Nos. 13-3177, 13-3181, 13-3182, 13-3183, 13-3193, 13-3194, 13-3195, 13-3196, 13-3201, 13-3202, 13-3204, 13-3205, 13-3206, 13-3207, 13-3208, 13-3214

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. 13-3177, 13-3181, 13-3182, 13-3183, 13-3193, 13-3194, 13-3195, 13-3196, 13-3201, 13-3202, 13-3204, 13-3205, 13-3206, 13-3207, 13-3208, 13-3214

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STATEMENT REGARDING ORAL ARGUMENT

Because defendants challenge the constitutionality of the federal criminal statute under which they were convicted, and raise other important legal issues relating to the application of the statute, the government requests oral argument.

JURISDICTIONAL STATEMENT

This is a consolidated appeal in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. 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 filed timely notices of appeal on February 15, 17-21, and 25, 2013. (Notices of Appeal, R. 397-400, 402-403, 414-415, 417-419, 425, 427, 430-431, 444, Page ID# 4504-4509, 4512-4515, 4566-4569, 4572-4577, 4583, 4586, 4595-4598, 4612-4613). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

This brief responds to 16 separate briefs filed by the defendants-appellants. Seven of these briefs raise substantive issues, and there is overlap of the issues presented. The nine other briefs incorporate arguments made by other defendants. Taken together, the defendants raise the following issues on appeal[2]:

1. Whether 18 U.S.C. 249(a)(2) is a valid exercise of Congress's Commerce Clause power, both facially and as applied in this case.

2. Whether the jury was correctly instructed on the meaning of "because of" religion in 18 U.SC. 249(a)(2).

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

3. Whether the jury was correctly instructed on the definition of kidnapping as used in the sentencing enhancement provision of 18 U.S.C. 249(a)(2).

4. Whether the government's prosecution of this case violated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb.

5. Whether the district court abused its discretion in admitting the testimony of various government witnesses.

6. Whether the district court's jury instructions on conspiracy constructively amended the indictment in violation of defendants' Fifth Amendment rights.

7. Whether the evidence was sufficient to sustain various convictions.

8. Whether the government's closing argument deprived defendants of their right to a fair trial.

9. Whether the district court abused its discretion in sentencing Samuel Mullet, Sr.

10. Whether the district court abused its discretion in sentencing Levi Miller.

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).[3] The indictment alleged that 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, 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).[4] 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 objects of the conspiracy: (1) to cause bodily injury to nine victims – Marty Miller, Barbara Miller, David Wengerd, Raymond

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[3] 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 indicted, the verdict as to each count, and their sentences. 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.

[4] 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."

Hershberger, Andy Hershberger, Levi Hershberger, Myron Miller, Melvin Schrock, and Anna Schrock[5] – 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 alleged numerous overt acts relating to five separate attacks, as well as to destroying evidence and making false statements to law enforcement investigators. (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).

Count 2 addressed the September 6, 2011, assault of Marty and Barbara Miller, and charged ten defendants with violating Section 249(a)(2) "by forcibly removing [Marty Miller's] beard and head hair and [Barbara Miller's] head hair" because of their religion, causing bodily injury. Count 2 further alleged that, in connection with the assaults, defendants used battery-operated Wahl hair clippers that had traveled in interstate commerce and hired a driver to transport them in a

[5] The victims were identified in the indictment by their initials, but their names were disclosed during the course of the case. (Indictment, R. 87, Page ID# 1185).

motor vehicle to the victims' home, thereby traveling using an instrumentality of interstate commerce. (Indictment, R. 87, Page ID# 1197-1198).

Count 3 addressed the September 24, 2011, assault of David Wengerd, and charged four defendants with violating Section 249(a)(2) "by forcibly removing his beard and head hair" because of his religion, causing bodily injury. Count 3 further alleged that, in connection with the assault, defendants induced Wengerd to hire a driver to transport him to one of the defendants' homes, thereby resulting in Wengerd's traveling using an instrumentality of interstate commerce. (Indictment, R. 87, Page ID# 1198-1199).

Count 4 addressed the October 4, 2011, assault of Raymond Hershberger and his two sons, Andy and Levi Hershberger, and charged seven defendants with violating Section 249(a)(2) by "assault[ing Raymond Hershberger and Andy Hershberger] by forcibly removing their beards and head hair" because of their religion, causing bodily injury, and by "assault[ing Levi Hershberger] by throwing him into the arm of a couch and injuring his ribs." Count 4 further alleged that, in connection with these assaults, defendants (1) hired a driver to transport them in a motor vehicle to the victims' home, thereby traveling using an instrumentality of interstate commerce, and (2) used dangerous weapons, *i.e.*, eight-inch horse mane shears and battery-operated Wahl hair clippers, that had traveled in interstate commerce. (Indictment, R. 87, Page ID# 1199-1200).

Count 5 addressed a separate attack that occurred on October 4, 2011, and charged seven defendants with violating Section 249(a)(2) by assaulting [Myron Miller] by "forcibly restraining him and removing his beard" because of his religion, causing bodily injury. Count 5 further alleged that, in connection with the assault, defendants (1) hired a driver to transport them in a motor vehicle to Myron Miller's home, thereby traveling using an instrumentality of interstate commerce, and (2) used a dangerous weapon, *i.e.*, eight-inch horse mane shears, that had traveled in interstate commerce. (Indictment, R. 87, Page ID# 1200-1201).

Count 6 addressed a fifth attack, which occurred on November 9, 2011. Count 6 charged three defendants with violating Section 249(a)(2) by "assault[ing Melvin Schrock] by forcibly removing his beard and head hair with scissors" because of his religion, causing bodily injury, and by "assault[ing Anna Schrock] when she attempted to intervene in the attack on [Melvin Schrock]." Count 6 further alleged that in connection with the assault (1) Melvin and Anna Schrock hired a driver and traveled using an instrumentality of interstate commerce, and (2) defendant Emanuel Schrock used an instrumentality of interstate commerce, *i.e.*, letters sent in the United States Mail, to lure the victims to his home. (Indictment, R. 87, Page ID# 1201-1202).

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 Miller) 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).[6]

b. Defendants moved to dismiss the indictment. (*E.g.*, Motion to Dismiss, R. 73, Page ID# 1129-1147; Motion to Dismiss, R. 79, Page ID# 1159-1169). The

[6] Pursuant to 18 U.S.C. 249(b), the Assistant Attorney General certified prosecution of the defendants under 18 U.S.C. 249(a)(2) "because the State has requested that the Federal Government assume jurisdiction," and it "is in the public interest and necessary to secure substantial justice." (Certificate of the Assistant Attorney General, R. 91, Page ID# 1215-1216).

crux of their arguments was that 18 U.S.C. 249(a)(2) is unconstitutional on its face and as applied because it exceeds Congress's Commerce Clause power and the conduct charged lacks a sufficient nexus to interstate commerce. The district court denied the motions, noting that Section 249(a)(2) requires the government to prove that there is a "jurisdictional nexus" that "establish[es] an explicit connection between the prohibited conduct and interstate commerce." (Opinion and Order, R. 145, Page ID# 1497).[7] The court concluded that the Superseding Indictment satisfied this requirement by alleging that defendants "used scissors * * *, which had traveled from out of state into Ohio, to carry out the assault," and "lured a victim by using the mail system and used motor vehicles to facilitate each assault." (Opinion and Order, R. 145, Page ID# 1497).

Prior to trial, various issues arose with regard to the jury instructions. The court addressed the appropriate definition of "kidnapping" as used in Section 249(a)(2), which does not define the term. (Tr., R. 314, Page ID# 3500-3511). The court also addressed the instructions regarding the meaning of the phrase "because of the actual or perceived religion of victim" in Section 249(a)(2), and whether defendants had to act with a "religious animus" toward the victims (*i.e.*, that they acted "because of hatred toward the victim's belonging to the Amish

[7] Reported at 868 F. Supp. 2d 618 (N.D. Ohio 2012).

faith"). (Tr., R. 314, Page ID# 3489-3498; Defendants' Proposed Jury Instructions, R. 158, Page ID# 1583).

c. A jury trial was held between August 28 and September 12, 2012. (Tr., R. 527-529, 537-542, Page ID# 5055-5741, 5792-7496). On September 11, 2012, at the end of the government's evidence, the court denied motions for judgment of acquittal. (Tr., R. 541, Page ID# 7186-7191). There were no defense witnesses.

On September 20, 2012, the jury found all 16 defendants guilty of conspiracy (Count 1) and each defendant guilty of various charges relating to four of the five religion-based attacks. (See Attachment B; Verdict Form, R. 230, Page ID# 2036-2133). All four defendants charged with the September 24, 2011, assault of David Wengerd (Count 3) were acquitted. (Verdict Form, R. 230, Page ID# 2057, 2084, 2093, 2100). Samuel Mullet, Sr., was acquitted of Count 7 (obstruction), and Lester Miller was acquitted of Count 9 (obstruction). (Verdict Form, R. 230, Page ID# 2064, 2109). For each guilty verdict on the Section 249(a)(2) charge, the jury specifically found that the offense included kidnapping. (*E.g.*, Verdict Form, R. 230, Page ID# 2056, 2059, 2061, 2063).

d. On November 1, 2012, defendants filed a motion for judgment of acquittal or a new trial on the conspiracy and Section 249 counts. (Motion for Judgment, R. 264, Page ID# 2668-2700; Motions to Join, R. 266-273, Page ID# 2703-2718; R. 275, Page ID# 2721; R. 278, Page ID# 2726-2727; R. 281, Page

ID# 2730-2731). Defendants again argued that Section 249(a)(2) was unconstitutional on its face and as applied. Samuel Mullet, Sr., also argued that the evidence was insufficient to link him personally to the beard- and hair-cutting attacks; newly discovered evidence warranted a new trial; and the admission of certain evidence constituted a miscarriage of justice. (Motion for Judgment, R. 264, Page ID# 2670-2686, 2698). On December 6, 2012, the court denied the motion. (Opinion and Order, R. 293, Page ID# 2800-2807).

e. 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 in one of five groups, based on the district judge's assessment of each individual defendant's conduct and background, 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[8]

See also Attachment B. Every defendant received a downward variance from the advisory guidelines sentencing range. Defendants filed timely notices of appeal. (Notices of Appeal, R. 397-400, 402-403, 414-415, 417-419, 425, 427, 430-431, 444, Page ID# 4504-4509, 4512-4515, 4566-4569, 4572-4577, 4583, 4586, 4595-4598, 4612-4613).[9]

2. Statement Of The Facts

This case arises out of five religiously-motivated, premeditated, violent attacks over a two-month period by members of a community in Bergholz, Ohio, against practitioners of the Amish religion. Defendants' convictions relate to four of these five attacks: (1) the September 6, 2011, assault of Marty and Barbara Miller; (2) the October 4, 2011, assault of Raymond, Andy, and Levi Hershberger; (3) the October 4, 2011, assault of Myron Miller; and (4) the November 9, 2011,

[8] At the government's suggestion, the district court deferred the reporting date for Kathryn Miller and Elizabeth Miller until other defendants were released from custody to minimize the hardship on some defendants' minor children. (Tr., R. 545, Page ID# 7753).

[9] Several of the defendants filed motions for release pending appeal with this Court, which the Court denied. See Order, *United States* v. *Schrock*, No. 13-3194 (6th Cir. May 9, 2013); Order, *United States* v. *Samuel Mullet, Sr.*, No. 13-3205 (6th Cir. July 24, 2013); Order, *United States* v. *Anna Miller*, No. 13-3183 (6th Cir. July 24, 2013).

assault of Melvin and Anna Schrock. There is no dispute that these assaults occurred.

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. To effectuate the assaults, defendants hired drivers to either drive them to the victims, or the victims to them. The defendants used various implements to commit the assaults. They used battery-operated Wahl hair clippers in the attack on September 6, 2011, and the first attack on October 4, 2011. (Tr., R. 538, Page ID# 6310; Tr., R. 540, Page ID# 6763-6764, 6946; GX 1 (battery-operated Wahl hair clippers)). They used eight-inch horse mane shears in the two assaults on October 4, 2011, which they purchased earlier that day at the Mount Hope horse auction. (Tr., R. 538, Page ID# 6378; GX 2 (the eight-inch horse mane shears)). They used another pair of horse scissors in the November 9, 2011, assault. (Tr., R. 537, Page ID# 6078; GX 14 (the horse scissors)). The evidence established that the battery-operated Wahl hair clippers, the eight-inch horse mane shears, and the horse scissors had traveled in interstate commerce. During some of the attacks, defendants injured individuals who lived with the victims. After the assaults, some of the defendants concealed – by literally burying – a camera used to memorialize their acts, and Samuel Mullet, Sr., (Mullet) made false statements to a federal investigator.

a. The Victims, The Defendants, And The Defendants' Compound In Bergholz, Ohio

(i). The nine victims are members of the Old Order Amish faith who live in various Old Order Amish communities, or "district[s]," spread over four counties and two judicial districts in Ohio. (Tr., R. 528, Page ID# 5238, 5405; Tr., R. 537, Page ID# 5797-5798). The Old Order Amish "try to stay away from the modern way of life" and "keep life more simple." (Tr., R. 528, Page ID# 5405). They do not drive automobiles or use electricity. When they must travel, they hire a driver. (Tr., R. 528, Page ID# 5244, 5412; Tr., R. 529, Page ID# 5586). They have their own schools, which their children generally attend through eighth grade. (Tr., R. 528, Page ID# 5248-5249). They speak Pennsylvania Dutch. (Tr., R. 528, Page ID# 5236).

Married Amish men typically grow long beards, and the women grow their hair long and wear it under a prayer cap (or bonnet). (Tr., R. 528, Page ID# 5317-5318, 5406-5407; Tr., R. 537, Page ID# 5800; Tr., R. 541, Page ID# 6969-6972). The beards, long hair, and prayer cap are generally considered central to the Amish tradition and are considered religious symbols. (Tr., R. 528, Page ID# 5406; Tr., R. 541, Page ID# 6968, 7006-7007). According to Professor Donald Kraybill, an expert who testified for the government on the Amish religion, the beard is a "historical religious practice" and "public symbol": "It's a symbol of devotion to God, a symbol of piety, a symbol of righteousness, and a very public symbol of

Amish religious identity. It's there all the time, and so it's very central in terms of a man's religious identity." (Tr., R. 541, Page ID# 6969-6970, 7006; see generally Tr., R. 528, Page ID# 5242-5243, 5317-5319, 5406-5407; Tr., R. 529, Page ID# 5729-5730; Tr., R. 537, Page ID# 5800). The beards reflect creation (they believe it is the natural order of things for men to have beards), the separation of gender (which is common in many Amish activities), and scripture (the numerous references to beards in the Bible). (Tr., R. 541, Page ID# 6968-6969). The men begin to let their beard grow when they marry and then do not cut it. As a general matter, if an Amish man appeared in public without his beard, others would think he is "leaving the Amish." (Tr., R. 528, Page ID# 5242-5243; Tr., R. 537, Page ID# 5800). The tradition of the women wearing a prayer cap or bonnet stems from the belief, according to Dr. Kraybill, that women "should have their heads covered whenever they are praying, and they should pray unceasingly." (Tr., R. 541, Page ID# 6971-6972).

Typically, the Amish church does not have a centralized structure. The "basic unit" of Amish society is the church "district," which is akin to a local congregation or parish. (Tr., R. 540, Page ID# 6906-6907). Districts do not have separate church buildings; the families take turns hosting the church services in their homes. (Tr., R. 528, Page ID# 5250, 5316-5317). The typical Amish district comprises 15-35 families. If a district becomes larger than that, the members

cannot gather in one house, so the church will split and a new district will be formed. (Tr., R. 528, Page ID# 5250-5251; Tr., R. 540, Page ID# 6908-6909). Each district has a bishop, who is the senior official and religious leader of the community. (Tr., R. 528, Page ID# 5249-5250, 5253; Tr., R. 540, Page ID# 6924). Along with the deacon, ministers, and preachers, the bishop gives spiritual direction to the members. (Tr., R. 540, Page ID# 6924). Districts form "affiliations" with other districts that have similar rules, regulations, and practices. (Tr., R. 540, Page ID# 6911-6912). If there are doctrinal disagreements among districts in an affiliation, the bishops will meet to try to resolve the issue. Some of these bishop meetings include over 100 bishops. (Tr., R. 540, Page ID# 6927-6928).[10]

A bishop's responsibilities include not only spiritual matters, but also doctrinal issues. (Tr., R. 528, Page ID# 5408; Tr., R. 540, Page ID# 6924). If a member does not comply with church rules, the deacons and ministers will talk to the person and try to convince the person to conform. (Tr., R. 528, Page ID# 5255-5256; Tr., R. 537, Page ID# 5799; Tr., R. 541, Page ID# 6974-6975). If that is

[10] There are many different Amish affiliations that have different traditions in terms of technology, dress, and other practices. (Tr., R. 528, Page ID# 5308-5309; Tr., R. 540, Page ID# 6914; Tr., R. 541, Page ID# 7096). According to Professor Kraybill, the term "Old Order Amish" originated in the late 1800's to refer to the more conservative Amish groups rather than some more progressive groups; the Old Order Amish wanted "to stick with the old * * * way of doing things." (Tr., R. 540, Page ID# 6915-6916).

unsuccessful, the person will be given a period of time to conform. (Tr., R. 528, Page ID# 5256; Tr., R. 541, Page ID# 6975). If the person does not, he is brought before the church and, unless he makes a public confession, may be excommunicated by a vote of the members. (Tr., R. 528, Page ID# 5258, 5333-5334; Tr., R. 541, Page ID# 6975-6976, 7007-7008). The bishop alone cannot excommunicate a member. (Tr., R. 528, Page ID# 5258). Excommunication means the loss of membership in the church. (Tr., R. 528, Page ID# 5257; Tr., R. 541, Page ID# 6978, 7020-7021). The bishop and ministry team of one district have no authority over those in another district. (Tr., R. 540, Page ID# 6925).

As part of Old Order Amish religious practice, a person who is excommunicated is "shunned" by other members of their district. (Tr., R. 528, Page ID# 5395-5396; Tr., R. 541, Page ID# 6978). The person may remain in the community and may talk to members of the church. (Tr., R. 541, Page ID# 7021). But the person is "sham[ed]" through practices that are intended to remind him to confess; *e.g.*, he must sit at a separate table. (Tr., R. 528, Page ID# 5348-5349, 5408; Tr., R. 541, Page ID# 7021). A person who has been excommunicated may return to the church if he appears before the congregation and publicly confesses. (Tr., R. 528, Page ID# 5358, 5377; Tr., R. 537, Page ID# 5825-5826; Tr., R. 541, Page ID# 7011). If that does not happen, the person will generally move out of the community. (Tr., R. 528, Page ID# 5349). Other Amish churches of the same

affiliation are expected to honor the district's excommunication and not accept the person into their church district – a practice generally called "strict shunning." (Tr., R. 528, Page ID# 5260-5261, 5321; Tr., R. 540, Page ID# 6929-6931; Tr., R. 541, Page ID# 7018, 7055). Therefore, if a person who has been excommunicated wants to join another Amish church, he must first return to the church from which he was excommunicated, confess, and be restored to full membership. (Tr., R. 528, Page ID# 5260-5261, 5359; Tr., R. 540, Page ID# 6929).[11]

According to victim testimony, Old Order Amish do not consider violence or physical punishment to be an appropriate disciplinary measure or part of shunning. (Tr., R. 528, Page ID# 5238-5239, 5260, 5409, 5420-5421; Tr., R. 541, Page ID# 6977, 7022-7023). A victim also testified that an Old Order Amish bishop does not become intimate with other members of the community. (Tr., R. 528, Page ID# 5422-5424; Tr., R. 541, Page ID# 6983-6984).

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[11] By contrast, where districts practice "moderate" shunning, a person who has been excommunicated by one Amish district may be accepted into a new district without first returning to his original district and having his excommunication lifted. In such a case, once the person is accepted into the new district, the original district will lift the ban, and its members will stop shunning the person. (Tr., R. 528, Page ID# 5260, 5320-5322; Tr., R. 540, Page ID# 6929-6930). According the Professor Kraybill, the Amish world has long been divided over strict shunning versus moderate shunning, and there have been numerous large bishops' meetings addressing the issue. (Tr., R. 540, Page ID# 6928-6929). "The more traditional, old-fashioned attitude toward shunning is strict shunning." (Tr., R. 540, Page ID# 6931).

(ii). 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 defendant Samuel Mullet, Sr., the unquestioned leader of the Bergholz community. (Tr., R. 529, Page ID# 5575-5581; Tr., R. 540, Page ID# 6788-6792, and exhibits addressed therein).

At the time Mullet married, he lived in Trumbull County, Ohio, where his father was the Bishop of an Amish community. (Tr., R. 528, Page ID# 5410). Mullet later moved to Fredericktown, Ohio, but, because he believed that the Fredericktown bishops were not strict enough, in 1995, he and others split off and formed their own church in Bergholz, Ohio. (Tr., R. 528, Page ID# 5411, 5414; Tr., R. 540, Page ID# 6747, 6917, 6923).

In 2001, Mullet became the self-appointed Bishop of the Bergholz church, and, more than that, the all-powerful leader of all aspects of life on the compound. (Tr., R. 528, Page ID# 5415-5416; Tr., R. 540, Page ID# 6923). Mullet described his responsibilities as Bishop as ensuring that community members live their lives in a manner consistent with his scriptural teachings and "obey" his instructions, religious and otherwise. (Tr., R. 540, Page ID# 6779). The community regularly met three nights a week at Mullet's house. (Tr., R. 529, Page ID# 5583).

Mullet maintained tight control of the activities of Bergholtz. He yelled at church members and expressed that those who disagreed with him were living in sin. (Tr., R. 528, Page ID# 5420-5422). He also screened incoming and outgoing mail. (Tr., R. 529, Page ID# 5674). Further, he took an active role in overseeing the marital relationships of community members by sexually "counseling" couples, especially women. (Tr., R. 528, Page ID# 5423-5424; Tr., R. 529, Page ID# 5676-5677). For instance, he "counsel[ed]" Nancy Mullet concerning her marriage to his son, Eli Mullet, by first having her hug and kiss him (Mullet), and ultimately having her come to his room to have sex with him. (Tr., R. 529, Page ID# 5678-5682, 5695-5698).[12] When she resisted, he said that he "c[ould]n't understand why you can't obey me. The other ladies can." (Tr., R. 529, Page ID# 5682).[13]

Under Mullet's leadership, the Bergholz community also developed their own methods of disciplining members of the community. They used outdoor chicken coops, so-called "Amish jails," where members would be confined for days or weeks, sometimes in cold weather, as punishment for their sins and to

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[12] Defendants filed a motion in limine to preclude the use of this evidence at trial, which the court denied. (Motion in Limine, R. 153, Page ID# 1522-1526; Pre-Trial Transcript, R. 314, Page ID# 3513-3524).

[13] This is not the only example of Mullet's apparent "counseling." When Mullet was arrested in his home on November 23, 2011, at approximately 6:00 a.m., he emerged from his bedroom with defendant Lovina Miller, the wife of Mullet's nephew, defendant Eli Miller. (Tr., R. 540, Page ID# 6742-6743).

reform their lives. (Tr., R. 538, Page ID# 6335; Tr., R. 539, Page ID# 6505-6508; Tr., R. 540, Page ID# 6640-6641). In addition, adult members of Mullet's Bergholz community would have to submit themselves to corporal punishment with a paddle. (Tr., R. 538, Page ID# 6335; Tr., R. 539, Page ID# 6508-6510). Members of the Bergholz community also sometimes voluntarily cut each other's beard and head hair as part of a cleansing ritual designed to allow members to recommit themselves to living a proper spiritual life. (Tr., R. 537, Page ID# 5977-5979, 6040-6041; Tr., R. 538, Page ID# 6334; Tr., R. 539, Page ID# 6401; Tr., R. 540, Page ID# 6676-6677).

(iii). Mullet excommunicated several families from Bergholz. (Tr., R. 541, Page ID# 7052-7053). In 2000, Mullet excommunicated Lavern and Mattie Troyer for not obeying church rules; the Troyers' excommunication partially underlies some of the attacks in this case. (Tr., R. 539, Page ID# 6497; Tr., R. 540, Page ID# 6748-6749).[14] He also excommunicated others in the community who were

[14] After their excommunication, instead of confessing their sins and restoring their membership in the Bergholz church, Mattie and Lavern Troyer returned to their former Amish community in Ulysses, Pennsylvania. (Tr., R. 529, Page ID# 5540-5541, 5693; Tr., R. 541, Page ID# 7163). Subsequently, their son, Aden Troyer, who was married to Mullet's daughter, Wilma Mullet, tried to convince Wilma to move to Pennsylvania, but she refused. (Tr., R. 529, Page ID# 5693; Tr., R. 540, Page ID# 6748-6749). Aden and Wilma had marital problems and eventually divorced, resulting in a custody fight over their children. (Tr., R. 539, Page ID# 6498-6499; Tr., R. 540, Page ID# 6748-6749, 6784; Tr., R. 541, Page ID# 7059). Aden was awarded legal custody of their two daughters; the court (continued…)

questioning his rules. (Tr., R. 540, Page ID# 6748). In addition, he excommunicated Melvin and Anna Schrock, the victims of the final assault on November 9, 2011, who had moved to Bergholz in 2000. (Tr., R. 539, Page ID# 6567; Tr., R. 540, Page ID# 6749, 6868-6869). The Schrocks believed that the Bergholz community was doing things, as outlined above, that were inconsistent with scripture and with which they did not agree. They were informed that they had been excommunicated at a regular church service, without advance notice. (Tr., R. 539, Page ID# 6569-6572). They left the church in 2006 with some of their children, but defendants Emanuel Schrock and his wife Linda Schrock stayed in Bergholz. (Tr., R. 539, Page ID# 6573-6575). Mullet also excommunicated several other families, including his son Eli Mullet and his wife Nancy Mullet because they wanted to move from Bergholz, although they ultimately returned to the church. (Tr., R. 529, Page ID# 5673-5674; Tr., R. 540, Page ID# 6749, 6868-6872). When Mullet was arrested on November 23, 2011, he acknowledged that he excommunicated some members of the community "because they didn't want to obey some rules of the church." (Tr., R. 540, Page ID# 6735, 6748, 6776). He

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(…continued)
order stated that "[a]ll parenting time shall be in Pennsylvania. Under no circumstances shall parenting time take place in Bergholz, Ohio." (Tr., R. 540, Page ID# 6690, 6748-6749, 6784; see also Tr., R. 537, Page ID# 6054; Tr. R. 539, Page ID# 6499).

also provided a list of the names of those he excommunicated. (Tr., R. 540, Page ID# 6748-6750).

In September 2006, a committee of bishops met in Ulysses, Pennsylvania, to address Mullet's excommunications. (Tr., R. 528, Page ID# 5347; Tr., R. 540, Page ID# 6931). Three hundred bishops and preachers attended; Professor Kraybill described this meeting as "an earthquake in the Amish world." (Tr., R. 540, Page ID# 6931). The specific issue was whether the districts should honor the shunning of persons excommunicated from Bergholz or, instead, accept them into their churches. (Tr., R. 528, Page ID# 5479; Tr., R. 540, Page ID# 6932; Tr., R. 541, Page ID# 7054, 7106-7109). The bishops authorized several smaller committees to investigate the excommunications and meet with Mullet. (Tr., R. 540, Page ID# 6932; Tr., R. 541, Page ID# 7013-7015, 7055, 7109-7112). Ultimately, a seven-bishop committee – that included Raymond Hershberger, later a victim in the first October 4, 2011, attack – recommended that they meet with Mullet and give him one more opportunity to readmit those he had excommunicated. (Tr., R. 541, Page ID# 7117; see GX 40-3, R. 556-14, Page ID# 7902 (letter dated September 13, 2006, from the seven-bishop committee)).

Ultimately, the 300 bishops voted unanimously to reverse the excommunications, *i.e.*, to allow those persons excommunicated from Bergholz to be accepted back into their other church districts without first obtaining

forgiveness from Mullet. (Tr., R. 528, Page ID# 5331, 5479; Tr., R. 529, Page ID# 5541; Tr., R. 540, Page ID# 6933; Tr., R. 541, Page ID# 7016-7020). The bishops concluded that these persons had not been properly excommunicated based on scripture. (Tr., 540, Page ID# 6933; Tr., R. 541, Page ID# 7016). Mullet was aware of this meeting and those bishops' decision to allow former Bergholz members to join Amish churches despite Mullet's excommunications. (Tr., R. 540, Page ID# 6751-6752).

(iv). Following the bishops' meeting reversing the Bergholz excommunications, and the removal of Wilma Mullet's children from Bergholz to the custody of her former husband (Aden Troyer), 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," including Marty and Barbara Miller (victims of the first attack). (Tr., R. 537, Page ID# 5980-5982, 6039; Tr., R. 539, Page ID# 6403; Tr., R. 540, Page ID# 6696-6697). Mullet claimed the authority to punish district members who disobeyed his church rules, even if they had left or never had been a part of his Bergholz compound, and said that beard and hair cuttings would stop people from being "Amish hypocrites." (Tr., R. 528, Page ID# 5408; Tr., R. 540, Page ID# 6643, 6695). He specifically identified the Millers, Myron Miller (the victim of the fourth assault), and Melvin Schrock (the victim of the fifth assault) as Amish hypocrites. (Tr., R. 540, Page

ID# 6643-6644). As set forth below, although Mullet was not present at any of the assaults, he directed, assisted, encouraged, and oversaw the assaults committed by the other defendants.

b. The September 6, 2011, Assault Of Marty And Barbara Miller In Their Home

(i). The first beard-cutting attack occurred on September 6, 2011, against Marty and Barbara Miller (Mullet's sister) by three of their sons and six of their children's spouses. (Tr., R. 528, Page ID# 5404-5405, 5409-5410, 5434-5454).

The Millers moved to Bergholz in the spring of 2007 to be closer to six of their seven children, who had previously moved there. (Tr., R. 528, Page ID# 5416-5417, 5459, 5468-5469, 5505; Tr., R. 529, Page ID# 5538; Tr., R. 540, Page ID# 6676). Their son, defendant Lester Miller, moved to Bergholz because he wanted a "more conservative, a more traditional Amish community." (Tr., R. 528, Page ID# 5459). Their son-in-law, defendant Freeman Burkholder, and his wife Nancy (their daughter; not a defendant), moved to Bergholz because their former community "didn't practice what they preached" and were "hypocrite[s]." (Tr., R. 529, Page ID# 5584). In this regard, some of the Millers' children referred to their father as a hypocrite, as did Mullet. (Tr., R. 539, Page ID# 6405, 6468; Tr., R. 540, Page ID# 6644, 6665). Barbara believed her children were in a "cult" at Bergholz, and the Millers and their children had become estranged, yet the Millers

hoped to ease the friction by moving to Bergholz. (Tr., R. 528, Page ID# 5505; Tr., R. 529, Page ID# 5522, 5549; Tr., R. 540, Page ID# 6680).

In Bergholz, the Millers lived with Freeman Burkholder. (Tr., R. 528, Page ID# 5418-5419). During this time, Barbara Miller saw Mullet doing things she did not agree with; she believed that he was following the Old Testament, with its "references to violence [and] anger," rather than the New Testament. (Tr., R. 528, Page ID# 5474-5475). Barbara described Mullet as angry and mean, further stating that people could not reason with him. (Tr., R. 529, Page ID# 5539). She told her children that some of the things they were doing were wrong and inconsistent with the Amish religion they had been taught, knowing that her views would get back to Mullet. (Tr., R. 528, Page ID# 5472; Tr., R. 529, Page ID# 5563-5564). To Barbara, these were serious matters of religion and faith. (Tr., R. 528, Page ID# 5432; Tr., R. 529, Page ID# 5565).

After approximately four months, Marty and Barbara Miller decided to leave Bergholz because Mullet wanted them to become members of the church, they did not agree with his religious views, and they did not want to be subject to Mullet's authority. (Tr., R. 528, Page ID# 5426-5428; Tr., R. 529, Page ID# 5545). They did not tell their children they were leaving until just before their driver was due to pick them up because they did not want their children to confront them about their decision. (Tr., R. 528, Page ID# 5427-5431). When one of her children learned

finally they were leaving, she told Barbara that she was "going straight to hell" for leaving Bergholz. (Tr., R. 528, Page ID# 5429, 5460). Subsequently, she received a "nasty" letter from Mullet, and their communications with their children were "unpleasant." (Tr., R. 528, Page ID# 5431-5433). In addition, the Millers' former community had accepted persons who had been excommunicated by the Bergholz community. (Tr., R. 528, Page ID# 5477-5478).

(ii). On September 6, 2011, at approximately 8:30 p.m., nine of the defendants (three of the Miller's sons (Eli, Lester, and Raymond Miller); the Millers' son-in-law (Freeman Burkholder); and five of the Millers' daughters-in-law (Anna, Lovina, Kathryn, Emma, and Elizabeth Miller)), and others from Bergholz, traveled to the Millers' home for the purpose of ritualistic religious violence, specifically cutting Marty's beard and hair and Barbara's hair. (Tr., R. 529, Page ID# 5585, 5596-5598, 5612-5613; Tr., R. 539, Page ID# 6403-6404, 6408; Tr., R. 540, Page ID# 6645, 6834-6835). Some of the Millers' children (and others) had previously discussed cutting the Millers' hair, and also discussed it with Mullet. (Tr., R. 539, Page ID# 6403-6406, 6542-6543; Tr., R. 540, Page ID# 6644-6645, 6696-6697). Mullet agreed that they should do so, and that it might make the Millers see where they had gone wrong spiritually, help them lead a proper Amish life, and get to heaven. (Tr., R. 529, Page ID# 5592-5595, 5617; Tr., R. 537, Page ID# 5980-5981). In short, he agreed to the attack on the specific

basis of the religious beliefs and practices of the intended victims (who did not live at Bergholz).

Defendants hired a driver, Larry Harrington, who does "[t]axi work" for the Amish, to take them to the Millers in his passenger van. (Tr., R. 529, Page ID# 5585-5586). It was a two-hour drive, each way, and they paid Harrington for his services. (Tr., R. 529, Page ID# 5585, 5595, 5597, 5653-5654).

Harrington picked up the defendants at various locations, stopping last at Mullet's house, where they picked up Eli Miller's wife, Lovina, who had been living with Mullet for more than a year. (Tr., R. 529, Page ID# 5596-5597). At this time, they also picked up battery-operated Wahl hair clippers that were kept in Mullet's barn. (Tr., R. 539, Page ID# 6406-6407, 6474). The clippers bore a notation indicating that they were made in China. (GX 1 (the clippers)). All of the members of the group agreed that the purpose of the trip was, in the words of Nancy Burkholder, "to get their hair and beard." (Tr., R. 529, Page ID# 5662-5663).

The group arrived at the Millers' home at approximately 10:30 p.m. (Tr., R. 528, Page ID# 5438; Tr., R. 529, Page ID# 5597). The men wore head lamps to help them see what they were doing. (Tr., R. 528, Page ID# 5441). Marty Miller was sleeping in his bed; Barbara Miller was reading in her nightgown. (Tr., R. 528, Page ID# 5437). Lester Miller knocked on the door and Barbara retrieved a

flashlight and opened the door; she was startled to have visitors so late at night. (Tr., R. 528, Page ID# 5438-5440; Tr., R. 529, Page ID# 5598). Lester came in the house and said: "We came to talk"; the others, although they were not invited to come in, barged into the house, including six of Barbara's seven children (some not charged in the indictment). (Tr., R. 528, Page ID# 5440-5441; Tr., R. 529, Page ID# 5518, 5533, 5555). Lester asked where Marty was, and Barbara told him he was sleeping. (Tr., R. 528, Page ID# 5442, 5493-5494).

At that point, the men headed toward the bedroom. (Tr., R. 528, Page ID# 5442). Barbara also went to the bedroom to put on her prayer cap, where she saw the men clustered around Marty as he was getting dressed. (Tr., R. 528, Page ID# 5443-5444; Tr., R. 529, Page ID# 5525). Lester grabbed Marty by the beard, dragged him into the living room, and threw him in a chair. During this time, Eli Miller grabbed Barbara by the wrists and held her back. (Tr., R. 528, Page ID# 5445-5447; Tr., R. 529, Page ID# 5561).

The men restrained Marty in the chair and yelled at him while Lester Miller used scissors to cut Marty's beard and hair. (Tr., R. 528, Page ID# 5447-5448; Tr., R. 529, Page ID# 5553, 5555, 5563, 5599; Tr., R. 540, Page ID# 6699). At the same time, Freeman Burkholder used the battery-operated Wahl hair clippers to shear Marty's beard. (Tr., R. 528, Page ID# 5276, 5457, 5488; Tr., R. 529, Page ID# 5563-5564). Marty struggled but was not able to get up from the chair. (Tr.,

R. 529, Page ID# 5564, 5663). He pleaded: "No boys, no. Please, no," as he was crying and begging. (Tr., R. 528, Page ID# 5448-5449). During this time, the men yelled accusations at Marty about various alleged offenses against Mullet. (Tr., R. 528, Page ID# 5502; Tr., R. 529, Page ID# 5527). Barbara was "terrified" to see her "boys treat[ing] their dad that way." (Tr., R. 529, Page ID# 5561). When Barbara tried to intervene, Nancy Burkholder grabbed her by the arm and forcibly held her back. (Tr., R. 528, Page ID# 5449).

Next, Lovina, Anna, Emma, Elizabeth, and Kathryn Miller took turns cutting Barbara's hair from waist length to just beneath her ears. (Tr., R. 528, Page ID# 5452-5453; Tr., R. 529, Page ID# 5600-5601). As they did so, Barbara prayed aloud for God to forgive them. (Tr., R. 528, Page ID# 5453; Tr., R. 529, Page ID# 5601). In addition, Anna Miller grabbed Barbara's prayer cap off her head and cut it into ribbons. (Tr., R. 528, Page ID# 5452; Tr., R. 529, Page ID# 5526). Before they left the house, the group collected the beard and hair clippings and put them in a bag, along with Barbara's mutilated prayer cap. (Tr., R. 528, Page ID# 5454; Tr., R. 529, Page ID# 5453-5454).

As a result of the assault, Marty's beard and head hair were cut to the skin. (Tr., R. 528, Page ID# 5454). One side of his head was bleeding, he had razor burns on his throat and neck, and suffered bruising from the attack. (Tr., R. 528,

Page ID# 5454; Tr., R. 529, Page ID# 5562, 5664). Barbara had serious bruises on both wrists, which lasted nearly a month. (Tr., R. 529, Page ID# 5561).

(iii). After the assaults, which lasted approximately 15 minutes, the defendants were driven directly back to Mullet's house, where Mullet was waiting for them at approximately 1:00 a.m. (Tr., R. 529, Page ID# 5438, 5602-5603; Tr., R. 539, Page ID# 6407-6408; Tr., R. 540, Page ID# 6647). Mullet knew that the group had gone to the Millers' house that evening to cut their hair. (Tr., R. 540, Page ID# 6646). Eli Miller came in with the bag of hair and presented it to Mullet, stating: "Here's the hair." (Tr., R. 540, Page ID# 6648-6649). He then placed the bag containing the hair and Barbara's shredded cap on the floor. (Tr., R. 539, Page ID# 6409-6410; Tr., R. 540, Page ID# 6648-6649, 6699). Lester Miller described the details of what they had done; Mullet laughed. (Tr., R. 540, Page ID# 6648). After the group left, Mullet told one of his grandsons that the bag containing the hair and cap should be burned, which it was. (Tr., R. 539, Page ID# 6410, 6543; Tr., R. 540, Page ID# 6649, 6700).[15] Lester Miller later acknowledged that he participated in cutting his father's beard and his mother's hair. (Tr., R. 529, Page ID# 5727, 5730; Tr., R. 538, Page ID# 6311). Eli Miller also acknowledged that

[15] The burning of the bag of hair and the cap was the basis of the Count 7 obstruction of justice charge, on which Mullet was acquitted. (Verdict Form, R. 230, Page ID# 2064). It nevertheless also demonstrates his consciousness of guilt.

he and others cut his parents' hair and his father's beard. (Tr., R. 538, Page ID# 6288).

c. The October 4, 2011, Assault Of Raymond Hershberger, Andy Hershberger, And Levi Hershberger At Their Home

(i). Raymond Hershberger, who was 76 years old when he was assaulted, has been the Bishop of his Old Order Amish church since 1984. (Tr., R. 541, Page ID# 7102-7103). His two sons, Andy and Levi Hershberger, reside with him on the same property nowhere near Bergholz. (Tr., R. 541, Page ID# 7102). On October 3, 2011, defendant Johnny Mullet told others in the Bergholz community that, on the way home from the Mount Hope horse auction the next day, they would stop at Raymond Hershberger's house to cut off his beard because, although Raymond had never lived at Bergholz and did not even know its residents, Raymond was on the committee that reversed the Bergholz excommunications. (Tr., R. 538, Page ID# 6316, 6341; see also Tr., R. 539, Page ID# 6417-6419).

The following morning, October 4, 2011, defendants Johnny Mullet, Danny Mullet, Lester Mullet, Lester Miller, Levi Miller, Eli Miller, and others were driven by their hired driver, Mike Kanoski, from Mullet's house to the horse auction in a four-door pickup truck and horse trailer. (Tr., R. 529, Page ID# 5704-5706; Tr., R. 538, Page ID# 6294-6295, 6315-6316; Tr., R. 539, Page ID# 6419; Tr., R. 540, Page ID# 6753, 6761). Kanoski had previously been a driver for Mullet and often drove the Amish to auctions. (Tr., R. 529, Page ID# 5704; Tr., R.

538, Page ID# 6291-6292). One of Mullet's grandsons called Kanoski about a week earlier to make the driving arrangements. (Tr., R. 538, Page ID# 6289). Mullet had personally given Johnny Mullet driving directions to Raymond Hershberger's home. (Tr., R. 529, Page ID# 5715-5716).

Once they were at the horse auction, Johnny Mullet confirmed that they would stop at Raymond Hershberger's house on the way home. (Tr., R. 529, Page ID# 5706-5707). In addition, Lester Miller purchased a pair of eight-inch horse shears from Curvin Wenger, the owner of New Bedford Sharpening Services. (Tr., R. 529, Page ID# 5728-5729; Tr., R. 538, Page ID# 6158-6160, 6365-6372; GX 2 (the shears); GX 3, R. 556-1, Page ID# 7818 (photocopy of receipt for purchase of shears, including Lester Mullet's name)). Wenger testified that the shears he sold Lester Miller were manufactured in New York, where Wenger has them custom made. (Tr., R. 538, Page ID# 6374-6375). He also testified that the shears were sharp enough to cut through three-eighth-inch-thick hard leather. (Tr., R. 538, Page ID# 6373). Lester Miller gave the shears to the defendants who assaulted the Hershbergers (and Myron Miller, addressed below) that evening; he knew at that time that they would be used to cut beards in those attacks. (Tr., R. 529, Page ID# 5729; Tr., R. 540, Page ID# 6761-6762).

(ii). At approximately 9:00 p.m., defendants returned to Kanoski's pickup truck to be driven home. (Tr., R. 538, Page ID# 6295-6296). Johnny Mullet told

Kanoski that they had a couple of stops to make and, with Mullet's directions, guided Kanoski to the Hershbergers' property, where they arrived at approximately 9:30 p.m. (Tr., R. 529, Page ID# 5710; Tr., R. 538, Page ID# 6296-6297). While most of the people remained with the truck, five of the defendants – Johnny Mullet, Danny Mullet, Lester Mullet, Levi Miller, and Eli Miller – went to the house where Andy Hershberger lived and knocked on the door. (Tr., R. 528, Page ID# 5264-5265; Tr., R. 538, Page ID# 6298). They asked Andy if his father (Raymond) was there, and Andy told them that his father was in the house next door and that he would take them there. (Tr., R. 528, Page ID# 5265). Andy then went to Raymond's bedroom and told him that some men were at the house and wanted to talk to them. (Tr., R. 528, Page ID# 5266-5267; Tr., R. 541, Page ID# 7124-7125). Raymond responded: "Why so late?" (Tr., R. 528, Page ID# 5267).

Raymond came into the kitchen and sat in a chair; four of the defendants were sitting on the couch and one was standing. (Tr., R. 528, Page ID# 5271; Tr., R. 541, Page ID# 7126). When Raymond stated that he did not know who they were, Johnny Mullet said that they were from Bergholz, and "[w]e are here to do what you did with our shunned people." (Tr., R. 528, Page ID# 5272, 5289; Tr., R. 541, Page ID# 7127). Raymond responded: "I never had anything to do with your people." (Tr., R. 528, Page ID# 5273). Johnny Mullet then asked: "Wasn't your name on that committee in Ulysses, Pennsylvania?"; Raymond said it was. (Tr., R.

528, Page ID# 5273). When Raymond and Andy heard the word Bergholz, they "knew something was going to happen" (Tr., R. 541, Page ID# 7127); they were aware of the Bergholz community's connection to the prior beard cuttings. (Tr., R. 528, Page ID# 5273-5274, 5288, 5385, 5387).

At that point, the defendants stood up and moved toward Raymond. (Tr., R. 541, Page ID# 7127). As Andy yelled upstairs for his brother Levi, Raymond put his hands up and said "oh, please, don't cut my white hair." (Tr., R. 541, Page ID# 7128, 7140, 7153; see also Tr., R. 528, Page ID# 5274-5276, 5323; Tr., R. 539, Page ID# 6615). Raymond also said: "A Christian wouldn't do what you are doing"; Johnny Mullet retorted that "a Christian won't fight." (Tr., R. 528, Page ID# 5276-5277). Raymond then responded: "A Christian wouldn't do what you are doing," and Johnny Mullet replied "[w]e aren't Christians any more." (Tr., R. 528, Page ID# 5276).

As Danny Mullet and Eli Miller held Raymond in the chair, Johnny Mullet cut Raymond's beard and hair with the eight-inch horse mane shears that they had purchased earlier that day. (Tr., R. 528, Page ID# 5273; Tr., R. 538, Page ID# 6229-6230, 6233-6236, 6275-6279; Tr., R. 541, Page ID# 7128). Levi Miller used the battery-operated Wahl hair clippers to cut his hair. (Tr., R. 528, Page ID# 5273; Tr., R. 538, Page ID# 6162, 6171; Tr., R. 541, Page ID# 7128, 7140). During the commotion, Raymond's 79 year-old wife entered the room and

attempted to take the scissors, but Danny Mullet physically pushed her aside. (Tr., R. 528, Page ID# 5277-5278; Tr., R. 538, Page ID# 6236; Tr., R. 541, Page ID# 7129, 7154).

As Raymond's hair was being cut, the defendants grabbed Andy Hershberger and restrained him on the couch. (Tr., R. 528, Page ID# 5274-5275). When Levi Hershberger came downstairs, Lester Mullet grabbed him and threw him on the couch with Andy. (Tr., R. 528, Page ID# 5274-5275; Tr., R. 539, Page ID# 6617-6618). Levi landed on his ribs, which caused pain that lasted over two weeks. (Tr., R. 539, Page ID# 6618, 6620). Both Andy and Levi struggled but were held down on the couch by Lester Mullet. (Tr., R. 528, Page ID# 5305; Tr., R. 538, Page ID# 6164; Tr., R. 539, Page ID# 6617-6619). One of the defendants said to Andy: "You're a preacher as well." (Tr., R. 528, Page ID# 5280; Tr., R. 541, Page ID# 7130). That defendant then grabbed Andy's beard and used the clippers to "chop" at Andy's beard and hair until the clippers stopped working. (Tr., R. 528, Page ID# 5281-5282; Tr., R. 541, Page ID# 7130). At that point, Johnny Mullet said "[l]et's go," and they all left. (Tr., R. 528, Page ID# 5282-5283). During the assaults, members of the Bergholz community who remained outside could hear screams coming from the house. (Tr., R. 529, Page ID# 5711; Tr., R. 537, Page ID# 5995; Tr., R. 539, Page ID# 6422).

Following the assault, Raymond Hershberger was shaking and crying over the loss of his beard; he was "ashamed" about how "he looked." (Tr., R. 528, Page ID# 5284, 5301; Tr., R. 541, Page ID# 7136). Some spots on his head "were bare * * * down to the skull," and his beard was no more than an inch long. (Tr., R. 528, Page ID# 5285; Tr., R. 539, Page ID# 6619). In addition to the loss of his beard and hair, Raymond sustained cuts to his head; he was bleeding. (Tr., R. 528, Page ID# 5286; Tr., R. 541, Page ID# 7133). One of the defendants took trophy photographs of Raymond with a disposable camera as Johnny Mullet removed his beard. (Tr., R. 540, Page ID# 6766; GX 4-9, R. 556-2, Page ID# 7819 (photograph of Raymond Hershberger and Johnny Mullet)). The defendants, including Mullet, wanted to see pictures of Raymond "because they look different if they lose their hair." (Tr., R. 529, Page ID# 5720-5721).

(iii). After the defendants left the Hershbergers' property, Levi Hershberger walked up the road to a telephone and called the police. (Tr., R. 539, Page ID# 6619). Holmes County Sheriff Timothy Zimmerly and Holmes County Detective Joseph Mullet (no relation to the defendants) responded to a call involving a home invasion and an assault. (Tr., R. 538, Page ID# 6087-6088, 6131-6132). Detective Mullet arrived first, and saw Levi Hershberger standing in the yard. (Tr., R. 538, Page ID# 6088, 6134-6135). Levi was upset and yelling. (Tr., R. 538, Page ID# 6135). He told the detective that some men from Bergholz went into the house and

gave his father a haircut. (Tr., R. 538, Page ID# 6136). Detective Mullet went into the house and saw Raymond Hershberger sitting in a chair crying. (Tr., R. 538, Page ID# 6137). The detective noticed that Raymond had chunks of his hair cut out, cuts and scrapes on this head, was bleeding from the head, and his beard was very short and choppy. (Tr., R. 538, Page ID# 6139, 6208). He also noticed that Andy Hershberger had a chunk of his hair missing, and that Levi Hershberger was holding his left ribs in pain. (Tr., R. 538, Page ID# 6139-6140). A few minutes later, Sheriff Zimmerly arrived; he noticed that all of the Hershbergers were upset, their hair was on the floor, Raymond was crying, Raymond's beard and hair were cut, and he was bleeding from cuts on this head. (Tr., R. 538, Page ID# 6088-6091).

Detective Mullet collected hair that was lying on the floor and put it into a bag, which was introduced into evidence at trial. (Tr., R. 538, Page ID# 6142-6147; GX 10-1; GX 10-2). He also asked whether the Hershbergers wanted to file a criminal complaint against their assailants, but Raymond Hershberger did not (although he later changed his mind). (Tr., R. 538, Page ID# 6094, 6147-6148, 6154-6155).

Later that evening, Detective Mullet received a call that a pickup truck believed to be connected to the assaults had been stopped by the Jefferson County Sheriff's Office. (Tr., R. 538, Page ID# 6092-6093, 6148). Detective Mullet and

Sheriff Zimmerly met Jefferson County Sheriff Fred Abdallah, who took them to interview the driver of the truck, Mike Kanoski. (Tr., R. 538, Page ID# 6093, 6148-6149, 6195). Kanoski told them the names of some of the passengers of the truck, and the police proceeded to further investigate the attacks. (Tr., R. 538, Page ID# 6150-6151).

d. The October 4, 2011, Assault Of Myron Miller At His Home

(i). Myron Miller is the Bishop of an Amish community in Carrollton County, Ohio. (Tr., R. 537, Page ID# 5796-5797). In 2003, Mullet's son, Bill Mullet, and Bill's family, moved from Bergholz to Myron Miller's district. Myron helped Bill with the move. (Tr., R. 537, Page ID# 5801-5803). Shortly thereafter, Mullet warned Bill that he would be excommunicated if he did not move back to Bergholz. (Tr., R. 537, Page ID# 5803-5804). He did not, and Mullet excommunicated him. (Tr., R. 537, Page ID# 5803-5804, 5847). Myron's community nevertheless chose to allow Bill and his family to worship with them. (Tr., R. 537, Page ID# 5880-5881).

(ii). Prior to defendants' trip to the Mount Hope horse auction on October 4, 2011, Johnny Mullet told other members of the Bergholz community that on the way home, after stopping at the Hershbergers' property, they would stop at Myron Miller's house and cut his beard. (Tr., R. 538, Page ID# 6317). In addition, at the

horse auction, defendants discussed cutting Myron Miller's beard. (Tr., R. 539, Page ID# 6421).

After defendants' assaults on the Hershbergers, Johnny Mullet directed their driver to take defendants to Myron Miller's house, approximately 45 minutes away. (Tr., R. 538, Page ID# 6299-6300). They arrived at approximately 10:45 p.m., and the same five individuals who went inside the Hershbergers' house got out of the truck. (Tr., R. 538, Page ID# 6300; Tr., R. 537, Page ID# 5816, 5820). Johnny Mullet knocked on the door, and Miller's daughter answered. (Tr., R. 537, Page ID# 5815). She then went upstairs to her parents' bedroom and woke them up. (Tr., R. 537, Page ID# 5814-5815). Because they knew about previous attacks, Myron's wife predicted that the late night visit was probably about Bergholz. (Tr., R. 537, Page ID# 5815).

Myron Miller went to the door, and saw several men standing outside. When he opened the door, Johnny stepped forward, grabbed Myron by the beard, and yanked him outside. (Tr., R. 537, Page ID# 5815-5817). Myron tried to get loose, but other defendants restrained him. (Tr., R. 537, Page ID# 5818). As he struggled, defendants used the eight-inch horse shears purchased at the auction to cut approximately six inches off of his beard. (Tr., R. 529, Page ID# 5728-5729; Tr., R. 537, Page ID# 5818-5821, 5833). As a result of the attack, Myron's arms

were sore for several days. (Tr., R. 537, Page ID# 5821). Myron felt humiliated after the beard cutting. (Tr., R. 537, Page ID# 5821).

Eventually, Johnny Mullet said "let's go," and Myron could see the defendants run to a pickup truck and horse trailer parked on the road in front of the house. (Tr., R. 537, Page ID# 5819). Myron followed them, got the license plate number of the truck, and called the Sheriff. (Tr., R. 537, Page ID# 5819-5822, 5874).

After the assault of Myron Miller, defendants directed their driver to take them to Mullet's house so they could immediately report to Mullet what they did that night. (Tr., R. 537, Page ID# 5996; Tr., R. 538, Page ID# 6319; Tr., R. 539, Page ID# 6424). Several of the defendants split the cost of the driver's services. (Tr., R. 538, Page ID# 6303-6304). Although it was nearly midnight, Mullet was still dressed and waiting, and others were also present. (Tr., R. 537, Page ID# 5996; Tr., R. 540, Page ID# 6652, 6654). The attacks came as no surprise to Mullet; earlier that day, Mullet had told his daughter Barbara Yoder that some of the defendants would stop at Raymond Hershberger's home and cut his beard and head hair, and then stop at Myron Miller's home and do the same. (Tr., R. 540, Page ID# 6654-6655, 6662-6663, 6704). In addition, Mullet had earlier given his son, defendant Johnny Mullet, directions to the Hershberger's house. (Tr., R. 529, Page ID# 5713-5716).

As the group filed into the house, Johnny Mullet told Mullet "[w]e got his hair" and "[w]e got two of them." (Tr., R. 538, Page ID# 6320; Tr., R. 540, Page ID# 6655). Johnny Mullet then told Mullet that they cut the Hershbergers' hair and beards and Myron Miller's beard and how the victims reacted to being assaulted. (Tr., R. 538, Page ID# 6320; Tr., R. 537, Page ID# 5997; Tr., R. 540, Page ID# 6655-6656). The defendants also stated that Eli Miller had a camera. (Tr., R. 539, Page ID# 6425). The camera was later turned over to the FBI; it included a picture of Johnny Mullet attacking Raymond Hershberger, as well as photographs of other victims. (Tr., R. 540, Page ID# 6764-6766; GX 4-9, R. 556-2, Page ID# 7819 (photograph)).

e. The November 9, 2011, Assault Of Melvin And Anna Schrock At Defendant Emanuel Schrock's Home

(i). Melvin and Anna Schrock moved to Bergholz in 2000. Eventually, they believed Mullet was doing things as leader of Bergholz that were not in accordance with scripture, and Melvin expressed their concerns to the church leaders. (Tr., R. 539, Page ID# 6567, 6570). Subsequently, at a regular church service, Mullet announced that Melvin and Anna were excommunicated. (Tr., R. 539, Page ID# 6571-6572). As a result, they moved out of Bergholz. (Tr., R. 539, Page ID# 6572). They asked their children to leave Bergholz; some did, but their son Emanuel Schrock and his wife Linda (one of Mullet's daughters) stayed. (Tr., R. 539, Page ID# 6573). Melvin and Anna continued to try to persuade Emanuel to

leave Bergholz because they did not agree with Mullet. (Tr., R. 529, Page ID# 5611; Tr., R. 538, Page ID# 6322; Tr., R. 537, Page ID# 6000, 6059; Tr., R. 539, Page ID# 6575-6576).

In October and early November 2011, Emanuel sent letters by United States mail to Melvin and Anna Schrock inviting them to come visit him in Bergholz. (Tr., R. 537, Page ID# 5999, 6057; Tr. R. 539, Page ID# 6576-6587, 6605; GX 11-1, 11-2, 12-1, 12-2, 13-1, 13-2, R. 556-6 to 556-8, Page ID# 7823-7828 (the letters)). The letters suggested that the purpose of the invitation was simply to visit and have an opportunity to reconcile. (Tr., R. 539, Page ID# 6580-6583). In fact, the defendants planned to use the visit to cut the Schrock's beard and hair because he was "against Sam Mullet" and was trying to persuade Emanuel to leave Bergholz. (Tr., R. 540, Page ID# 6658; see also Tr., R. 537, Page ID# 5999, 6058, 6070-6071; Tr., R. 539, Page ID# 6427). One of Linda's sisters, Barbara Yoder, testified that Linda told her before the assault about the plan to cut Melvin's beard and hair. (Tr., R. 540, Page ID# 6708-6709). Emanuel also told almost a dozen people in the Bergholz community about his plan to invite his father to his house and to assault him. (Tr., R. 539, Page ID# 6426-6427).

Melvin and Anna Schrock wanted to visit Emanuel, but they were aware of previous religiously-motivated assaults and were concerned that they would meet a similar fate. (Tr., R. 539, Page ID# 6581, 6588). In addition, at this time, Melvin

had serious health problems (he would die two months later), which Emanuel knew about. (Tr., R. 539, Page ID# 6566, 6587-6588). Emanuel falsely assured them that they would be safe and so, on November 9, 2011, Melvin and Anna hired driver Robert Mitchell, who often provided transportation services to the Amish, to drive them from Ashland, Ohio, to Bergholz. (Tr., R. 539, Page ID# 6553-6555; Tr., R. 540, Page ID# 6787, 6883-6884).

(ii). After a two-hour drive, Melvin and Anna arrived at Emanuel's house. (Tr., R. 539, Page ID# 6556, 6559). Because Melvin and Anna were concerned about what might happen when they arrived, they had arranged to have the County Sheriff accompany them to Emanuel's house. (Tr., R. 537, Page ID# 6001; Tr., R. 539, Page ID# 6557, 6590). The Sheriff went into the house first and spoke to Emanuel, obtaining assurances that Emanuel would not assault his parents. (Tr., R. 537, Page ID# 6002, 6012, 6060). Once the Sheriff left the house, Melvin and Anna went inside. (Tr., R. 537, Page ID# 6002; Tr., R. 539, Page ID# 6590).

After they had dinner, Anna went to the kitchen with Linda Schrock and prepared to leave. (Tr., R. 537, Page ID# 6067). Emanuel and Melvin began arguing about Bergholz. (Tr., R. 537, Page ID# 6003, 6061-6062; Tr., R. 539, Page ID# 6591, 6609). Emanuel then retrieved scissors to cut Melvin's beard and hair. (Tr., R. 537, Page ID# 6004; Tr., R. 539, Page ID# 6591-6592). These horse scissors were also purchased in Mount Hope; the evidence showed that they had

traveled in interstate commerce prior to November 9, 2011. (Tr., R. 537, Page ID# 6007; Tr., R. 540, Page ID# 6770-6771; GX 14 (the horse scissors)).

Melvin struggled as Emanuel began to forcibly cut his hair. Two of Emanuel's teenaged sons restrained Melvin so that he could not move. (Tr., R. 539, Page ID# 6592-6593). Emanuel cut Melvin's beard and hair, stating: "[M]aybe this will help you." (Tr., R. 539, Page ID# 6428-6429, 6592). At this time, Anna ran to the door to get out of the house, but Linda grabbed Anna and physically restrained her to prevent her from seeking assistance. (Tr., R. 537, Page ID# 6004-6005, 6067; Tr., R. 539, Page ID# 6593-6594, 6610; Tr., R. 540, Page ID# 6661). As Anna called for help, Linda held her hand over Anna's mouth. (Tr., R. 539, Page ID# 6594, 6610). During this time, their driver, who was also waiting outside to take Melvin and Anna home, could hear screams coming from the house. (Tr., R. 539, Page ID# 6560-6561).

After the assaults, restraint, and beard and hair cutting, Emanuel and Linda Schrock's son, David Schrock, took trophy photographs of Melvin. (Tr., R. 537, Page ID# 6008; Tr., R. 539, Page ID# 6429). He used the same camera used in some of the previous assaults, and wanted photographs to memorialize for others in Bergholz (including Mullet) what they had done to Melvin. (Tr., R. 537, Page ID# 6008-6009; Tr., R. 539, Page ID# 6429, 6597, 6599). The photographs showed that Melvin Schrock suffered a cut on his left cheek. (GX 4-11, 4-12, 4-13, R.

556-3 to 556-5, Page ID# 7820-7822 (photographs of Melvin Schrock after assault)).

When Melvin and Anna came out of the house, the driver could see that Melvin's nearly ten-inch long beard had been sheared to a half-inch. (Tr., R. 539, Page ID# 6561-6562). On the drive home, Anna was quietly sobbing. (Tr., R. 539, Page ID# 6562-6563). Neither Melvin nor Anna could sleep that night. (Tr., R. 539, Page ID# 6596). Melvin Schrock passed away on January 10, 2012, prior to trial. (Tr., R. 539, Page ID# 6566).

After Melvin and Anna left, Emanuel and Linda went directly to Mullet's house to report to him and other members of the Bergholz community (including all of the "Bergholz women" (Tr., R. 540, Page ID# 6659-6660)) that they had completed their assault on Melvin and Anna Schrock. (Tr., R. 529, Page ID# 5607; Tr., R. 538, Page ID# 6322-6323; Tr., R. 537, Page ID# 6008-6009; Tr., R. 539, Page ID# 6428). Emanuel boasted we got a "whole bushel" of their hair. (Tr., R. 538, Page ID# 6323). Mullet knew ahead of time that there was a plan to cut Melvin's hair, and the evidence showed it was part of the conspiracy and plan led by Mullet; he later even admitted to the FBI that "he didn't do anything to

encourage it, but * * * did [not] feel compelled to stop it, either." (Tr., R. 540, Page ID# 6756-6757; see also Tr., R. 539, Page ID# 6427-6428).[16]

f. Defendants' Statements Acknowledging The Assaults

A few days after the October 4, 2011, assaults, four of the defendants – Johnny Mullet, Lester Mullet, Levi Miller, and Lester Miller – were taken into custody on state charges, based on information the defendants' driver, Mike Kanoski, provided to police, as well as the victims' accounts to law enforcement. (Tr., R. 538, Page ID# 6103, 6150-6151, 6155). Subsequently, law enforcement officers interviewed several of the defendants at the Jefferson County jail, and also routinely recorded telephone calls made from the jail, including calls by the defendants to Mullet. (Tr., R. 538, Page ID# 6165).

(i). On October 7, 2011, Detective Fred Johnson of the Holmes County Sheriff's Office interviewed Johnny Mullet. (Tr., R. 538, Page ID# 6216-6219). Johnny admitted that he and others had stopped at the Hershbergers' house on the way home from the horse auction because of disagreements over excommunications, he had used scissors to cut Raymond's hair while Raymond begged him not to do so, and Raymond had not been free to leave. (Tr., R. 538,

[16] At one point, some of the members of the Bergholz community told Mullet that they wanted to commit more beard and hair cutting attacks. Mullet told them that they could not because "[w]e've got enough trouble." The men complied with Mullet's direction. (Tr., R. 539, Page ID# 6425-6426).

Page ID# 6222-6226, 6244). At the end of the interview, Johnny provided a written statement, which stated, in part, that he cut Raymond's hair with scissors while others held him down; that he had discussed doing so with other defendants before they left that morning for the auction; and that, after the assault, there was blood on the top of Raymond's head. (Tr., R. 538, Page ID# 6226-6232; GX 28-1, R. 556-13, Page ID# 7900; GX 28-2, R. 556-13, Page ID# 7901 (written statements)).

On October 12, 2011, Detective Mullet took recorded statements from Levi Miller, Lester Mullet, and Lester Miller. (Tr., R. 538, Page ID# 6155-6156, 6158, 6204-6205). Levi Miller admitted that he and others had stopped at the Hershbergers' house on the way home from the horse auction, and that he had participated in the beard and hair cuttings. (Tr., R. 538, Page ID# 6162, 6171). Lester Mullet admitted that, during the assault, he had held down Andy and Levi Hershberger. (Tr., R. 538, Page ID# 6164). Lester Miller asserted that he had stayed in the trailer during the assaults and had nothing to do with what happened in the house. (Tr., R. 538, Page ID# 6157-6158).

Also on October 12, 2011, Mullet came to the Holmes County Sheriff's Office with Danny Mullet and Eli Miller when Danny and Levi surrendered to the police. Sheriff Timothy Zimmerly briefly spoke with Mullet and told him that these attacks must stop. (Tr., R. 538, Page ID# 6095). Mullet assured the Sheriff

that "it was over with [and] nothing else would happen." (Tr., R. 538, Page ID# 6095). Given the subsequent assaults, that was not true.

On the same day, Detective Johnson interviewed Danny Mullet, who admitted that he had held down Raymond Hershberger in the chair while Raymond's hair was being cut; Raymond had not been free to leave; and Raymond had been assaulted because of religious differences over an excommunication. (Tr., R. 538, Page ID# 6233-6236). Detective Jeffrey McVicker interviewed Eli Miller. Eli admitted that he had also restrained Raymond Hershberger, and also acknowledged that, after they cut the Hershbergers' hair, they had stopped and cut Myron Miller's hair. (Tr., R. 538, Page ID# 6273, 6275-6280).

(ii). On October 9, 2011, while in custody, the detained defendants placed several recorded telephone calls to Mullet from the Jefferson County jail. (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). Later in the conversation, Lester Mullet stated that "we did get about half of Andy's [Hershberger] beard" and everyone on the call laughed, including Mullet. (GX 16-

16 (transcript), R. 556-9, Page ID# 7844; GX 15-10 (audio recording); Tr., R. 539, Page ID# 6441).

In a telephone call the same day from defendant Levi Miller, Mullet admitted: "Well listen Levi[,] you only cut off hair. * * * Public is going to say wow taking somebody's hair off what is that, that is all religion, Fred [Abdallah (the Sheriff)] said it right in the paper it is a religious degrading." (GX 18-6 (transcript), R. 556-10, Page ID# 7854; GX 17-4 (audio recording); Tr., R. 539, Page ID# 6445). Mullet also stated that "[s]ome of the guys already wanted to go tonight and do it again," and laughed. (GX 18-11 (transcript), R. 556-10, Page ID# 7859; GX 17-7 (audio recording); Tr., R. 539, Page ID# 6446). In the third telephone conversation, Mullet similarly acknowledged to Johnny Mullet that "[t]o take off hair" is a "religious degrading" and that the men "had almost made up their mind to go again." (GX 20-8 (transcript), R. 556-11, Page ID# 7890; GX 19-1, GX 19-2 (audio recordings); Tr., R. 539, Page ID# 6452-6453).

(iii). In December 2011, FBI Agent John Aske interviewed Lester Miller. (Tr., R. 529, Page ID# 5727). Miller acknowledged that when he gave his codefendants the eight-inch horse shears that he purchased at the Mount Hope auction, he knew that they would be used to cut Myron Miller's beard. (Tr., R. 529, Page ID# 5729, 5736). Miller also said that Raymond's beard was cut for a "religious purpose," *i.e.*, "[b]ecause he violated Amish religious faith by ignoring

Samuel Mullet's excommunication order and allowing * * * Aden Troyer to join his Amish community after he had been excommunicated by Mr. Mullet." (Tr., R. 529, Page ID# 5729). In short, he reconfirmed that the attacks were motivated by the victims' religious beliefs and practices.

(iv). In October 2011, Mullet spoke to the local and national media. (Tr., R. 540, Page ID# 6772-6773; GX 21-1 (video clip of news report played to jury)). He stated that "it's all religion. * * * It started with us excommunicating members that weren't * * * obeying the laws." (GX 21-1 (video clip)). Mullet made other statements to the media that reflected his involvement as Bishop of the Bergholz community. On October 10, 2011, an Associated Press article reported that Mullet explained that the beard and hair cuttings were a religious matter and that the police should not be involved. (Tr., R. 540, Page ID# 6774-6777; GX 22-3, R. 556-12, Page ID# 7899 (copy of article)). The article further stated:

> Mullet, 66, said the goal of the haircutting was to send a message to Amish in Holmes County that they should be ashamed of themselves for the way they were treating Mullet and his community. They changed the rulings of our church here, and they're trying to force their way down our throat, make us do like they want us to do[, a]nd we're not going to do that. * * * We know what we did and why we did it. * * * We excommunicated some members here because they didn't want to obey the rules of the church. * * * Mullet said he should be allowed to punish people who break the laws of the church.

(Tr., R. 540, Page ID# 6775-6777). Mullet did not explain how the victims' actions, which occurred many miles or hours from his Bergholz compound, in any way interfered with his practices.

g. Defendants' Subsequent Obstruction Of Justice And False Statements

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 after 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 recorded while several of the defendants were in state custody after the October 4, 2011, assaults (see pp. 49-50, *supra*), Lester Mullet and Levi Miller agreed with Mullet to conceal the camera used to take pictures of the victims of the October 4 (and, later, the November 9, 2011) assaults. During the October 9, 2011, call between Mullet and Lester Mullet, Lester stated that "if you still got that camera get rid of it." (GX 16-6 (transcript), R. 556-9, Page ID# 7834; GX 15-4 (audio recording); Tr., R. 539, Page ID# 6436). When Mullet asked why, Lester stated that he "told them by mistake what Eli was doing. Get rid of it so they can't get ahold of that thing." (GX 16-6 (transcript), R. 556-9, Page ID# 7834; GX 15-4 (audio recording); Tr., R. 539, Page ID# 6436). Mullet responded that "[t]hey're not going to get ahold of the camera because Eli is going to tell them he threw it away[,] so we can keep it

here." (GX 16-6 (transcript), R. 556-9, Page ID# 7834; GX 15-4 (audio recording); Tr., R. 539, Page ID# 6437; see also Tr., R. 540, Page ID# 6731). During the call between Levi Miller and Mullet, Levi said: "[W]hat about those pictures that we took? I didn't know if we should get rid of them or what." (GX 18-24 (transcript), R. 556-10, Page ID# 7872; GX 17-16 (audio recording); Tr., R. 539, Page ID# 6451). Mullet responded that he "would take care of them," and they are "not going to get thrown away." (GX 18-24 (transcript), R. 556-10, Page ID# 7872; GX 17-16 (audio recording); Tr., R. 539, Page ID# 6451).

At first, the camera was kept in Eli Miller's bedroom. (Tr., R. 537, Page ID# 6012-6013). Eli then called his wife, Lovina Miller, and told her he wanted the camera hidden. (Tr., R. 537, Page ID# 6014). As a result, in November 2011, after some of the defendants had been charged with federal crimes, Daniel Schrock, who lived with Eli and Levi, retrieved the camera from the house and gave it to Johnny Mast, one of Mullet's grandsons. (Tr., R. 537, Page ID# 6013-6017, 6047-6049; Tr., R. 539, Page ID# 6429-6430). Daniel told Johnny to either hide or dispose of it so that the FBI could not find it in the house. (Tr., R. 537, Page ID# 6015-6016; Tr., R. 539, Page ID# 6430, 6539). According to Daniel, it was no secret that Eli wanted the camera hidden; Johnny, in turn, understood that the FBI was interested in the camera. (Tr., R. 537, Page ID# 6016; Tr., R. 539, Page ID# 6539). Johnny 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, in March 2012, during his grand jury testimony, Johnny was asked about the camera. (Tr., R. 539, Page ID# 6431, 6539-6540). As a result, he turned it over 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 had been aware 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.

When the FBI agents interviewed Mullet on November 23, 2011, they asked him about the October 4, 2011, assaults. (Tr., R. 540, Page ID# 6747, 6752-6753). Mullet falsely stated that he had no prior knowledge that there was a plan to cut hair and beards 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 and Christ Mullet, and formed the basis of Count 10 (false statement). (Tr., R. 529, Page ID# 5715; Tr., R. 540, Page ID# 6653-6654). Barbara Yoder, for example, testified that she was at Mullet's house on the evening of October 4, 2011, and that before defendants returned to Mullet's house, Mullet said he knew they were going to stop at the Hershbergers' house and at Myron Miller's house to cut their beards and hair. (Tr., R. 540, Page ID# 6653-6655).

h. The FBI's Investigation Of The Assaults

Approximately a week after several of the defendants were arrested by local authorities in connection with the October 4, 2011, assaults, the Holmes County Sheriff's Department asked the FBI for assistance in investigating the beard cutting assaults. (Tr., R. 538, Page ID# 6095-6096; Tr., R. 540, Page ID# 6725-6726, 6836, 6854). On October 19, 2011, the FBI and the local law enforcement officials met to determine if there were any potential violations of federal criminal civil rights laws, *i.e.*, if the beard and hair cuttings were religion-based. (Tr., R. 540, Page ID# 6726-6727, 6807-6808, 6836, 6842). At this time, the FBI became aware that there had been similar attacks in several other counties. (Tr., R. 540, Page ID# 6727-6728).

On October 24, 2011, the FBI officially opened its investigation. (Tr., R. 540, Page ID# 6728, 6797, 6855). Subsequently, the FBI learned of the November 9, 2011, attack. (Tr., R. 540, Page ID# 6729-6730). At this point, the FBI investigation became a "priority" because both federal and local law enforcement realized that the local arrests after the October 4, 2011, assaults had not deterred additional assaults. (Tr., R. 540, Page ID# 6730, 6855-6856).

Based on its investigation, the FBI prepared a complaint charging some of the defendants with federal hate crimes violations. They also obtained arrest warrants and obtained a search warrant for Mullet's property, looking for, among

other things, clippers, shears, scissors, and a camera. (Tr., R. 540, Page ID# 6731, 6734-6743, 6831-6832, 6858, 6880).

On November 23, 2011, the FBI executed the warrants. (Tr., R. 540, Page ID# 6735). The FBI arrested Mullet, searched his home, and found the electric hair clippers in the barn. (Tr., R. 540, Page ID# 6743, 6757-6758, 6763; GX 1 (the clippers)). A few days later, Lester Miller gave the FBI the eight-inch horse shears used in the October 4, 2011, assaults. (Tr., R. 540, Page ID# 6761-6762, 6764, 6803-6804, 6844-6845; GX 2 (eight-inch horse shears)). On March 14, 2012, Johnny Mast turned over to the FBI the camera used to take photographs of some of the victims. (Tr., R. 540, Page ID# 6764). Finally, on August 22, 2012, Daniel Schrock, the son of defendants Emanuel and Linda Schrock, gave the FBI the horse scissors used in the November 9, 2011, assault of Melvin and Anna Schrock. (Tr., R. 540, Page ID# 6770-6771, 6809-6811; GX 14 (horse scissors).

SUMMARY OF THE ARGUMENT

This case is the first prosecution and first appeal challenging convictions under 18 U.S.C. 249(a)(2), a provision of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Shepard-Byrd Act or Act), signed into law on October 28, 2009. Pub. L. No. 111-84, Div. E, 123 Stat. 2835 (2009).[17] Section

[17] This Court addressed a pre-enforcement First Amendment challenge to Section 249(a)(2) in *Glenn* v. *Holder*, 690 F.3d 417 (6th Cir. 2012), cert. denied, (continued…)

249(a)(2) criminalizes acts of violence committed "because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person." 18 U.S.C. 249(a)(2). This provision was enacted pursuant to Congress's Commerce Clause authority, and contains a "jurisdictional element" requiring proof, in each count, that the crime has a nexus to interstate or foreign commerce.[18]

1. Defendants' principal argument is that Section 249(a)(2) is unconstitutional on its face and as applied because it exceeds Congress's Commerce Clause power. The facial challenge 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 the

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(…continued)
133 S. Ct. 1581 (2013). The Court affirmed that the plaintiffs, who alleged that the statute chilled their speech in opposition to homosexuality, lacked standing to challenge the statute because they had not alleged that they violated the statute or intended to do so in the future. *Id.* at 421-422.

[18] There have been several constitutional challenges to convictions under a different provision of the Shepard-Byrd Act, 18 U.S.C. 249(a)(1), which applies to hate crimes based on race, color, national origin, and religion. Section 249(a)(1) was enacted pursuant to Congress's power under Section 2 of the Thirteenth Amendment. The two courts of appeals that have addressed the issue have upheld Section 249(a)(1) as a valid exercise of Congress's Thirteenth Amendment power. See *United States* v. *Maybee*, 687 F.3d 1026 (8th Cir.), cert. denied, 133 S. Ct. 556 (2012); *United States* v. *Hatch*, 722 F.3d 1193 (10th Cir.), cert. pending, No. 13-6765 (filed Oct. 1, 2013). A third appeal is pending. *United States* v. *Cannon*, No. 12-20514 (5th Cir. argued Aug. 5, 2013).

as-applied challenge, the jurisdictional elements can be met in a number of ways, including that, in connection with the 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. Defendants' conduct satisfied these jurisdictional elements as follows: (a) for Counts 2 and 4-6, to effectuate the assaults, defendants used dangerous weapons – battery-operated Wahl hair clippers (Counts 2 and 4), eight-inch horse shears (Counts 4-5), or other horse scissors (Count 6) – that traveled in interstate commerce; (b) for Count 6, defendants used the United States mail to lure the victims to the place of the assault; and (c) for Counts 2 and 4-6, defendants hired a driver to either drive the defendants to the victims' house (Counts 2 and 4-5), or drive the victims to defendants' house (Count 6), in a motor vehicle. In each of these circumstances, defendants used instrumentalities of, or things in, interstate commerce to effectuate the assault. 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.

Moreover, the facts of this case show the importance of a federal statute that reaches this conduct. These were not ordinary assaults. Over a period of several months, and despite the involvement of local law enforcement in four counties, members of the Amish community were awakened at night, forcibly detained,

assaulted, and disfigured by beard and hair cuttings that were intended to destroy, and did destroy, one of the most important symbols of their religious beliefs. The victims were devastated and physically injured, and the assaults injected terror and anxiety into a community that awaited the next nighttime assault. Neither the arrest of three of the defendants by local authorities, nor Mullet's empty assurances that the assaults would stop, brought an end to the attacks. Rather, it was only through the joint efforts of local and federal law enforcement authorities – and the ability of federal authorities to respond to religiously-motivated violence under Section 249(a)(2) in a single federal case – that the community's safety was restored.

2. Defendants have not shown that the jury instructions on Section 249(a)(2)'s requirement that they acted "because of" religion – to which they did not properly object – was plain error. In fact, the jury was correctly instructed that "because of" religion requires that religion be "a significant motivating factor." As used in Section 249, "because of" does not require "but for" causation or that religion be "the" motivating factor. Nor does the statute require that the defendants be motivated by animus or "hatred" towards a particular religion. In any event, even if the jury instruction was erroneous (which it is not), any error would be harmless given the overwhelming evidence that none of the assaults would have occurred absent the victims' religious beliefs and practices; therefore,

the evidence would satisfy even defendants' proposed standard. Finally, there is no basis for defendants' arguments that the statute is unconstitutionally overbroad and vague and permits criminal liability based on thought.

3. The district court did not abuse its discretion in instructing the jury on the definition of kidnapping as used in the sentencing enhancement provision of Section 249(a)(2). Defendants requested that the court use the common law definition that requires abducting the victim from one State into another State. The district court correctly rejected that argument, and defined kidnapping according to its generic and contemporary meaning, which includes restraining or confining a person by force with the intent to terrorize or cause bodily injury. This definition is consistent with the definition of kidnapping courts have used in 18 U.S.C. 242, another federal criminal civil rights statute, and that this Court has used in addressing the Sentencing Guidelines.

4. Kathryn Miller's argument that prosecution of this case violates the Religious Freedom Restoration Act (RFRA) was not properly raised below, and therefore is waived. This issue was raised only in an amicus brief, not by a party. In any event, the government's prosecution of this case does not violate RFRA because application of Section 249(a)(2) to defendants' conduct does not "substantially burden" their free exercise of religion, the threshold showing necessary to implicate RFRA. And even if it did, the government has a compelling

interest in preventing the kind of religion-based, violent assaults at issue in this case and targeted by Section 249(a)(2), and the statute is the least restrictive means of doing so. In any event, defendants do not assert that the religion-based assaults were *themselves* religious practices.

5. The district court did not abuse its discretion in admitting the testimony of various government witnesses. First, testimony concerning Mullet's sexual conduct with his daughter-in-law (*i.e.*, that he directed her to have sex with him for religious reasons) was properly admitted pursuant to Rule 404(b) to show Mullet's control and authority over defendants. Although Mullet was not present at any of the assaults, the theory of the government's case was that Mullet, as leader of the Bergholz community, required the other defendants to obey his directions. His conduct with Nancy Mullet and others on the compound exemplifies his high degree of control over the other defendants; supports the conclusion that he was the driving force behind the assaults; and ties him to the conspiracy and each of the assaults. Further, the evidence was admitted pursuant to instructions not to elicit the details of Mullet's sexual conduct with Nancy Mullet and pursuant to a limiting instruction that directed the jury to consider the evidence only as it related to Mullet's motive and control of the community.

Second, the expert testimony of Dr. Kraybill on Amish culture and practices was properly admitted to educate the jury. He was permitted to testify only to

general Amish practices (*e.g.*, the significance of beards for men), and not permitted to characterize anyone's testimony. Defendants have not explained how his testimony rendered the trial unfair. Defendants' other challenges to various testimony likewise fail.

6. The district court's jury instructions on conspiracy (Count 1) did not constructively amend the indictment. Defendants assert that because the indictment alleged that defendants conspired to injure *all* of the named victims, the court's instruction that the jury need find only that defendants willfully caused bodily injury to *at least one* victim was improper. But the district court's instruction followed the well-settled principle that an offense may be charged conjunctively but proved disjunctively.

7. Defendants' various arguments challenging the sufficiency of the evidence fail. First, the evidence was sufficient to establish a conspiracy (Count 1), *i.e.*, that the assaults were not unrelated and that there was a common agreement and purpose. Second, with respect to the Section 249(a)(2) counts, the evidence was sufficient to establish (1) bodily injury, which is defined to include disfigurement, physical pain, and cuts; (2) that defendants' conduct satisfied the jurisdictional requirements, given their use of weapons that traveled in interstate commerce, their use of the United States mail, and their hiring of drivers to

transport them and their victims in motor vehicles (see Issue I); and (3) aiding and abetting.

8. The government's closing argument did not deprive defendants of a fair trial. Defendants challenge a statement in the government's final argument addressing bodily injury and suggesting that for Melvin Schrock, who died a few months after the assault, the injury was permanent. Defendants misconstrue the statement. The government was not stating that Melvin Schrock's death constituted bodily injury, as defendants suggest. Rather, the challenged statement was part of the government's rebuttal of defendants' argument that the loss of beard and hair could not constitute bodily injury because it could grow back. The government was observing that the disfigurement caused by the beard and hair cutting could constitute bodily injury, even if the hair grew back, because bodily injury need not be permanent – although for one victim (Melvin Schrock) the injury *was* permanent because he died before his beard grew back. There was nothing improper about the statement.

9. The district court did not abuse its discretion in sentencing Mullet to 15 years' imprisonment. The district court correctly applied the kidnapping guideline as the underlying substantive offense. Also, the court downwardly varied based on the 18 U.S.C. 3553(a) factors; under the Guidelines, the applicable sentencing range was life imprisonment. Mullet also failed to show that there is an

unwarranted disparity between his sentence and those given defendants convicted of similar crimes.

10. The district court did not abuse its discretion in sentencing Levi Miller to 84 months' imprisonment. As with Mullet, the district court correctly applied the kidnapping guideline as the underlying substantive offense and conducted a proper individualized assessment of the defendant's conduct. The district court correctly concluded that the leadership enhancement was applicable, and that he was not entitled to a downward adjustment for acceptance of responsibility. Levi Miller was also granted a substantial variance; the Guidelines range was life imprisonment.

ARGUMENT

I

SECTION 249(a)(2) IS A VALID EXERCISE OF CONGRESS'S POWER UNDER THE COMMERCE CLAUSE ON ITS FACE AND AS APPLIED IN THIS CASE

A. Standard Of Review

The Court reviews challenges to Congress's constitutional power to enact a statute *de novo*. See, *e.g.*, *United States* v. *Rose*, 522 F.3d 710, 716 (6th Cir. 2008). The Court may strike down an Act of Congress only if "the lack of constitutional authority to pass the act in question is clearly demonstrated." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012) (alteration

and quotation marks omitted). In the context of this case, that test is met only if the statute "bears no rational relation to interstate commerce." *United States* v. *Faasse*, 265 F.3d 475, 481 (6th Cir. 2001) (en banc).

B. Section 249(a)(2) Is A Valid Exercise Of Congress's Power Under The Commerce Clause

1. The Enactment Of Section 249(a)(2) Under Congress's Commerce Clause Authority

a. Defendants were convicted of violating 18 U.S.C. 249(a)(2), which makes it a crime to "willfully 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." Section 249(a)(2) was enacted pursuant to Congress's Commerce Clause power. See H.R. Rep. No. 86, Pt. 1, 111th Cong., 1st Sess. 15 (2009) (H.R. Rep. No. 86). Congress recognized that "the Commerce Clause provides Congress ample authority to prosecute acts of violence motivated by animus based on * * * [*e.g.*, religion] *where the act has the requisite connection to interstate commerce*." H.R. Rep. No. 86 at 15 (emphasis added). In drafting Section 249(a)(2), Congress intended to invoke the "full scope of [its] Commerce Clause power." *Ibid.*

To this end, and "[t]o avoid constitutional concerns * * *, the [statute] requires that the Government prove beyond a reasonable doubt, as an element of the offense, a nexus to interstate commerce in every prosecution." H.R. Rep. No.

86 at 15. Specifically, the defendant's conduct must satisfy one of the four statutory "circumstances," also called jurisdictional "elements" or "hooks":

> (i) the conduct * * * occurs during the course of, or as the result of, the travel of the defendant or the victim – (I) across a State line or national border; or (II) using a channel, facility, or instrumentality of interstate or foreign commerce;
>
> (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct * * *;
>
> (iii) * * * the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or
>
> (iv) the conduct * * * (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (II) otherwise affects interstate or foreign commerce.

18 U.S.C. 249(a)(2)(B).

These elements are intended to "comport with" the broad categories of interstate commercial activity that Congress may regulate under its commerce power – (1) channels, (2) instrumentalities or persons and things, and (3) activities with a substantial effect – as set forth in *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995). See H.R. Rep. No. 86 at 15. They also reflect the Congressional Finding contained in the statute that such violence affects interstate commerce in a number of ways, including by the use of "[c]hannels, facilities, and instrumentalities of interstate commerce * * * to facilitate the commission of such violence," and by the use of "articles that have traveled in interstate commerce."

Shepard-Byrd Act, Section 4702(6), 123 Stat. 2836. In short, Section 249(a)(2) was drafted broadly enough so that it applies to the fullest extent of Congress's Commerce Clause authority, but carefully enough, given the jurisdictional elements, so that it tracks only those powers recognized by well-settled Commerce Clause jurisprudence.

b. Congress heard extensive evidence addressing the prevalence of bias crimes and the need for further federal involvement beyond existing state and federal law protections. The House Report states that "[b]ias crimes are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society." H.R. Rep. No. 86 at 5. The House Report also notes that "[s]ince 1991, the FBI has identified over 118,000 reported violent hate crimes," and that in 2007 alone, the FBI documented more than 7600 hate crimes. *Ibid.* Further, a 2002 Senate Report noted that "the number of reported hate crimes has grown almost 90 percent over the past decade," averaging "20 hate crimes per day for 10 years straight." S. Rep. No. 147, 107th Cong., 2d Sess. 2 (2002) (S. Rep. No. 147).[19] Based on such evidence, Congress found that the

[19] S. Rep. No. 147 addresses hate crimes legislation that was proposed in 1998 and eventually became the 2009 Shepard-Byrd Act. See generally *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearings before the Senate Comm. on the Judiciary*, 111th Cong., 1st Sess. 4 (2009) (noting that in 1998 the Committee heard testimony on "an almost identical bill") (Statement of Attorney General Eric H. Holder, Jr.).

"incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, sexual identity, or disability of the victim poses a serious national problem"; such "violence disrupts the tranquility and safety of communities and is deeply divisive"; and "[e]xisting Federal law is inadequate to address this problem." Shepard-Byrd Act, Sections 4702(1) & (4), 123 Stat. 2835.[20]

Congress was also keenly aware of federalism concerns. As a result, Section 249 was intended to supplement, not replace, state authority. Congress stated that state and local governments will "continue to be responsible for prosecuting the overwhelming majority" of violent hate crimes, but can "carry out their responsibilities more effectively with greater Federal assistance." Shepard-Byrd Act, Section 4702(3), 123 Stat. 2835. Congress further stated that federal jurisdiction over such crimes "enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes," and the

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[20] Section 249 was intended to address the limited reach of 18 U.S.C. 245, the first modern federal hate crimes statute, enacted in 1968. Because Section 245 was intended to address the violent interference with activities protected by the then-recently enacted Civil Rights Act of 1964 and the Constitution, it prohibits only hate-based violence in connection with the victim's participation in specifically defined federal activities. See H.R. Rep. No. 86 at 5-9. The House Report explains that "[t]hese deficiencies limit the Federal Government's ability to prosecute certain hate crimes, and its ability to assist State and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes." H.R. Rep. No. 86 at 5.

problem of hate crimes is sufficiently serious and widespread "to warrant Federal assistance to States, local jurisdictions, and Indian tribes." Shepard-Byrd Act, Sections 4702(9) & (10), 123 Stat. 2836; see also H.R. Rep. No. 86 at 8 ("By expanding the reach of Federal criminal law, this bill will similarly expand the ability of the FBI and other Federal law enforcement entities to provide assistance to State law enforcement authorities. It is expected that this cooperation will result in an increase in the number of hate crimes solved by arrests and successful prosecutions."); Shepard-Byrd Act, Section 4704, 123 Stat. 2837 (providing federal financial and non-financial support for the states' investigation and prosecution of hate crimes). In so doing, Congress acted in accordance with its recognized authority "to prohibit activities of traditional state and local concern that also have an interstate nexus," and to do so "to add a second layer of enforcement supplementing what it found to be inadequate state authority and state enforcement." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (addressing the Travel Act, 18 U.S.C. 1952, in which Congress "consciously link[ed] the enforcement powers and resources of the Federal and State Governments to deal with traditional state crimes").

Accordingly, Section 249 includes a "certification" provision, stating that no federal prosecution may be undertaken under the statute unless the Attorney General certifies that the State does not have jurisdiction; the State has requested

that the federal government assume jurisdiction; a verdict or sentence obtained in state court "left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence"; or federal prosecution "is in the public interest and necessary to secure substantial justice." 18 U.S.C. 249(b)(1). The certification requirement is "intended to ensure that the Federal Government will assert its new hate crimes jurisdiction only in a principled and properly limited fashion, and is in keeping with procedures under the current Federal hate crimes statute." H.R. Rep. No. 86 at 14. In this case, in accordance with the certification provision, local authorities requested that the federal government assume jurisdiction to ensure that a case of national importance covering multiple local jurisdictions, and involving defendants beyond their investigative resources, could be fully investigated and prosecuted in a single federal proceeding. (Government's Opposition to Defendants' Motions to Dismiss, R. 92, Page ID# 1233).

2. Section 249(a)(2) Is Facially Valid

Defendants argue that Section 249(a)(2) is unconstitutional on its face because it does not regulate any economic activity, and that the facial invalidity of the statute is not saved by its jurisdictional elements. See Mullet Br. 16-19; Levi Miller Br. 25-31; Lester Miller Br. 15-16. These arguments are incorrect. Congress's Commerce Clause power is not limited to addressing only matters that are themselves economic activities. Moreover, where a statute's reach is limited

by express jurisdictional elements, thereby ensuring on a case-by-case basis that the particular offense has a sufficient nexus to interstate commerce, the statute is effectively immunized from a *facial* constitutional attack. See generally *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (A facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *United States* v. *Khami*, 362 F. App'x 501, 508 (6th Cir. 2010) (following *Salerno*). Moreover, Congress's Commerce Clause power must be coupled with its power under the Necessary and Proper Clause, which "makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are convenient, or useful or conducive to the authority's beneficial exercise." *United States* v. *Comstock*, 560 U.S. 126, 133-134 (2010) (citation and internal quotation marks omitted). Under the Necessary and Proper Clause, the court "look[s] to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* at 134. Indeed, the Supreme Court has recognized that "Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated power to regulate interstate and foreign commerce [and] to enforce civil rights." *Id*. at 136.

a. As noted above, the Court in *Lopez* identified three broad categories of activity that Congress may regulate under its Commerce power: "First, Congress

may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce * * *. [Third], Congress' commerce authority includes the power to regulate those activities * * * that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-559; see also *United States* v. *Morrison*, 529 U.S. 598, 608-609 (2000); *Gonzales* v. *Raich*, 545 U.S. 1, 16-17 (2005); *Thomas More Law Center* v. *Obama*, 651 F.3d 529, 541 (6th Cir. 2011), cert. denied, 133 S. Ct. 61 (2012).

In attacking Section 249(a)(2)'s facial validity, defendants largely focus on the third *Lopez* category and the Supreme Court's decision in *Morrison*.[21] In *Morrison*, the Court addressed whether Congress's Commerce Clause authority supported the enactment of the civil remedy provision of the Violence Against Women Act (VAWA).[22] The Court noted that because plaintiffs did not argue that the statute fell within either of the first two *Lopez* categories, and the statute was directed at gender-based violence "wherever it occurs," the proper inquiry was

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[21] See, *e.g.*, Mullet Br. 15-16 (This case "must be analyzed under category three" and the "central question is whether the regulated activity is an economic activity that substantially affects interstate commerce."); see also Levi Miller Br. 30; Anna Miller Br. 13-27; Kathryn Miller Br. 32-33; Lester Miller Br. 15-16.

[22] See 42 U.S.C. 13981(c), providing that "a person * * * who committed a crime of violence motivated by gender * * * shall be liable to the party injured."

whether the activities regulated had a substantial impact on interstate commerce. 529 U.S. at 609. The Court held, by a 5-4 vote, that Congress's commerce power under the third *Lopez* category could not support VAWA because the regulated conduct was not economic in nature, the statute lacked any jurisdictional element ensuring that the targeted conduct affected interstate commerce, and the link reflected in the congressional findings between gender-based violence and effects on interstate commerce was too attenuated. *Id.* at 610-619.

Unlike in *Morrison*, the constitutionality of Section 249(a)(2) does not turn on whether the religion-based violence, in the aggregate, "substantially affects" interstate commerce. In this case, the government proved beyond a reasonable doubt below that each of the assaults implicated instrumentalities of interstate commerce, or things in interstate commerce, and therefore had specific and discrete connections with interstate commerce. (See, *e.g.*, Tr., R. 542, Page ID# 7277-7278; Government's Opposition to Defendants' Motions to Dismiss, R. 92, Page ID# 1227-1234). The jury instructions reflected this theory of the case, requiring the jury, in order to convict, to find that defendants' conduct occurred in "one of three circumstances," *i.e.*, (1) as a result of the travel of the defendant or victim using an instrumentality of interstate commerce, (2) through defendant's use of an instrumentality of interstate commerce, or (3) through the use of a dangerous weapon that traveled in interstate commerce. (Tr., R. 542, Page ID# 7253-7255).

These instructions mirror the first three jurisdictional elements in the statute. See 18 U.S.C. 249(a)(2)(B)(i)-(iii). Therefore, the final *Lopez* prong is not at issue in this case, and defendants' arguments that the statute cannot be sustained under that rationale, although incorrect in this context, are beside the point.[23]

Unlike the disputed provision of VAWA, Section 249(a)(2) contains jurisdictional elements that tie a particular instance of violence to the various categories of Congress's commerce power. Although, as noted above, jurisdictional elements are one factor relevant to the determination whether the regulated activity substantially affects interstate commerce (*i.e.*, satisfies the third

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[23] Anna Miller's central argument is that the statute cannot be sustained under the third *Lopez* category. See Anna Miller Br. 13-24. She relies primarily on the district court's decision in *United States* v. *Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. 2012), appeals pending on other grounds, Nos. 13-5902, 13-5903 (6th Cir.), which rejected a similar challenge to Section 249(a)(2) in the context of a motion to dismiss the indictment. Although the court in *Jenkins* did state that the Shepard-Byrd Act "falls under" the third *Lopez* category, *id.* at 767, as discussed below the court ultimately upheld the statute based on Congress's power to regulate instrumentalities of interstate commerce and the statute's jurisdictional elements, *id.* at 771-773. Likewise, the defendants' further arguments that, under *Morrison*, the congressional findings underlying Section 249(a)(2) are insufficient to support the statute are irrelevant here because the Court in *Morrison* addressed the force of congressional findings only in the context of determining whether the regulated activity substantially affected interstate commerce. See Mullet Br. 19-20 (addressing *Morrison* and congressional findings); Anna Miller Br. 16-17 (same). To prevail on their facial challenge, however, defendants must show that Section 249(a)(2) is invalid in all of its applications. Defendants do not do so where, as here, they focus on only one category of properly regulated activity, *i.e.*, *Lopez*'s third prong.

Lopez category), the jurisdictional elements can also independently ensure that the regulated conduct implicates channels and instrumentalities of interstate commerce, and things in interstate commerce (*i.e.*, satisfies the first two *Lopez* categories). That is the case here. Congress used its commerce power to reach only assaults that are facilitated by, or otherwise involve, things or activities that Congress is empowered to regulate under the Commerce Clause. The jurisdictional elements limit the reach of the statute to "a discrete set" of activities (bias-based violence) "that additionally have an explicit connection with * * * interstate commerce." *Lopez*, 514 U.S. at 562. These activities do not themselves have to be economic in nature. See *United States* v. *Coleman*, 675 F.3d 615, 620 (6th Cir.), cert. denied, 133 S. Ct. 264 (2012).[24]

b. This Court has squarely recognized that "[w]here a statute lacks a clear economic purpose, the inclusion of an explicit jurisdictional element suffices to ensure, through case-by-case inquiry, that the [violation] in question affects interstate commerce. Indeed, we regard the presence of such a jurisdictional

[24] For this reason, Lester Miller errs in suggesting that the United States cannot rely on Congress's power to regulate the use of instrumentalities of, or things in, interstate commerce because Congress's Commerce Clause power must be directed at an "activity" that affects interstate commerce, and (according to Miller) the assaults here do not affect interstate commerce. Lester Miller Br. 14-16 (citing *Sebelius*, 132 S. Ct. at 2585-2586 (addressing the Affordable Care Act)). This argument reads out of Congress's Commerce Clause power the first two *Lopez* prongs, which are independent of one another and of prong three.

element as the touchstone of valid congressional use of its Commerce Clause powers to regulate non-commercial activity." *Coleman*, 675 F.3d at 620 (citation and internal quotation marks omitted). In fact, the Court in *Lopez* specifically cited to the jurisdictional element in the statute at issue in *United States* v. *Bass*, 404 U.S. 336 (1971), *i.e.*, 18 U.S.C. 1202(a) (now codified as 18 U.S.C. 922(g)), which prohibits felons from possessing a firearm that traveled in interstate commerce, as an example of an acceptable provision. *Ibid.*; see pp. 81-84, *infra* (addressing federal gun statutes).

Therefore, "the presence of the jurisdictional element defeats [defendants'] facial claim." *United States* v. *Chesney*, 86 F.3d 564, 568 (6th Cir. 1996) (rejecting a facial challenge to 18 U.S.C. 922(g)(1), which prohibits a felon from possessing a firearm that has traveled in interstate commerce, based on that statute's jurisdictional element); see *United States* v. *Thompson*, 361 F.3d 918, 923 (6th Cir. 2004) (stating that the jurisdictional element in 18 U.S.C. 922(g)(1) ensures that the statute reaches only those activities affecting interstate commerce); *United States* v. *Al-Zubaidy*, 283 F.3d 804, 812 (6th Cir. 2002) (upholding criminal provision of VAWA, noting that the statute "provides an explicit jurisdictional element requiring interstate travel"); *United States* v. *Napier*, 233 F.3d 394, 399-400 (6th Cir. 2000) (rejecting challenge to 18 U.S.C. 922(g)(8) given the

jurisdictional element); *United States* v. *Baker*, 197 F.3d 211 (6th Cir. 1999) (same).

Further, to the extent a court concludes that a statute's jurisdictional elements sweep too broadly, the remedy is not to invalidate the statute on its face, but to address its constitutionality as applied. For example, in *United States* v. *Corp*, this Court declined to declare 18 U.S.C. 2252(a)(4)(B), a child pornography statute containing a jurisdictional element, facially unconstitutional, even though the Court had concerns that the element may be so insubstantial as to provide almost no limitation at all. 236 F.3d 325, 332 (6th Cir. 2001), abrogation on other grounds recognized in *United States* v. *Bowers*, 594 F.3d 522, 523 (6th Cir. 2010). The Court explained that the "jurisdictional components of constitutional statutes are to be read as meaningful restrictions," and therefore examined the interstate nexus in the particular case to determine if the statute was constitutionally applied. *Ibid.*; see also *Faasse*, 265 F.3d at 487 ("[W]e do not strike down a statute facially because there are hypothetical situations in which the Act's interstate commerce connection may conceivably be tenuous.").

c. Finally, two district courts have rejected facial challenges to Section 249(a)(2) in similar cases. First, in *Jenkins*, the indictment alleged that defendants devised a plan to lure a gay man out of his house to assault him based on his sexual orientation. *United States* v. *Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. 2012),

appeals pending on other grounds, Nos. 13-5902, 13-5903 (6th Cir.). The defendants drove the victim in their truck to a park where they assaulted him. *Id.* at 764-765. In rejecting defendants' motion to dismiss the indictment, the district court stated that Congress used the jurisdictional elements in the statute to reach conduct under the full breadth of its Commerce Clause power (in that case, the element was the defendants' use of an instrumentality of interstate commerce – the car – to effectuate the assault). *Id.* at 770. The court explained that these jurisdictional elements, if proven, "ensure that the conduct was in a category of activity that was within the power of Congress to regulate." *Id.* at 771.

Second, and most recently, in *United States* v. *Mason*, No. 3:13-cr-00298-01-SI, 2014 WL 37923, at *1 (D. Or. Jan. 6, 2014), the court denied defendant's motion to dismiss the indictment charging him with violating Section 249(a)(2) for assaulting a gay man with a car tool that had previously traveled in interstate commerce. The court concluded that the statute's jurisdictional elements were sufficient to satisfy the requirements of the Commerce Clause and therefore to sustain the facial constitutionality of the statute. *Id.* at *8. The court also explained that the factual question of whether the tool actually traveled in interstate commerce was a question for the jury. *Ibid.*

In sum, Section 249(a)(2) was intended to invoke the full scope of Congress's Commerce Clause power, and requires that the government prove one

or more jurisdictional elements set forth in the statute beyond a reasonable doubt. These jurisdictional elements include the showing that, in connection with the assault, the defendants used a weapon that traveled in interstate commerce or the defendants or victims traveled using an instrumentality of interstate commerce. The statute is necessarily constitutional on its face.

3. Section 249(a)(2) Is A Valid Exercise Of Congress's Commerce Clause Power As Applied In This Case

Where a statute has a jurisdictional hook, courts must determine on a case-by-case basis whether a defendant's conduct has a sufficient nexus to interstate commerce to sustain the statute as applied. See, *e.g.*, *United States* v. *Laton*, 352 F.3d 286, 297 (6th Cir. 2003). Therefore, the constitutional question in this case is whether – given that the facts of this case fall within one or more of the statutory jurisdictional hooks – the proscribed activity sufficiently implicates Congress's power under the Commerce Clause.

Here, defendants' conduct satisfied Section 249(a)(2)'s jurisdictional elements, and was sufficiently tied to interstate commerce, in three distinct ways: (1) for three of the assaults, defendants used dangerous weapons – battery-operated Wahl hair clippers (Counts 2 and 4), eight-inch horse shears (Counts 4-5), or other horse scissors (Count 6) – that traveled in interstate commerce; (2) for one of the assaults (Count 6), defendants used the United States mail to lure the victims to the place of the assault; and (3) for each assault, defendants hired a driver to either

drive the defendants to the victims' house (Counts 2, 4-5), or drive the victims to defendants' house (Count 6), in a motor vehicle. In each of these circumstances, defendants used instrumentalities of interstate commerce, or things in interstate commerce, consistent with *Lopez's* second prong, to effectuate the assault. 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.[25]

a. Defendants' Purchase And Use Of Clippers, Shears, And Scissors That Traveled In Interstate Commerce Created A Sufficient Nexus To Congress's Commerce Clause Power

The statute is constitutional as applied to Counts 2 and 4-6 because defendants, in committing the religion-based assaults, used battery-operated Wahl hair clippers that traveled in interstate commerce (Counts 2 and 4), purchased and used horse shears that traveled in interstate commerce (Counts 4-5), and used horse scissors that traveled in interstate commerce (Count 6).[26] In so doing, defendants,

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[25] In *Jenkins*, the court applied this framework in rejecting defendants' as-applied challenge to the constitutionality of Section 249(a)(2). See 909 F. Supp. at 770-772; note 23, *supra*.

[26] Anna Miller and Kathryn Miller, who were found guilty of Count 2 (the assault of Marty and Barbara Miller), assert that there was no evidence that the scissors used in that assault traveled in interstate commerce. Anna Miller Br. 25 n.6; Kathryn Miller Br. 29. With regard to Count 2, however, the government relies on the use of the hair clippers and the automobile for the jurisdictional element.

"in connection with" the assaults, employed a "weapon that has traveled in interstate * * * commerce." 18 U.S.C. 249(a)(2)(B)(iii). Accordingly, this aspect of defendants' conduct falls squarely within both Congress's Commerce Clause power and Section 249(a)(2)'s jurisdictional hook.

(i). Among the harms addressed by Section 249(a)(2) are those "facilitated by the unencumbered movement of weapons across State * * * borders." S. Rep. No. 147 at 21. In this regard, the statute "is similar to several other Federal statutes in which Congress has prohibited persons from using or possessing weapons and other articles that have at one time or another traveled in interstate * * * commerce." *Ibid.* Courts have uniformly upheld such statutes as a valid exercise of Congress's commerce power to regulate products or things that travel in interstate commerce.

In *Scarborough* v. *United States*, 431 U.S. 563 (1977), the Supreme Court upheld defendant's conviction for violating a federal statute prohibiting a convicted felon from possessing "in commerce or affecting commerce" any firearm (addressing 18 U.S.C. 1202(a), now 18 U.S.C. 922(g)(1)). The Court concluded that the phrase "in commerce or affecting commerce" was not "intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575. Therefore, the fact that the firearm *previously traveled in interstate commerce* created a sufficient nexus between the

felon's possession of the firearm and interstate commerce to support defendant's conviction under the statute.

This Court has recognized that *Scarborough* remains unaffected by *Lopez* and *Morrison*, and that the government need not show that the possession of a firearm, in itself, had a substantial connection to interstate commerce. For example, in *Napier*, 233 F.3d at 399, addressing a provision of the statute that prohibits persons subject to a domestic violence order from possessing a firearm, 18 U.S.C. 922(g)(8), this Court rejected the argument that Congress had "unconstitutional[ly] attempt[ed]" to use its commerce power "to regulate domestic abuse, which is strictly a matter of state concern." The Court stated that "[n]othing in *Morrison* casts doubt on the validity of [Section] 922(g), which *regulates a product of interstate commerce*," *id.* at 402 (emphasis added), and the fact that the firearm possessed by the defendant "had previously traveled in interstate commerce" was "sufficient to establish the interstate commerce connection," *id.* at 401. See also *Chesney*, 86 F.3d at 570-571 (noting that *Lopez* "did not disturb" *Scarborough*'s holding that proof that "a firearm moved in interstate commerce at any time" satisfies the statute and that, as construed, the statute was within Congress's Commerce Clause power).

More recently, in *United States* v. *McBee*, 295 F. App'x 796, 798 (6th Cir. 2008), this Court rejected the argument "that the direction of the Supreme Court's

Commerce Clause jurisprudence indicates that the Supreme Court would not find the jurisdictional nexus [of Section 922(g)] sufficient." The Court, reaffirming the "precedential force" of *Scarborough*, stated that it "does not engage in speculation; we are bound by what the Supreme Court has said, not what it might say." *Ibid.* (citation and internal quotation marks omitted); see also *United States* v. *Campbell*, 436 F. App'x 518, 528-529 (6th Cir. 2011) (evidence that weapon was manufactured outside of the State of possession is sufficient), cert. denied, 132 S. Ct. 1602 (2012); *United States* v. *Henry*, 429 F.3d 603, 630 (6th Cir. 2005) (the "Commerce Clause requires no proof other than that the firearm * * * traveled in interstate commerce").[27]

Indeed, after the Supreme Court in *Lopez* struck down the statute prohibiting the possession of a gun in a school zone, Congress enacted 18 U.S.C. 922(q)(2), which makes it unlawful to possess a firearm in a school zone if, *inter alia*, the firearm "has moved in" interstate commerce. Courts have recognized that the

[27] Other courts of appeals are in accord that, notwithstanding *Lopez* and *Morrison*, Congress may regulate, under its commerce power, the possession of firearms in various circumstances as long as the firearm at some point in the past traveled in interstate commerce. These courts also recognize that in regulating the possession of a firearm, Congress is regulating a product in interstate commerce. See, *e.g.*, *United States* v. *Roszkowski*, 700 F.3d 50, 57-59 (1st Cir. 2012), cert. denied, 133 S. Ct. 1278 (2013); *United States* v. *Singletary*, 268 F.3d 196, 203-204 (3d Cir. 2001); *United States* v. *Sarraj*, 665 F.3d 916, 921-922 (7th Cir.), cert. denied, 132 S. Ct. 2412 (2012); *United States* v. *Jones*, 231 F.3d 508 (9th Cir. 2000); *United States* v. *Patton*, 451 F.3d 615, 634-635 (10th Cir. 2006); *United States* v. *McAllister*, 77 F.3d 387, 390 (11th Cir. 1996).

addition of this jurisdictional hook renders the statute a valid exercise of Congress's commerce power. See, *e.g.*, *United States* v. *Dorsey*, 418 F.3d 1038, 1045-1046 (9th Cir. 2005) (the jurisdictional element in Section 922(q) "resolves the shortcomings" of *Lopez* because it includes an interstate commerce requirement that "ensure[s] through case-by-case inquiry, that the firearm possession in question affects interstate commerce") (citation omitted).

The federal statute prohibiting convicted felons from possessing body armor, 18 U.S.C. 931, yields a similar conclusion. "[B]ody armor" is defined to include personal protective body covering "sold or offered for sale[] in interstate * * * commerce." 18 U.S.C. 921(a)(35). Analogizing to *Scarborough*, courts have upheld prosecutions under the statute where the defendant possessed body armor that at some time in its past traveled in interstate commerce. See, *e.g.*, *Patton*, 451 F.3d at 635-636 (because defendant's bulletproof vest "moved across state lines at some point in its existence, Congress may regulate it under *Scarborough*," which "was left intact by *Lopez*"); *United States* v. *Cook*, 488 F. App'x 643, 645 (3d Cir.), cert. denied, 133 S. Ct. 628 (2012); *United States* v. *Alderman*, 565 F.3d 641, 646-648 (9th Cir. 2009). A similar example is 18 U.S.C. 842(i), which proscribes possession by a felon of explosives shipped in interstate commerce. This statute has been upheld because "its express jurisdictional element ensures that it regulates only the possession of explosives that have travelled in interstate commerce."

United States v. *Folen*, 84 F.3d 1103, 1104 (8th Cir. 1996); see also *United States* v. *Joos*, 638 F.3d 581, 586 (8th Cir. 2011).

(ii). Consistent with its power to prohibit convicted felons from possessing firearms, body armor, and explosives that previously traveled in interstate commerce, Congress can regulate the possession of weapons such as clippers, shears, and scissors that have traveled in interstate commerce. And if Congress can regulate the mere *possession* of particular items that have traveled in interstate commerce, Congress can regulate or restrict their *use*. Such regulation is, in fact, less onerous than the regulation of mere possession. Indeed, another provision of the federal gun statute prohibits the "discharge" of a firearm in a school zone if the firearm traveled in interstate commerce. 18 U.S.C. 922(q)(3)(A). Under that provision, Congress is using its power to regulate firearms that travel in interstate commerce to regulate, not simply the possession of the firearms by certain people, but also their particular use.

Therefore, because Section 249(a)(2) reaches religiously-motivated assaults involving the use of weapons that have traveled in interstate commerce, it falls within Congress's commerce power. Prohibiting a particular use of weapons, *e.g.*, to commit a violent crime, regulates the flow of the weapons in interstate commerce and prohibits conduct "that has an undeniable connection to interstate commerce." *Roszkowski*, 700 F.3d at 58. As a result, Section 249(a)(2) is

constitutional as applied here because the evidence established that defendants used weapons that traveled in interstate commerce to effectuate the attacks. Moreover, in this case, there is a direct nexus between the use of weapons that traveled in interstate commerce and the assaults because, with respect to the eight-inch horse shears (Counts 4 and 5), the weapon was purchased for the express purpose of committing the assaults.

This conclusion is supported by the recent decision in *Mason*. In that case, the defendant was charged with violating Section 249(a)(2) for assaulting a gay man with a metal car tool after yelling gay slurs at the man. *Mason*, 2014 WL 37923, at *1. Defendant moved to dismiss the indictment, arguing that the statute was unconstitutional on its face and as applied. The court rejected the arguments, stating that it was bound by *Scarborough* – "which was not overruled by the Supreme Court in either *Morrison* or *Lopez*" – and the Ninth Circuit's decision in *Alderman*, 565 F.3d at 646-648 (addressing the body armor statute). *Id.* at *7-8. The court stated that the jurisdictional element in Section 249(a)(2), requiring the use of an weapon that traveled in interstate commerce in connection with the assault, "is significantly similar to the jurisdictional elements approved in both *Alderman* and *Scarborough*," and therefore "is sufficient to satisfy the requirements of the Commerce Clause." *Id.* at *8. The court further explained that

the statute would be constitutional as applied to the defendant if the jury found that the car tool actually traveled in interstate commerce. *Ibid.*

(iii). Defendants argue that cases addressing the federal child pornography statute, 18 U.S.C. 2252(a)(4)(B), compel a different conclusion. See, *e.g.*, Anna Miller Br. 20-22. That statute, as relevant here, makes it a crime to possess child pornography that has been "produced using materials" that have been shipped or transported in interstate commerce. Some courts have suggested or concluded that this jurisdictional hook is too sweeping because "all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce." *United States* v. *Rodia*, 194 F.3d 465, 473 (3d Cir. 1999); see also *Corp*, 236 F.3d at 332; *United States* v. *McCoy*, 323 F.3d 1114, 1124-1126 (9th Cir. 2003) (the jurisdictional hook "encompasses virtually *every* case imaginable, so long as any modern-day photographic equipment or material has been used"), overruled on other grounds, *United States* v. *McCalla*, 545 F.3d 750 (9th Cir. 2008); *United States* v. *Morales-De-Jesus*, 372 F.3d 6, 14 (1st Cir. 2004).

That argument is flawed. First, after the Supreme Court's decision in *Raich*, courts have upheld Section 2252(a)(4)(B) under Congress's power to regulate a class of activities, rendering it unnecessary to analyze the Commerce Clause connection for each case individually under the statutory jurisdictional hook. See, *e.g.*, *Bowers*, 594 F.3d at 524; *United States* v. *Rose*, 714 F.3d 362, 370-371 (6th

Cir.), cert. denied, 134 S. Ct. 272 (2013). Contrary to the suggestion of some defendants, we do not argue that Section 249(a)(2) falls within Congress's commerce power because it is part of a "larger economic regulation." See, *e.g.*, Mullet Br. 18; Kathryn Miller Br. 35.

Second, the jurisdictional element in Section 2252(a)(4)(B) is far broader than that in Section 249(a)(2). Section 249(a)(2)(B)(iii) is directed at the wrongful use of an object *that itself* traveled in interstate commerce. In other words, the statute regulates a particular use of weapons that have traveled in interstate commerce – the defendants' willful use of a weapon to cause bodily injury because of the victims' religion. As discussed above, such a statute is consistent with Congress's Commerce Clause power to regulate the use or possession of things that travel in interstate commerce. The Commerce Clause link in Section 2252(a)(4)(B), in contrast, is a step removed. As noted above, that statute, as relevant here, makes the possession of child pornography a crime, regardless of whether it has traveled in interstate commerce, as long as it was "produced using materials" that have been shipped or transported in interstate commerce. In other words, the jurisdictional link rests on interstate travel of the underlying materials that assist in production of child pornography, not the interstate travel of the child pornography itself. See *Morales-DeJesus*, 372 F.3d at 14 (the jurisdictional element "focuses on things such as film, cameras, videotapes, and recorders

moving in interstate commerce, which are *then used* to produce child pornography" (emphasis added). Therefore, even if the jurisdictional hook in Section 2252(a)(4)(B) were insufficient, which it is not, Section 249(a)(2) does not possess the same distance between the regulation of specific things that travel in interstate commerce and the proscribed activity.

Defendants also assert that even if Congress may regulate an item "itself" that has moved in interstate commerce, or may proscribe its possession, that does not mean that it can regulate any conduct involving its use. See, *e.g.*, Mullet Br. 18-19; Anna Miller Br. 23-24. Defendants cite the statement in *United States* v. *Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000), addressing the jurisdictional hook in 18 U.S.C. 2252(a)(4)(B), that "[i]t is one thing for Congress to prohibit possession of a weapon that has itself moved in interstate commerce, but it is quite another thing for Congress to prohibit homicides using such weapons." But as discussed above, in the murder-for-hire, kidnapping, gun, and body armor contexts, it is simply untrue, at least to the extent the court was implying that Congress could not prohibit such conduct at all. Congress can regulate not only the possession of items that have traveled in interstate commerce, but also specific conduct that was effectuated by the use of such items. Indeed, Congress has repeatedly done so under its power to regulate the use of a product that has moved in interstate

commerce. See, *e.g.*, 18 U.S.C. 922(q)(3)(A) (prohibiting the "discharge" of a firearm in a school zone if the firearm traveled in interstate commerce).

b. Defendants' Use Of The United States Mail To Lure The Victims To The Place Of The Assault Created A Sufficient Nexus To Congress's Commerce Clause Power

Count 6 charged Mullet and Emanuel and Linda Schrock with assaulting Emanuel's parents on November 9, 2011. As recounted above, Emanuel sent letters by United States mail to his parents inviting them to visit him in Bergholz. He intended to, and did, use their visit to cut his father's beard and hair. Defendants' use of the mail to effectuate this assault, in and of itself, constitutes a sufficient use of an instrumentality of interstate commerce to render Section 249(a)(2) constitutional as applied in Count 6.

It is well-settled that the use of the mail, like the making of a telephone call, constitutes use of an instrumentality of interstate commerce that may support a Commerce Clause nexus. For example, this Court has upheld application of the murder-for-hire statute in cases involving the use of the mail. See *United States* v. *Cope*, 312 F.3d 757, 770-771 (6th Cir. 2002) (rejecting a challenge to a murder-for-hire conviction where the defendant used the mail in connection with the scheme even where the letters did not cross state boundaries); see also *United States* v. *Johnson*, 443 F. App'x 85, 97 (6th Cir. 2011) (The murder-for-hire statute "allow[s] federal prosecutors to bring specific types of state murder cases into

federal court," and "involves the use of interstate activities, such as mail, that enable murder for hire schemes"; the "evidence must establish a nexus between the use of the mail and the furtherance of the murder for hire strategy."), cert. denied, 132 S. Ct. 1908 (2012); *United States* v. *Hackley*, 662 F.3d 671, 682 (4th Cir. 2011) (use of mail to facilitate murder-for-hire), cert. denied, 132 S. Ct. 1936, and 132 S. Ct. 2703 (2012); *United States* v. *Mueller*, 661 F.3d 338, 346 (8th Cir. 2011) (same), cert. denied, 132 S. Ct. 1951 (2012); see also *Giordano*, 442 F.3d at 41 (statute proscribing use of "the mail or any facility or means of interstate … commerce to specified ends[] is clearly founded on * * * the power to regulate and protect the instrumentalities of interstate commerce") (brackets, citation, and internal quotation marks omitted). The fact that the mail or telephone call travels only intrastate does not change this conclusion. See, *e.g.*, *United States* v. *Corum*, 362 F.3d 489, 493 (8th Cir. 2004) (intrastate telephone call sufficient to support conviction for violating 18 U.S.C. 844(e)); *Cope*, 312 F.3d at 771 (Section 1958 "does not require that the government prove that items mailed * * * cross state boundaries"); *United States* v. *Weathers*, 169 F.3d 336, 341 (6th Cir. 1999) ("telephones, even when used intrastate, constitute instrumentalities of interstate commerce") (emphasis omitted); *United States* v. *Nowak*, 370 F. App'x 39, 44-45 (11th Cir. 2010) (intrastate telephone calls to arrange murder-for-hire); *United States* v. *Marek*, 238 F.3d 310, 318 (5th Cir. 2001) ("intrastate use of interstate

facilities is properly regulated under Congress's second-category *Lopez* power"). Indeed, as reflected above, many federal criminal statutes rely on the use of the mail to empower Congress to reach particular conduct.

Moreover, the federal mail fraud statute, 18 U.S.C. 1341, which makes it a crime, *inter alia*, to obtain money by false pretenses using the mail, including private or commercial mail carriers, even where the mailing is wholly intrastate, in part relies on Congress's Commerce Clause power. See, *e.g.*, *United States* v. *Hasner*, 340 F.3d 1261, 1270 (11th Cir. 2003) (in a mail fraud case involving the use of private mail carrier, "Congress properly exercised its power under the Commerce Clause * * * by regulating private and commercial carriers as instrumentalities of interstate commerce – even though the conduct took place entirely intrastate"); *United States* v. *Gil*, 297 F.3d 93, 100 (2d Cir. 2002) ("application of the mail fraud statute to intrastate mailings sent or delivered by private or commercial intrastate carriers is a permissible exercise of Congress's power under the second *Lopez* category"); *United States* v. *Photogrammetric Data Servs., Inc.*, 259 F.3d 229 (4th Cir. 2001) (same).

These statutes target specific wrongful conduct – *e.g.*, fraud, kidnapping, murder-for-hire, and bomb-threats – not the use of mail itself. Rather, Congress is using its power to regulate the mail to reach wrongful conduct that is facilitated by the use of the mail. That is the case here. Congress can proscribe the assault on the

Schrocks pursuant to Section 249(a)(2) under its Commerce Clause power because that wrongful conduct was facilitated by the use of the mail. Because Congress's Commerce Clause power extends to the *intrastate* use of the mail, the application of Section 249(a)(2) to the defendants convicted of Count 6 is constitutional.

c. Defendants' Use Of Commercially Hired Motor Vehicles To Effectuate The Assaults Created A Sufficient Nexus To Interstate Commerce

Finally, Section 249(a)(2) is constitutional as applied to all four Section 249 counts (Counts 2, 4-6) because defendants hired drivers to drive them to the victims' residence, or drive the victims to the defendants' residence, in motor vehicles for the purpose of committing the assaults. The religiously motivated assaults, therefore, occurred "as the result of[] the travel" of the defendants or the victims using an "instrumentality of interstate * * * commerce," 18 U.S.C. 249(a)(2)(B)(i), and "in connection with" the defendants' use of an "instrumentality of interstate * * * commerce," 18 U.S.C. 249(a)(2)(B)(ii). This activity, therefore, both satisfies the statutory language and creates a sufficiently direct nexus to Congress's power to regulate instrumentalities of interstate commerce.

(i). Automobiles, like airplanes and trains, are instrumentalities of interstate commerce, as they "retain the *inherent potential* to affect commerce." *United States* v. *McHenry*, 97 F.3d 125, 127 (6th Cir. 1996). Indeed, they are the

"quintessential instrumentalities of modern interstate commerce." *Id.* at 126 (citation omitted); see also *United States* v. *Reddit*, 87 F. App'x 440, 443 (6th Cir. 2003) (automobile, "in and of itself," is "an instrumentality of interstate commerce" (citation and internal quotation marks omitted)).

When Congress elects to regulate instrumentalities of interstate commerce, "federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement." *United States* v. *Mandel*, 647 F.3d 710, 722 (7th Cir. 2011) (citation omitted). Therefore, when "Congress legislates pursuant to this branch of its Commerce Clause power, it may regulate even purely intrastate uses of th[e] instrumentalities." *United States* v. *Giordano*, 442 F.3d 30, 41 (2d Cir. 2006); see also *Lopez*, 514 U.S. at 558 (Congress has the power to "regulate and protect" instrumentalities of interstate commerce "even though the threat may come only from intrastate activities."); *Reddit*, 87 F. App'x at 443. In other words, "[p]urely intrastate activity" falls within the power to regulate instrumentalities of interstate commerce "when an instrumentality of interstate commerce is used." *United States* v. *Corum*, 362 F.3d 489, 495 (8th Cir. 2004). Included in this power is "the power *to prohibit [the instrumentalities'] use for harmful purposes*, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature." *United States* v. *Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) (emphasis added). And in regulating instrumentalities

of interstate commerce, Congress's power is "plenary," and is not subject to the substantial effects test. *Al-Zubaidy*, 283 F.3d at 811; *Faasse*, 265 F.3d at 483.

(ii). Defendants' use of commercially hired motor vehicles to perpetrate each of the assaults brings the assaults within Congress's commerce power to regulate instrumentalities of interstate commerce. Congress's power to regulate cars and other vehicles necessarily includes regulating their use, including their use to engage in specified, criminal activities. As the court in *Ballinger* recognized, "Congress has repeatedly used this power [to prohibit the use of instrumentalities of interstate commerce for wrongful purposes] to reach criminal conduct in which the illegal acts ultimately occur *intrastate*, when the perpetrator uses the channels or instrumentalities of interstate commerce to facilitate their commission." *Ballinger*, 395 F.3d at 1226 (emphasis added).

For example, in the federal murder-for-hire criminal statute, 18 U.S.C. 1958(a), Congress made it a crime, *inter alia*, to use any "facility of interstate * * * commerce" with the intent that a murder be committed for payment. In *Mandel*, the court affirmed the underlying conviction where the defendant used his car and drove *intrastate* to meet with a person he hoped would kill his business partner. 647 F.3d at 720-723. The court noted that the "federal murder for hire statute * * * specifically prohibits (as relevant here) use of the instrumentalities of interstate commerce with the intent that a murder be committed for financial or other

remuneration." *Id.* at 720-721. The court concluded that "[a]s applied to [defendant's] intrastate use of his automobile, the statute does not plainly exceed the scope of Congress's Commerce Clause authority," explaining that "federal jurisdiction is supplied by the nature of the instrumentality * * * used, not by separate proof of interstate movement." *Id.* at 722 (citation omitted).

A similar example is the federal kidnapping statute, 18 U.S.C. 1201(a)(1), which makes it a crime to kidnap and hold for ransom any person where the offender, *inter alia*, "uses" an "instrumentality of interstate * * * commerce * * * in furtherance of the commission of the offense" (emphasis added). This Court has recognized that the statute reaches a kidnapping facilitated by a telephone call, including an *intrastate* telephone call, because Congress can forbid the use of a telephone – an instrumentality of interstate commerce – to facilitate the kidnapping. *United States* v. *Brika*, 487 F.3d 450, 455 (6th Cir. 2007). Indeed, as one court has explained, the kidnapping statute "is an example of Congress exerting its power to regulate the use of the instrumentalities of interstate commerce under *Lopez*'s second category," and "[f]ederal statutes with similar jurisdictional language have repeatedly withstood Commerce Clause challenges," including the federal murder-for-hire statute. *United States* v. *Jacques*, No. 2:08-cr-117, 2011 WL 1706765, at *9-10 (D. Vt. May 4, 2011). The court recognized that, "[l]ike kidnapping, murder has traditionally been proscribed under state law,"

but "courts have not hesitated to consider the murder-for-hire statute a valid regulation of *activity involving an instrumentality of interstate commerce*." *Id.* at *9 (emphasis added). Therefore, even if the kidnapping statute only indirectly regulates the instrumentalities of interstate commerce, *i.e.*, by criminalizing certain conduct "when the instrumentalities of interstate commerce *are used to facilitate that conduct*," *id.* at *8 (emphasis added), it represents a valid exercise of "Congress's long-established power to regulate channels and instrumentalities of interstate commerce," *id.* at *11.

Another analogous example is 18 U.S.C. 844(e), which makes it a crime to use the "mail, telephone, telegraph or other instrument of interstate * * * commerce" to make a bomb threat. In *Corum*, the court upheld defendant's conviction where he made only local telephone calls, stating that the statute fell within the second *Lopez* category; the use of the telephone established a sufficient interstate commerce nexus; and no additional showing was necessary that the activity substantially affected interstate commerce. 362 F.3d at 492-495; see also *United States* v. *Dela Cruz*, 358 F.3d 623, 625 (9th Cir. 2004) (use of telephone supported conviction under Section 844(e) regardless whether particular calls substantially affected interstate commerce); *United States* v. *Gilbert*, 181 F.3d 152, 158-159 (1st Cir. 1999) (use of telephone to make intrastate bomb threats "was, without more, sufficient to sustain jurisdiction under the interstate commerce

clause"; the third category of Congress's commerce power under *Lopez* "does not apply because a telephone is an instrumentality of interstate commerce and this alone is a sufficient basis for jurisdiction based on interstate commerce").

(iii). Here, Congress is using its power to regulate motor vehicles as instrumentalities of interstate commerce to prohibit, through Section 249(a)(2), religiously-motivated violent assaults effectuated through the use of vehicles (in this case, commercially hired vehicles). If Congress can criminalize under the Commerce Clause murder-for-hire schemes that involve the intrastate use of a car, or kidnappings or bomb threats that are facilitated by the making of an intrastate telephone call, Congress can similarly criminalize violent crime that is religion-based *and* facilitated by the use of a motor vehicle. Therefore, Section 249(a)(2) permissibly targets conduct under Congress's power to regulate instrumentalities of interstate commerce to prohibit their use for wrongful purposes. As this Court stated in *McHenry*, "once we determine that congressional action has been directed toward regulating * * * an 'instrumentality' of interstate commerce – *e.g.*, cars * * * – that is the end of the [*Lopez*] Category Two inquiry. The action is a valid exercise of the commerce power." 97 F.3d at 127.

The conclusion that, here, defendants' use of hired drivers and vehicles to effectuate to the assaults creates a sufficient Commerce Clause nexus, is consistent not only with governing law, but also with *Jenkins*. As noted above, in that case,

the indictment alleged that defendants devised a plan to lure a gay man out of his house to assault him based on his sexual orientation. The defendants drove in their truck to the victim's residence, convinced him to get in the truck, and then drove to a park where they assaulted him. *Jenkins*, 909 F. Supp. 2d at 764-765. The district court concluded that, although the travel was entirely intrastate, defendants' use of a motor vehicle (and the highway) to take the victim to the remote location where they beat him was sufficient to support the conclusion that Section 249(a)(2) was constitutional as applied. *Id.* at 771-772. The court stated that even though the "intrastate use of a truck to affect a violent act is seemingly attenuated from interstate commerce, precedent in this Circuit is clear that when Congress limits a law to cover activity effectuated with a motor vehicle, it is inherently acting within its power to regulate the instrumentalities of interstate commerce." *Id.* at 771. That conclusion applies with equal force here.[28]

(iv). Defendants argue that accepting federal criminalization of bias-based crimes based on the use of a car alone means that the federal government could exercise jurisdiction over any crime, so long as someone used a car in connection with the crime. See, *e.g.*, Anna Miller Br. 24-26; Kathryn Miller Br. 23-29; Mullet Br. 20-21. But there is a difference between the potential scope of Congress's

[28] Ultimately, the defendants in *Jenkins* were acquitted of the Section 249(a)(2) counts (but convicted of kidnapping and conspiracy to kidnap), as the defendants here were acquitted on Count 3.

power and the exercise of that power. Here, after assembling an extensive record, Congress chose to exercise its power to regulate instrumentalities of interstate commerce as one means of addressing religion-based assaults that result in bodily injury – a type of crime both frequently facilitated by a motor vehicle and uniquely suited for federal enforcement – based on core principles embodied in the Constitution. See H.R. Rep. No. 86 at 5 ("Bias crimes are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society."). Moreover, in exercising its authority, Congress intended to supplement, not replace, state authority, and included a certification provision that requires the Attorney General to approve each specific Section 249(a)(2) prosecution.

In all events, the cases and statutes addressed above make clear that Congress *can* use its power to regulate instrumentalities of interstate commerce (like cars) to address harms facilitated by the use of those instrumentalities. For example, the Fourth Circuit rejected the argument that the murder-for-hire statute could not reach contract killings involving the "mere use" of a facility of interstate commerce because otherwise the statute would cover "virtually every murder-for-hire including, for instance, a contract killing in which all of the parties were neighbors and defendant made a single phone call to the victim's residence." *United States* v. *Runyon*, 707 F.3d 475, 489 (4th Cir.) (citation and internal

quotation marks omitted), petition for cert. pending, No. 13-254 (filed Aug. 21, 2013). The court stated that this argument "fails by a wide margin" because Congress may regulate and protect instrumentalities of interstate commerce, or persons or things in interstate commerce, even if the threat comes from only intrastate activities. *Ibid.*[29]

II

THE JURY INSTRUCTION ON THE MEANING OF "BECAUSE OF" RELIGION IN SECTION 249(a)(2) WAS CORRECT AND DID NOT PREJUDICE THE DEFENDANTS

A. Standard Of Review

If a defendant fails to object to the final jury instructions as given, this Court reviews for plain error. See, *e.g.*, *United States* v. *Semrau*, 693 F.3d 510, 527 (6th Cir. 2012); *United States* v. *Frost*, 125 F.3d 346, 373 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998). Otherwise, "trial courts have broad discretion in drafting jury instructions, and we reverse only for abuse of discretion." *United States* v.

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[29] Kathryn Miller states that she is adopting the argument made by other defendants that the district court erred in denying the motions to dismiss the charges "against the female defendants involved in the September 6 Incident" (Count 2). Kathryn Miller Br. 57; see generally Tr., R. 541, Page ID# 7180-7191 (court addressing motions for judgment of acquittal after government rested). This argument is not raised by other defendants and is not further developed; therefore, it is waived. To the extent Kathryn Miller is referring to the motions to dismiss the indictment because Section 249(a)(2) is beyond Congress's Commerce Clause power, for the reasons set forth herein, her argument is incorrect.

Prince, 214 F.3d 740, 760-761 (6th Cir. 2000). The Court "will not reverse the trial court unless the jury charge fails accurately to reflect the law," or "if the instructions * * * were confusing, misleading, or prejudicial." *Ibid.* (citations and internal quotation marks omitted). Even where a court improperly instructs the jury on an element of the offense, the error is subject to harmless-error analysis, *i.e.*, whether it appears beyond a reasonable doubt that the error did not contribute to the verdict. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 9-10, 15 (1999).

B. The Defendants Did Not Properly Object To The Jury Instruction On The Meaning Of "Because Of" Religion In Section 249(a)(2),Which In Any Event Was Correct And Did Not Prejudice The Defendants

Defendants argue that the district court erroneously defined "because of" religion to mean that religion must be "a significant motivating factor." Mullet Br. 21-29; Levi Miller Br. 32-36. They assert that "because of" requires "but-for" causation, or that religion be "the" motivating factor for an assault. Mullet Br. 23-27; Levi Miller Br. 33-36. They also assert that the trial court's definition renders the statute unconstitutionally vague and overbroad. Finally, defendants assert that they must have acted with religious animus toward the victim or have been motivated by "prejudice or bias" to violate Section 249. Because defendants did not object to the final jury instruction on the ground that a "but-for" standard was required, their argument is subject to plain error review by this Court. In any event, this instruction was correct, and did not prejudice defendants.

1. Defendants' proposed jury instructions defined "because of" to require that the "defendant acted with religious animus toward the victim, meaning that the defendant caused bodily injury to the victim *because of* hatred toward the victim's belonging to the Amish faith." (Defendants' Proposed Jury Instructions, R. 158, Page ID# 1583 (emphasis added)). Their proposed instruction further provided that if, however, "the defendant is partially motivated by prejudice, but still would have committed the act regardless of that prejudice, the defendant cannot be found guilty." (Defendants' Proposed Jury Instructions, R. 158, Page ID# 1583). The government's proposed jury instruction defined "because of" to mean that religion "was a motivating factor for a defendant's actions," and that "the fact that a defendant may have had other motives for his or her conduct [*i.e.*, other than the religion or perceived religion of the victim] does not make that conduct any less a violation." (Government's Proposed Supplemental Jury Instructions, R. 183, Page ID# 1780).

Shortly before trial, the court addressed defendants' argument that the government had to prove that religion "was the sole or exclusive motivating factor." (Tr., R. 314, Page ID# 3490-3495). The court rejected that argument, stating that the law does not require such a showing, and that it was impossible to prove "beyond a reasonable doubt that a person had only one motive." (Tr., R. 314, Page ID# 3490). When defendants then argued that the government should

have to prove that defendants "would not have acted absent the defendant's prejudice against [their] religion," the court rejected that instruction as well. (Tr., R. 314, Page ID# 3491-3192). The court further noted that some defendants suggested a "but-for" standard; the court rejected that standard, stating that the "better way to do it is [to] require the Government to prove affirmatively that [religion] was a significant motivating factor in the defendant's behavior." (Tr., R. 314, Page ID# 3192).

Defendants then argued that the jury should be instructed that the defendants must have been "motivated by prejudice or bias." (Tr., R. 314, Page ID# 3493). The court rejected that standard as contrary to what the statute required, explaining that in the context of this case – what the court called an "intrareligious disagreement" – it would not make sense to make the government prove that the defendants had a bias against their own religion. (Tr., R. 314, Page ID# 3493-3494). Defendants next asserted that the statute "require[s] an act of hate," which the court also rejected (Tr., R. 314, Page ID# 3494).

The court concluded that religion must be a "significant motivating factor." (Tr., R. 314, Page ID# 3490, 3494-3497). At trial, the jury was instructed as follows:

> The government must prove beyond a reasonable doubt that a person's actual or perceived religion was *a significant motivating factor* for a Defendant's action. If in fact you find that a Defendant was significantly motivated by the actual or perceived religion of a person in committing an

> assault * * *, you may find that the Defendant committed the charged offense even if he or she had other reasons for doing what he or she did as well. In other words, the fact that a Defendant may have had other motives for his or her conduct does not make that conduct any less a violation.

(Tr., R. 542, Page ID# 7252-7253 (emphasis added)).

2. Because defendants did not object to the final jury instructions, and proposed an instruction that was incorrect (focusing on a showing of animus, prejudice, or hatred), this issue is reviewed for plain error. *Semrau*, 693 F.3d at 527; *Frost*, 125 F.3d at 373; see also Federal Rules of Criminal Procedure 30(d). Although the court suggested that some defendants requested a "but for" standard, and then rejected that standard, the defendants did not object to the final jury instructions on the basis that "but-for" causation was required. Rather, they asserted that "hate" was required. For the reasons discussed below, defendants have not shown that the instructions constituted plain error, *i.e.*, that there was "clear" and "obvious error," *Frost*, 125 F.3d at 373, and that, taken as a whole, the instructions were "so clearly erroneous as to likely result to produce a grave miscarriage of justice," *Semrau*, 693 F.3d at 528. Accordingly, on this basis alone, defendants' challenge to this jury instruction fails.

3. In any event, on the merits, the district court's instruction that "because of" requires the government to prove that religion was a "significant motivating factor" was correct and consistent with instructions used in other Section 249 cases (with one exception, addressed below) and cases involving similar criminal civil

rights statutes. In any event, because the evidence in this case easily satisfies both the standard the district court used and a "but-for" standard, this Court need not resolve the meaning of "because of" in Section 249(a)(2).

Section 249 was not enacted on a clear slate. Rather, it was intended to address the limited reach of 18 U.S.C. 245(b)(2)(B). When Section 249 was enacted, well-settled law held that, for the government to prove that a defendant acted "because of" race (for example) in Section 245(b)(2)(B), the evidence must show that race was a "substantial reason" or "substantial motivating factor" for a defendant's conduct. For example, in *United States* v. *McGee*, 173 F.3d 952, 957 (6th Cir. 1999), this Court held that the evidence would satisfy the "because of" standard in Section 245(b)(2)(B) "so long as racial animus is a *substantial reason* for a defendant's conduct," and explained that once that was established, "other motivations are not factors to be considered" (emphasis added). The Court cited to its earlier decision, *United States* v. *Ebens*, 800 F.2d 1422, 1429 (6th Cir. 1986), abrogated on other grounds by *Huddleston* v. *United States*, 485 U.S. 681 (1988), also a Section 245(b)(2)(B) case, which found that the jury could have reasonably concluded that the defendant "was motivated" by his belief that the victim was Japanese, and the fact that the assault may have also been motivated by other factors was not relevant. *Ebens*, in turn, cited *United States* v. *Bledsoe*, 728 F.2d 1094, 1098 (8th Cir. 1984). In *Bledsoe*, a Section 245(b)(2)(B) case, where the

defense claimed that the attack was motivated by the victim's perceived sexual orientation and not his race, the court upheld a jury instruction indicating that race must have been a "substantial motivating factor," and the presence of other factors "does not make [the] conduct any less a violation." See also *United States* v. *Nelson*, 277 F.3d 164, 185-191 (2d Cir. 2002) (addressing meaning of "because of" in Section 245(b)(2)(B), and suggesting it means "motivated by"; also citing legislative history).

Given that Section 249 was intended to expand on the protections of Section 245(b)(2)(B), there is no reason that the "because of" language in Section 249(a)(2) should be interpreted differently from – let alone more *narrowly* than – the same language in Section 245(b)(2)(B). Indeed, when Congress drafts a statute, "courts presume that it does so with full knowledge of existing law." *International Union* v. *Auto Glass Emps. Fed. Credit Union*, 72 F.3d 1243, 1248 (6th Cir. 1996); see also *Souter* v. *Jones*, 395 F.3d 577, 598 (6th Cir. 2005) ("In interpreting a statute, we presume that Congress legislates against the background of existing jurisprudence unless it specifically negates that jurisprudence."). Here, where the phrase in question is lifted directly from not some unrelated provision, but the most similar statute in the United States Code, that logic becomes all the more powerful.

The district court's instruction was also consistent with cases addressing the meaning of "because of" in the criminal prohibition of the Fair Housing Act, 42 U.S.C. 3631. See *United States* v. *Piekarsky*, 687 F.3d 134, 141-146 (3d Cir.) (to prove that defendant acted "because of" race, government need not prove that race was the sole or primary motivating factor; citing cases), cert. denied, 133 S. Ct. 373, and 133 S. Ct. 549 (2012); *United States* v. *Johns*, 615 F.2d 672, 675 (5th Cir. 1980) (per curiam) (in 42 U.S.C. 3631 case, evidence that defendants shot victim to discourage interracial living was sufficient, and presence of other motives does not make their conduct any less a violation); *United States* v. *Nix*, 417 F. Supp. 2d 1009, 1012-1013 (N.D. Ill. 2006) (rejecting a "but-for" standard for meaning of "because of" in Section 3631 and adopting "substantially motivating factor" standard; citing cases). This Court can also presume that Congress was aware of the meaning "because of" in these criminal civil rights statutes in drafting Section 249.

Not only was the jury instruction in this case wholly consistent with the well-established meaning of "because of" in similar criminal civil rights statutes, it was also consistent with the instructions used in two other Section 249 cases. See *United States* v. *Maybee*, 687 F.3d 1026, 1032 (8th Cir.) (In upholding a conviction for violating 18 U.S.C. 249(a)(1), the court noted that a reasonable jury could have concluded that the race of the victims was "a substantial motivating

factor" for defendant's actions.), cert. denied, 133 S. Ct. 556 (2012); *United States* v. *Cannon*, No. 4:12-cr-00025 (S.D. Tex.), appeal pending, No. 12-20514 (5th Cir.) (In a Section 249(a)(1) case, the jury was instructed that race must have been a motivating factor and that the government was not required to prove that it was the sole motivating factor.).[30] Therefore, the district court did not abuse its discretion in instructing the jury on the meaning of "because of" religion.

4. Defendants note that in *Jenkins* (the Section 249(a)(2) case discussed above, pp. 77-78, 99), the district court rejected the government's argument that "because of" means either a motivating, substantial, or significant factor, and instead adopted a "but-for" standard. *United States* v. *Jenkins*, No. 12-15-GVFT, 2013 WL 3338650, at *6-7 (E.D. Ky. July 2, 2013), appeals pending on other grounds, Nos. 13-5902, 13-5903 (6th Cir.); see Mullet Br. 24-27. Although the court accepted that "because of" did not mean that sexual orientation had to be the *sole* motivating factor, the court concluded that it had to be a "necessary prerequisite" to the assault; *i.e.*, although there might be other motivating factors, "sexual orientation must be *the* factor that motivates the conduct – 'the substantial factor.'" *Jenkins*, 2013 WL 3338650, at *7.

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[30] On appeal, the defendants in *Cannon* have challenged the sufficiency of the evidence that they acted "because of" race, but not the even less stringent jury instructions.

In creating its "necessary prerequisite" standard, the court in *Jenkins* principally relied on *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167 (2009), a civil Age Discrimination in Employment Act (ADEA) case. In that case, the Supreme Court held that the meaning of "because of" in the civil provisions of the ADEA meant that age had to be the "reason" for the defendant's conduct, which in turn meant that it had to be the "but-for" cause. *Id.* at 176.[31] After *Gross*, the Supreme Court similarly held that the civil retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), proscribing discrimination against an employee "because he has opposed" an unlawful employment practice, requires proof of but-for causation. *University of Texas Sw. Med. Ctr*. v. *Nassar*, 133 S. Ct. 2517, 2533 (2013) (citation omitted). *Gross* and *Nassar*, however, address statutory language that arose in an entirely different context from Section 249. Indeed, in *Gross*, the Court was confronted with the issue whether the "mixed-motive" burden shifting analysis used in civil Title VII cases applied to the ADEA cases. The Court held that it did not, because, *inter alia*, when Title VII was

[31] Defendants also cite this Court's decision in *Lewis* v. *Humboldt Acquisition Corp. Inc.*, 681 F.3d 312 (6th Cir. 2012) (en banc), in which this Court rejected both a sole-cause standard and a motivating factor standard for the civil provisions of the Americans with Disabilities Act and, following *Gross*, held that the plaintiff must show that "but-for" his disability the adverse employment decision would not have been taken. *Lewis*, 681 F.3d at 317-322 (citation omitted).

amended to add that language, the ADEA was not. *Gross*, 557 U.S. at 174-176. By contrast, as discussed above, in enacting Section 249, Congress intended to expand on the protections of Section 245(b)(2)(B), a criminal statute, which had a well-established meaning of "because of." Indeed, since criminal cases require a higher standard of proof beyond a reasonable doubt for each element, the civil burden shifting scheme the defendants rely upon are totally inapposite,[32] and *Jenkins* is correctly viewed as the sole outlier on this point.

5. Moreover, because the evidence in this case easily satisfies a "but-for" test, even if any error had occurred, it would be harmless beyond a reasonable doubt. For this reason, the Court could dispose of this issue without resolving the proper standard for the "because of" language in Section 249(a)(2).

As noted above, even under the "but-for" test, religion need not have been the *sole* cause of defendants' conduct; rather, under a "but-for" standard, the

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[32] Most recently, the Supreme Court held that the phrase "results from" in the "death results" enhancement provision of the Controlled Substances Act, 21 U.S.C. 841(b)(1)(C), required a showing of but-for causation, citing *Gross* and *Nassar*. *Burrage* v. *United States*, No. 12-7515, 2014 WL 273243 (S. Ct. Jan. 27, 2014). The Court in *Burrage* explained that because the Controlled Substances Act did not define "results from," in the absence of "textual or contextual indication to the contrary" the Court gives the phrase its "ordinary meaning." The Court concluded the ordinary meaning incorporated the "but-for" standard. *Id.* at *4-5. Because Section 249 was intended to follow upon Section 245(b)(2)(B), this Court should look to the Section 245(b)(2)(B) cases, and secondarily to the criminal provisions of the Fair Housing Act, in defining the phrase.

government would be required to show that defendants would not have assaulted the victims in the absence of victims' religion (*i.e.*, the defendants' religious disputes with the victims). There is overwhelming evidence that the attacks took place because Mullet and his followers did not like that the victims disagreed with Mullet's religious practices, left his compound to worship in their own way, and rejected his excommunications. For example, it was after the bishop's meeting in Pennsylvania reversing the Bergholz excommunications, that Mullet, other defendants, and members of the Bergholz community began discussing cutting the beards and hair of the victims, some of them complete strangers otherwise. Mullet said that beard and hair cuttings would stop people from being "Amish hypocrites." (Tr., R. 528, Page ID# 5408; Tr., R. 540, Page ID# 6643, 6695). He also acknowledged that "it's all religion. * * * It started with us excommunicating members that weren't * * * obeying the laws." See p. 51, *supra*. He further stated that the beard and hair cuttings were a religious matter and that police should not be involved. (Tr., R. 540, Page ID# 6774-6777). Finally, and most importantly, the central aim of every assault was to attack sacred symbols of the victims' Amish faith, *i.e.*, their uncut beards. It is difficult to imagine an assault more clearly motivated by religion than one so intentionally targeted at an outward sign of the victim's faith.

Accordingly, the evidence establishes beyond a reasonable doubt that "but-for" the victim's religion and religious practices, the assaults would not have taken place; indeed, religion was *the reason* for the assaults.[33] Because the evidence would have satisfied even this heightened standard, any arguable error in the jury instruction did not contribute to the verdict and was harmless. Cf. *United States* v. *Clanton*, 515 F. App'x 826, 830 (11th Cir. 2013) (erroneous jury instruction was harmless error because evidence sufficient to meet the correct standard); see also *United States* v. *Kone*, 307 F.3d 430, 435 (6th Cir. 2002) ("If the trial court's interpretation of the law was erroneous, our review focuses on whether the

[33] With regard to the September 6, 2011, assault of Marty and Barbara Miller (Count 2): defendants believed that cutting the Miller's hair would make them lead a proper Amish life, and during the assault the men yelled accusations at Marty Miller concerning various offenses against Mullet. With regard to the October 4, 2011, assault of the Hershbergers (Count 4): Raymond Hershberger, who had never even met his attackers, was assaulted because he was on the committee that reversed some of Mullet's shunnings, and Lester Miller admitted to the FBI that Raymond's beard was cut for a religious purpose. With regard to the October 4, 2011, assault of Myron Miller (Count 5): Myron Miller helped Mullet's son move out of Bergholz and, as a result, Mullet excommunicated the son, which Myron did not recognize. With regard to the November 9, 2011, assault of Melvin and Anna Schrock (Count 6): Mullet excommunicated the Schrocks; the Schrocks and some of their children then moved out of Bergholz; defendants Emanuel and Linda Schrock were angry with Melvin and Anna and believed they were against Mullet. See pp. 25-47, *supra*. Although defendants argued that there were other non-religious reasons for the assaults, even if so, religion need not be the *sole* reason under the "but-for" standard. See, *e.g.*, *Jenkins*, 2013 WL 3338650, at *7. In other words, the presence of other motivations would not negate the government's proof that the assaults would not have taken place were it not for the victims' religious beliefs and practices.

erroneous interpretation was prejudicial. We will reverse a jury verdict only when the jury instructions, 'as a whole, are confusing, misleading, or prejudicial.'" (citations omitted)).

6. Defendants suggest that, if the statute prohibits assaults when religion is a significant motivating factor, it is unconstitutionally overbroad and vague and permits criminal liability based on thought. Mullet Br. 22-23, 27; Levi Miller Br. 34-35. But as this Court has recognized, Section 249(a)(2), by it plain terms, applies only to willful, violent conduct. *Glenn* v. *Holder*, 690 F.3d 417, 420 (6th Cir. 2012) ("The Act * * * prohibits violent acts; it does not prohibit constitutionally protected speech or conduct."), cert. denied, 133 S. Ct. 1581 (2013). Violent conduct is not "speech" and is not protected by the First Amendment. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence.").[34] For this reason, and because the statute does not otherwise encroach on constitutionally protected

[34] The Shepard-Byrd Act expressly incorporates these principles and ensures that the Act is enforced only against violent conduct and only in ways that are consistent with the First Amendment. The "Rule[s] of Construction" make clear that the Act applies only "to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability of a victim."). Shepard-Byrd Act, Section 4710(2), 123 Stat. 2841; see also *id.* at Sections 4710(3)-(6) (also addressing First Amendment concerns).

conduct, it is not overbroad. *Leonardson* v. *City of East Lansing*, 896 F.2d 190, 195 (6th Cir. 1990). Further, because the statute gives fair notice of what conduct is prohibited (*i.e.*, willfully causing bodily injury because of the victim's religion), it is not void for vagueness. See, *e.g.*, *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999).

Moreover, the statute's requirement that defendants act "because of" the victim's religion, as instructed by the district court, does not infringe defendants' First Amendment rights. See, *e.g.*, *Mitchell*, 508 U.S. at 487 (noting that the motive element of civil rights statutes that prohibit conduct "because of" a person's religion, race, or other protected categories does not violate First Amendment rights; collecting cases). The statute "applies to anyone who violates its terms, regardless of ideology or message." *Norton* v. *Ashcroft*, 298 F.3d 547, 553 (6th Cir. 2002) (upholding Federal Access to Clinic Entrances Act against claim that it violated the free speech rights of abortion opponents). Therefore, even if, as here, the violent conduct derived from the defendants' religious beliefs about appropriate punishments for perceived religious misdeeds, it is not defendants' beliefs that triggered application of the statute, but rather their willful violent conduct, motivated by the victims' religion, causing bodily injury. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 390 (1992) ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation

merely because they express a discriminatory idea or philosophy."). Put another way, it is not the defendants' religion that was at issue in this case, it is the defendants' violent conduct motivated by the victims' religion.

7. Finally, defendants assert that Section 249 requires the government to prove that defendants acted with religious "animus" toward the victims, *i.e.*, that they acted with "[a]nti-Amish hatred." Mullet Br. 27-29; Levi Miller Br. 33-35. The district court correctly rejected this argument because there is no statutory support for it, and it is not the reason defendants were prosecuted. Indeed, defendants cite no authority for their position. In short, a defendant can be convicted of violating Section 249 by assaulting someone "because of" his religion regardless of whether defendant, as a general matter, likes or dislikes members of that religion. Cf. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 668-669 (1987) (under 42 U.S.C. 1981, decisions must be premised on race but need not be motivated by racial hostility or animus); *Blackston* v. *Wexford Health Sources, Inc.*, 354 F. App'x 106, 107-108 (5th Cir. 2009) (under 42 U.S.C. 1981, plaintiff need not show that defendant had "some type of hatred or ill-will" toward members of plaintiff's race).

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY ON THE MEANING OF "KIDNAPPING" AS USED IN THE SENTENCING ENHANCEMENT PROVISION OF SECTION 249(a)(2)

A. Standard Of Review

The standard of review for challenges to jury instructions is abuse of discretion. See pp. 101-102, *supra*.

B. The District Court Did Not Abuse Its Discretion In Instructing The Jury On The Meaning Of "Kidnapping"

1. Background

A person convicted of willfully causing bodily injury to another person because of the person's religion is subject to up to ten years' imprisonment, but if the offense includes kidnapping (or certain other specifically enumerated actions or consequences) it is punishable by imprisonment "for any term of years or for life." 18 U.S.C. 249(a)(2)(A). The term "kidnapping" is not defined in the statute. With regard to each defendant convicted of violating Section 249(a)(2) (Counts 2, 4-6), the jury separately and unanimously found the defendant: (1) guilty of willfully causing bodily injury because of the victim's religion, and (2) that the offense included kidnapping. (*E.g.*, Verdict Form, R. 230, Page ID# 2117-2118).

Defendants' instructions proposed that "kidnapping" be defined according to its common law definition, which requires the transportation of the victim across

state lines. (Defendants' Proposed Jury Instructions, R. 158, Page ID# 1586-1587). The government proposed that "kidnapping" be defined according to its more 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." (Government's Proposed Supplemental Jury Instructions, R. 183, Page ID# 1783). The court declined to use the common law definition of kidnapping, and used the language proposed by the government. (Tr., R. 314, Page ID# 3507; Tr., R. 541, Page ID# 7205; Tr., R. 542, Page ID# 7255-7256).

2. The Jury Instruction On Kidnapping Was Not An Abuse Of Discretion

Defendants assert that kidnapping should have been defined according to its common law meaning, and therefore that it must entail the abduction and transportation of the victim from one State to another (as well as restraint). Mullet Br. 29-34; Levi Miller Br. 36-42; Anna Miller Br. 27-33. They also suggest it should be defined consistent with the federal kidnapping statute, 18 U.S.C. 1201. Mullet Br. 36. Further, they assert that if the term is ambiguous, the rule of lenity requires that the statute be interpreted in defendants' favor. Mullet Br. 34-35. Finally, defendants argue that, even if the common law definition is not used,

kidnapping requires more than mere restraint. Mullet Br. 35-37. These arguments fail.

a. First, the district court's jury instruction was correct. In *United States* v. *Guidry*, 456 F.3d 493, 509-511 (5th Cir. 2006), addressing the same provision in another criminal civil rights statute, 18 U.S.C. 242,[35] the court expressly rejected the argument that it must apply the definition of kidnapping that requires the victim to be carried out of State. Rather, the court applied the "generic, contemporary meaning" of kidnapping, and found that it was sufficient that the defendant confined the victim without her consent. *Id.* at 510-511. The court relied upon *Taylor* v. *United States*, 495 U.S. 575, 592-596 (1990), where the Supreme Court addressed whether a state law conviction for burglary satisfied the definition of burglary as used in 18 U.S.C. 924(e). Section 924(e) is a sentencing enhancement provision that applies when the defendant has three previous convictions for a "violent felony," which is defined to include burglary. To resolve this issue, the Court first had to determine the definition of "burglary" as used in Section 924(e), and then determine whether the state conviction for burglary necessarily satisfied

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[35] Section 242 states, in relevant part: "Whoever, under color of * * * law * * *, willfully subjects any person * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * shall be fined * * * or imprisoned not more than one year * * *; and * * * if such acts include kidnapping or an attempt to kidnap * * * shall be fined under this title, or imprisoned for any term of years or life, or both."

this definition. *Id.* at 593. In resolving the first issue, the Supreme Court squarely rejected the argument that the definition of "burglary" in 18 U.S.C. 924(e) was limited to the common law meaning of the term, which requires breaking and entering into the dwelling place in the nighttime, and instead held that the "generic, contemporary meaning" applied. *Taylor*, 495 U.S. at 592-599.[36]

The court in *Guidry* explained that "*Taylor* instructs that where * * * the enhancement provision does not specifically define the enumerated offense, we must define it according to its generic, contemporary meaning and should rely on a uniform definition." *Guidry*, 456 F.3d at 509 (citation and internal quotation marks omitted). The court further stated that "the *Taylor* Court's assessment with regard to the term 'burglary' in a sentencing enhancement statute holds true for the term 'kidnapping' in the instant statute: Construing 'kidnapping' to mean common-law kidnapping would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as kidnapping would fall within the common-law definition." *Id*. at 510 (citation and internal quotation marks and brackets omitted).

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[36] In *Taylor*, the Court stated that the "arcane distinctions embedded in the common-law definition have little relevance to modern law enforcement concerns." 598 U.S. at 593. The Court concluded "that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598.

Analogously, this Court, and others, have applied the generic definition of undefined terms in addressing the application of the Sentencing Guidelines. In *United States* v. *Soto-Sanchez*, 623 F.3d 317, 319 (6th Cir. 2010), the Court 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, citing *Taylor*, 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; *United States* v. *De Jesus Ventura*, 565 F.3d 870 (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 or 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), cert. denied, 133 S.

Ct. 2021 (2013); *United States* v. *Jenkins*, 680 F.3d 101, 108-109 (1st Cir. 2012) (same).

The definition of "kidnapping" used in the instant case comports with this generic definition used by most States. In fact, the government, in proposing the jury instruction that was used, opted for "the most conservative approach," and therefore the instruction includes: (1) an act of restraining, removing, or confining; (2) an unlawful means of accomplishing that act; *and* (3) a criminal purpose beyond the intent to restrain the victim's liberty. (Trial Brief of the United States, R. 160, Page ID# 1642; Government's Proposed Supplemental Jury Instructions, R. 183, Page ID# 1783). For this reason, and consistent with *Guidry*, the jury instruction – requiring that the defendant restrain and confine a person, by force, *with the intent to terrorize or cause bodily injury* – was a conservative and correct statement of the law.

In addition, after first arguing that the trial court should have used the common law definition of kidnapping, defendants also assert that the jury should have to find that defendants' conduct met the requirements of the federal kidnapping statute, 18 U.S.C. 1201. Mullet Br. 36-37. This Court has rejected that argument in an analogous case addressing Section 242. See *United States* v. *Combs*, 33 F.3d 667, 670 (6th Cir. 1994) (definition of kidnapping in 18 U.S.C. 1201 does not apply to definition of kidnapping in Section 242); see also *Guidry*,

456 F.3d at 510 (rejecting using the definition of kidnapping in 18 U.S.C. 1201 in Section 242, at least to the extent it requires interstate abduction, explaining that, because the defendant was charged with violating the victim's civil rights, and Section 242 does not require "kidnapping" to "comport with the elements of the federal kidnapping statute," the "generic, contemporary meaning of the kidnapping statute suffices"). In any event, even if the definition of kidnapping in Section 1201 did apply in this case, the jury instruction given was consistent with Section 1201. Section 1201 provides, as the substantive elements of the offense, that "[w]hoever unlawfully seizes, *confines*, inveigles, decoys, kidnaps, abducts, or carries away *and holds* for ransom or reward *or otherwise* any person" shall be punished by "imprisonment for any term or years or for life." 18 U.S.C. 1201 (emphasis added). See generally *United States* v. *Zuni*, 273 F. App'x 733, 741 (10th Cir.) (Section 1201 requires "that the victim be (1) held against his or her will (2) for some benefit to the captor" (citation omitted)), cert. denied, 555 U.S. 902 (2008). As noted above, in this case the jury instructions refer to confining a person "with the intent to terrorize or cause bodily injury." (Tr., R. 542, Page ID# 7255).

b. Defendants assert that the definition the district court used cannot be correct because, otherwise, nearly every assault or robbery could also be charged as kidnapping. Mullet Br. 35-37. They assert that in these circumstances, more

than "trivial restraint" is required, citing *Government of the Virgin Islands* v. *Berry*, 604 F.2d 221 (3d Cir. 1979). *Berry*, however, has no bearing on the appropriate definition of "kidnapping" as used in Section 249(a)(2) and no relation to this case.

In *Berry*, 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. 604 F.2d at 223. The court noted that the "literal" language of the statute applied because defendants "enticed" the victim to go the beach with the intent to detain, and did so to "extract * * * money" and commit extortion. *Id.* at 225. The court, however, noting that a conviction for aggravated kidnapping resulted in a *mandatory* life sentence, 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, noting the "inequity inherent in permitting kidnapping prosecutions of those who in reality committed lesser or different offenses." *Id.* at 226, 228.

Berry is similar to cases addressing when 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 other 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"); cf. *United States* v. *Zuni*, 273 F. App'x 733, 742-744 (10th Cir. 2008) (defendant acquitted of aggravated sexual abuse but convicted of kidnapping; sufficient evidence that kidnapping occurred separate from assault).

These concerns are not implicated here, as 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' conduct that constituted a crime under Section 249 also included kidnapping, so that it satisfied the

sentencing enhancement provision Congress chose to include in the same hate crime statute. Like other federal criminal civil rights statutes, the statute recognizes that not all bias-motivated crimes causing bodily injury are equally egregious and warrant the same punishment.[37] Therefore, the statute sets forth different levels of punishment depending on whether defendant's actions *also* included other specific conduct or caused 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, and 247. 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 and terrorizing them. But that is what they did, the jury specifically found this additional element, and the defendants were sentenced accordingly to reflect this conduct and enhanced seriousness of the crime.

[37] 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").

c. Defendants also argue that, because "kidnapping" is not defined in the statute and increases the punishment of the crime, the rule of lenity should apply and kidnapping should be interpreted to not apply to their conduct. Mullet Br. 34-35; Levi Miller Br. 42. It is true that the rule of lenity requires courts to interpret ambiguous statutory terms so that they do not increase a penalty. But a statutory term is ambiguous only "if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Galaviz*, 645 F.3d 347, 362 (6th Cir. 2011) (citation and internal quotation marks omitted); see generally *Ladner* v. *United States*, 358 U.S. 169, 178 (1958) (If a statutory term is ambiguous, a court should not "interpret a federal criminal statute so as to increase the penalty * * * when such an interpretation can be based on no more than a guess as to what Congress intended."). Here, as discussed above, other criminal statutes with the same sentencing enhancements, and analogous caselaw, including cases discussing the meaning of "kidnapping" in another federal criminal civil rights statute, instructs that the term should be interpreted pursuant to its generic, contemporary meaning, rather than according to common law or the federal kidnapping statute. Looking to that meaning, there is no ambiguity in the statutory term.

Defendants also make a void-for-vagueness argument. They assert that absent a clear definition of "kidnapping" they could not have known at the time of the assaults that their conduct constituted kidnapping – "[t]he definition did not exist until the district court created it at trial." Levi Miller Br. 42; see also Anna Miller Br. 32-33. But that is simply not true, given the cases and other statutes discussed above. Cf. *United States* v. *Griffin*, No. 12-15795, 2013 WL 5860526, at *3 (11th Cir. Nov. 1, 2013) (The "or otherwise" language in federal kidnapping statute is not unconstitutionally vague.). Moreover, a vagueness argument is particularly unsuitable where, as here, the challenged statutory language is being applied according to its generic, contemporary meaning.

IV

PROSECUTION OF KATHRYN MILLER DID NOT VIOLATE THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA)

A. Standard Of Review

Whether the indictment and prosecution of this case violates RFRA is a question of law subject to *de novo* review. See, *e.g.*, *United States* v. *Duncan*, 356 F. App'x 250, 253 (11th Cir. 2009) (per curiam); *United States* v. *Sandia*, 188 F.3d 1215, 1217 (10th Cir. 1999).

B. This Prosecution Did Not Violate RFRA

Kathryn Miller argues that prosecution of this case violated RFRA because the defendants were engaging in conduct they believed was required by their

religion and religious leader. Kathryn Miller Br. 37-49. Therefore, according to Miller, the charged conduct constituted the "exercise of religion," and the indictment and prosecution constituted a "substantial burden" on that exercise that the government failed to justify as furthering a compelling interest. Kathryn Miller Br. 38-39. This argument is baseless.

1. RFRA provides that the government "shall not substantially burden a person's free exercise of religion, even if the burden results from a rule of general applicability," unless the government demonstrates that "application of the burden * * * is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000bb-1. The statute further provides that a violation of RFRA can be asserted as a "defense in a judicial proceeding." *Ibid.* RFRA requires a two-step analysis. First, the person invoking RFRA must show enforcement of the statute substantially burdens a religious practice. *United States* v. *Ali*, 682 F.3d 705, 710 (8th Cir. 2012). A religious practice is a practice that is both "sincerely held" and "rooted in the [person's own] religious beliefs." *Ibid.* (brackets, citation, and internal quotation marks omitted). A practice that does not meet these qualifications does not implicate RFRA. A statute that substantially burdens a religious practice will nonetheless be upheld if it furthers a compelling governmental interest using the least restrictive means.

See generally *United States* v. *Lafley*, 656 F.3d 936, 939 (9th Cir. 2011); *United States* v. *Wilgus*, 638 F.3d 1274, 1279 (10th Cir. 2011).

The Shepard-Byrd Act itself incorporates the protections of RFRA:

> Nothing in this division, or an amendment made by this division, shall be construed or applied in a manner that infringes any rights under the first amendment of the Constitution of the United States. Nor shall anything in this division, or an amendment made by this division, be construed or applied in a manner that substantially *burdens a person's exercise of religion* (regardless of whether compelled by, or central to, a system of religious belief), speech, expression, or association, unless the Government demonstrates that application of the burden to the person is in furtherance of a *compelling governmental interest* and is the *least restrictive means* of furthering that compelling governmental interest, if such exercise of religion, speech, expression, or association was not intended to –
>
> (A) plan or prepare for an act of physical violence; or
>
> (B) incite an imminent act of physical violence against another.

Section 4710(3), 123 Stat. 2841 (emphasis added). Congress also specified that nothing in the Act "shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the first amendment to the Constitution of the United States." Section 4710(6), 123 Stat. 2842. At the same time, Congress expressly recognized that "[t]he Constitution of the United States does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of

violence." Section 4710(6), 123 Stat. 2842; see *Glenn* v. *Holder*, 690 F.3d 417 (6th Cir. 2012) (addressing pre-enforcement challenge to Shepard-Byrd Act), cert. denied, 133 S. Ct. 1581 (2013).

1. As a threshold matter, the argument that the prosecution of this case violates RFRA was not properly presented below. This issue was raised, not by any party, but in an amicus brief filed by the Center for Individual Rights (CIR). (Motion and Memorandum In Support of Motion for Leave to File Amicus Brief, R. 95, Page ID# 1258-1259). As the district court properly held (Opinion and Order, R. 145, Page ID# 1499-1500), CIR could not raise this issue in this case because an amicus curiae may not raise an issue not advanced by a party. See *United States* v. *Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). Although Kathryn Miller filed a motion to join the amicus brief (Motion to Join, R. 139, Page ID# 1461), that motion was never granted, and therefore was a nullity. Accordingly, Katherine Miller's RFRA argument is waived. See, *e.g.*, *Scottsdale Ins. Co.* v. *Flowers*, 513 F.3d 546, 553-554 (6th Cir. 2008) (arguments not properly presented in the district court are deemed waived on appeal).[38]

[38] We note that CIR is now representing Kathryn Miller in her appeal (but did not represent her in the district court). Thus, CIR appears to be using its own amicus brief, and Kathryn Miller's improper motion to join in it, to advance a RFRA argument in this Court that the district court determined was not properly presented below.

2. Even if this issue were properly before this Court, it fails for two reasons. First, defendants have not shown that enforcement of the statute substantially burdens a religious practice. Defendants do not contend that their religion required them to commit the assaults, *i.e.*, that the religion-based *assaults* were themselves religious practices that they both "sincerely held" and are "rooted in" their own religious beliefs. *Ali*, 682 F.3d at 710. Indeed, in other parts of their appeal they assert just the opposite, that these attacks were not religiously motivated at all. Nor do they assert that Section 249(a)(2) requires them or coerces them "to act contrary to their religious beliefs." *Ruiz-Diaz* v. *United States*, 703 F.3d 483, 486 (9th Cir. 2012). Therefore, defendants have not satisfied the first prong of the RFRA analysis.

Defendants argue that the violent assaults constituted the exercise of religion because the government alleged, and presented evidence, that the defendants were motivated by their interpretation of the scriptures. Kathryn Miller Br. 38-39. But the fact that defendants' assaults were *motivated* by their religion does not mean that the *assaults themselves* (the steps they chose to seek retribution against the defendants) constituted the exercise of religion, or that prosecuting defendants for the assaults burdened their exercise of religion. Defendants could have taken a variety of lawful actions to persuade the victims to accept Mullet's interpretation of scripture; they chose to commit violent assaults.

Defendants also suggest that RFRA protects certain religious rituals (*e.g.*, baptisms, circumcisions) that they characterize as "violen[t]." Kathryn Miller Br. 46-48. But the examples they give involve individuals who have consented, either directly or (in the case of infants) through their parents or guardians, and cannot reasonably be considered "violent." In any event, the only relevant issue here is whether RFRA protects *defendants'* violent assaults. The possibility that, in other contexts, certain religious practices may be construed by some as "violent" acts does not affect this case. See generally *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-431 (2006) (The "compelling state interest" analysis requires courts to examine application of the challenged law to the particular person whose sincere exercise of religion is being burdened.). Defendants, therefore, bear the burden of showing that they were exercising their religion when they committed the violent assaults that left the victims bleeding and bruised, and they have not done so.

Second, the government unquestionably has a compelling interest in preventing the kind of willful religion-based violent assaults at issue in this case and targeted by Section 249(a)(2). See *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 656 (4th Cir. 1995) (in upholding statute criminalizing violence at reproductive health clinics, holding that "we do not think the Free Exercise Clause shields conduct violating a criminal law that protects people and property from

physical harm").[39] Moreover, outlawing such violent assaults is no more restrictive than any other means of preventing them. See *ibid.* (FACE serves a compelling governmental interest in protecting public safety and public health, and it is sufficiently narrow because its prohibitions "are directed only to those actions Congress found to be a national problem, specifically force, threat of force, or physical obstruction."). Indeed, defendants do not cite any authority for the proposition that the federal government lacks a compelling interest in preventing the religion-based violent assaults that occurred here. Moreover, defendants' argument is particularly ironic in this case, where they are attempting to use a statute intended to protect religious liberty to shield their violent conduct against others exercising *their* religious liberty. For these reasons, the district court correctly concluded that the government has a compelling interest in prohibiting such violence, and that the Act "is sufficiently narrow to address the conduct Congress found to be a national problem: violence motivated by the victim's

[39] The court in *American Life League, Inc.* rejected a RFRA challenge to 18 U.S.C. 248, the Freedom of Access to Clinic Entrances Act (FACE), which, in part, criminalizes violence directed at providers and recipients of reproductive health services. 47 F.3d at 654-656; see also *United States* v. *Brock*, 863 F. Supp. 851, 866 (E.D. Wis. 1994) (RFRA claim in FACE case; government has a compelling interest in preventing violence at clinics); cf. *Boim* v. *Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (First Amendment claim by student; school has a compelling interest in preventing violence at schools); *Reimann* v. *Murphy*, 897 F. Supp. 398, 403 (E.D. Wis. 1995) (RFRA claim by inmate; State has a compelling interest in quelling violence in prisons).

actual or perceived religion." (Opinion and Order, R. 145, Page ID# 1500). On this basis alone, defendants' RFRA claim fails.

Defendants suggest that the government cannot have a sufficiently compelling interest in this case because violent conduct is a traditional area of state regulation. Kathryn Miller Br. 41-43. But Congress has enacted numerous statutes directed at violent conduct, and did so here after compiling extensive evidence addressing the prevalence of hate crimes and the need for further federal involvement beyond any existing state and federal law protections. Moreover, Congress has long had a compelling interest in prosecuting violent assaults based on, *e.g.*, the religion of the victim. See, *e.g.*, 18 U.S.C. 245. Further, prosecuting religion-based assaults in only in state courts rather than federal court also is not less burdensome on the exercise of religion. In this case, state law enforcement authorities actually requested that the federal government assert jurisdiction over the assaults. Defendants also suggest that, because the defendants and the victims "share[] the same religion," application of Section 249(a)(2) in this case does not further any governmental interest in preventing religion-based violence. Kathryn Miller Br. 41. But defendants' religion is irrelevant if the defendants assaulted the victims "because of" their religion, which is the type of violent assault the statute targets.

V

DEFENDANTS' CHALLENGES TO THE TESTIMONY OF VARIOUS GOVERNMENT WITNESSES ARE WITHOUT MERIT

A. Standard Of Review

The Court reviews a trial court's decision to admit evidence under Federal Rules of Evidence 403 and 404(b) for abuse of discretion; such review is "highly deferential." *United States* v. *Lykins*, No. 12-6742, 2013 WL 6125933, at *7 (6th Cir. 2013); see also *United States* v. *Corsmeier*, 617 F.3d 417, 421-422 (6th Cir. 2010). This Court also reviews the decision to admit expert testimony for abuse of discretion, and a district court has "broad latitude" in deciding whether to admit such testimony. *United States* v. *Ashraf*, 628 F.3d 813, 826 (6th Cir. 2011). If the district court erred in admitting the evidence, the harmless error standard applies, and the Court will not reverse the conviction unless there is a reasonable possibility that the evidence might have contributed to the conviction. See, *e.g.*, *United States* v. *Clay*, 667 F.3d 689, 700 (6th Cir. 2013). If the defendants did not object to the testimony, this Court reviews for plain error. See, *e.g.*, *United States* v. *Miller*, 531 F. App'x 569, 575 (6th Cir.), cert. denied, 134 S. Ct. 541 (2013).

B. The Testimony Concerning Mullet's Sexual Conduct With Nancy Mullet Was Properly Admitted To Show Mullet's Control Over The Defendants With Whom He Conspired And Aided And Abetted, And That The Assaults Were Religion-Based

Defendants argue that the district court erred in admitting testimony concerning Mullet's sexual conduct with his daughter-in-law, Nancy Mullet. Mullet Br. 40-48; Levi Miller Br. 42-47; Anna Miller Br. 49-51. They assert that this evidence is irrelevant and the prejudicial nature of the evidence rendered the trial fundamentally unfair. These arguments are without merit. The evidence was part of a pattern of controlling conduct, was directly responsive to Mullet's central defense, and was highly probative of the extent of Mullet's control over his co-defendants, and the court did not abuse its discretion in admitting it.

1. Background

Prior to trial, defendants filed a motion in limine arguing, in part, that the government should not be permitted to introduce evidence under Rule 404(b) of sexual misconduct unrelated to the substantive charges, asserting that such evidence was irrelevant, highly inflammatory, and "improperly suggests that if Mr. Mullet would engage in such sexual conduct he is likely to engage in the conduct alleged in the * * * indictment." (Defendants' Motion in Limine, R. 153, Page ID# 1522-1526). The government responded that because Mullet did not physically participate in the assaults, the evidence was relevant to his control over the community, his connection to the assaults, and the notion that the assaults could

not have occurred without his participation. (Government's Response in Opposition to Defendants' Motion in Limine, R. 184, Page ID# 1791-1794). The court concluded that Nancy Mullet could testify about her own experiences with Mullet, which were relevant to Mullet's control over the community, the religious disputes, and the motivation behind the assaults, but that the court would circumscribe the testimony and give the jury a limiting instruction addressing why it was being admitted. (Tr., R. 314, Page ID# 3513-3519).

Nancy Mullet testified that Mullet "counsel[ed]" her about her marriage to his son, Eli Mullet, by first having her hug and kiss him, and ultimately having her come to his room to have sex with him. She also testified that when she resisted, Mullet said that he "c[ould]n't understand why you can't obey me. The other ladies can." (Tr., R. 529, Page ID# 5678-5682, 5695-5698). Further, she testified that she did not want to do those things, but was afraid not to because she had to obey Mullet and wanted to help her husband, who was hospitalized with mental health issues at the time. (Tr., R. 529, Page ID# 5679-5681).

At the end of Nancy Mullet's direct testimony, the court instructed the jury:

> You have heard some testimony that * * * [Mullet] may have engaged in acts other than the ones charged in the indictment, specifically, that he may have engaged in sexual conduct with married women within the Bergholz community. You may consider this evidence only as it relates to the nature of the religious disputes between the Bergholz community and other Amish practitioners and to * * * [Mullet's] intent, motive, plan, or knowledge with respect to the acts charged in the indictment. You must not consider it for any other purpose. Remember that * * * [Mullet] and all the other

> defendants are on trial only for the crimes charged in the indictment, not for any other acts. * * * [Mullet] is not charged with any sex crime.

(Tr., R. 529, Page ID# 5685-5686). The court repeated this admonition in the jury instructions. (Tr., R. 542, Page ID# 7237-7238). In his closing, Mullet argued to the jury that he should be acquitted because there was insufficient evidence to link him to the attacks, physically or otherwise. (Tr., R. 542, Page ID# 7438-7450).

2. The District Court Properly Admitted Nancy Mullet's Testimony

Rule 404(b) allows a party to introduce evidence of other acts committed by the defendant to prove, *inter alia*, motive, opportunity, intent, preparation, plan, and knowledge, "so long as the evidence is not used merely to show propensity and if it bears upon a relevant issue in the case." *United States* v. *Delaney*, 443 F. App'x 122, 131 (6th Cir. 2011) (citation and internal quotation marks omitted). It is a "rule of inclusion." *United States* v. *Queen*, 132 F.3d 991, 994 (4th Cir. 1997). Relevant evidence (*i.e.*, evidence of a material fact at issue at trial) is admissible unless it is offered to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Evidence offered for a permissible purpose is therefore admissible under Rule 404(b) unless the court determines, under the Rule 403 balancing test, that any unfair prejudicial effect *substantially* outweighs its probative value. See *United States* v. *Clay*, 667 F.3d 689, 693 (6th Cir. 2012).

The district court did not abuse its discretion by allowing Nancy Mullet to testify that Mullet directed her to have sex with him. This evidence, like the evidence that Mullet screened incoming and outgoing mail (Tr., R. 529, Page ID# 5674), was probative of Mullet's control and authority over his co-defendants and the Bergholz community. Mullet was not present at the assaults, but was charged with conspiring with, and aiding and abetting, the assailants. The theory of the government's case was that Mullet, as leader of the Bergholz community, exercised control over members of the community, required them to obey his directions and interpretations of scripture, and excommunicated those who would not obey or countermanded his authority. His conduct with Nancy Mullet exemplifies the high degree of control he held over defendants and members of the community and his role as their religious authority; it therefore supports the conclusion that Mullet was the driving force behind the assaults. That evidence is therefore directly relevant to tying Mullet to the conspiracy and to each of the assaults.

Defendants suggest that this evidence was improperly admitted because there was other evidence establishing Mullet's authority in the community. Mullet Br. 44-45. But the mere fact that there is other evidence indicating Mullet's control in the community and the religious nature of the assaults does not make the evidence "needlessly cumulative" and therefore fatally prejudicial. See, *e.g.*,

United States v. *Love*, 254 F. App'x 511, 518-519 (6th Cir. 2007). Indeed, the fact that it was part of a pattern of controlling conduct renders it more pertinent and less unfairly prejudicial, not more. Moreover, the selected evidence presented by the government (which was not presented in graphic detail) was not merely a repetition of other evidence of Mullet's control over the community; rather, it showed just how far that control went. Moreover, the testimony's "contribution to the determination of [the] truth," discussed above, is not outweighed "by its contribution to the length of the trial." *United States* v. *Williams*, 81 F.3d 1434, 1443 (7th Cir. 1996).

Defendants also suggest that, because Mullet's sexual relations with Nancy Mullet took place in 2008 (three years before the assaults), they were too remote in time to be probative of Mullet's control over the defendants. Levi Miller Br. 46; Anna Miller Br. 55. The government's evidence concerning Mullet and his control over the Bergholz community, however, covered a time span beginning far earlier than the assaults, including excommunications in 2006 and the 2006 bishops meeting in Ulysses, Pennsylvania, that led to the reversal of some of Mullet's excommunications. In addition, the trial judge specifically noted that Mullet's control extended up until his arrest, as evidenced by the fact that arresting agents found him in bed with another younger female relative who was a co-defendant.

Anna Miller argues that a portion of FBI Agent Sirohman's testimony, which touched upon Mullet's sexual conduct, was improperly admitted. Sirohman testified that when Mullet was arrested in his home on November 23, 2011, at approximately 6:00 a.m., he emerged from his bedroom with defendant Lovina Miller, the wife of Mullet's nephew, defendant Eli Miller. Anna Miller Br. 55; see Tr., R. 529, Page ID# 5687; Tr., R. 540, Page ID# 6742-6743. Anna Miller asserts that this testimony was irrelevant and improper, and was intended to suggest "that the Bergholz women were promiscuous," thereby "catering to the jury's prejudices." Anna Miller Br. 50. Defendants did not object to this evidence at trial, and Sirohman's testimony was also part of properly demonstrating a pattern of control by Mullet, this time actually involving a conspirator close in time to the attacks. Therefore, the testimony would also be properly admissible to show a close relationship between two co-conspirators. It follows that admission of this testimony was not plain error. See *United States* v. *Page*, 520 F.3d 545, 547 (6th Cir. 2008) (plain error standard requires showing that an obvious error was made that affected defendant's substantial rights and seriously affected the fairness and integrity of the trial).

In short, this evidence was admitted for a proper purpose and was directly relevant to elements of the government's proof and Mullet's central defense. Moreover, the evidence was not admitted to show propensity; Mullet was not

charged with any crimes relating to sexual misconduct. In addition, the court and government further avoided any risk of unfair prejudice by carefully circumscribing the scope of this testimony. Moreover, the court twice gave the jury careful limiting instructions making clear that the jury could consider the evidence only as it related to the nature of the religious disputes between the Bergholz community and other Amish practitioners and to Mullet's intent, motive, plan, or knowledge concerning the acts charged in the indictment. See, *e.g.*, *United States* v. *Wheeler*, 349 F. App'x 92, 98 (6th Cir. 2009). Finally, the mixed verdicts (Mullet and other defendants were acquitted of the attack charged in Count 3 and certain obstruction charges) support the conclusion that the evidence was not unduly prejudicial. See, *e.g.*, *United States* v. *Aramony*, 88 F.3d 1369, 1378-1379 (4th Cir. 1996) (evidence of defendant's sexual relations was not unfairly prejudicial given, in part, the cautionary instruction given the jury and the fact that the jury returned a mixed verdict).[40]

[40] Contrary to defendants' assertion, the mere fact that this evidence involved sexual conduct does not make it so prejudicial as to render the trial fundamentally unfair. Mullet Br. 46; see *United States* v. *Perry*, 352 F. App'x 351, 354 (11th Cir. 2009) (trial court did not abuse its discretion in admitting limited evidence of prior sexual assault to establish identity in case involving assault with intent to rob a postal clerk); see generally *Delaney*, 443 F. App'x at 133 ("evidence must do more than paint the defendant in a bad light to be unfairly prejudicial") (citation, internal quotation marks, and brackets omitted).

In all events, any error was harmless beyond a reasonable doubt because the "evidence of guilt is overwhelming, eliminating any fair assurance that the conviction was substantially swayed by the error." *United States* v. *Mack*, 729 F.3d 594, 603 (6th Cir.) (citation omitted), petition for cert. pending, No. 13-8149 (filed Dec. 5, 2013). Nancy Mullet was one of 26 government witnesses during nine days of testimony. As recounted above, there is considerable evidence of Mullet's connection to the assaults, including his own statements in the prison telephone calls and his admissions to the media. In addition, there is no dispute that the assaults occurred; Mullet exercised control over the Bergholz community; Mullet gave driving directions to his co-conspirators for an attack; Mullet actively encouraged and approved the assaults; and the assailants reported back to Mullet after each assault. So too was Anna Miller's involvement uncontested. Thus, any error would have been harmless.

C. The Expert Testimony Of Dr. Kraybill On Amish Culture And Practices Was Proper And, In Any Event, Was Not Plain Error

Defendants argue that discrete snippets of Professor Kraybill's expert testimony on Amish culture and practice rendered the trial fundamentally unfair. Levi Miller Br. 47-48; Anna Miller Br. 45-48. They assert that this testimony was "severely critical" of the thoughts and practices of the members of the Bergholz community and the defendants who resided there, and was irrelevant and highly prejudicial. This argument is baseless.

The district court permitted Dr. Kraybill, a leading national expert on Amish studies, to testify only to matters within his expertise – *i.e.*, "general Amish practice, and the significance of beards for men and long hair for women" – to educate the jury. (Tr., R. 314, Page ID# 3543). He was not permitted to characterize anyone's testimony. (Tr., R. 314, Page ID# 3543-3545). Dr. Kraybill testified over the course of two days, and was extensively cross-examined. (Tr., R. 540, Page ID# 6887-6946; Tr., R. 541, Page ID# 6966-7099). With one exception (concerning an aspect of his knowledge of the origin of the Bergholz community), defendants did not object to his direct testimony. (See Tr., R. 540, Page ID# 6917).

Defendants do not explain how the testimony they challenge constitutes plain error affecting the outcome or fairness of the proceeding. See *Page*, 520 F.3d at 547 (address plain error standard). Moreover, defendants elicited some of this testimony on cross-examination; they cannot object to that testimony now. (See Tr., R. 541, Page ID# 7010 (Dr. Kraybill responding, on cross-examination, that many Bergholz practices "don't seem very Amish to me" and "Bergholz is a lone ranger group")). Other statements defendants selectively highlight – Dr. Kraybill's description of "cult-like behavior[s]," which might include "sexual impropriety" – were made in response to generalized questions and specifically were not, consistent with the court's instructions, directed at the defendants. (See Tr., R.

541, Page ID# 6980-6981). That may be why the defendants did not object to the testimony. In short, defendants have not shown that Dr. Kraybill's testimony was improper, let alone that it constituted plain error. See also *Ashraf*, 628 F.3d at 826 (noting a district court's wide latitude in admitting expert testimony).

D. Defendants' Other Challenges To Various Testimony Are Without Merit

Defendants also assert that the district court improperly admitted other testimony concerning the Bergholz community, including Myron Miller's testimony that "cultic activities" were going on in Bergholz (Tr., R. 537, Page ID# 5810); Raymond Hershberger's testimony concerning the various methods of discipline used by some members of the community, including confinement in chicken coops (Tr., R. 541, Page ID# 7104-7105); Barbara Miller's and Melvin Schrock's references to the use of chicken coops (Tr., R. 528, Page ID# 5409; Tr., R. 538, Page ID# 6360); and Barbara Yoder's testimony concerning the chicken coops and her reference to them as "Amish jails" (Tr., R. 540, Page ID# 6640). Anna Miller Br. 48-49; Levi Miller Br. 48-49. Defendants assert that this testimony improperly "delegitmize[d]" defendants' religious practices, or put their "religious beliefs and practices * * * on trial," and was unfairly prejudicial. Anna Miller Br. 53. This argument is baseless.

Four of these five witnesses were victims of the assaults. Certainly it was not improper for them to testify concerning their direct observations of the

defendants' conduct. This included practices that they personally experienced or of which they had direct knowledge, and that were a source of disagreement within the community. This is especially proper given the government's burden of proving beyond a reasonable doubt that the victims were assaulted because of their religion. For this reason, contrary to defendants' suggestion, this fact-based testimony concerning their experiences did not somehow infringe on defendants' First Amendment right to the free exercise of religion, or challenge their sincerely held religious beliefs. See Anna Miller Br. 54. Moreover, defendants have not shown how this evidence affected their substantial rights.

E. Defendants' Due Process Rights Were Not Violated By The Cumulative Effect Of The Challenged Testimony

Finally, defendants assert that the cumulative effect of these alleged errors – *i.e.*, the admission of the challenged testimony – violated their Due Process rights and deprived them of a fair trial. Anna Miller Br. 51-56; Levi Miller Br. 48-49. For the reasons set forth above, because the district court did not commit error, harmless or otherwise, the cumulative error doctrine does not apply. See, *e.g.*, *United States* v. *Deitz*, 577 F.3d 672, 697 (6th Cir. 2009).

In any event, even if this Court were to determine that some of the trial court's rulings were error, no combination of the alleged errors deprived defendants of a fair trial. See generally *United States* v. *Walker*, 506 F. App'x 482, 488 (6th Cir. 2012) ("In order to obtain a new trial based on cumulative error, * * *

[defendant] must show that the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair.") (citation omitted). There was overwhelming evidence that the assaults satisfied the elements of Section 249(a)(1) (see Issue VII, *infra*, addressing sufficiency of the evidence).

At bottom, defendants' arguments challenging various testimony describing or characterizing certain practices of defendants or the Bergholz community – practices that formed the genesis of the religious disputes that led to the physical attacks and the beard- and hair-cutting – necessarily fail because the testimony concerns factual matters that go to the heart of this case. Defendants may not like it that some of these matters cast them in a bad light, but having committed the assaults, and making clear that they were religiously motivated, defendants cannot now complain that the victims or other government witnesses have addressed these factual matters in their testimony. Defendants and their community remain free to hold their religious beliefs and practice their religion. What they cannot do is violently assault others because they do not approve of the *victims'* religious beliefs and practices.

VI

THE JURY INSTRUCTIONS ON COUNT 1 (CONSPIRACY) DID NOT CONSTRUCTIVELY AMEND THE INDICTMENT

A. Standard Of Review

This Court reviews claims of constructive amendments to the indictment *de novo*. See, *e.g.*, *United States* v. *Kuehne*, 547 F.3d 667, 682 (6th Cir. 2008).

B. The Jury Instructions On Conspiracy Did Not Constructively Amend The Indictment

A constructive amendment results "when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted for an offense other than the one charged in the indictment." *United States* v. *Walker*, 734 F.3d 451, 458 (6th Cir. 2013) (citation omitted). Lester Miller argues that the jury instructions on one of the objects of the conspiracy charged in Count 1 constructively amended the indictment because the object offense of violating Section 249(a)(2) by causing bodily injury to the victims uses the word "and" in listing the victims, but the jury instructions used "or," the jury instructions impermissibly broadened the possible bases for conviction. Lester Miller Br. 18-27. This argument is without merit.

The district court's jury instruction was correct and followed the "well-settled principle" that an offense may be charged conjunctively in an indictment,

but the district court may charge the jury in the disjunctive. *United States* v. *LaPointe*, 690 F.3d 434, 440 (6th Cir. 2012). The Court has explained:

> The government's right to charge in the conjunctive and prove in the disjunctive reflects the necessary discrepancies between indictments and jury instructions. Indictments must be phrased in the conjunctive so that society can be confident that the grand jury has found probable cause for all of the alternative theories that go forward. Juries, on the other hand, may convict a defendant on any theory contained in the indictment. As a result, judges read jury instructions in the disjunctive.

Ibid. For example, in *United States* v. *Jones*, 533 F. App'x 562, 571-572 (6th Cir.), cert. denied, 134 S. Ct. 834 (2013), the indictment charged a conspiracy to "manufacture, possess with intent to distribute, *and* distribute" illegal drugs, but the jury was charged that it need only find a conspiracy to commit "*one or more*" of the crimes alleged in the conspiracy charge. The defendant argued that the indictment required the government to prove that he committed all three underlying crimes, and therefore the court violated his Fifth Amendment rights by "replacing the conjunctive 'and' in the indictment with the disjunctive 'and/or' in the jury instructions." *Id.* at 572. The Court rejected that argument as "completely lack[ing] merit," stating that an "indictment count that alleges in the conjunctive a number of means of committing a crime can support a conviction if any of the alleged means are prove[n]." *Ibid.* (citation omitted). Other cases are in accord. See, *e.g.*, *United States* v. *Budd*, 496 F.3d 517, 528-529 (6th Cir. 2008) (rejecting argument that because the object offenses in the conspiracy charge are separated

by the word "and," the court impermissibly broadened the possible bases for conviction) (citing cases). In view of these cases, defendant's argument fails.

VII

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTIONS

A. Standard Of Review

The sufficiency of the evidence is 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). This standard of review "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

B. Sufficient Evidence Supports Defendants' Convictions

Defendants make various arguments challenging the sufficiency of the evidence. We address each of these arguments in turn; none has merit.[41]

[41] Defendants do not challenge the sufficiency of the evidence, or for that matter any basis, for their convictions on Counts 8 (obstruction of justice) (Mullet, Eli Miller, Lester Mullet) and 10 (false statements) (Mullet).

1. The Evidence Was Sufficient To Sustain Defendants' Convictions For Conspiracy (Count 1)

All sixteen defendants were charged and convicted on Count 1 – conspiracy to violate Section 249(a)(2), Section 1519 (obstruction of justice), and Section 1001 (false statements), in violation of 18 U.S.C. 371. (Superseding Indictment, R. 87, Page ID# 1186-1196; Verdict Form, R. 230, Page ID# 2036-2053). The essence of a conspiracy is an agreement between two or more individuals 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; (2) knowledge and intent to join the conspiracy; and (3) an overt act in furtherance of the conspiracy. *United States* v. *Pugh*, 404 F. App'x 21, 24 (6th Cir. 2010). Proof of a formal agreement is unnecessary; a tacit agreement among the parties is sufficient, and may be inferred from circumstantial evidence. *Ibid.*; see Tr., R. 542, Page ID# 7242-7249 (jury instructions on conspiracy).

Levi Miller and Mullet argue that the evidence was insufficient to establish a conspiracy because the "attacks on various dates were unrelated incidents," motivated by different factors and family issues, and therefore there was no common agreement or purpose. Levi Miller Br. 51-52; Mullet Br. 48-50. But the evidence shows that the attacks were related and that there was a common agreement – defendants, under Mullet's leadership, believed that the victims (the "Amish hypocrites") had to be punished for defying or disrespecting Mullet and

the Bergholz community, worshipping how and with whom they desired, and failing to live a "proper" Amish life. Mullet acknowledged as much in his telephone call from jail to Mullet. See p. 50, *supra*. Moreover, there is no dispute that Levi Miller participated in the two assaults on October 4, 2011, with five other defendants, and that he knew the previous day that they would do so. See pp. 32-35, *supra*. Further, when they arrived at the Hershbergers (the first assault on October 4, 2011), the victims did not previously even know them, and defendant Johnny Mullet said that "we're here to do what you [did] to our shun[ned] people." (Tr., R. 541, Page ID# 7127). After the two assaults that evening, the defendants went to Mullet's house and told Mullet that they had cut the victims' hair ("[w]e got two of them"). See pp. 41-42, *supra*. Likewise, the defendants who assaulted the Millers during the first assault, which they had previously discussed together and with Mullet, immediately reported to Mullet after the assault and presented him with the hair that they had cut. See pp. 31-32, *supra*. Finally, Mullet's statements to the press, and in the telephone conversations to the defendants in jail, prove that the assaults were related events and were part of an agreement to punish the victims because of their religion. In short, the undisputed facts provide sufficient evidence from which a reasonable jury could not help but conclude that

defendants agreed to forcibly attack the victims for religious reasons, and that each knowingly and intentionally participated in doing so.[42]

Anna Miller, who participated only in the September 6, 2011, assault of her in-laws (Count 2), asserts that the evidence was insufficient to support her conspiracy conviction because, in her view, given the separation of genders in Amish culture, there were two separate assaults against the Millers, one by the men against Marty Miller and one by the women against Barbara Miller, and the government's evidence established only that she participated in the conspiracy to cut Barbara Miller's hair. Anna Miller Br. 35-40. Although Anna Miller mischaracterizes the indictment, and ignores the important fact that she was within feet of both assaults, her concession that she "only participated in a conspiracy to cut Barbara Miller's hair" is by itself fatal to her sufficiency argument on Count 1. Anna Miller Br. 40. Indeed, she traveled to the Millers' home with the male conspirators. With respect to the assaults (one of the three objects of the conspiracy, relevant here), the indictment alleged a single conspiracy – that

[42] Mullet also suggests that the failure to stop the assaults, or to not object to what he knew was happening, cannot establish that he was part of an agreement to assault the victims. Mullet Br. 50-51. As he also notes, however, the jury instructions made that point clear. (See Tr., R. 542, Page ID# 7246). But Mullet's conviction for conspiracy does not turn on his mere knowledge and failure to act, but rather on the overwhelming evidence that Mullet directed the attacks (literally in one case), helped set the assaults in motion, and his co-defendants acted at his behest, discussed the assaults with him, and reported back to him immediately after the assaults.

defendants conspired to violate Section 249(a)(2). Therefore, each defendant could be found guilty of this conspiracy if the government proved that there was a conspiracy (*i.e.*, that two or more defendants agreed to commit the crimes charged) *and* that the particular defendant voluntarily joined the conspiracy and some co-conspirator took some action in furtherance of it. (See Tr., R. 542, Page ID# 7242; Verdict Form, R. 230, Page ID# 2036-2053). Anna Miller's concession that she participated in a conspiracy to assault Barbara Miller satisfies each of the elements of her conspiracy conviction and more, as she herself committed an important overt act. There is no requirement that each defendant participate in every aspect of the conspiracy; the participants may change and may perform different roles at different times. See, *e.g.*, *United States* v. *Gardiner*, 463 F.3d 445, 457 (6th Cir. 2006); see also *United States* v. *Smith*, 320 F.3d 647, 653 (6th Cir. 2003) (a single conspiracy does not become multiple conspiracies simply because "each member did not know of or become involved in all of the activities in furtherance of the conspiracy" (citation omitted)).

Finally, Kathryn Miller's challenges to her conspiracy conviction are similarly without merit. Kathryn Miller Br. 52-57. As discussed above, a defendant can be found guilty of conspiracy without participating in each act in furtherance of the conspiracy. There is ample evidence that Kathryn Miller

personally participated in assaulting her mother-in-law and father-in-law. See pp. 27-30, *supra*.

2. The Evidence Was Sufficient To Sustain Defendants' Convictions for Violating 18 U.S.C. 249(a)(2) (Counts 2, 4-6)

As relevant here, to establish a violation of Section 249(a)(2), the government must prove that the defendant: (1) willfully; (2) caused bodily injury to any person; (3) because of the actual or perceived religion of the person; and (4) the conduct occurred in one of the specific circumstances set forth in the statute tying the assault to interstate commerce. (See Tr., R. 542, Page ID# 7251). Defendants variously challenge the sufficiency of the evidence underlying their convictions for violating Section 249(a)(2).

a. Bodily Injury

Four defendants argue that the evidence was insufficient to show that the victims suffered bodily injury. Lester Miller argues that the government failed to prove that Marty and Barbara Miller and the Hershbergers (the victims of Counts 2 and 4, respectively), suffered bodily injury. Lester Miller Br. 27-30. Anna Miller also asserts that she could not be convicted on Count 2 because "hair cutting is not bodily injury." Anna Miller Br. 40-42. Emanuel Schrock and Linda Schrock argue that the government failed to show that they caused bodily injury to Melvin Schrock (a victim in Count 6). Emanuel Schrock Br. 14-15; Linda Schrock 10-12. These arguments are incorrect.

Section 249 defines bodily injury, by reference to 18 U.S.C. 1365(h)(4), as: "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary." See 18 U.S.C. 249(c)(1). The statute further provides that bodily injury does not include "solely emotional or psychological harm to the victim." *Ibid.* The government argued at closing that, consistent with this definition and the jury instructions, bodily injury includes, in part, a cut, abrasion, bruise, or disfigurement, and that "[e]ach of Counts 2 through 6 involves at least one of those types of injuries." (Tr., R. 542, Page ID# 7279). With respect to specific victims, the government argued: (1) Barbara Miller "had bruises on her arms that lasted several weeks"; (2) Marty Miller "had cuts and a razor burn on his face"; (3) Raymond Hershberger "had bleeding cuts on his head"; (4) Levi Hershberger "had pain in his ribs for three weeks after being launched into a couch and held down"; and (5) Melvin Schrock "had a gouge mark on his face after being sheared by his own son, a mark that you will see when you look at the[] pictures. " (Tr., R. 542, Page ID# 7280-7281 (referring to GX 4-11, R. 556-3, Page ID# 7820; GX 4-13, R. 556-5, Page ID# 7822)). The government added that "in every assault, the[] [d]efendants disfigured their victims by forcibly removing their head and beard hair," "mar[ring]" and

"chang[ing]" their appearance. (Tr., R. 542, Page ID# 7279-7280). The evidence supports these conclusions.

(i). With respect to Lester Miller's and Anna Miller's argument that Marty and Barbara Miller (the victims in Count 2) did not suffer bodily injury, the evidence reflects that Lester violently grabbed Marty by the beard, dragged him into the living room, and threw him in a chair. (Tr., R. 528, Page ID# 5445-5446; Tr., R. 529, Page ID# 5561). As Marty was restrained in a chair, Lester used scissors to cut his beard and head hair, and Freeman Burkholder used the battery-operated clippers to cut his beard. As a result, one side of his head was bleeding, he had razor burns on his throat and neck, and he suffered pain and bruising. (Tr., R. 528, Page ID# 5454; Tr., R. 529, Page ID# 5562, 5664). Therefore, the evidence established that Marty Miller suffered bodily injury both through the disfigurement that resulted from the hair and beard cutting, and from the pain, cuts, bleeding, and bruises. As for Barbara Miller, the evidence established that after Lester grabbed Marty and threw him in the chair, Eli Miller grabbed Barbara Miller by the wrists and pulled her back, which caused pain and bruising on her wrists. (Tr., R. 528, Page ID# 5446; Tr., R. 529, Page ID# 5561). Subsequently, defendants cut Barbara's hair from nearly waist length to just beneath her ears. (Tr., R. 528, Page ID# 5452-5453). This pain, bruising, and disfigurement is sufficient to constitute bodily injury.

Lester Miller asserts that this evidence is insufficient to establish bodily injury because the pain, cuts, and bruising are *de minimis*. Lester Miller Br. 27-29. He cites no support for the notion that there is a *de minimis* exception to the statutory definition of bodily injury; in any event, there is none. Bodily injury is defined to include "a cut, abrasion, bruise, burn, or disfigurement" and "any other injury to the body, no matter how temporary." See p. 157, *supra*. Moreover, the injuries to the victims cannot fairly be characterized as *de minimis*.

Anna Miller argues that the cutting of the hair cannot constitute disfigurement because disfigurement must include "some sort of physiological response from the body." Anna Miller Br. 40-42. There no legal or logical basis for this argument. Because "disfigurement" is not defined in the statute, it should be given its ordinary definition. See, *e.g.*, *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417 (6th Cir. 2009). Disfigurement means to mar or "spoil or damage the appearance of []something or someone[]." See, *e.g.*, "Disfigure," Merriam Webster Dictionary, http://www.merriam-webster.com/dictionary/disfigure (last visited Feb. 28, 2014). Given the status of beard and head hair as a sacred religious symbol for the Amish, the forcible, involuntary removal of such hair alone satisfies this definition. In all events, as noted above, there was also evidence that the victims' variously suffered physical pain, abrasions, bleeding, cuts, and bruising.

(ii). Second, Lester Miller's argument that the government failed to prove that either Raymond or Andy Hershberger (the victims in Count 4) suffered bodily injury is without merit. Lester Miller Br. 29-30. The evidence showed that as a result of having his beard forcibly cut, Raymond suffered cuts to his head, and blood was visible. (Tr., R. 528, Page ID# 5286; Tr., R. 541, Page ID# 7133). The evidence also showed that defendants grabbed Andy's beard, "jerked [his] head," and used the clippers to forcibly "gouge" and "chop[]" out his hair. (Tr., R. 528, Page ID# 5281-5282). These painful acts, cuts, and disfigurement constitute bodily injury.[43]

(iii). Finally, with respect to Emanuel and Linda Schrock's argument that the government failed to show that they caused bodily injury to Melvin Schrock (a victim in Count 6), the government introduced photographs of Melvin and argued to the jury that the photographs showed that he had a cut on his cheek. (Tr., R. 541, Page ID# 7281; GX 4-11, R. 556-3, Page ID# 7820; GX 4-13, R. 556-5, Page

[43] Lester Miller suggests that the government, to establish a conviction on Count 4, had to prove that *both* Raymond and Andy Hershberger were injured. Lester Miller Br. 29-30. Although the evidence establishes that both Raymond and Andy did suffer bodily injury, defendants' conviction on Count 4 can be sustained as long as one of the named victims suffered bodily injury. See Issue VI, *supra* (addressing distinction between charging in the conjunctive, and proving in the disjunctive). Moreover, Lester Miller does not dispute that the third victim of this assault, Levi Hershberger, suffered bodily injury as a result of being thrown on the couch and injuring his ribs.

ID# 7822). Although defendants argued to the contrary (*e.g.*, Tr., R. 540, Page ID# 6767-6768; Tr., R. 542, Page ID# 7390-7391), the trial court correctly recognized that it was for the jury to decide what the pictures showed, (Tr., R. 540, Page ID# 6768). Accordingly, because a reasonable jury could have concluded from the photographic evidence that, as a result of having his beard and hair cut, Melvin suffered a cut on his cheek, defendants' argument fails. In any event, because defendants also disfigured Melvin when they forcibly cut his hair, the jury could have found bodily injury on that basis alone.

b. Commerce Clause Jurisdictional Element

Anna Miller, who was convicted on Counts 1 and 2 in connection with the attack of Marty and Barbara Miller, on September 6, 2011, argues that the evidence concerning the assault was insufficient to satisfy Section 249(a)(2)'s jurisdictional elements. Anna Miller Br. 42-44. She argues that there is insufficient evidence concerning what scissors were used in the assault and whether they traveled in interstate commerce, and that the use of a motor vehicle to travel to the Millers to assault them was too "tenuous" a connection to interstate commerce. Anna Miller Br. 43. These arguments do not provide any basis to disturb her convictions. First, with respect to Count 2, defendants' use of a hired driver and car (the instrumentality of interstate commerce), and the battery-operated clippers, to effectuate the assault establishes the jurisdictional

requirement. Second, Anna Miller is not arguing that the defendants charged in Count 2 did not use a motor vehicle to facilitate the assault. Rather, she is simply repeating the incorrect argument that the use of the motor vehicle was insufficient to bring the assaults within Congress's Commerce Clause power. See Issue I, *supra*.

Linda Schrock, who was convicted on Counts 1 and 6 in connection with the assault of her in-laws, Melvin and Anna Schrock, on November 9, 2011, similarly argues that her conviction should be overturned because there was insufficient evidence that the horse scissors used in this assault traveled interstate and that "possession was contemporaneous with interstate movement." Linda Schrock Br. 7-9. But FBI Agent Sirohman testified that the scissors had traveled in interstate commerce prior to November 9, 2011 (Tr., R. 540, Page ID# 6770-6771), and there is no requirement that defendant have "possessed" the scissors while they were moving interstate. In any event, application of Section 249(a)(2) to Linda Schrock (Count 6) also can be upheld independently based on the use of the car and use of the mail to effectuate the assault.

c. *Aiding And Abetting*

Each of the defendants in the counts alleging a violation of Section 249(a)(2) was also charged under 18 U.S.C. 2 for aiding and abetting the assaults. (Indictment, R. 87, Page ID# 1197-1202). Accordingly, the jury was instructed

that a defendant could be found guilty even if he or she did not "personally commit[] the crime," as long as the defendant intentionally counseled, helped or encouraged another to commit the crime. (Tr., R. 542, Page ID# 7263). Linda Schrock argues that there was insufficient evidence that she aided and abetted in the assault of Melvin Schrock (Count 6) because there is no evidence that she used the scissors, encouraged Emanuel to cut his father's hair, or otherwise was involved in the hair cutting. Linda Schrock Br. 12-13. These arguments are both incorrect (when the evidence is viewed in the light most favorable to the government) and beside the point. The testimony reflects that Linda had spoken to one of her sisters (Barbara Yoder) about the plan to cut Melvin Schrock's hair beforehand; agreed with Emanuel to invite his parents to their house for dinner as subterfuge for the intended attack[44]; and, while Melvin struggled and resisted being assaulted, Linda physically restrained Anna when she tried to run outside to seek help from the Sheriff and covered Anna's mouth when she yelled for help. See p. 45, *supra*. These actions satisfy the elements of aiding and abetting. See, *e.g.*, *United States* v. *Lowery*, 60 F.3d 1199, 1202 (6th Cir. 1995) (aiding and abetting involves "an act by a defendant which contributes to the execution of a crime" and "the intent to aid in its commission" (citation omitted)). Linda's actions were

[44] See Tr., R. 539, Page ID# 6583 (text of the one of the letters from Emanuel Schrock to his parents inviting them to his house, stating that "Linda and I were talking, and we decided to invite you here for supper one evening").

intended to, and did, facilitate the attack as a whole. (See Tr., R. 542, Page ID# 7263).

VIII

THE GOVERNMENT'S STATEMENT AT CLOSING ARGUMENT CONCERNING BODILY INJURY WAS PROPER

A. Standard Of Review

The question whether the government's closing argument constitutes prosecutorial misconduct is reviewed *de novo*. *United States* v. *Henry*, 206 F. App'x 452, 456 (6th Cir. 2006).

B. The Government's Closing Argument Was Proper

1. Emanuel Schrock was convicted in connection with the November 9, 2011, assault of his parents, Melvin and Anna Schrock. Melvin died two months after the assault. Emanuel Schrock argues that the government asserted during final argument that Melvin Schrock's death was bodily injury upon which the jury could rely to find him guilty, and this statement denied him a fair trial. Emanuel Schrock Br. 16-20. He couples this claim with his argument, addressed above, that the evidence was insufficient to establish that the beard and hair cutting itself resulted in bodily injury. He asserts that, absent of evidence that the beard and hair cutting caused bodily injury, and the government's failure to present any evidence that Melvin Schrock's death was caused by the beard and hair cutting, the statement that death can constitute bodily injury was prejudicial and warrants

reversal. E. Schrock Br. 16-20. These claims totally mischaracterize the events at trial.

This Court applies a two-part test in addressing arguments that the government's closing argument warrants reversal: first, the Court determines if the statement was improper; second, if it was, the Court determines whether the statement was "flagrant and warrant[s] reversal." *Henry*, 206 F. App'x at 456 (citation omitted). The "flagrancy test" considers four factors: (1) whether the remarks tended to mislead the jury or prejudice the defendant; (2) whether they were isolated or extensive; (3) whether they were deliberate or accidentally placed before the jury; and (4) the strength of the evidence against the defendant. *United States* v. *Francis*, 170 F.3d 546, 549-550 (6th Cir. 1999). Schrock cannot satisfy either element of this two-part test.

2. First, the challenged statement was proper, which is evident from both a proper reading of the statement and the context in which it was made. As noted above, in its initial closing argument, the government argued that in each assault the defendants disfigured their victims by forcibly removing their head and beard hair, and that, under the statute, disfigurement, *inter alia*, constituted bodily injury. The government also argued, with respect to Melvin Schrock, that he "had a gouge mark on his face after being sheared by his own son, a mark that you will see when

you look at the[] pictures." (Tr., R. 542, Page ID# 7281, referring to GX 4-11, R. 556-3, Page ID# 7820; GX 4-13, R. 556-5, Page ID# 7822).

In response, several of the defendants argued in their closing argument that the loss of the beard and head hair could not constitute bodily injury because it could grow back. For example, Levi Miller argued that disfigurement had to be permanent, and therefore that if the beard grew back there was no disfigurement. (Tr., R. 542, Page ID# 7379; see also Tr., R. 542, Page ID# 7437 (Mullet Closing Argument)). In response to these arguments, the government stated in its final closing argument (emphasis added):

> Bodily injury is temporary, right? Read the definition in your jury instructions. It doesn't have to be permanent. *For Raymond Miller,*[45] *it was because he passed away before he was able to get his hair and beard back.* [Objections overruled]. It can be a temporary cut, an abrasion, bruise, and physical pain.

(Tr., R. 542, Page ID# 7476).

Emanuel Schrock's argument – that this statement improperly indicates that death can constitute bodily injury – misconstrues the statement. The challenged statement was part of the government's rebuttal of defendants' arguments that the loss of beard and head hair could not constitute disfigurement because the hair

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[45] Emanuel Schrock states that it is "[c]ounsel's recollection [that] the government's attorney used the name of Melvin Schrock in this sentence and not Raymond Miller as indicated in the transcript." E. Schrock Br. 18 n.3. We do not dispute that the statement was *intended* to refer to Melvin Schrock, but the transcript says Raymond Miller.

could grow back. The reference to the victim's death was simply an observation that, for one victim, the injury *was* permanent in that he died before his beard grew back. Accordingly, the government was not suggesting, as Emanuel Schrock erroneously asserts, that this victim's death was the "bodily injury" that could satisfy that statutory element, and the statement was proper rebuttal.

In any event, even if the statement was somehow improper, it was not flagrant, warranting reversal. First, the statement could not have misled any reasonable juror, and there is no indication that it did. The court gave the jury the standard instruction that it must base its decision only on the evidence it saw and heard in court, and that the lawyer's statements and arguments are not evidence. (Tr., R. 542, Page ID# 7233). Second, the challenged statement represents a single sentence from approximately 60 pages of the government's closing argument. (See Tr., R. 542, Page ID# 7266-7307, 7459-7478). Third, the government did not deliberately misstate the evidence or the law because it was correctly noting, in referencing not only hair cutting but other injuries, that disfigurement or injury need not be permanent to constitute "bodily injury" and that, in any event, for one victim, some disfigurement was permanent because he died before his hair grew back. Finally, given the uncontroverted evidence that Melvin Schrock's beard and head hair were cut in the attack; the statutory definition of "bodily injury" that includes disfigurement; and the additional photographic evidence indicating a cut

on Melvin Schrock's cheek, substantial evidence supported the jury's conclusion that Melvin suffered bodily injury.

IX

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING SAMUEL MULLET, SR.

A. Standard Of Review

The Court applies the abuse of discretion standard to review the reasonableness of sentencing. See, *e.g.*, *United States* v. *Gunter*, 620 F.3d 642, 645 (6th Cir. 2010); *Gall* v. *United States*, 552 U.S. 38, 46 (2007). A district court abuses its sentencing discretion if it commits significant procedural error, such as improperly calculating the guideline range, failing to consider the factors in 18 U.S.C. 3553(a), or selecting a sentence based on clearly erroneous facts. *United States* v. *Adkins*, 729 F.3d 559, 570-571 (6th Cir. 2013). "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. *Conaster*, 514 F.3d 508, 520 (6th Cir. 2008). The Court affords guidelines-range sentences 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). In this case, each

and every defendant received a sentence significantly below his or her advisory guidelines range. Their claims have no merit.

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

1. Background

Samuel Mullet, Sr., was convicted on seven counts: one count of conspiracy (Count 1); four counts of violating Section 249(a)(2) (Counts 2, 4-6); one count of obstruction of justice (Count 8); and one count of making false statements (Count 10). (Judgment, R. 394, Page ID# 4489). See also Attachment B. For the Section 249(a)(2) convictions, he faced a maximum statutory sentence of life imprisonment. See 18 U.S.C. 249(a)(2)(A)(ii)(II).

The Presentence Report calculated Mullet's combined adjusted offense level to be 48. (Presentence Report, R. 339, Page ID# 3941). The base offense level, 32, was based on the highest adjusted offense level for the eight victims, and, pursuant to Sentencing Guidelines § 2H1.1 (Offenses Involving Individual Rights), was based on the underlying substantive offense of kidnapping (U.S.S.G. § 2A4.1(a)).[46] The applicable guideline range for an adjusted offense level of 48 is life imprisonment.

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[46] The base offense level was then increased for: (1) use of a dangerous weapon (+2) (U.S.S.G. § 2A4.1(b)(3)); (2) conduct that involved the selection of the victims because of religion (+3) (U.S.S.G. § 3A1.1(A)); (3) Mullet's role as the organizer or leader of activity that involved five or more participants (+4)

(continued…)

Mullet filed objections to the presentence report and a sentencing memorandum asserting that he should be sentenced "far below" the guideline range of life imprisonment. (Mullet's Sentencing Memorandum, R. 349, Page ID# 4092-4093). Among other things, he argued that the appropriate underlying offense was minor assault, not kidnapping, and that the base offense level should be 15, resulting in a sentencing range of 18-24 months' imprisonment. (Mullet's Sentencing Memorandum, R. 349, Page ID# 4094-4095, 4106).

At the sentencing hearing, the court found that the presentence report correctly calculated the guideline range and that kidnapping was the appropriate underlying offense, noting that the jury specifically found beyond a reasonable doubt that each of the attacks included kidnapping. (Tr., R. 545, Page ID# 7605-7606, 7740). The court also found that the enhancements for using a dangerous weapon, "hate crime motivation," and "leadership roles" were correct. (Tr., R. 545, Page ID# 7605-7608, 7740). Mullet argued that a significant variance was warranted under the 18 U.S.C. 3553(a) standards because using kidnapping as the underlying offense would result in a sentence far greater than that necessary to accomplish the purpose and goals of sentencing and create sentencing disparities.

(…continued)
(U.S.S.G. § 3B1.1(a)); (4) making false statements (+2) (U.S.S.G. § 3C1.1); and (5) having more than five underlying "groups" (+5) (U.S.S.G. § 3D1.4). (Presentence Report, R. 339, Page ID# 3934-3941 (setting forth in detail these calculations)).

(Tr., R. 545, Page ID# 7645-7663). The court found that the assaults would not have occurred but for Mullet, and therefore he deserved the "harshest * * * [and] longest sentence." (Tr., R. 545, Page ID# 7748-7749). The court also found that Mullet had not expressed remorse and, significantly, that he remained "a danger to the community because of the control [he] possess[es] over others." (Tr., R. 545, Page ID# 7748-7749). At the same time, the court agreed that a life sentence "is longer than necessary and is disproportionate" to what Mullet did. (Tr., R. 545, Page ID# 7748-7749). For these reasons, the court granted Mullet a significant downward variance, sentencing him to 15 years' imprisonment. (Judgment, R. 394, Page ID# 4490).

2. Mullet Has Not Shown That The District Court Abused Its Discretion In Sentencing Him

The district court correctly determined Mullet's adjusted base level and sentencing range of life imprisonment, but downwardly varied based on the Section 3553(a) factors, sentencing Mullet to 15 years' imprisonment. Notwithstanding this downward variance, Mullet challenges his sentence on several bases. These arguments lack merit.

a. First, Mullet argues that the district court "failed to identify Mullet's total offense level and applicable guideline range," and that the "failure to state the applicable range is a significant procedural error warranting reversal." Mullet Br. 53-54. This argument is baseless. As noted above, the presentence report

concluded that Mullet's final offense level was 48, which, given Mullet's Criminal History Category I, resulted in a sentencing range of life imprisonment. At the sentencing hearing, the court methodically determined that the presentence report "correctly calculated the advisory range," including the four-level adjustment for Mullet's leadership role. (Tr., R. 545, Page ID# 7605-7608, 7748-7749). In so doing, the court specifically accepted the presentence report's offense level of 48, and the guideline range applicable to that offense level was life imprisonment. Indeed, Mullet's central arguments at sentencing concerned the appropriate downward variance under the Section 3553(a) factors from a life sentence. There was no procedural error in this aspect of the court's sentencing.

b. Second, Mullet argues that the court improperly applied the kidnapping guideline of Section 2A4.1. Mullet Br. 54-56. Citing *United States* v. *Epley*, 52 F.3d 571 (6th Cir. 1995), he argues that, because he was not charged with or convicted of federal kidnapping, and "could not have been convicted of federal kidnapping," the kidnapping guideline (U.S.S.G. § 2A4.1) cannot apply. Mullet Br. 55. This argument is erroneous.

In *Epley*, 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). In that case, the defendant police officers planted drugs and a

weapon in the car of the victim, 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 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 (U.S.S.G. § 2A4.1) simply because restraint was involved. *Epley*, 52 F.3d at 580-582. The Court stated that defendants' conduct did not satisfy any of the federal crimes that are sentenced under Sentencing Guidelines § 2A4.1, including the federal kidnapping statute, and that the underlying crime was more analogous to obstruction of justice. *Id.* at 582.

Unlike in *Epley*, Mullet was charged with, and convicted of, a federal crime that included kidnapping as a statutory element. In other words, kidnapping is a specific element of the sentencing enhancement provision of Section 249, and Mullet was convicted under this provision. Therefore, Mullet's base offense level should reflect that verdict, and the correct underlying offense is kidnapping (U.S.S.G. § 2A4.1). Otherwise, the statutory sentencing enhancement in Section 249(a)(2) would be meaningless.

Mullet also argues that use of the kidnapping guideline renders the "Restraint of Victim" guideline (U.S.S.G. § 3A1.3), which results in a two-level

enhancement, meaningless. Mullet Br. 56. That enhancement was not applied here. As the Application Notes to Sentencing Guidelines § 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 the 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.)." In other words, the "Restraint of Victim" adjustment can only apply where the underlying conduct does not involve kidnapping. Accordingly, the guidelines were followed, not circumvented.[47]

c. Third, Mullet suggests that his sentence should be vacated because his 15-year sentence, which was based on the Section 249(a)(2) convictions, exceeds the statutory maximum for the conspiracy count (Count 1; five years) and the false statements count (Count 10; five years), citing cases that remand for resentencing where the sentence exceeds that statutory maximum. Mullet Br. 56-57. This argument is baseless; there is no dispute that Mullet's sentence of 15 years' imprisonment does not exceed the statutory maximum for each Section 249(a)(2)

[47] Mullet cites *United States* v. *Gray*, 692 F.3d 514, 517, 521-522 (6th Cir. 2012), cert. denied, 133 S. Ct. 990 (2013), as an example of a court applying the two-level enhancement for "Restraint of Victim" for a conviction of Section 242. Mullet Br. 56. But in that case, the underlying offense was not kidnapping, and therefore Section 2A4.1 did not apply.

violation (*i.e.*, life imprisonment). Mullet also makes the bare assertion that his sentence is improper because the court did not specifically state what the sentences were on his convictions under statutes with shorter maximum sentences. Mullet Br. 57. But the court did clearly enunciate the sentence.[48]

d. Fourth, Mullet argues that 16 of the 27 objections he made to the presentence report were "unresolved at sentencing." Mullet Br. 57-58. Although the probation officer addressed all of these objections in an addendum to the presentence report (see Presentence Report, R. 339, Page ID# 3950-3958), Mullet asserts that, pursuant to Federal Rule of Criminal Procedure 32(i)(3)(B), the district court did not properly rule on these objections, and therefore his sentence must be vacated.[49] Of these 16 objections, however, only one was conceivably relevant to the sentence he received – objection 26, asserting that kidnapping should not be used as the underlying offense. (Presentence Report, R. 339, Page ID# 3957). The

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[48] After concluding that 15 years' imprisonment, rather than life, was the appropriate sentence for Mullet's Section 249(a)(2) violations, the court stated: "[I]t will be 15 years on the Hate Crimes statute, all concurrent, and the statutes that have shorter sentences, the shorter sentences all concurrent. So it's 15 years." (Tr., R. 545, Page ID# 7750).

[49] Federal Rule of Criminal Procedure 32(i)(3)(B) provides that, at sentencing, the court: "must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing."

district court addressed this objection and found that the probation officer correctly applied the guidelines. (See Tr., R. 545, Page ID# 7605-7606, 7740). The other objections Mullet cites were directed at the factual narratives of the indictment and the underlying conduct (objections 1-4, 7, 10, 12); victim impact statements (objections 13-14, 16-17); the sufficiency of the evidence (as to Counts 8 and 10); and a summary of an interview with Mullet's wife. (Presentence Report, R. 339, Page ID# 3950-3954). Furthermore, Mullet did not specifically raise any of these disputes at sentencing, other than simply to preserve or maintain his prior objections to the presentence reports. (See Tr., R. 545, Page ID# 7755-7756). See generally *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)). These matters could not have affected the sentencing guidelines calculations. See, *e.g.*, *United States* v. *Howell*, 412 F. App'x 794, 795 (6th Cir. 2011) ("The district court must affirmatively rule on a controverted matter where it could potentially impact the defendant's sentence." (citation and brackets omitted)). In all events, any error is harmless, as the court heard the entire trial, considered each defendant, and granted a substantial downward variance pursuant to the Section 3553(a) factors in sentencing Mullet to 15 years' imprisonment,

rather than to the life sentence reflected in the sentencing guidelines. See *id.* at 797.

e. Mullet also asserts that his sentence is substantively unreasonable because there is an unwarranted disparity between his sentence and those given other defendants convicted of similar crimes. Mullet Br. 58-60. Mullet cites the sentences given in three other, unrelated Section 249 cases (135, 120, and 102 months), and those in other civil rights cases. See Mullet Br. 58-59; Mullet's Sentencing Memorandum, R. 349, Page ID# 4108-4114. As this Court has explained, however, the Court considers citations to sentences imposed "in other singular cases" to be "weak evidence" to show a national sentencing disparity. *United States* v. *Rossi*, 422 F. App'x 425, 434-435 (6th Cir. 2011). Moreover, the 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. *Ibid*. (citation omitted); see also *United States* v. *Swafford*, 639 F.3d 265, 270 (6th Cir.), cert. denied, 132 S. Ct. 320 (2011). Mullet has not shown that this sentence is at odds with those arising in a similar context. Nor has he shown that his sentence was substantively unreasonable.

X

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING LEVI MILLER

A. Standard Of Review

The standard of review for the trial court's sentencing decision is set forth above (pp. 168-169).

B. Levi Miller's Sentence Was Not An Abuse Of Discretion

1. Levi Miller was convicted on three counts: one count of conspiracy (Count 1); and two counts of violating Section 249(a)(2) (Counts 4-5; the two October 4, 2011, attacks) (Judgment, R. 395, Page ID# 4494). See Attachment B. For the Section 249(a)(2) convictions, he faced a maximum statutory sentence of life imprisonment. See 18 U.S.C. 249(a)(2)(A)(ii)(II).

The Presentence Report calculated Levi's combined adjusted offense level to be 43. (Presentence Report, R. 363, Page ID# 4342). The offense level was based on the adjusted offense level for the four victims of the October 4, 2011, assaults. Under Sentencing Guidelines § 2H1.1 (Offenses Involving Individual Rights), that offense level was based on the underlying substantive offense, kidnapping (32)

(U.S.S.G. § 2A4.1(a)).[50] The applicable guidelines range for an adjusted offense level of 43 is life imprisonment.

Levi Miller objected to the presentence report, including that kidnapping should not be used as the underlying offense; the three enhancements were not applicable; and he should receive a two-level decrease for acceptance of responsibility. (Presentence Report, R. 363, Page ID# 4338, 4348-4351). He also filed a sentencing memorandum, asserting that the court should "exercise its discretion pursuant to [the Section] 3553(a) [factors] and impose a sentence well below that anticipated by the advisory guideline range." (Levi Miller's Sentencing Memorandum, R. 356, Page ID# 4205). At trial, the government responded that it did not object to a downward variance of eight levels or less. (Government's Sentencing Memorandum, R. 358, Page ID# 4244).

At the sentencing hearing, Levi Miller again objected to the three-level increase for playing a leadership role and asserted that he was entitled to a reduction for acceptance of responsibility. (Tr., R. 545, Page ID# 7624-7627). He also argued that a significant variance was warranted under the Section 3553(a)

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[50] The base offense level was then increased as follows: (1) use of a dangerous weapon (+2) (U.S.S.G. § 2A4.1(b)(3)); (2) conduct that involved the selection of the victims because of religion (+3) (U.S.S.G. § 3A1.1(A)); (3) Levi Miller was the manager or supervisor of five or more participants (+4) (U.S.S.G. § 3B1.1(a)); and (4) there were four underlying "groups" (+4) (U.S.S.G. § 3D1.4). (Presentence Report, R. 363, Page ID# 4338-4342 (setting forth in detail these calculations)).

standards because of his age and family status and the facts that he is not a danger to the community or likely to commit other crimes. (Tr., R. 545, Page ID# 7675-7677). The court concluded that although Levi Miller led the October 4, 2011, attacks, the guidelines sentence was greater than was called for under 18 U.S.C. 3553(a). The court therefore granted Levi Miller a downward variance, even greater than the variance agreed to by the government, sentencing him to 84 months' imprisonment. (Judgment, R. 395, Page ID# 4495).

2. Levi Miller challenges the use of kidnapping to determine the base offense level, application of the leadership enhancement, and the court's failure to reduce the offense level for acceptance of responsibility. Levi Miller Br. 54-58. For the reasons set forth above addressing Mullet's sentence, the district court correctly used kidnapping as the base offense level. With respect to the leadership enhancement, the district court, after hearing the trial, correctly concluded that the enhancement was appropriate because "[p]eople look to him as a leader. He was a religious leader and he also led those two attacks." (Tr., R. 545, Page ID# 7627). This conclusion is correct. For instance, his telephone call with Mullet from jail reflects that he directed other defendants with respect to committing more assaults. (GX 18-14 (transcript), R. 556-10, Page ID# 7862; GX 17-10 (audio recording) ("you guys * * * better not" go again; "[l]et's see what all happens out of this first")). Further, Levi was one of the five defendants who participated in both

assaults on October 4, 2011. The nature, scope, and breadth of his own conduct support the adjustment.

Levi Miller was also not entitled to acceptance of responsibility. The trial judge expressly found that "none of the defendants has accepted responsibility," and noted that, since the verdicts, "[n]one of the defendants has submitted anything in writing." (Tr., R. 545, Page ID# 7615). That determination is entitled to great deference. *United States* v. *Dugalic*, 489 F. App'x 10, 21 (6th Cir.), cert. denied, 133 S. Ct. 669 (2012); see also U.S.S.G. § 3E1.1, comment. (n.5). Moreover, the Sentencing Commission has noted that, as a general matter, this adjustment is not intended to apply to a defendant who "puts the government to its burden of proof at trial by denying the essential factual elements of guilt," and defendant has not demonstrated that this is the "rare situation[]" warranting an exception to that rule. U.S.S.G. § 3E1.1, comment. (n.5); see also *Dugalic*, 489 F. App'x at 21.

In any event, the court granted Levi Miller a substantial downward variance in sentencing him to 84 months' imprisonment, rather than the guidelines sentence of life. Miller's actual sentence reflects a base offense level of no more than 28 (rather than the calculated 43), or a reduction of 15 levels. Therefore, the alleged errors Levi Miller has raised could not have caused him to receive a more severe sentence.

CONCLUSION

This Court should affirm defendants' convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief is accompanied by United States' Motion To File An Oversized Brief As Appellee and is 44,351 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: February 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, 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. Section 249(a)(2) is beyond scope of Congress's Commerce power 2. Section 249(a)(2)'s requirement that defendant act "because of" religion is unconstitutionally vague 3. Jury instruction on definition of kidnapping as used in Section 249(a)(2) 4. Admission of 404(b) and 403 evidence 5. Sufficiency of the evidence 6. 15-year sentence procedurally and substantively unreasonable *Also incorporates arguments of all other defendants
2. Levi S. Miller	1. Section 249(a)(2) is beyond scope of Congress's Commerce power 2. Section 249(a)(2)'s requirement that defendant act "because of" religion is unconstitutionally vague 3. Jury instruction on definition of kidnapping as used in Section 249(a)(2) 4. Admission of 404(b) and 403 evidence 5. Sufficiency of the evidence 6. 84-month sentence procedurally and substantively unreasonable *Also incorporates arguments of all other defendants

3. Kathyrn Miller	1. Section 249(a)(2) is beyond scope of Congress's Commerce power 2. Prosecution for violating Section 249(a)(2) violates RFRA 3. Sufficiency of the evidence on the conspiracy count (Count I) 4. Incorporates arguments of other defendants on: a. jury instruction on definition of kidnapping as used in Section 249(a)(2) b. jury instruction on requirement that religion be the motivating factor for Section 249(a)(2) c. admission of "irrelevant and prejudicial" evidence about defendants d. denial of motion to dismiss female defendants in Count 2
4. Anna Miller	1. Section 249(a)(2) is beyond scope of Congress's Commerce power *also joins arguments made by Samuel Mullet, Sr., on this issue 2. Jury instruction on definition of kidnapping as used in Section 249(a)(2) *also joins arguments made by Samuel Mullet, Sr., on this issue 3. Sufficiency of the evidence on conspiracy, bodily injury, and jurisdictional hook 4. Evidentiary issues: a. Expert testimony of Dr. Kraybill b. Testimony "denigrating" the Bergholz community c. Testimony concerning Mullet's sexual conduct d. Cumulative errors rendered trial fundamentally unfair

5. Lester Miller	1. Section 249(a)(2) is beyond scope of Congress's Commerce power 2. The jury instructions constructively amended the indictment 3. Sufficiency of the evidence of bodily injury (Millers, Count 2) 4. Sufficiency of the evidence of bodily injury (Hershbergers, Count 4) *Incorporates all arguments of Samuel Mullet, Sr., and Anna Miller
6. Emanuel Schrock	1. Sufficiency of the evidence of bodily injury (Melvin Schrock, Count 6) 2. Improper closing argument *Incorporates arguments of all other defendants
7. Linda Shrock	1. Sufficiency of the evidence that dangerous weapon traveled in interstate commerce 2. Sufficiency of the evidence of bodily injury (Melvin Schrock, Count 6) 3. Sufficiency of the evidence on aiding and abetting *Incorporates arguments of all other defendants
8. Lovina Miller	Incorporates arguments of all other defendants
9. Freeman Burkholder	Incorporates arguments of all other defendants
10. Emma Miller	Incorporates arguments of all other defendants
11. Elizabeth Miller	Incorporates all arguments in briefs of Samuel Mullet, Sr., and Anna Miller

12. Eli M. Miller	Incorporates all arguments in briefs of Samuel Mullet, Sr., and Anna Miller
13. Johnny S. Mullet	Incorporates all arguments in briefs of Samuel Mullet, Sr., and Anna Miller
14. Danny S. Mullet	Incorporates all arguments in briefs of Samuel Mullet, Sr., and Anna Miller
15. Lester S. Mullet	Incorporates all arguments in briefs of Samuel Mullet, Sr., and Anna Miller
16. Raymond Miller	Incorporates all arguments in brief of Samuel Mullet, Sr.

ATTACHMENT B: SUMMARY OF CHARGES BY DEFENDANT

Defendant	Counts Charged	Guilty	Underlying Assaults	Victims	Sentence
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	All		180 mos.
2. Johnny S. Mullet	1 (371) 4 (249) 5 (249)	X X X	 10/4/11 10/4/11	 Hershbergers Myron Miller	84 mos.
3. Danny S. Mullet	1 (371) 4 (249) 5 (249)	X X X	 10/4/11 10/4/11	 Hershbergers Myron Miller	60 mos.
4. Lester S. Mullet	1 (371) 4 (249) 5 (249) 8 (1519)	X X X X	 10/4/11 10/4/11	 Hershbergers Myron Miller	84 mos.
5. Levi S. Miller	1 (371) 3 (249) 4 (249) 5 (249) 8 (1519)	X X X	 10/4/11 10/4/11	 Hershbergers Myron Miller	84 mos.
6. Eli M. Miller	1 (371) 2 (249) 3 (249) 4 (249) 5 (249 8 (1519)	X X X X X	 9/6/11 10/4/11 10/4/11	 Millers Hershbergers Myron Miller	84 mos.
7. Emanuel Schrock	1 (371) 3 (249) 6 (249)	X X	 11/9/11	 Schrocks	60 mos.

8. Lester Miller	1 (371) 2 (249) 4 (249) 5 (249) 9 (1519)	X X X	9/6/11 10/4/11	Millers Hershbergers	60 mos.
9. Raymond Miller	1 (371) 2 (249)	X X	9/6/11	Millers	24 mos.
10. Freeman Burkholder	1 (371) 2 (249)	X X	9/6/11	Millers	12 mos. & 1 day
11. Anna Miller	1 (371) 2 (249)	X X	9/6/11	Millers	12 mos. & 1 day
12. Linda Shrock	1 (371) 6 (249)	X X	11/9/11	Schrocks	24 mos.
13. Lovina Miller	1 (371) 2 (249)	X X	9/6/11	Millers	12 mos. & 1 day
14. Kathyrn Miller	1 (371) 2 (249)	X X	9/6/11	Millers	12 mos. & 1 day
15. Emma Miller	1 (371) 2 (249)	X X	9/6/11	Millers	12 mos. & 1 day
16. Elizabeth Miller	1 (371) 2 (249)	X X	9/6/11	Millers	12 mos. & 1 day

ATTACHMENT C: SUMMARY BY COUNTS CHARGED

COUNT	DEFENDANTS CHARGED	DEFENDANT(S) CONVICTED	VICTIMS	DATE OF ASSAULT	INTERSTATE COMMERCE NEXUS (249 COUNTS) or UNDERLYING CONDUCT
1. 18 U.S.C. 371	All 16 defendants charged with conspiracy	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	1. Defendants hired Larry Harrington, who does "taxi work" for them, to drive them to victims' home 2. Defendants used battery-operated Wahl hair clippers (GX 1) that had traveled in interstate commerce
3. 18 U.S.C. 249	Samuel Mullet, Sr. Levi Miller Emanuel Schrock Eli Miller	NONE	David Wengerd	9/24/11	
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	1. Defendants hired Mike Kanoski to drive them to victims' home 2. Defendants used eight-inch horse shears (GX 2) purchased earlier in the day that were made in New York and traveled in interstate commerce

					3. Defendants used battery-operated Wahl hair clippers (GX 1) that had traveled in interstate commerce
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	1. Defendants hired Mike Kanoski to drive them to victims' home 2. Defendants used eight-inch horse shears (GX 2) purchased earlier in the day that were made in New York and traveled in interstate commerce
6. 18 U.S.C. 249	Samuel Mullet, Sr. Emanuel Schrock Linda Schrock	ALL	Melvin and Anna Shrock	11/9/11	1. Defendants hired Robert Mitchell to pick up the victims and drive them to Emanuel Schrock's home 2. Defendants used horse scissors (GX 14) that were manufactured out of state and traveled in interstate commerce 3. Defendants used the United States Mail to arrange for the victims to come to their house so defendants could assault them

7. 18 U.S.C. 1519	Samuel Mullet, Sr.	NONE			
8. 18 U.S.C. 1519	Samuel Mullet, Sr. Levi Miller Eli Miller Lester Mullet	Samuel Mullet, Sr. Eli Miller Lester Mullet			Concealing camera used to photograph appearance of some victims
9. 18 U.S.C. 1519	Lester Miller	NONE			
10. 18 U.S.C. 1001	Samuel Mullet, Sr.	Samuel Mullet, Sr.			False statements to the FBI concerning his prior knowledge of the 10/4/11 assaults

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGE ID# RANGE
73	Motion to Dismiss filed by Samuel Mullet Sr. and Lester Miller	1129-1147
79	Johnny Mullet's Motion to Dismiss	1159-1169
87	Superseding Indictment	1184-1204
91	Certificate of the Assistant Attorney General	1215-1216
92	Government's Consolidated Opposition to Defendants' Motions to Dismiss	1227-1234
95	Motion and Memorandum in Support of Motion for Leave to File Amicus Brief	1258-1276
136	Samuel Mullet Sr.'s Motion to Strike Surplusage from Superseding Indictment	1442-1448
139	Kathryn Miller's Motion to Join the Center for Individual Right's Motion to Dismiss	1461
143	Order denying motion to strike	1473-1476
145	Opinion and Order denying Motion to Dismiss	1497, 1499-1500
153	Defendants' Motion in Limine	1522-1526
158	Defendants' Proposed Jury Instructions	1583, 1586-1587
160	Trial Brief of the United States	1642
183	Government's Proposed Supplemental Jury Instructions	1780, 1783
184	Government's Response to Defendants' Motion in Limine	1791-1794
230	Verdict Form	2036-2053,
264	Defendant Samuel Mullet, Sr.'s Motion for Judgment of Acquittal/Motion for New Trial	2668-2700
266	Defendant Lester Miller's Motion to Join	2703-2704
267	Defendant Elizabeth Miller's Motion to Join	2705-2706
268	Defendant Lovina Miller's Motion to Join	2707-2708
269	Defendant Anna Miller's Motion to Join	2709-2710
270	Defendant Emma Miller's Motion to Join	2711-2712
271	Defendant Lester S. Mullet's Motion to Join	2713-2714
272	Defendant Kathryn Miller's Motion to Join	2715-2716
273	Defendant Linda Schrock's Motion to Join	2717-2718

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGE ID# RANGE
275	Defendant Raymond Miller's Motion to Join	2721
278	Defendant Emanuel Schrock's Motion to Join	2726-2727
281	Defendant Freeman Burkholder's Motion to Join	2730-2731
293	Opinion and Order denying Motion for New Trial	2800-2807
314	Transcript of Final Pretrial Proceedings, August 20, 2012	3489-3498 3500-3511 3513-3524 3543-3545
339 (Sealed)	Presentence Investigation Report as to Samuel Mullet, Sr. (Sealed)	3950-3958 (Sealed)
349	Samuel Mullet Sr.'s Sentencing Memorandum	4092-4095, 4106, 4108-4114
356	Levi Miller's Sentencing Memorandum	4205
358	Government's Sentencing Memorandum	4228-4266, 4244
363 (Sealed)	Presentence Investigation Report as to Levi F. Miller (Sealed)	4324-4351 4338-4342, 4348-4351 (Sealed)
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
397	Notice of Appeal filed by Daniel S. Mullet	4504-4505
398	Notice of Appeal filed by Levi Miller	4506-4507
399	Notice of Appeal filed by Lovina Miller	4508
400	Notice of Appeal filed by Kathyrn Miller	4509
402	Notice of Appeal filed by Linda Schrock	4512-4513
403	Notice of Appeal filed by Johnny Mullet	4514-4515
404	Judgment as to Emanuel Shrock	4516-4520
405	Judgment as to Lester Miller	4521-4525
406	Judgment as to Raymond Miller	4526-4530

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGE ID# RANGE
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 Shrock	4561-4565
414	Notice of Appeal filed by Emma Miller	4566-4567
415	Notice of Appeal filed by Lester S. Mullet	4568-4569
417	Notice of Appeal filed by Elizabeth Miller	4572-4573
418	Notice of Appeal filed by Anna Miller	4574-4575
419	Notice of Appeal filed by Lester M. Miller	4576-4577
425	Notice of Appeal filed by Samuel Mullet, Sr.	4583
427	Notice of Appeal filed by Raymond Miller	4586
430	Notice of Appeal filed by Eli Miller	4595-4596
431	Notice of Appeal filed by Emanuel Shrock	4597-4598
444	Notice of Appeal field by Freeman Burkholder	4612-4613
527	Jury Trial Transcript, August 28, 2012	5055-5222
528	Jury Trial Transcript, August 29, 2012	5223-5510

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528	Testimony of Andy Hershberger	5236, 5238, 5242-5244, 5248-5249, 5250-5251, 5253, 5255-5258, 5260-5267, 5271-5278, 5280-5286, 5288-5289, 5301, 5305, 5308-5309, 5316-5319 5320-5323, 5331, 5333-5334, 5347-5349, 5358-5359, 5366, 5377, 5385, 5387, 5395-5396
528	Testimony of Barbara Miller	5404-5412, 5414-5419, 5420-5424, 5426-5454, 5457, 5459-5461, 5468-5469, 5472, 5474-5475, 5477-5478, 5488, 5493-5494, 5502, 5505

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529	Jury Trial Transcript, August 30, 2012	5511-5741
529	Testimony of Barbara Miller	5518, 5522, 5525-5527, 5533, 5538-5545, 5549, 5553, 5555, 5561-5565
529	Testimony of Nancy Burkholder	5575-5586, 5592-5603, 5607, 5611-5613, 5617, 5627-5628, 5653-5654
529	Testimony of Nancy Mullet	5662-5663, 5673-5674, 5676-5682, 5685-5687, 5693, 5695-5698
529	Testimony of Chris Mullet	5702, 5704-5707, 5710-5711, 5713-5717, 5720-5721, 5724-5725
529	Testimony of John Aske	5727-5730, 5736
537	Jury Trial Transcript, September 6, 2012	5792-6080

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537	Testimony of Myron Miller	5796-5804 5810-5822, 5825-5826, 5833, 5855-5859, 5874, 5876-5877 5880-5881
537	Testimony of David Wengerd	5918-5929
537	Testimony of Daniel Schrock	5974, 5977-5982, 5986, 5995-5997, 5999-6005, 6007-6009, 6012-6017, 6039-6041, 6047-6049, 6054, 6057-6062, 6064, 6067, 6070-6071
538	Jury Trial Transcript, September 5, 2012	6081-6384
538	Testimony of Timothy Zimmerly	6087-6096, 6103
538	Testimony of Mark Clark	6114-6116

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538	Testimony of Joseph Mullet	6131-6132, 6134-6137, 6139-6140, 6142-6151, 6154-6160, 6162, 6164-6165, 6171, 6195, 6204-6205, 6208
538	Testimony of Fred Johnson	6216-6219, 6226-6236
538	Testimony of Jeffrey McVicker	6273, 6275-6280
538	Testimony of Michael Kanoski	6288-6289, 6291-6292, 6294-6300, 6303-6304
538	Testimony of Melvin Schrock, Jr.	6310-6311, 6315-6317, 6319-6320, 6322-6323, 6334-6335, 6341, 6360
538	Testimony of Corvin Wenger	6365-6373
539	Jury Trial Transcript, September 7, 2012	6385-6632

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539	Testimony of Johnny Mast	6398, 6401, 6403-6408 6410, 6416-6419, 6421-6422, 6424-6431, 6432-6454, 6468, 6474, 6497-6499, 6505-6510, 6533, 6539-6540
539	Testimony of Bobby Mitchell	6553-6557, 6559-6561, 6563
539	Testimony of Anna Schrock	6542-6543, 6561-6563, 6566-6567, 6569-6588, 6590-6594, 6596-6597, 6599, 6605, 6609-6610
539	Testimony of Levi Herschberger	6615, 6617- 6620
540	Jury Trial Transcript, September 10, 2012	6633-6961

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540	Testimony of Barbara Yoder	6640-6641, 6643-6649, 6652-6657, 6659-6660, 6662-6663, 6658, 6661, 6665, 6676-6677, 6680, 6690, 6695-6697, 6699-6700, 6704, 6708-6709
540	Testimony of Michael Sirohman	6725-6731, 6734-6743, 6747-6754, 6756-6758, 6761-6768, 6770-6777, 6779, 6784, 6787-6792, 6797, 6803-6804, 6807-6811, 6831-6832, 6834-6836, 6842, 6844-6845, 6854-6856, 6858, 6868-6872, 6876-6877, 6880, 6883-6884

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540	Testimony of Donald Kraybill	6887-6946
541	Jury Trial Transcript, September 11, 2012	6962-7224
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541	Testimony of Raymond Hershberger	7102-7112, 7117 7124-7130, 7133, 7136, 7140, 7153-7154, 7163
542	Jury Trial Transcript, September 12, 2012	7225-7496
545	Sentencing Hearing Transcript, February 8, 2013	7605-7608, 7615, 7624-7627, 7645-7663, 7675-7677, 7740, 7748-7750, 7753, 7755-7756
554	Jury Trial Transcript, September 19, 2012	7791-7814
556-1	GX 3, photocopy of receipt for purchase of shears	7818
556-2	GX 4-9, photograph of Raymond Hershberger and Johnny Mullet	7819
556-3	GX 4-11, photograph of Melvin Schrock after assault	7820
556-4	GX 4-12, photograph of Melvin Schrock after assault	7821
556-5	GX 4-13, photograph of Melvin Schrock after assault	7822
556-6	GX 11, letter dated October 17, 2011	7823-7824
556-7	GX 12, letter dated October 24, 2011	7825-7826

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556-8	GX 13, letter dated November 5, 2011	7827-7828
556-9	GX 16-6, 16-9, 16-16, transcript of jail recordings	7834, 7837, 7844
556-10	GX 18-6, 18-11, 18-19, 18-24-18-25, transcript of jail recordings	7854, 7859, 7867, 7872-7873
556-11	GX 20-8, transcript of jail recordings	7890
556-12	GX 22-3, copy of Associated Press article	7899
556-13	GX 28-1-28-2, Johnny Mullet's written statement	7900-7901