concern is that Congress did not intend kidnapping to be used to turn other, lesser crimes into more serious crimes with greater penalties, or to obtain a conviction on a second charge where the restraint or detention was inherent in the commission of another crime. See *Gabaldon*, 389 F.3d at 1096-1098 ("confinement was not merely an inconsequential and inherent side-effect of her murder"); *Peden*, 961 F.2d at 522 ("asportation and detention went beyond that necessarily inherent in rape").

These concerns are not implicated here. The issue is not whether defendants could be convicted of both Section 249(a)(2) *and* Section 1201 (kidnapping). Rather, the issue is whether defendants' relevant conduct under the Guidelines also included kidnapping. Not all bias-motivated crimes causing bodily injury are equally egregious and warrant the same punishment.[27] Therefore, different levels

[27] Other federal criminal statutes mandate more severe sentences where the underlying offense includes other conduct, such as kidnapping. See, *e.g.*, 18 U.S.C. 2113(e) (bank robbery; enhanced sentence if defendant "forces any person to accompany him").

of punishment depend on whether defendant's actions *also* included other specific conduct (*i.e.*, physical restraint, deception, or the victim's death). These additional factors include "kidnapping[,] or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill." 18 U.S.C. 249(a)(2)(A)(ii)(II); cf. 18 U.S.C. 241, 242, 245, 247 (criminal civil rights statutes containing similar sentencing enhancement provisions). Kidnapping, of course, is not inherent in committing a religiously-motivated assault. Here, for example, defendants could have cut the victims' beards and hair without confining them in their homes or at other isolated locations, dragging them around and holding them down, and otherwise restraining, assaulting, and terrorizing them. But that is what they did, the jury specifically found this additional element, and the defendants were sentenced accordingly by the trial judge to reflect this conduct and the enhanced seriousness of the crime.

b. The District Court Did Not Abuse Its Discretion In Resentencing Defendants To Reduced Sentences That Reflect The Court's Original Culpability Groupings

In resentencing the eight defendants who had not finished serving their sentences, the district court followed the five groupings it used in originally sentencing them. Defendants argue that by reducing each of their sentences by 28 percent, the court improperly used a "mathematical formula" in violation of the

Due Process Clause, Rule 32, and the requirements of Section 3553. Mullet Br. 47-49; Lester Miller Br. 12; Levi Miller Br. 18-20. This argument is not correct.

The district court carefully considered each defendant's appropriate sentence under the Sentencing Guidelines and the Section 3553(a) factors. As set forth above, the court: (1) calculated the Sentencing Guidelines range; (2) explained that the sentences it originally gave were substantially below that range; (3) determined that it was not going to impose longer sentences, so that any sentences imposed would still be well below the guidelines range; (4) recognized the Section 3553(a) factors and the obligation to "give a sentence to each defendant that is sufficient but not greater than necessary to meet the statutory purposes of sentencing"; (5) noted that in initially sentencing defendants it was "very careful" to group and rank the defendants according to culpability; (6) explained that it was "still important to do that" and that that was "an objective [it] want[ed] to accomplish on resentencing"; and (7) found that these eight defendants "still warrant[ed] substantial prison sentences" for "terroriz[ing] and traumatiz[ing] the victims" and using a method of attack "that was particularly calculated to inflict trauma on them because they were Amish." (Tr., R. 732, Page ID# 9177-9179, 9238-9245).

The court, therefore, determined that defendants' sentences should reflect "the seriousness of their conduct and the harm that each of [them] caused," and

"maintain[] the groupings and rankings [the court] made two years ago." (Tr., R. 732, Page ID# 9244). Those grouping were based on factual analysis conducted by a prudent trial judge. Because Johnny Mullet and Levi Miller, who had originally received 84 month sentences, were subject to a statutory maximum sentence of 60 months on resentencing, and the court had concluded substantial prison sentences were still warranted, the court resentenced them to 60 months. The court then concluded that "the fairest and appropriate thing to do is to use the same factor and reduce the sentences of the other six defendants by the same ratio, approximately 28%." (Tr., R. 732, Page ID# 9244).

Defendants latch on to the 28% figure and assert that the court improperly sentenced them according to a mathematical formula. In so doing, they do not challenge the amount of the reduction, but assert only that it was arbitrary and applied equally. But it was not arbitrary, and the fact that it was applied equally comports directly with considering the nature and circumstances of the offense and reducing unwarranted disparity between co-defendants. The percentage-based reduction was applied after the court determined that all sentences would be reduced, defendants still warranted substantial sentences, and the revised sentences of two of the defendants *had* to be reduced (given the statutory maximum applicable to them) from 84 months to no more than 60 months. The court then

applied the sentence reductions equally to maintain the court's carefully crafted sentencing groups for comparatively situated defendants.

There is no bar to adjusting co-defendants' sentences to make them proportional, and defendants have cited no cases suggesting otherwise.[28] See, *e.g.*, *United States* v. *Crouse*, 145 F.3d 786, 791 (6th Cir. 1998) (court can consider goal of proportionality among indicted co-conspirators as a basis for departure); see also *United States* v. *Greco*, 734 F.3d 441, 451 (6th Cir. 2013) (district court may, but is not required to, consider co-conspirators' sentences when sentencing a defendant); *United States* v. *Simmons*, 501 F.3d 620, 624 (6th Cir. 2007) (sentencing court has discretion to determine a defendant's sentence in light of sentences of co-defendants). Indeed, defendants are often the ones arguing that their sentences should have been reduced in proportion to the reduction granted to a co-defendant – Lester Miller makes that argument here (see pp. 90-93, *infra*).

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[28] Defendants cite three cases, none of which suggests that the district court acted inappropriately in proportionally revising defendants' sentences downward. See Mullet Br. 48-49; Lester Miller Br. 12; Levi Miller Br. 19; *United States* v. *Richards*, 659 F.3d 527, 549-552 (6th Cir. 2011) (affirming district court's sentence below the advisory guideline range based upon the role of mental illness in the defendant's offense); *United States* v. *Barajas-Nunez*, 91 F.3d 826, 831-832 (6th Cir. 1996) (finding plain error where district court improperly issued sentence below guideline range based upon defendant's inability to speak English and lack of formal education); *United States* v. *Gardner*, 905 F.2d 1432, 1438-1439 (10th Cir. 1990) (upholding district court's sentence above the guideline range based upon defendant's criminal history resembling that of a career offender).

See, *e.g.*, *United States* v. *Richardson*, 939 F.2d 135, 140 (4th Cir. 1991). Moreover, invoking the specter of using a numerical formula to seek to undo a sentencing determination is, at the least, ironic given that the calculation of all sentences under the guidelines involves mathematical formulas to arrive at the advisory sentencing range. For this reason, the often cited language cautioning against the use of "mathematical formulas" generally arises in the context of appellate court review of outside-guidelines sentences. See, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 47 (2007) (rejecting "use of a rigid mathematical formula" for determining the reasonableness of departure from the guidelines); *United States* v. *Grossman*, 513 F.3d 592, 596 (6th Cir. 2008) (noting that *Gall* bars use of a rigid mathematical formula for *reviewing* sentences). In this case, the level of reduction was based, in part, on Congress's determination of the maximum punishment allowable for a defendant convicted on a single count of 18 U.S.C. 371. That, and proportional sentencing of co-defendants, are hardly improper considerations.

In short, in this context, the district court did exactly what it was supposed to do in resentencing the defendants. The court used the guidelines ranges as its initial benchmarks, and explained why downward variances were appropriate. See generally *Gall*, 552 U.S. at 46 (requiring district judges to offer sufficient justifications for significant departures from the guidelines). The court also explained that it was important to maintain the "groupings" that it "carefully"

adopted in initially sentencing defendants, so that similarly culpable defendants would receive similar sentences. Of course, the only way to maintain those groupings, while at the same time revising defendants' sentences downward, is to adjust them on the same proportional basis, which is what the court did. Under these circumstances, given the deference due to the district court's sentencing determinations, including its "on-the-scene assessment of the competing considerations," the trial court did not abuse its discretion. *Grossman*, 513 F.3d at 596.

c. The District Court Properly Applied The Sentencing Enhancements For Vulnerable Victim And Leadership Role

i. Mullet argues that the district court improperly applied the two-level vulnerable victim enhancement under Section 3A1.1(b)(1) because: (1) although it was included in Mullet's Presentence Report for resentencing, it was not in his original Presentence Report or imposed at the original sentencing, and (2) there is no evidence that any of the victims were vulnerable victims within the meaning the of guideline. Mullet Br. 40-44. Levi Miller similarly argues that the district court could not apply this enhancement because it was not imposed at his initial sentencing. Levi Miller Br. 17-18. These arguments are baseless.

First, the mere fact that the vulnerable victim enhancement was not included in defendants' original Presentence Reports, or imposed by the court in the initial sentencing, did not preclude the court from imposing it on resentencing, and

Mullet has cited no cases suggesting the contrary. This Court's remand was general, not limited. See, *e.g.*, *United States* v. *Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997) (discussing general versus limited remands and the presumption that remands are general, allowing district courts to consider issues). Although a defendant may be sentenced to an enhanced sentence on remand, Mullet's sentence was *reduced* from 180 to 129 months, and Levi Miller's sentence was *reduced* from 84 to 60 months. Therefore, principles applying to increased sentences on remand do not apply. See Attachment B (reflecting that all defendants not resentenced to time served were resentenced to reduced sentences); see also *United States* v. *Rogers*, 278 F.3d 599, 604 (6th Cir. 2002) ("In cases where the defendant ultimately receives a lower sentencing at resentencing, the * * * presumption of vindictiveness never arises." (citing cases)).[29]

Second, the district court expressly found, by a preponderance of the evidence, that some of the victims were vulnerable. (Tr., R. 732, Page ID# 9213). This conclusion is not clearly erroneous. The enhancement for vulnerable victims

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[29] Both Mullet and Levi Miller acknowledge as much, but nonetheless assert that the district court's application of the enhancement at resentencing "remains suspect." Mullet Br. 42-43; Levi Miller Br. 17. That is not a legal argument that can support the assertion that the enhancement should not have been applied. Moreover, although a defendant can still prevail by showing "actual vindictiveness through the presentation of direct evidence," neither defendant has done so here. *Rogers*, 278 F.3d at 604.

applies when the victim "is unusually vulnerable due to *age*, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct," and the defendant "knows or should have known the victim's unusual vulnerability." U.S.S.G. §3A1.1, comment. (n.2) (emphasis added).[30] The Presentence Reports found that three of the victims were vulnerable – Raymond Hershberger, Melvin Schrock, and Anna Schrock. Raymond Hershberger was 76 years old and was in bed when the defendants arrived to assault him. Melvin Schrock was 66 years old and in very poor health (he died two months after the attack). Finally, Anna Schrock was 66 years old and also in poor health. (*E.g.*, Presentence Investigation Report, R. 590, Page ID# 8332, 8337-8338). Defendants, of course, knew this about their victims because they were either related to them (the Schrocks were attacked by their children) or it would have been evident to them at the time of the attack (Hershberger). Therefore, these victims fall squarely within the intended application of the vulnerable victim enhancement. See generally *United States* v. *Anderson*, 349 F.3d 568, 572 (8th Cir. 2003) ("When a vigorous young defendant inflicts a crime of violence on an elderly person, the defendant's knowledge that the victim was unusually vulnerable

[30] This Court has recognized that the "Guideline speaks of 'vulnerable victim' while the note speaks of an 'unusually vulnerable victim,'" and has "assume[d] the Guideline language controls." *United States* v. *Lukasik*, 250 F. App'x 135, 138 (6th Cir. 2007) (emphasis omitted).

to this crime due to age is often obvious for purpose of clear error review."); *United States* v. *Zats*, 298 F.3d 182, 188 (3d Cir. 2002) (the test for vulnerability "calls for an examination of the individual victims' ability to avoid the crime").[31]

ii. Mullet also argues that the district court improperly applied the four-level leadership enhancement under Section 3B1.1(a). He rests this argument solely on the assertion that there is insufficient evidence that he hid, organized, or led the *hiding of the camera* – the conduct that underlies four defendants' (including Mullet's) convictions for obstruction of justice (Count 8). Mullet Br. 44-47. First, that is simply not true; in both the post-attack meetings and the recorded jail calls Mullet led the effort to obstruct. See generally U.S. Br. 49-54. Second, even if that were true, it is beside the point. The appropriateness of Chapter Three adjustments – including the leadership enhancement – is determined from all relevant conduct, not solely from the conduct underlying the offenses of conviction. The Relevant Conduct provision, Section 1B1.3(a), expressly states

[31] Mullet suggests that the "typical" case applying the vulnerable victim enhancement due to age involves either fraud schemes against the elderly or victims who are children. Mullet Br. 43-44. First, the argument that the elderly are not susceptible to physical violence is ridiculous. Second, even if that is true, it does not mean the enhancement is inapplicable here. Moreover, the Schrocks were also vulnerable due to their poor health – a category of vulnerability, like age, expressly referenced in the Commentary to the Sentencing Guidelines. Also, to the extent Mullet argues that the government must show that defendants actually chose their victims because of their age or health issues, that is not an element of the enhancement. See, *e.g.*, *United States* v. *McCaster*, 333 F. App'x 970, 973-974 (6th Cir. 2009).

that "Adjustments" in Chapter Three of the guidelines shall be determined on the basis of all defendant's relevant conduct. And the Introductory Commentary to Part B (Role in the Offense) of the guidelines explains that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of [Section] 1B1.3 * * * and not solely on the basis of elements and acts cited in the count of conviction." U.S. Sentencing Guidelines Manual Ch. 3, Pt. B, intro. comment.

Therefore, the district court was not limited solely to Mullet's significant conduct directed at hiding the camera in determining whether the leadership enhancement applied. Rather, the court could consider all of Mullet's actions in connection with the relevant conduct, which includes the attacks. Because the facts overwhelmingly show that Mullet directed the attacks, and his co-defendants acted at his behest, discussed the assaults with him, and reported to him immediately after the assaults (see U.S. Br. 19-25, 153-154 & n.42), the district court's conclusion that Mullet was the organizer and leader of the attacks and the obstruction was not clearly erroneous. (See Tr., R. 732, Page ID# 9214).[32]

[32] At resentencing, the district court stated: "I believe the evidence definitely showed that Bishop Mullet le[d] the community in general and le[d] this conspiracy. Nothing happened, the evidence showed nothing happened without his knowledge before or immediately after. And the very first thing that the defendants did when whey committed various attacks was to assemble at his house and show him the evidence of those attacks." (Tr., R. 732, Page ID# 9214).

d. The District Court Correctly Followed 18 U.S.C. 3553(a) In Sentencing Defendants

Defendants make various arguments directed at the sentencing factors in 18 U.S.C. 3553(a). Mullet and Levi Miller assert that the district court failed to justify their sentences in light of the mitigating factors and new information raised at the resentencing hearing, and failed to address unwarranted disparities created by their sentences. Mullet Br. 49-52; Levi Miller Br. 20-21. Lester Miller argues that his sentence results in an unwarranted disparity with the sentences given to some of his co-defendants. Lester Miller Br. 7-12. None of these arguments has merit.

i. First, Mullet and Levi Miller argue that the district court erred in failing to specifically address the mitigating factors and new information presented in support of their arguments that they should be resentenced to time served. These matters include their age, low risk of recidivism, and, for Mullet, the recent death of his wife and one his grandchildren. Mullet Br. 49-50; Levi Miller Br. 20.

As a general matter, if a defendant raises non-frivolous arguments at sentencing, it is procedurally unreasonable for the court not to address them. See *Rita* v. *United States*, 551 U.S. 338, 356-359 (2007); *United States* v. *Payton*, 754 F.3d 375, 378 (6th Cir. 2014); *United States* v. *Begley*, 602 F. App'x 622, 628-629 (6th Cir. 2015). The underlying principle is that, by articulating its reasons, the sentencing court assures reviewing courts (and the public) that the court "has

considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita*, 551 U.S. at 356-357. Further, the court's explanation, "can be brief if the circumstances do not warrant a lengthier explanation." *United States* v. *Cornett*, 591 F. App'x 456, 460 (6th Cir. 2015); *Rita*, 551 U.S. at 357. "*Rita* suggests that a briefer explanation is sufficient where the matter is conceptually simple, and the record makes clear that the sentencing judge considered the evidence and arguments." *Cornett*, 591 F. App'x at 460 (citation and internal quotations marks omitted); see also *United States* v. *Haj-Hamed*, 549 F.3d 1020, 1024 (6th Cir. 2008); *United States* v. *Duane*, 533 F.3d 441, 451 (6th Cir. 2008); *United States* v. *Madden*, 515 F.3d 601, 610 (6th Cir. 2008).

First, because defendants did not object at sentencing to the adequacy of the district court's explanation concerning mitigating factors, this issue is reviewed for plain error. See *United States* v. *Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc). At the sentencing hearing, the district court, after announcing and explaining his sentences, asked counsel if there was "anything further" they "wish[ed] to say." (Tr., R. 732, Page ID# 9250). None of the defendants responded. See also *Duane*, 533 F.3d at 451 (because defendant "did not seek further explanation for the sentence when given an opportunity to do so," Court

reviewed his argument that district court failed to adequately explain its consideration of the Section 3553(a) factors for plain error).

Here, there was no error, plain or otherwise. The district court did not ignore Mullet's and Levi Miller's factual arguments. At the lengthy initial sentencing hearing, Mullet extensively argued that his age, lack of prior criminal history, and the collateral consequences to his family and community of a long term of imprisonment warranted a relatively short sentence. (Tr., R. 545, Page ID# 7648-7662). Levi Miller argued likewise, noting that he was 54 years old, had been incarcerated since his arrest, recognized the seriousness of his offense, was not a danger to the community, and had a low risk of recidivism. (Tr., R. 545, Page ID# 7675-7677). The district court acknowledged these arguments, noting that the defendants had no prior records, were not likely to re-offend, and had children and family members who depended on them. (Tr., R. 545, Page ID# 7740-7742). Nevertheless, the court explained in detail why substantial sentences were warranted, including why Mullet deserved the "harshest [and] longest sentence." (Tr., R. 545, Page ID# 7748). The court noted that none of the attacks would have occurred but for him, he controlled everything that occurred in the community and ran it "with an iron fist," he did not express any remorse for the harm he caused, and he remained a danger to the community. (Tr., R. 545, Page ID# 7749).

At resentencing, the court explained that it intended to reduce defendants' sentences – already substantially below the guidelines – because the Section 249(a)(2) convictions had been vacated, but also to maintain the groupings that it originally crafted based on defendants' relative culpability. The court also concluded that, given the nature and circumstances of their conduct and its effect on the victims, the defendants still warranted substantial sentences. The court stated: "*[F]or all of the reasons that I said two years ago*, and for the reasons I've just articulated, I believe that the remaining eight defendants still warrant substantial prison sentences." (Tr., R. 732, Page ID# 9242-9243 (emphasis added)). In these circumstances, there was no need for the court to further address the mitigating factors it explicitly considered during the initial sentencing.

Moreover, Mullet's argument that his sentence should be reduced because of the death of his wife and one his grandchildren while he was in prison is not the kind of argument that compels a specific response by the court in resentencing, particularly where, as here, the court had made clear the reasons for its sentences, including Mullet's relatively longer sentence. See generally *Vonner*, 516 F.3d at 387 (no requirement that court give reasons for "rejecting any and all arguments by the parties for alternative sentences"). The court also expressly noted that it reviewed defendants' filings and the presentence reports, "listened carefully" to counsel's statements, and understood that it was required to consider "everything I

can learn about each defendant." (Tr., R. 732, Page ID# 9238). In these circumstances, taken as a whole, the district court sufficiently explained the reasons for the sentences and did not commit plain error.[33]

Second, Mullet and Levi Miller argue that the court failed to address the unwarranted disparity between their sentences and those of others convicted of similar conduct. Mullet Br. 51-52; Levi Miller Br. 20-21. They cite a study of national average statistics for sentences for obstruction of justice and civil rights offenses, and also the sentences in several specific cases. Levi Miller did not make this argument at either sentencing hearing. Mullet made this argument at his original sentencing hearing (Tr., R. 545, Page ID# 7658-7659), and in the first appeal (see U.S. Br. 177). He did not, however, renew it at resentencing, precluding the district court from addressing this argument. Therefore, this argument is waived. See, *e.g.*, *United States* v. *Bryant*, No. 93-1187, 1994 WL 64707, at *2 (6th Cir. Mar. 4, 1994) ("It certainly seems reasonable to require, when a sentence is vacated and remanded for resentencing, that the defendant

[33] Levi Miller does not develop his argument that the court failed to consider mitigating factors, other than to assert that the district court "should have taken into consideration" his age, criminal history, current length of incarceration, lack of prior convictions, and separation from his wife and family. Levi Miller Br. 20. This Court does not consider undeveloped arguments. See, *e.g.*, *United States* v. *Robinson*, 390 F.3d 853, 886 (6th Cir. 2004). Of course, the district court was aware of all of these factors at resentencing.

renew all of his objections in order to preserve them for appeal. The first sentencing is, at that time, a nullity and perhaps should not function to preserve arguments not re-raised at the second sentencing.").

Even if this issue is properly before this Court, defendants seek larger downward variances than they have already received. But variances tend to increase disparity rather than eliminate it. *United States* v. *Swafford*, 639 F.3d 265, 270 (6th Cir. 2011). Further, the generalized statistics cited by Mullet, devoid of context, do not suffice to show that his sentence was disparate from sentences given for similar conduct in similar circumstances.[34] Section 3553(a)(6) requires the court to avoid unwarranted national sentencing disparities "between defendants with similar criminal histories convicted of similar criminal conduct" to leave room for downward departures for those defendants deserving of leniency. *United States* v. *Rossi*, 422 F. App'x 425, 434 (6th Cir. 2011); *United States* v. *Simmons*,

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[34] Defendants cite to Table 14 of the United States Sentencing Commission's *2014 Sourcebook of Federal Sentencing Statistics*, available at http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/sourcebook-2014 (last visited Aug. 20, 2015). Table 14 reflects that the mean length of imprisonment for "Civil Rights" offenses was 50 months, and for "Administration of Justice Offenses" 24 months. These highly generalized statistics do not reflect that any of the defendants' sentences are at odds with sentences imposed for similar conduct in similar circumstances. For example, the "Administration of Justice Offenses" category broadly include "commission of offense while on release, bribery of a witness, failure to appear by offender, contempt, failure to appear by material witness, *obstruction of justice*, payment of witness, perjury or subornation of perjury, misprision of a felon, and accessory after the fact." See *Sourcebook*, Appendix A (emphasis added).

501 F.3d 620, 624 (6th Cir. 2007). Moreover, this Court has explained that national uniformity "is generally taken into account by the Sentencing Guidelines, which are almost certainly the best indication of ordinary practice"; therefore, challenges to the substantive reasonableness of a sentence are generally more appropriately brought as a challenge to the reasonableness of the sentence, not as a sentence disparity challenge. *Rossi*, 422 F. App'x at 434-435 (citation omitted); *Swafford*, 639 F.3d at 270; see also *United States* v. *Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006) ("Sentencing disparities are at their ebb when the Guidelines are followed, for the ranges are themselves designed to treat similar offenders similarly."); *United States* v. *Hildreth*, 485 F.3d 1120, 1128 (10th Cir. 2007) ("a properly calculated Guidelines sentence will typically reflect an accurate application of the factors listed in § 3553(a), including the need to avoid unwarranted sentencing disparities under § 3553(a)(6)" (citation and internal quotation marks omitted)). The Court has also explained that it considers citations to sentences imposed in other cases to be "weak evidence" to show a national sentencing disparity. *United States* v. *Grigg*, 434 F. App'x 530, 532 (6th Cir. 2011). In short, because Mullet has not shown that this sentence is at odds with those involving similar conduct and arising in a similar context, his sentencing disparity argument fails.

ii. Lester Miller makes a different sentencing disparity argument, comparing his sentence to those of several of his co-defendants. Lester Miller Br. 7-12. Lester Miller was originally sentenced to 60 months' imprisonment, which was reduced on resentencing to 43 months. The crux of his argument is that he should have been resentenced in proportion to the eight defendants originally sentenced to either 12 or 24 months' imprisonment, and therefore should have been resentenced to time-served (then 29 months). See Attachment B. He notes that each defendant originally sentenced to 24 months or less was convicted on two counts, and that after this Court vacated defendants' Section 249(a)(1) convictions he remained convicted on only one count (and not three, as at the original sentencing). His argument, therefore, rests on his view that "he had served more time than individuals convicted of two counts when he had only been convicted of one count." Lester Miller Br. 9; (Tr., R. 732, Page ID# 9193 (Lester Miller's argument at resentencing hearing)). This argument is baseless.

First, Lester Miller misconstrues Section 3553(a)(6) by suggesting that it *forbids* sentencing disparities among co-defendants based upon their individual circumstances. As noted above, this subsection forbids unwarranted *national* disparities, rather than disparate sentences among co-defendants. See, *e.g.*, *United States* v. *Dimora*, 750 F.3d 619, 632 (6th Cir. 2014). At the same time, sentencing courts may, but are not required to, consider sentencing disparities among co-

defendants. *Greco*, 734 F.3d at 451. But co-defendants are sentenced based on the Sentencing Guideline and their individual circumstances, rather than on the sentences given to other defendants. *United States* v. *Richards*, 593 F. App'x 500, 505-506 (6th Cir. 2014). Therefore, a sentence is substantively reasonable if it is proportionate to the offense, regardless of the sentences given to co-defendants. *Id.* at 505.

In any event, in this case, the judge properly exercised his discretion to avoid unwarranted disparities among the co-defendants. In originally sentencing the defendants, the district court accepted the government's grouping of them into five tiers based on culpability. (Tr., R. 545, Page ID# 7748; Government's Sentencing Memorandum, R. 358, Page ID# 4228, 4234-4250). Lester Miller was sentenced in the middle of the five sentencing tiers. He participated in two of the assaults – the attack on his parents, and the attack on the Hershbergers – and was convicted on two counts of violating Section 249(a)(2). He was instrumental in assaulting his parents; he was the first person in the house, and he dragged his father from his bedroom by his beard and threw him in a chair. See U.S. Br. 28-30. He also provided the shears used to attack the Hershbergers, and was present outside their house when the attack occurred, from where he could hear the victims' screams. See U.S. Br. 33-36. The court recognized Lester Miller's involvement in these

attacks, and also noted that he was "deceptive and violent in the[] assaults." (Tr., R. 545, Page ID# 7750-7751).

By contrast, the eight defendants sentenced to 12 or 24 months (the bottom two tiers) were involved in only one assault – six of them participated only in the attack on their in-laws, the Millers, and the court found that they were the least culpable, sentencing them to 12 months. The two defendants sentenced to 24 months also participated in only one assault, but additional factors made them relatively more culpable. The court noted that Linda Schrock used deception to lure her in-laws to her house, where she and her husband attacked them, and lied to the sheriff by assuring him that they did not intend to harm their parents. The court also noted that Raymond Miller, after his arrest, was "ready to go again, commit more assaults." (Tr., R. 545, Page ID# 7743, 7751; Government's Sentencing Memorandum, R. 358, Page ID# 4248-4249). Therefore, even if it were appropriate to compare defendants' sentences, Lester Miller's sentence appropriately reflects that his level of culpability exceeded that of the defendants receiving lesser sentences of 12 or 24 months.

Finally, Lester Miller's seeks to gauge his culpability by comparing his one conviction (*excluding* his two Section 249(a)(2) convictions vacated by this Court), with other defendants' two convictions (*including* their Section 249(a)(2) conviction). There is no explanation, or logical reason, for why that is an

appropriate comparison.[35] In short, Lester Miller's sentence is proportionate to his conduct and his culpability level, and therefore is substantively reasonable.

e. The District Court Correctly Sentenced Johnny Mullet And Daniel Mullet For Conspiracy To Obstruct Justice

Johnny Mullet and Daniel Mullet cite Sentencing Guidelines §1B1.2(d) in suggesting that the district court was required to make its own determination whether they were guilty of conspiring to obstruct justice, and that had the court done so it would have concluded that there was insufficient evidence to support a conviction. Johnny Mullet Br. 10-14; Daniel Mullet Br. 10-13.[36] This argument is not correct.

First, the jury found these defendants guilty of conspiracy to obstruct justice via the special verdicts. When a defendant is convicted of conspiracy, the district court "is to apply the offense level that it would have applied had that defendant been convicted of the substantive offense on which the conspiracy charge is based." *United States* v. *Vallejo*, 297 F.3d 1154, 1169 (11th Cir. 2002); see

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[35] Lester Miller suggests the resentencing court improperly considered the conduct underlying his vacated Section 249(a)(2) convictions as relevant conduct because, at the time of resentencing, that conduct "was not related to a criminal act." Lester Miller Br. 9-11. As we have explained, however, the district court did not err in considering, as relevant conduct pursuant to Section 1B1.3(a)(1), defendants' conduct in the hair-cutting attacks, even though this Court vacated the Section 249(a)(2) convictions.

[36] Johnny Mullet and Danny Mullet's arguments on this issue are essentially the same.

U.S.S.G. § 2X1.1(a). Section 1B1.2(d) sets forth general principles for applying this rule where defendants are charged with conspiracy to commit more than one offense. This guideline provides that, in those circumstances, the conviction shall be treated as if the defendant committed a separate count of conspiracy for each offense. In other words, "where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery." U.S.S.G. § 1B1.2(d), comment. (n.3). The guideline further explains, however, that if the verdict "does not establish which offense(s) was the object of the conspiracy," this rule applies only to an object offense that the court, "were it sitting as a trier of fact, would convict the defendant of conspiring to commit." U.S.S.G. § 1B1.2(d), comment. (n.4).

Defendants assert that their sentencing falls into the latter category. But that is not true. As noted above, the conspiracy verdict was not a general verdict. Pursuant to the verdict form, once the jury found that there was a conspiracy, it had to specifically determine the objects of the conspiracy. There were three listed objects, and the jury found that each defendant joined a conspiracy that had two objects – violating Section 249(a)(2) *and* violating Section 1519. After this Court

vacated the Section 249(a)(2) convictions, defendants remained convicted of conspiracy to obstruct justice.

In this context, Section 1B1.2(d) is irrelevant, and there is no reason for the district court to make an independent factual determination concerning which objects each defendant conspired to convict. Each defendant necessarily remained convicted of conspiracy with only a single object – conspiracy to obstruct justice. Accordingly, defendants have not shown that the district court erred in determining their sentences.

f. The District Court Properly Sentenced Defendants In Accordance With Federal Rule Of Criminal Procedure 32

Finally, Mullet makes a hodge-podge of assertions challenging the district court's compliance with the sentencing requirements in Federal Rule of Criminal Procedure 32. Mullet Br. 38-40. Although he acknowledges that his asserted "errors in themselves may not be prejudicial to [his] sentence," he suggests that they require resentencing. Mullet Br. 40.

Mullet has not identified any errors in the sentencing proceeding that warrant resentencing. Moreover, some of his assertions are factually incorrect – *e.g.*, that the court did not ask those defendants sentenced to time served if they

wished to address the court,[37] or that the court "equivocated" on their right to appeal.[38] Other "errors" complained of – including not resolving certain factual challenges to the presentence report, and failing to ask Mullet whether he had read and discussed the presentence report with his counsel – were not raised at the hearing and, therefore, are reviewed for plain error. *United States* v. *Collier*, 506 F. App'x 459, 461-462 (6th Cir. 2012) (where no objection raised to failure to ascertain that defendant had read presentence report, review is for plain error). Since Mullet effectively admits that any such omissions, if they even occurred, were not prejudicial, he cannot meet the elements of plain error review requiring an effect on substantial rights. See also *United States* v. *Jallad*, 468 F. App'x 600, 605 (6th Cir. 2012) ("As a threshold matter, the defendant must actively raise the dispute during the sentencing hearing before the district court's duty to find facts arises." (citation omitted)).

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[37] At resentencing, the court addressed the eight defendants sentenced to time served and stated: "Do any of those eight defendants wish to address the Court? * * * You don't have to, but you absolutely have the opportunity to do so." (Tr., R. 732, Page ID# 9185).

[38] The court told the defendants sentenced to time served: "I don't think you have the right to further appeal, * * * but out of an abundance of caution I'm advising each of you that if you wish to appeal, you have 14 days to file your notice of appeal and you should consult with your lawyer about that." (Tr., R. 732, Page ID# 9185-9186). Seven of those eight defendants appealed.

Further, Mullet's counsel made extensive arguments to the court at resentencing addressing the guidelines calculations, the Section 3553(a) factors, and his request that Mullet be sentenced to time served. (Tr., R. 732, Page ID# 9211-9232). Although the court denied Mullet's request, the court imposed a sentence (129 months) substantially below both the guidelines range (151-188 months), as well as his original sentence (180 months). In short, Mullet has not identified any error in the resentencing proceedings warranting further resentencing.

CONCLUSION

This Court should affirm defendants' convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The brief is accompanied by United States' Motion To File An Oversized Brief As Appellee and is 23,105 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), if applicable.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: August 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2015, I electronically filed the foregoing Brief for the United States as Appellee with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

ATTACHMENT A: SUMMARY OF ARGUMENTS RAISED BY EACH DEFENDANT ON APPEAL

Defendant-Appellant	**Arguments Raised on Appeal**
1. Samuel Mullet, Sr.	1. Shepard-Byrd Hate Crimes Act is unconstitutional, and therefore the district court lacked jurisdiction over remaining counts 2. Application of kidnapping guideline in sentencing for conspiracy to obstruct justice 3. Sentence is procedurally and substantively unreasonable (various arguments) * Also incorporates all arguments of all other defendants
2. Anna Miller	1. Challenge to Count 1 conspiracy conviction based on the Court of Appeal's reversal of the Section 249 (a)(2) convictions 2. Sufficiency of the evidence to support conspiracy to obstruct justice * Also incorporates Samuel Mullet, Sr.'s argument on the constitutionality of the Shepard-Byrd Hate Crimes Act
3. Levi S. Miller	1. District court should have ordered a new trial instead of resentencing defendants 2. Sentence is procedurally and substantively unreasonable (various arguments) 3. Sufficiency of the evidence to support conspiracy to obstruct justice * Also incorporates arguments of all other defendants
4. Lester Miller	1. Sentence is disproportionate to his co-defendants' sentences 2. Court arbitrarily reduced his sentence by 28 percent

	* Also incorporates arguments of all other defendants
5. Johnny S. Mullet	1. Court failed to make independent finding pursuant to U.S.S.G. § 1B1.2(d) that he committed conspiracy to obstruct justice 2. Application of kidnapping guideline in sentencing for conspiracy to obstruct justice * Also incorporates arguments of all other defendants
6. Daniel S. Mullet	1. Court failed to make independent finding pursuant to U.S.S.G. § 1B1.2(d) that he committed conspiracy to obstruct justice 2. Application of kidnapping guideline in sentencing for conspiracy to obstruct justice * Also incorporates all arguments of all other defendants
7. Linda Schrock	1. Government failed to prove that scissors used in assault on Melvin and Anna Schrock traveled in interstate commerce 2. There was insufficient evidence to prove that defendants caused bodily injury to Melvin or Anna Schrock * Also incorporates all arguments of all other defendants
8. Lester S. Mullet	Incorporates all arguments of Samuel Mullet, Sr., and Anna Miller
9. Raymond Miller	Incorporates all arguments of Samuel Mullet, Sr.
10. Emma Miller	Incorporates all arguments of Samuel Mullet, Sr., relating to dismissal of Count 1 for lack of jurisdiction
11. Elizabeth Miller	Incorporates all arguments of Samuel Mullet, Sr., relating to dismissal of Count 1 for lack of jurisdiction
12. Eli M.	Incorporates all arguments of Samuel Mullet, Sr., and Anna Miller

Miller	
13. Kathyrn Miller	Incorporates all arguments of Samuel Mullet, Sr., and Anna Miller, and all arguments relating to dismissal of Count 1 for lack of jurisdiction
14. Emanuel Schrock	Incorporates all arguments of Samuel Mullet, Sr., Anna Miller, and Daniel Mullet
15. Lovina Miller	Incorporates all arguments of all others defendants

ATTACHMENT B: SUMMARY OF CHARGES BY DEFENDANT (ALSO REFLECTING SENTENCING CULPABILITY GROUPINGS)

Defendant	Counts Charged	Guilty	Guideline Range (per PSR)	Sentence	Remaining Guilty Counts After Appeal	New Guideline Range (per PSR)	Resentence After Remand
1. Samuel Mullet, Sr.	1 (371) 2 (249) 3 (249) 4 (249) 5 (249) 6 (249) 7 (1519) 8 (1519) 10 (1001)	X X X X X X X	Life	**180 mos.**	1 (371) 8 (1519) 10 (1001)	324-405 mos. (statutory max of 360 mos.)	**129 mos.**
2. Johnny S. Mullet	1 (371) 4 (249) 5 (249)	X X X	Life	**84 mos.**	1 (371)	235-293 mos. (statutory max of 60 mos.)	**60 mos.**
3. Lester S. Mullet	1 (371) 4 (249) 5 (249) 8 (1519)	X X X X	Life	**84 mos.**	1 (371) 8 (1519)	188-235 mos. (statutory max of 300 mos.)	**60 mos.**
4. Levi Miller	1 (371) 3 (249) 4 (249) 5 (249) 8 (1519)	X X X	Life	**84 mos.**	1 (371)	210-262 mos. (statutory max of 60 mos.)	**60 mos.**
5. Eli M. Miller	1 (371) 2 (249) 3 (249) 4 (249) 5 (249 8 (1519)	X X X X X	Life	**84 mos.**	1 (371) 8 (1519)	392-365 mos. (statutory max of 300 mos.)	**60 mos.**

6. Daniel S. Mullet	1 (371) 4 (249) 5 (249)	X X X	324-405 mos.	**60 mos.**	1 (371)	151-188 mos. (statutory max of 60 mos.)	**43 mos.**
7. Emanuel Schrock	1 (371) 3 (249) 6 (249)	X X	324 mos. to Life	**60 mos.**	1 (371)	188-235 mos. (statutory max of 60 mos.)	**43 mos.**
8. Lester Miller	1 (371) 2 (249) 4 (249) 5 (249) 9 (1519)	X X X	360 mos. to Life	**60 mos.**	1 (371)	168-210 mos. (statutory max of 60 mos.)	**43 mos.**
9. Raymond Miller	1 (371) 2 (249)	X X	262-327 mos.	**24 mos.**	1 (371)	97-121 mos. (statutory max of 60 mos.)	**Time Served - Sentence completed**
10. Linda Schrock	1 (371) 6 (249)	X X	262 mos. To Life	**24 mos.**	1 (371)	121-151 mos. (statutory max of 60 mos.)	**Time Served - Sentence completed**
11. Freeman Burkholder	1 (371) 2 (249)	X X	262-327 mos.	**12 mos. & 1 day**	1 (371)	97-121 mos. (statutory max of 60 mos.)	**Time Served - Sentence completed**

12. Anna Miller	1 (371) 2 (249)	X X	262-327 mos.	**12 mos. & 1 day**	1 (371)	97-121 mos. (statutory max of 60 mos.)	**Time Served - Sentence completed**
13. Lovina Miller	1 (371) 2 (249)	X X	262-327 mos.	**12 mos. & 1 day**	1 (371)	97-121 mos. (statutory max of 60 mos.)	**Time Served - Sentence completed**
14. Kathyrn Miller	1 (371) 2 (249)	X X	262-327 mos.	**12 mos. & 1 day**	1 (371)	97-121 mos. (statutory max of 60 mos.)	**Time Served - (Sentence completed**
15. Emma Miller	1 (371) 2 (249)	X X	262-327 mos.	**12 mos. & 1 day**	1 (371)	97-121 mos. (statutory max of 60 mos.)	**Time Served - Sentence completed**
16. Elizabeth Miller	1 (371) 2 (249)	X X	262-327 mos.	**12 mos. & 1 day**	1 (371)	97-121 mos. (statutory max of 60 mos.)	**Time Served - Sentence completed**

ATTACHMENT C: SUMMARY BY COUNTS CHARGED

Count	Defendants Charged	Defendant(s) Convicted	Victims	Date of Assault	Convictions Remaining after Appeal
1. 18 U.S.C. 371	All 16 defendants charged with conspiracy	ALL			ALL
2. 18 U.S.C. 249	Samuel Mullet, Sr. Eli Miller Lester Miller Raymond Miller Freeman Burkholder Anna Miller Lovina Miller Kathyrn Miller Emma Miller Elizabeth Miller	ALL	Marty and Barbara Miller	9/6/11	NONE
3. 18 U.S.C. 249	Samuel Mullet, Sr. Levi Miller Emanuel Schrock Eli Miller	NONE	David Wengerd	9/24/11	NONE
4. 18 U.S.C. 249	Samuel Mullet, Sr. Johnny S. Mullet Danny S. Mullet Lester S. Mullet Levi Miller Eli Miller Lester Miller	ALL	Raymond, Andy, and Levi Hershberger	10/4/11	NONE
5. 18 U.S.C. 249	Samuel Mullet, Sr. Johnny S. Mullet Danny S. Mullet Lester S. Mullet Levi Miller Eli Miller Lester Miller	Samuel Mullet, Sr. Johnny S. Mullet Danny S. Mullet Lester S. Mullet Levi Miller Eli Miller	Myron Miller	10/4/11	NONE

6. 18 U.S.C. 249	Samuel Mullet, Sr. Emanuel Schrock Linda Schrock	ALL	Melvin and Anna Schrock	11/9/11	NONE
7. 18 U.S.C. 1519	Samuel Mullet, Sr.	NONE			NONE
8. 18 U.S.C. 1519	Samuel Mullet, Sr. Levi Miller Eli Miller Lester Mullet	Samuel Mullet, Sr. Eli Miller Lester Mullet			Samuel Mullet, Sr. Eli Miller Lester Mullet
9. 18 U.S.C. 1519	Lester Miller	NONE			NONE
10. 18 U.S.C. 1001	Samuel Mullet, Sr.	Samuel Mullet, Sr.			Samuel Mullet, Sr.

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGE ID# RANGE
73	Motion to Dismiss	1129-1147
79	Motion to Dismiss	1159-1169
87	Indictment	1184-1204
145	Opinion and Order	1497
230	Verdict Form	2036-2133
314	Transcript of Final Pretrial Proceedings, August 20, 2012	3500
358	Government's Sentencing Memorandum	4228, 4234-4250
391	Judgment as to Johnny S. Mullet	4474-4478
392	Judgment as to Daniel S. Mullet	4479-4483
393	Judgment as to Lester S. Mullet	4484-4488
394	Amended Judgment as to Samuel Mullet, Sr.	4489-4493
395	Judgment as to Levi F. Miller	4494- 4495
396	Judgment as to Eli Miller	4499-4503
404	Judgment as to Emanuel Schrock	4516-4520
405	Judgment as to Lester Miller	4521-4525
406	Judgment as to Raymond Miller	4526-4530
407	Judgment as to Freeman Burkholder	4531-4535
408	Judgment as to Anna Miller	4536-4540
409	Judgment as to Lovina Miller	4541-4545
410	Judgment as to Kathryn Miller	4546-4550
411	Judgment as to Emma Miller	4551-4555
412	Judgment as to Elizabeth Miller	4556-4560
413	Judgment as to Linda Schrock	4561-4565
528	Jury Trial Transcript, August 29, 2012	
528	Testimony of Andy Hershberger	5276, 5286
528	Testimony of Barbara Miller	5415-5416, 5429, 5454, 5457, 5460, 5488
529	Jury Trial Transcript, August 30, 2012	
529	Testimony of Nancy Burkholder	5575-5583, 5627-5628

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGE ID# RANGE
529	Testimony of Chris Mullet	5702, 5715-5717, 5724-5725
537	Jury Trial Transcript, September 6, 2012	
537	Testimony of Daniel Schrock	5980-5981, 5986, 6004-6007, 6013-6017, 6039, 6047-6049
538	Jury Trial Transcript, September 5, 2012	
538	Testimony of Mark Clark	6114-6116
538	Testimony of Joseph Mullet	6165
538	Testimony of Fred Johnson	6222-6232
539	Jury Trial Transcript, September 7, 2012	
539	Testimony of Johnny Mast	6403, 6414-6417, 6425, 6429-6454, 6533-6534, 6539
540	Jury Trial Transcript, September 10, 2012	
540	Testimony of Barbara Yoder	6649, 6653-6654, 6656-6657, 6695-6697, 6700
540	Testimony of Michael Sirohman	6747, 6752-6754, 6764, 6788-6792, 6876-6877
540	Testimony of Donald Kraybill	6923
541	Jury Trial Transcript, September 11, 2012	
541	Testimony of Donald Kraybill	7052-7053

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGE ID# RANGE
542	Jury Instructions	7243, 7245, 7248-7249, 7255
545	Sentencing Hearing Transcript, February 8, 2013	7648-7662, 7675-7677, 7740-7743, 7748-7751,
556-9	GX 16-6, 16-9, 16-16, transcript of jail recordings	7834, 7837, 7844
556-13	GX 28-1-28-2, Johnny Mullet's written statement	7900-7901
568	Scheduling Order	7962-7963
590	Presentence Investigate Report	8332, 8337-8338
603	United States Sentencing Memorandum	8548
604	Motion to Conform Proceedings	8552-8555
605	Motion to Dismiss by Lester Miller	8556-8564
606	Motion to Dismiss by Linda Schrock	8565-8570
607	Motion to Dismiss by Samuel Mullet, Sr.	8571-8581
613	Motion to Dismiss by Emanuel Schrock	8635-8638
618	Opinion and Order	8656-8657
621	Motion to Dismiss by Levi Miller	8662-8663
622	Anna Miller's Joinder	8664-8665
623	Motion to Join by Lovina Miller	8666-8667
624	Motion to Dismiss by Elizabeth Miller's	8668-8670
625	Motion to Dismiss by Daniel S. Mullet	8671-8676
626	Motion to Vacate by Daniel S. Mullet	8677-8685
627	Motion to Join by Lester S. Mullet	8686-8687
629	Motion to Join by Kathryn Miller	8694
635	Motion to Join by Levi Miller	8815-8816
639	Opinion and Order	8881-8887
642	Opinion and Order	8899-8901
645	Notice to Court	8940-8942
663	Amended Judgment as to Samuel Mullet, Sr.	8977-8981
664	Amended Judgment as to Johnny S. Mullet	8982-8986
665	Amended Judgment as to Daniel S. Mullet	8987-8991

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGE ID# RANGE
666	Amended Judgment as to Emanuel Schrock	8992-8996
667	Amended Judgment as to Lester Miller	8997-9001
668	Notice of Appeal by Samuel Mullet, Sr.	9002
669	Amended Judgment as to Lester S. Mullet	9003-9007
670	Amended Judgment as to Levi F. Miller	9008-9012
671	Amended Judgment as to Eli Miller	9013-9017
672	Amended Judgment as to Raymond Miller	9018-9022
673	Amended Judgment as to Freeman Burkholder	9023-9027
674	Amended Judgment as to Anna Miller	9028-9032
675	Amended Judgment as to Linda Shrock	9033-9037
676	Amended Judgment as to Lovina Miller	9038-9042
677	Amended Judgment as to Kathryn Miller	9043-9047
678	Amended Judgment as to Emma Miller	9048-9052
680	Amended Judgment as to Elizabeth Miller	9055-9059
682	Notice of Appeal by Levi F. Miller	9061-9062
684	Notice of Appeal by Lester S. Mullet	9064-9065
685	Notice of Appeal by Anna Miller	9066-9067
688	Notice of Appeal by Johnny Mullet	9072-9073
692	Notice of Appeal by Emanuel Schrock	9077-9078
693	Notice of Appeal by Raymond Miller	9079
694	Notice of Appeal by Kathryn Miller	9080-9081
695	Notice of Appeal by Daniel S. Mullet	9082-9083
696	Notice of Appeal by Eli Miller	9084-9085
697	Notice of Appeal by Elizabeth Miller	9086-9092
698	Notice of Appeal by Lovina Miller	9093
700	Notice of Appeal by Emma Miller	9097-9098
703	Notice of Appeal by Lester Miller	9104-9105
705	Notice of Appeal by Linda Schrock	9110-9111
707	Notice of Appeal by Emma Miller	9113-9114
728	Government’s Motion to Dismiss Without Prejudice	9155-9159
729	Order granting Motion to Dismiss	9160-9161
732	Resentencing Transcript hearing held on Mar. 2, 2015	9167-9251