IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	
	:	CASE NO: 5:11-CR-594-1
Plaintiff,	:	
	:	JUDGE DAN A. POLSTER
-vs-	:	
	:	
SAMUEL MULLET, SR.,	:	**DEFENDANT SAMUEL MULLET SR.'S**
	:	**SENTENCING MEMORANDUM**
Defendant.	:	

Defendant Samuel Mullet, Sr., through counsel, submits the following Memorandum for the Court's consideration at resentencing, scheduled for March 2, 2015. Samuel Mullet requests a sentence of time-served (39 months), which is above the applicable guideline range, and is sufficient but not greater than necessary to achieve the statutory goals of sentencing, pursuant to 18 U.S.C. §§ 3553(a) and 3661.

Respectfully submitted,

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I. Introduction

Defendant Samuel Mullet, Sr., age 69, is before this Court for resentencing after the Sixth Circuit vacated multiple hate crime convictions relating to a series of beard and hair cutting incidents. Samuel Mullet, the Bishop of the Bergholz Amish Community, did not directly participate in the beard and hair cutting incidents. The parties dispute the remaining counts of conviction and the applicable guideline range.

Samuel Mullet files a separate motion to dismiss Counts 1, 8, and 10 for lack of jurisdiction. Samuel Mullet also incorporates his co-defendants' arguments that Count 1 cannot stand because the Sixth Circuit vacated one ground of the multi-object conspiracy on legal grounds. *Yates v. United States,* 354 U.S. 298, 312 (1957) (Where one object of a multi-object conspiracy is based on legal error, and it is not clear which object the jury relied on to convict, the entire conspiracy conviction must be vacated); *United States v. Garcia,* 992 F.2d 409, 416 (2d Cir. 1993). Mullet also maintains the evidence was insufficient to support a conspiracy in Count 1, as previously raised in his post-trial motions and appeal. [Dkt. 216, Rule 29 Motion; Dkt. 264, Motion for New Trial, Dkt.541, Trial Tr., PageID 7181-87].

Should this Court find Counts 1, 8, and 10 remain viable, the applicable guideline range is **10-16 months**, using the obstruction guideline at U.S.S.G. § 2J1.2. Samuel Mullet has served approximately **39 months** since his arrest on November 23, 2011. Thus, Samuel Mullet requests a sentence of time served, which is above the applicable guideline range.

The government asks for imposition of the same 15 year sentence, despite the appellate opinion vacating the hate crime counts. The government also makes a veiled threat that, if the sentences are not high enough, it will retry the hate crime counts: "the United States will consider the sentences imposed on the conspiracy and obstruction charges in exercising its prosecutorial

discretion to decide whether to retry the section 249 counts." [Dkt.603, Gov't Sent. Memo, PageID 8542]. It is improper to threaten retrial if the sentence does not please the government. The possibility of retrial has no impact on the sentences imposed for the obstruction conduct, under 18 U.S.C. § 3553(a).

To reimpose the same sentence for conduct not sufficiently proven under the correct standard of law, would mean the government can avoid prosecuting a hate crime by merely charging obstruction to reach the same sentencing result. This offends the principles of Due Process, the Sixth Amendment's right to a fair trial, the purposes of sentencing, *Apprendi*, and the Sixth Circuit's opinion vacating the hate crime convictions.

II. Status of the Case

The status and facts of this lengthy case are familiar to the Court. Thus, Mullet summarizes only recent procedural events. On August 27, 2014, the Sixth Circuit "reversed the defendants' various hate-crime convictions and remanded the case for further proceedings consistent with this opinion." *United States v. Miller*, 767 F.3d 585, 602 (6th Cir. 2014). The opinion does not specifically name the vacated counts.

Complicating matters, at the original sentencing, this Court imposed a blanket sentence of "15 years custody," then noted "[a]nd I guess it will be 15 years on the Hate Crime statute, all concurrent, and the statutes that have shorter sentences, the shorter sentences all concurrent. So it's 15 years." [Dkt.545, Sent. Tr., PageID 7750]. This Court did not specify the length of the "shorter sentences" or to what counts the shorter sentences applied. The final amended judgment imposed 15-years of imprisonment with no reference to individual counts. [Dkt.394, Amended Judgment, PageID 4490]. Thus, Samuel Mullet remains in prison under an unspecific sentence.

Two days after the Sixth Circuit's opinion, co-defendant Linda Shrock sought release from custody pending retrial by this Court. [Dkt.558, Shrock's Motion for Release, PageID 7939]. The government opposed, asserting Count 1 and its sentence remain intact. [Dkt.561, Gov't Resp. in Opp. to Motion for Release, PageID 7941; Dkt.560, Schrock's Reply to Gov't Opp., PageID 7944]. This Court denied Ms. Shrock's request as premature because no mandate had yet issued and the Court would need briefing later as to Count 1:

> While the conspiracy conviction of Linda Shrock would by implication be reversed had the only object of that conspiracy been to commit hate crimes, the Sixth Circuit's decision does not talk about the continued validity of the conspiracy conviction given that the conspiracy conviction also encompassed obstruction of justice. The Court will require substantial briefing from the parties on this issue if and when it becomes ripe.

[Dkt.561, Opinion and Order, PageID 7948].

Co-defendant Anna Miller then sought rehearing in the Sixth Circuit to clarify whether the panel's opinion vacated Count 1, Conspiracy. *United States v. Anna Miller*, No. 13-3183 (6th Cir., filed Sept. 10, 2014) (6th Cir. Dkt.142). The Sixth Circuit declined to rehear or clarify the case. *Id.* at 6th Cir. Dkt.148-2.

The government sought en banc review of the August 27, 2014, decision. The Sixth Circuit denied en banc review, and issued a general mandate "reversing defendants' convictions and remanding for further proceedings," returning jurisdiction to this Court. [Dkt.564, Mandate, PageID 7951].

Resentencing is currently set for March 2, 2015. This Court requested briefing by the parties regarding sentencing, "anything else the parties wish to address," and potential relevant conduct considerations under U.S.S.G. § 1B1.3. [Dkt.568, Scheduling Order, PageID 7962].

III. Update to Samuel Mullet's Personal and Family Information

Samuel Mullet now updates his personal and family information, pursuant to 18 U.S.C. § 3553(a). This Court may consider post-sentence information and rehabilitation efforts at resentencing. *Howard v. United States*, 743 F.3d 459, 466 n.4 (6th Cir. 2014) (citing *Pepper v. United States*, 562 U.S. 476 (2011) (a district court at resentencing may consider evidence of the defendant's post-sentencing rehabilitation)).

During Samuel Mullet's past three years of incarceration, there were no security or discipline issues. While in prison, Samuel Mullet was surprised to find the support of fellow inmates, who come from cultural backgrounds far different from his. He became friends with several inmates, playing dominoes and chess frequently, and serving as a listening ear to their problems.

Tragically, his wife of 49 years, Martha Mullet, died suddenly and unexpectedly from cardiac arrest on November 11, 2014. Samuel and Martha were married in 1965, had 18 children and 110 grandchildren. Two of their children preceded her in death, their daughter Emma who died at the age of 22 from pancreatic cancer, and son Henry who died at the age of eight from pneumonia. Martha steadfastly stood by her husband's side throughout these legal proceedings, hoping he would return home soon. The BOP and the Sixth Circuit denied requests for emergency bond and furlough, and Samuel Mullet was unable to attend her funeral. Because no preacher or Bishop was present to conduct the traditional Amish funeral service, Samuel Mullet's son-in-law, Vernon Mast, one of the eldest community members, conducted a simple service for Martha. Samuel Mullet received grief counseling in prison following his wife's sudden passing.

In addition, just this week on February 17, 2015, Samuel Mullet's daughter Lizzie gave birth to a baby girl with hydrocephaly and sadly the infant died just hours after the birth. Samuel Mullet is devastated for his daughter and frustrated by his inability to be there in her time of grief.

Family and community members have supported the incarcerated co-defendants throughout their incarceration. It is particularly difficult for Mullet, due to his incarceration in Texas where the family cannot visit in person. He regularly speaks with family on the phone, but did not see his family in person until this month, on February 6, 2015, when the family made a visit to NEOCC in Youngstown.

Upon completion of his sentence, Samuel Mullet will return to his home in the Bergholz Amish Community. However, the community he returns to is forever changed due to the great loss of his wife Martha. Martha handled the community finances during Sam's incarceration, so his daughter, Wilma Mullet, is now handing all financial responsibilities. His son, Christ Mullet, runs the daily duties of farming, livestock, and the construction business for the 800-acre property. Several community members, including co-defendant Linda Schrock and most of her children, have left the Amish faith and are now living mainstream "English" lives.

IV. Counts 1, 8, and 10 – Nature and Circumstances of the Offense Conduct

Because trial occurred over two years ago and the focus was hate crimes rather than obstruction, Samuel Mullet now summarizes the events pertaining specifically to Counts 1, 8, and 10. The obstruction (Count 8) and conspiracy to obstruct (Count 1) involve a Fuji disposable camera utilized to take pictures of the Hershberger and Shrock incidents. The indictment alleges the obstruction (Counts 1, 8) took place from September 2011 through March 2012. The false statement count (Count 10) charged Samuel Mullet for the statement he made to law enforcement

on November 23, 2011, that he did not know about plans for the Hershberger incident before it occurred. [Dkt.87, Superseding Indictment].

The obstruction conduct was not violent nor did it "enable" further conduct. Rather, the obstruction conduct is run-of-the-mill under 18 U.S.C. § 1519 and § 1001. Serious obstruction conduct often involves violence, such as witness intimidation or threats, which did not occur here. Neither the burying of the camera nor the false statement prohibited the investigation or prosecution in this case. Police immediately knew the identities of the perpetrators. The photographs taken with the camera (but never developed by the defendants) in no way "facilitated" the beard and hair cutting incidents, as erroneously claimed by the government in its memo. [Dkt.603, Gov't Sent. Memo, PageID 8549]. Authorities arrested Samuel Mullet in connection to the incidents before the camera was found and before the false statement. Samuel Mullet was indicted in December of 2011, well before the camera was turned over to authorities by Johnny Mast on March 14, 2012.

The Hershberger incident took place on October 4, 2011. The disposable camera was used to take a photograph of Raymond Hershberger. [Dkt.540, Trial Tr., PageID 6766].

On October 7, 2011, several defendants (Johnny Mullet, Lester Mullet, Levi Miller and Lester Miller), were arrested by Holmes County authorities. Lester Miller was later released as he was not inside the Hershberger home during the incident. [Dkt.538, Trial Tr., PageID 6157].

On October 9, 2011, the jailed men made several recorded telephone calls to the Bergholz Community from the Jefferson County jail, during which Samuel Mullet, Lester Mullet and Levi Mullet discussed hiding the camera. [Dkt.539, Trial Tr., PageID 6436; Dkt.540, Trial Tr., PageID 6731]. These discussions were overheard by authorities, and had little impact, if any, on the investigation or prosecution in this case.

On October 12, 2011, Samuel Mullet turned his son Danny Mullet and nephew Eli Miller over to Holmes County authorities and spoke with the Holmes County Sheriff. [Dkt.538, Trial Tr., PageID 6095].

The FBI first met with Holmes County officials on October 19, 2011. On October 24, 2011, the FBI officially opened an investigation of the incidents. [Dkt.540, Trial Tr., PageID 6729]. Thus, the phone calls discussing the camera took place *before* the federal investigation began.

The Shrock incident took place on November 9, 2011. Emanuel and Linda Shrock's son, Daniel, used the disposable camera to photograph Melvin Shrock after his beard and hair were cut. [Dkt. 539, Trial Tr., PageID 6429]. After the incident, the camera was kept in a drawer in Eli Miller's room at Emanuel Shrock's home. [Dkt.537, Trial Tr., PageID 6012-13]

A federal complaint was filed against Samuel Mullet, Sr., on November 22, 2011. [Dkt.1, Complaint]. Agent Sirohman arrested Samuel Mullet on November 23, 2011, and interviewed him. During the interview, Samuel Mullet stated he had no knowledge that members of the Community were considering stopping at the Hershberger home on October 4, 2011. [Dkt.540, Trial Tr., PageID 6743]. The interview was not recorded. [Dkt.540, Trial Tr., PageID 6867]. At trial, Christ Mullet, Samuel Mullet's son, testified that Samuel told Christ after the Hershberger incident that Samuel gave Johnny Mullet directions to the Hershbergers. [Dkt.529, Trial Tr., PageID 5715-16].

At the time of the search of the Bergholz Community and Samuel Mullet's arrest on November 23, 2011, the FBI was aware that Eli Miller had the camera. [Dkt.540, Trial Tr., PageID 6881]. Yet, after arresting Eli Miller from his bedroom, the FBI failed to search Eli's room for the camera. [Dkt.540, Trial Tr., PageID 6881; Dkt.537, Trial Tr., PageID 6047]. After the FBI

arrests, Daniel Shrock testified that Eli Miller called his wife, Lovina Miller, and Lovina told Linda Shrock to tell Daniel to hide the camera. [Dkt.537, Trial Tr., PageID 6014]. Daniel Shrock gave the camera to Johnny Mast, telling him to hide or get rid of the camera. [Dkt.537, Trial Tr., PageID 6015-17; Dkt.539, Trial Tr., PageID 6430].

A federal indictment was filed against Samuel Mullet and eleven other defendants on December 10, 2011. [Dkt.10, Indictment]. Johnny Mast testified that, in December 2011, he alone made the decision to bury the camera in plastic bags under a tree. [Dkt.539, Trial Tr., PageID 6430-32]. Mast did not tell Samuel Mullet where the camera was hidden. [Dkt.539, Trial Tr., PageID 6430-32]. Mast testified no one told him to lie about the location of the camera. [Dkt.539, Trial Tr., PageID 6538]. On March 14, 2012, Johnny Mast turned over the camera to authorities of his own volition. [Dkt.540, Trial Tr., PageID 6764-66].

Based on the evidence from trial, the obstruction conduct did not significantly prohibit the investigation or prosecution for the underlying conduct.

V. Relevant Conduct

This Court requested briefing by the parties specifically to address potential relevant conduct under U.S.S.G. § 1B1.3, namely: "whether the Court may consider the assaults which the Defendants committed as 'relevant conduct' notwithstanding the Sixth Circuit's decision remanding the Hate Crimes convictions, and if the Court were to do so, whether that would preclude the Government from retrying the Defendants." [Dkt.568, Scheduling Order, PageID 7962].

A. Relevant Conduct and the Now-Vacated Conduct, under § 1B1.3.

The short answer to this Court's question of whether it may consider conduct underlying a vacated count is yes, with a caveat. The conduct must still meets the definition of "relevant

conduct," be sufficiently relevant to the offenses of conviction, and the Court must make specific findings of fact that the relevant conduct is proven by a preponderance of the evidence.

This Court's second question regarding retrial on conduct already sentenced as relevant conduct is directly addressed in *Witte v. United States*, 515 U.S. 389 (1995). Under *Witte*, if this Court considers the conduct originally charged as hate crimes and imposes sentences within the statutory range for each current count of conviction, a retrial for hate crimes is not barred by the Double Jeopardy Clause.

"Relevant conduct" is defined as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3.

An offense need not have resulted in a conviction to constitute relevant conduct under the Guidelines. *United States v. Watts*, 519 U.S. 148 (1997). It is also well-settled that uncharged conduct may be included as relevant conduct under § 1B1.3, *if* sufficiently related to the counts of conviction and proven. *See United States v. Weiner*, 518 F. App'x 358 (6th Cir. 2013) (finding uncharged conduct did not constitute relevant conduct under § 1B1.3(a)(1)(A)). The Sixth Circuit has not addressed conduct underlying vacated charges as relevant conduct. The Ninth Circuit, however, holds that a court may consider conduct underlying a reversed or vacated conviction as relevant conduct at sentencing. *See United States v. Franklin*, 235 F.3d 1165 (9th Cir. 2000). Thus, conduct underlying vacated counts may be considered in some circuits as relevant conduct *if* such conduct meets the § 1B1.3 definition and is sufficiently proven.

Regardless, the government must prove relevant criminal conduct by a preponderance of the evidence. *United States v. Campbell*, 567 F. App'x 422, 425 (6th Cir. 2014) (citing *United*

States v. Corrado, 227 F3d 528, 542 (6th Cir. 2000)). Here, there are no verdicts and no findings of a hate crime beyond a reasonable doubt. Thus, before this Court may sentence based on relevant conduct, it must first make specific factual findings as to which relevant conduct, if any, is proven by a preponderance of the evidence and why the conduct it is relevant to the offenses of conviction.

B. The Now-Vacated Conduct is not "Relevant Conduct" under § 1B1.3.

The "but for" standard applies to findings of hate crimes, even as relevant conduct. Under this standard, the government must prove the defendant caused bodily injury because the victim's "actual or perceived religion was the reason the defendant decided to act—that is, 'the straw that broke the camel's back.' " *Miller*, 767 F.3d at 592 (quoting *Burrage v. United States*, __ U.S. __, 134 S.Ct. 881, 888 (2014)). The Supreme Court, in *Burrage*, noted hate crimes require but-for proof a defendant would not have acted in the absence of the victim's protected status. *Id.* at 889 (citing *United States v. Hennings*, 791 N.W.2d 828, 833-35 (Iowa 2010)). The evidence in this case fails to establish by a preponderance of the evidence the victims were attacked "but for" their religion.

The government misquotes the Sixth Circuit opinion regarding the sufficiency of the evidence by stating the majority found "no doubt" the evidence supported the government's religious-motive theory. The majority merely noted there was "no doubt" probable cause existed allowing the government to proceed to trial on its religious-motive theory, *Miller*, 767 at 601, a standard considerably lower than a preponderance of the evidence. *See Florida v. Harris*, __ U.S. __, 133 S.Ct. 1050, 1055 (2019) ("Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable-cause] decision.") (citation omitted). Mullet denies the victims were selected because of the victim's actual or perceived religion, as previously set forth at trial and appeal. [*See* Dkt. 216, Rule 29 Motion; Dkt.

264, Motion for New Trial]. The government concedes there is no evidence Mullet ordered the beard cuttings. [Dkt.545, Trial Tr., PageID 7612].

In vacating the hate crime convictions, the Sixth Circuit discussed each incident at length. The multitude of motivations, including "parental mistreatment, personality conflicts, harassment, power struggles, and interference with family relationships" all served to defeat a but-for finding in its harmless error analysis. *Id.* at 591, 594. The Sixth Circuit noted even this Court remarked upon the difficulty of proving a but-for standard given the evidence in this case:

> When all is said and done, considerable evidence supported the defendants' theory that interpersonal and intra-family disagreements, not the victims' religious beliefs, sparked the attacks. And all of this evidence could have given a reasonable juror grounds to doubt that religion was a but-for cause of the assaults. As the district court judge remarked in considering whether to give a but-for jury instruction, it would be difficult—maybe 'impossible'—'to determine beyond a reasonable doubt [that] the defendant[s] would not have [attacked] but for the victim's religion or perceived religion.' R. 314 at 25–26. The defendants' lawyers, we suspect, could not put it any better. Any such difficulty confirms that a properly instructed jury, not this court, must decide the but-for causality question for itself.

Miller, 767 F.3d at 599-600.

The Sixth Circuit also rejected the government's argument that, because beards were cut, the incidents must have been religiously-motivated, an argument which the government attempts to re-raise now. [Dkt.603, Gov't Sent. Memo, PageID 8543]. The Court held that the method of attack does not explain the motivation:

> That the means of assault involved religious symbolism confirms only that [a defendant] knew how best to hurt his parents. It does not seal the deal that his parents' faith, as opposed to their lack of support for him, was a but-for motive of the assault.

Miller, 767 F.3d at 595-96. Furthermore, "the mixed verdict [due to the acquittal on Count 3] casts some doubt on the idea that a faith-inspired manner of assault *necessarily* equals a faith-inspired motive for assault." *Miller*, 767 F.3d at 596 (also at 600 ("why didn't the

government obtain a conviction on one of the five charged hate crimes even under the less-than-but-for-cause standard that the district court gave and even when the alleged religious mode of assault (cutting the victim's beard) was the same?")). Finally, the appellate court noted it is improper to assume a religious motivation simply because religion is central to the Amish society:

> Nor is it fair to say that, because faith permeates most, if not all, aspects of life in the Amish community, it necessarily permeates the motives for the assaults in this case, no matter how mundane the personal, power, or getting-one's-way disputes that formed the backdrop to these assaults. Even people of the most theocratic faith may do things—including committing crimes—for non-faith-based reasons. And even ostensible faith leaders, whether Samuel Mullet or Henry VIII, may do things, including committing crimes or even creating a new religion, for irreligious reasons.

Miller, 767 F.3d at 598.

Notably, the original and revised PSR's do not include Count 3, an acquitted count, as "relevant conduct." Instead, the PSR's list the behavior in Count 3 as "Offense Behavior Not Part of Relevant Conduct." [Dkt.590, PSR at ¶ 86, PageID 8324]. The same principle applies to the now-vacated Counts 2, 4, 5, and 6, which do not amount to "relevant conduct" under §1B1.3. The Court is of course free to consider any information at sentencing for variance purposes, but it may not use non-relevant conduct for its guideline calculation.

"*Considerable evidence* supported the defendants' theory that interpersonal and intra-family disagreements, not the victims' religious beliefs, sparked the attacks." *Miller*, 767 F.3d at 600. At most, the incidents are assaults for relevant conduct purposes, not hate crimes, as a "hate crime" is a specifically-defined federal offense not sufficiently proven here. The government fails to establish a federal hate crime by a preponderance of the evidence under a "but for" standard. Thus, to re-impose the same sentence is unjust.

VI. The Kinds of Sentences Available and the Sentencing Range Established for the Offense Under the Advisory Sentencing Guidelines

There is no applicable mandatory minimum in this case. The parties dispute the applicable guidelines and range. Under Mullet's calculation, the base level of 14 for obstruction controls and yields a guideline range of 10-16 months (after a 2-level downward adjustment for minor role in the offense). Samuel Mullet has already served 39 months of incarceration at the time of this filing.

The government's alleged "tiers" of defendants made little sense at the original sentencing and makes less sense now. Several defendants are capped at 60 months under Count 1, even those the government originally listed as high-tier defendants. Furthermore, the PSR (adopted by the government) makes several mistakes in its guideline calculation, such as: cross-referencing to kidnapping; grouping based on vacated counts; unwarranted enhancements for vulnerable victim and obstruction of justice; and an improper enhancement for role in the offense. These mistakes result in an extraordinarily high guideline range of 324-360 months (Level 41 and CHC I), which is well above the statutory maximum for Counts 1 and 10 (60 months) and Count 8 (240 months).

The PSR and the government invite procedural error by disregarding the guideline manual's instructions and asserting new enhancements not proposed at the original sentencing.

A. Offense Level

The PSR correctly starts with Conspiracy at § 2X1.1(a), cross-referencing to Obstruction at § 2J1.2. The obstruction guideline sets a base offense level of 14, pursuant to § 2J1.2(a). The obstruction guideline also contains a cross reference at § 2J1.2(c)(1), stating: "if the offense involved obstructing the investigation or prosecution of a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is

greater than" level 14. Using § 2X3.1, this guideline instructs the Court to use a base offense level "6 levels lower than the offense level for the underlying offense," which must not be lower than 4 and not higher than 30. U.S.S.G. § 2X3.1(a)(1) and (3)(A).

The central dispute is the application of § 2X3.1's cross-reference. Unlike the typical obstruction case, there are no underlying offenses of conviction. *See e.g. United States v. Allebban*, 578 F. App'x 492, 506-7 (6th Cir. 2014) (affirming § 2J1.2 and § 2X3.1 cross-reference to bribery guidelines where defendant was guilty of both obstruction and soliciting or accepting bribes). The PSR and the government erroneously suggest application of the kidnapping guideline (through the hate crime guideline's cross-reference at § 2H1.1(a)(1)), which results in an extraordinary high guideline range. As set forth above, a "hate crime" is not sufficiently proven by a preponderance of the evidence (the level of proof required to apply a cross-reference).

In its scheduling order, this Court refers to the incident conduct as "assault," which is sentenced under § 2A2.3 (Assault). Thus, for comparison purposes only, Mullet includes discussion of the Assault guideline (§ 2A2.3), the Aggravated Assault guideline (§2A2.2),[1] and the hate crime guideline (§ 2H1.1) A chart set forth below at page 26, illustrates that, even if the disputed cross-references and enhancements are included, the obstruction guideline still yields the highest possible guideline range and should be applied.

[1] Mullet maintains the incidents did not constitute aggravated assault, because the incidents did not involve a "dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon" U.S.S.G. § 2A2.2, Appl. Note 1.

1. Kidnapping Does Not Apply

The Sixth Circuit did not address the definition of kidnapping used at trial nor the disputed cross-reference (under the hate crime guideline § 2H1.1(a)(1)) to the kidnapping guideline of § 2A4.1. Thus, this issue remains ripe and is not "recycled" as the government suggests.

The government concedes the underlying conduct may be viewed as "less serious" than cases involving death, grave physical injury, or any period of significant restraint or confinement. [Dkt.603, Gov't Sent. Memo, PageID 8549]. Yet, the government seeks to apply § 2A4.1 for mere incidental restraint with no verdict of kidnapping.

In sentencing, there is gradation – from no restraint, to restraint (§ 3A1.3; § 5K2.4), to kidnapping (§ 2A4.1). *See United States v. Gray*, 692 F.3d 514, 517 (6th Cir. 2012) (affirming 36-month sentence including § 3A1.3 two-level enhancement where victim inmate died after assault and restraint with "double handcuffs, leg shackles, and a belly chain" and choke hold). Here, the underlying conduct does not even meet the Chapter Three enhancement for "restraint of victim" under § 3A1.3, which applies a two-level increase for physical restraint. The term "physically restrained" is defined at § 1B1.1 as: "the forcible restraint of the victim such as being tied, bound, or locked up." U.S.S.G. § 3A1.3, App. Note 1; § 1B1.1, Appl. Note 1(K). The Guidelines also provide for an upward variance under § 5K2.4 where a person was "abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense." Yet, neither of these guideline provisions is discussed by the PSR or the government. Instead, the government skips straight to the kidnapping guideline, § 2A4.1, which only applies to *federal* kidnapping.[2]

[2] Federal kidnapping, set forth at 18 U.S.C. §1201, requires: (1) the defendant knowingly and willfully kidnapped, abducted, seized, or confined another person; (2) for ransom, reward, or other benefit; and (3) traveled in interstate commerce or willfully used an instrumentality of commerce. *United States v. Ouedraogo*, 531 F.App'x 731, 742 (6th Cir. 2013) (citing *United States v. Brika*, 487 F.3d 450, 456 (6th Cir. 2007)).

U.S.S.G. § 2A4.1, comment (backg'd.). To apply the kidnapping guideline to incidental restraint renders the restraint enhancement of §3A1.3 and the policy at § 5K2.4 meaningless.

This is not a kidnapping case. The defendants were not charged with conspiracy to commit kidnapping, nor were state or federal law enforcement officials investigating a kidnapping when the obstruction conduct occurred. The incident conduct is most analogous to the crime of assault, because there was no more restraint than necessary to commit the brief assault of hair and beard cutting. [Dkt.528, Trial Tr., PageID 5277, 5454; Dkt. 537, Trial Tr., PageID 5819, 6007].

At Mullet's trial, this Court applied an erroneous definition of kidnapping that is more lenient and inclusive than federal kidnapping.[3] In summarily applying the kidnapping guideline at original sentencing, this Court stated: "each of the defendants was specifically found by the jury to have committed the offense of kidnapping in connection with the hate crime attacks, and so that directs the Court to Section 2A4.1 which is level 32; obviously a very high level." [Dkt.545, Sent. Tr., PageID 7606]; *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Sixth Circuit vacated the hate crime (and kidnapping) verdicts.

The brief restraint to cut the victim's beard and hair, however, does not amount to kidnapping for guideline purposes. Current Sixth Circuit law instructs that § 2A4.1 is not applicable to state-based kidnapping conduct, *i.e.* where the victim is briefly restrained incidental to the offense. *United States v. Epley*, 52 F.3d 571 (6th Cir. 1995). In *Epley*, the Sixth Circuit

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[3] The Hate Crimes Protection Act ("HCPA"), at 18 U.S.C. § 249(a)(2), sets a statutory maximum of ten years unless the crime also involved kidnapping, which is not defined by statute or case law. A finding of kidnapping raises the statutory maximum to life imprisonment. At trial, this Court adopted the government's kidnapping definition under the HCPA: "kidnapping means 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 and circumstances that create a substantial risk of bodily harm to that person." [R.542, Trial Tr., PageID 7255]. Sam Mullet objected to the definition at trial and at sentencing, raising both issues on appeal. Because the Sixth Circuit reversed on other grounds, it did not address kidnapping as defined at trial or sentencing.

rejected the government's request to apply the federal kidnapping guideline for what amounted to a state-offense of kidnapping. In *Epley*, three police officer defendants were sentenced under § 2H1.1 for violating civil rights by conducting a false arrest and planting evidence on the victim. The victim was handcuffed and transported to the Louisville Police Department where he was placed in custody, clearly confined and restrained. *Id.* at 574. The government appealed the district court's refusal to apply the kidnapping guidelines. The Sixth Circuit affirmed the sentences, stating § 2A4.1 was **not** applicable where a defendant could not have been convicted of federal kidnapping. *Epley*, 52 F.3d at 581-82. The lead defendant received 37 months incarceration, and the other two defendants received 3 years of unsupervised probation. *Id.* at 574.

This Court failed to address *Epley* at Mullet's original sentencing. The government now tries, unsuccessfully, to distinguish *Epley*, arguing that "kidnapping" associated with a federal civil rights violation is a "federal crime." [Dkt.603, Gov't Sent. Memo, PageID 8546].[4] The federal crime of kidnapping is contained at 18 U.S.C. § 1201, which was not alleged or proven here. The term "kidnapping" as used in 18 U.S.C. § 249 remains undefined, and was the central dispute at trial.

The government does not dispute the restraint here was only that necessary to cut the victim's beard and hair, after which the perpetrators immediately left. The victims were not bound, abducted, or transported to another location against their will. The government cites *United States v. Grimes*, 348 F.App'x. 138 (6th Cir. 2009), wherein the Sixth Circuit affirmed application

[4] The government relies on the Fifth Circuit case, *United States v. Guidry*, 456 F.3d 493, 510 (5th Cir. 2006), which did not address sentencing or the kidnapping guideline. In *Guidry*, the Fifth Circuit rejected the common law definition of kidnapping under 18 U.S.C. §242, reasoning that "[f]ederal jurisdiction exists without interstate abduction because [defendant's] action constituted a violation of [victim's] constitutional rights." *Guidry*, 456 F.3d at 510. Though the Fifth Circuit did not articulate a precise definition of kidnapping in *Guidry*, it found the defendant's conduct, which included intrastate abduction, asportation, and confinement, amounted to kidnapping. "[B]ecause [defendant] drove [victim] to a secluded area, he intentionally abducted and confined [victim] without her consent." *Id.*at 510. Thus, *Guidry* supports the conclusion that a kidnapping enhancement requires more than restraint.

of a kidnapping cross-reference from the felon in possession guideline, § 2K2.1(c), under plain error review. However, in *Grimes*, the victim was forcibly abducted at gunpoint, and the defendants demanded money for his release. *Grimes*, 348 F. App'x at 139. The defendants severely beat victim with a gun, forced the victim to walk down the street at gunpoint to his mother's house to get the ransom, where they planned to kill the victim if the money was not paid. *Grimes* does not cite or discuss the ruling in *Epley*, and does not alter its ruling. Thus, under *Epley*, where a defendant "does not commit an offense that would be sentenced [under the kidnapping guideline of § 2A4.1], or commit any analogous state law offense," the guideline does not apply. *Epley*, 52 F.3d at 582.

The principal reasoning espoused in *Epley* is that state kidnapping offenses are punishable by much lower sentences than the federal crimes enumerated under § 2A4.1, creating an unwarranted and unjustified disparity. *Epley*, 52 F.3d at 582 (finding offense conduct was equivalent to state misdemeanor or low-level felony, and "does not provide an analogous underlying offense under state law that justifies sentencing under § 2A4.1."). Here, kidnapping in Ohio (from which this Court loosely adopted its definition of kidnapping) is a second-degree felony where the victim is released in a safe place unharmed. *See* Ohio Rev. Code § 2905.01. A second-degree felony is punishable up to eight years, far below the maximum of life imprisonment for federal kidnapping. *Cf.* Ohio Rev. Code § 2929.14 to 18 U.S.C. § 1201. More importantly, in Ohio, kidnapping merges with the underlying offense for sentencing when the underlying offense cannot be committed without the act of restraint. *State v. Anderson*, 974 N.E.2d 1236 (Ohio App. 1 Dist. 2012) (citing *State v. Logan*, 397 N.E.2d 1345 (Ohio 1979) (setting guidelines to determine whether kidnapping and another offense are committed with separate animus)). Here, applying the kidnapping guideline results in a range more than *triple* Ohio's statutory maximum for

second-degree kidnapping and is improper under *Epley* and the Sixth Amendment. The government does not address this resulting disparity.

The government attempts to apply case law addressing the heavily debated term "crime of violence" contained in the Guidelines' recidivist enhancements. [Dkt.603, Gov't Sent. Memo, PageID 8545-46 (citing *United States v. Jenkins*, 680 F.3d 101, 107 (1st Cir. 2012); *United States v. Marquez-Lobos*, 697 F.3d 759 (9th Cir. 2012); *United States v. Soto-Sanchez*, 623 F.3d 317, 319 (6th Cir. 2010); *United States v. De Jesus Ventura*, 565 F.3d 870, 875 (D.C. Cir. 2009))]. However, those cases sought to harmonize 50 different state definitions of kidnapping to conform to a "crime- of violence" for the purposes of recidivist enhancements at U.S.S.G. §§ 2L1.2 and 2K2.1. Neither the federal definition of kidnapping nor the kidnapping guideline were at issue in these cases.

Mullet's original sentencing memorandum cites numerous examples of federal hate crime and civil rights cases involving kidnapping under state law, where the federal kidnapping guideline was not applied. [*See* Dkt.349, Samuel Mullet's Sent. Memo, PageID 4109-12]. The government did not respond to these cases nor present a case applying the federal kidnapping guideline through § 2H1.1's cross-reference.

Finally, the range reached by the kidnapping guideline exceeds the statutory maximum on all counts, triggering *Apprendi* protections. *Apprendi* requires a jury to find beyond a reasonable doubt any fact that increases the penalty for a crime beyond the statutory maximum. *Apprendi*, 530 U.S. 466. The fact that a sentence beyond the maximum could technically result from stacking counts consecutively is irrelevant, because *Apprendi* is concerned with the sentence for individual counts, rather than the cumulative sentence. *Id.* at 474. Because there are no verdicts of

kidnapping, it violates *Apprendi* to apply the kidnapping guideline and sentence Mullet in excess of the statutory maximum for each individual count.

For these reasons, the kidnapping guideline is not applicable. The offense level of 14 set by the obstruction guideline, § 2J1.2, controls.

2. Chapter Three Adjustments

The PSR erroneously suggests enhancements under Chapter Three: +2 for vulnerable victims (Raymond Hershberger, Melvin Shrock, and Anna Shrock) under § 3A1.1(b)(1); +4 for Samuel Mullet's alleged leadership role in the offense under § 3B1.1(a); +2 for obstruction of justice under § 3C1.1; and grouping of the now-vacated hate crime counts under § 3D1.2. The government did not address these enhancements in its memorandum.

Notably, the PSR correctly states there is no Chapter Three hate crime enhancement under § 3A1.1(a). That two-level enhancement only applies "[i]f the finder of fact at trial…determines beyond a reasonable doubt" that a hate crime occurred. U.S.S.G. § 3A1.1(a). Here, there are no hate crime convictions, and, thus, the Chapter Three hate crime enhancement is not applicable.

a. No Vulnerable Victim Enhancement - § 3A1.1(b)

There can be no applicable vulnerable victim enhancement under § 3A1.1(b). A vulnerable victim is a victim of the offense of conviction "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." U.S.S.G. § 3A1.1 cmt. n. 2. This enhancement was not proposed or included in the original PSR or at original sentencing. *See* U.S.S.G. § 3A1.1, App. Note 3 (allowing cumulative application of § 3A1.1(a) and (b)). Yet, the PSR now suddenly suggests this enhancement is appropriate due to the age of Raymond Hershberger, and the age and poor health of Melvin and Anna Shrock.

There is no evidence the defendants chose Raymond Hershberger or the Shrocks due to their age, or that their age made them particularly susceptible to the criminal conduct. The typical fact-pattern for vulnerable victim cases is where the perpetrator choses elderly victims in fraud schemes, or targets minors in assaults. *See e.g.*, *United States v. Wilson*, 561 F. App'x 451 (6th Cir. 2014) (affirming vulnerable victim enhancement where particularly susceptible victims were targeted in fraud scheme); *United States v. Willoughby*, 742 F.3d 229 (6th Cir. 2014) (affirming vulnerable victim enhancement where sex-trafficking minor was particularly susceptible due to fact she was homeless runaway with history of abuse and neglect); *United States v. Harbison*, 523 F. App'x 569 (11th Cir. 2013) (affirming vulnerable victim enhancement where sexual assault victim was a minor and defendant provided victim with crack-cocaine). Unlike these cited cases, there is no evidence that Hershberger or the Shrocks were unusually vulnerable or particularly susceptible to beard and hair cuttings due to their age or health. *Cf. United States v. Pospisil*, 186 F.3d 1023 (8th Cir. 1999) (affirming vulnerable victim enhancement in hate crime cross-burning where victims were targeted because there were young children in the home and because they were new in town).

Just as this enhancement was not suggested or adopted in the original sentencing, it is improper now. The victims in this case were neither unusually vulnerable nor chosen due to their age or health.

b. Role Adjustments -- §§ 3B1.1, 3B1.2

Mullet asks this Court not to confuse his position as the Bishop of the Bergholz Amish Community with automatic criminal leadership liability for obstruction. The PSR erroneously claims Mullet was an "organizer, leader, manager, or supervisor," of five or more participants, applying a four-level enhancement under § 3B1.1(a).

Only three defendants were convicted of obstruction under Count 8, Samuel Mullet, Levi Miller, and Eli Miller. Thus, the number of convicted participants falls short of that required for a four-level leadership enhancement (requiring five or more participants). U.S.S.G. § 1B1.1(a). In addition, Mullet's minor role in the offenses warrants a two-level downward adjustment for mitigating role pursuant to U.S.S.G. § 3B1.2(b). There was no evidence presented at trial that Daniel Shrock or Johnny Mast were operating at Mullet's direction when hiding the camera.

As for the hair and beard cutting incidents themselves, the government concedes "at no time in any of the charging documents did the government state that Mullet, Sr. ordered the attacks." [Dkt. 283, Gov. Opp., p. 16 n.7]; s*ee* U.S.S.G. § 3B1.1, comment. (n.4). Rather, his now-vacated convictions rested on *Pinkerton* liability under conspiracy law and/or an aiding and abetting theory of liability, both of which essentially attribute the overt acts of one member in a conspiracy to all members. [Dkt. 293, Opinion and Order, pp. 2-3]. The Guidelines instruct a minor role downward adjustment applies when there are multiple participants, but when, such as here, the defendant is less culpable than most other participants. U.S.S.G. § 3B1.2, cmt. (nn.4, 5).

Because Mullet was not the organizer or leader in hiding the camera, a four-level increase is unwarranted. Mullet maintains he is less culpable than those defendants who actually took part in the incidents, and because he did not order the incidents, Mullet's minor role warrants a two-level downward adjustment.

c. No Obstruction of Justice - § 3C1.1

There can be no obstruction of justice enhancement under § 3C1.1, because the offense for sentencing *is* obstruction. Such an enhancement would constitute improper double counting. The Guidelines instruct that "[i]f the defendant is convicted of an offense covered by … §2J1.2…this [§ 3C1.1] adjustment is not to be applied to the offense level for that offense…."

U.S.S.G. § 3C1.1, App. Note 7. Furthermore, the obstruction guideline itself instructs: "[f]or offenses covered under this section, § 3C1.1 … does not apply…." U.S.S.G. § 2J1.2 App. Note 2(A); *see also* U.S.S.G. § 3C1.1, App. Note 8 (explaining that the § 3C1.1 obstruction of justice enhancement only applies to grouped counts when a defendant is separately convicted of both the underlying offense and an obstruction offense). Thus, the PSR's inclusion of Chapter Three's obstruction of justice enhancement constitutes impermissible double counting.

d. Grouping Applies Only to Counts of Conviction - § 3D1.1

Under the grouping rules of § 3D1.2, Counts 1, 8, and 10 are to be grouped together because these counts "involv[e] substantially the same harm" by being "connected by a common criminal objective or constituting part of a common scheme or plan," *i.e.*, obstruction of justice. *See* § 3D1.2(b). Unconvicted offenses, such as the now-vacated counts, are not to be included in grouping. "[O]ffense levels are not to be raised by the inclusion of unconvicted offenses in the multiple-count grouping provision." *United States v. Newsom*, 402 F.3d 780 (7th Cir. 2005) (vacating grouping for uncharged relevant conduct as improper) *cert. denied*, 546 U.S. 1224 (2006) (quoting *United States v. Dawson*, 1 F.3d 457, 463 (7th Cir. 1993)).

The PSR mistakenly groups the now-vacated Counts 2, 4, 5 and 6.[5] The introductory commentary to Chapter 3, Part D clearly states "these [grouping] rules apply to multiple **counts of conviction**." (emphasis added). Further, § 3D1.1(a) states, "when a defendant has been **convicted** of more than one count … ." only then does the Court determine the proper grouping for those **counts of conviction**. (emphasis added). Even the titles of Guidelines clearly indicate

[5] The PSR also mistakenly groups by victim rather than by count. This Court previously found the PSR's grouping adjustment is erroneous and grouping must be by count only. [Dkt.545, Sent. Tr., PageID 7621-22].

grouping applies to "counts," as opposed to relevant conduct: "Procedure for Determining Offense Level of Multiple Counts" and "Groups of Closely Related Counts."

Because there are no hate crime counts of conviction, the grouping of vacated counts is improper. As illustration, the original and revised PSR do not include the acquitted Count 3 in its grouping analysis. The same rule applies to the now-vacated Counts 2, 4, 5, and 6, which may not be grouped because they are no longer counts of conviction.

Thus, the PSR's grouping adjustment of +5 is improper. There is no multiple-count grouping adjustment applicable in this case, as Counts 1, 8, 10 are grouped together as a single count.

B. Criminal History Category

Samuel Mullet's criminal history score is 0, corresponding to criminal history category **I**. At nearly seventy years old, he has no prior convictions, arrests, or past criminal conduct. [Dkt.590, PSR at ¶¶ 157-159].

C. Applicable Sentencing Range

The correct guideline calculation is **10-16 months** imprisonment, based on § 2J1.2's base offense level of 14 and a two-level downward adjustment for minor role in the offense. Because the guideline range is lower than the statutory maximum of 240 months for Count 8, "the sentences on all counts shall run concurrently" pursuant to § 5G1.2(c).

For comparative purposes only, the following chart offers calculations under Obstruction (§2J1.2), and cross-references to Hate Crimes (§2H1.1); Aggravated Assault (§2A2.2); and Assault (§2A2.3). This chart includes, for comparison purposes only, enhancements for bodily

injury,[6] vulnerable victim, obstruction of justice,[7] and role in the offense.[8] As this chart illustrates, even with all of the disputed enhancements, the highest offense level is 20 for Obstruction, with a range of 33-41 months:

	§ 2J1.2 Obstruction	**§ 2H1.1 Hate Crime Act**	**§ 2A2.2 Aggravated Assault**	**§ 2A2.3 Assault**
Base Offense Level	14	6	8	4
Bodily Injury	n/a	n/a	+3	+2
Adjusted Offense Level	**14**	**6**	**11**	**6**
Vulnerable Victim	+2	+2	+2	+2
Role as Leader	+4	+4	+4	+4
Obstruction of Justice	n/a	+2	+2	+2
Total Offense Level	**20**	**14**	**19**	**14**
Guideline Range	**33-41**	**10-16 Zone C**	**30-37**	**10-16 Zone C**

Samuel Mullet thus requests a sentence of time served (39 months), which is above the applicable guideline range of 10-16 months, and within the range of 33-41 if this Court should find the disputed enhancements apply.

[6] The assault guidelines provide an increase for "bodily injury." U.S.S.G. §§ 2A2.2(b)(3); 2A2.3(1)(A), defined as: "any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." U.S.S.G. § 1B1.1, App. Note 1(B). Mullet maintains there was no physical injury to any victim under this definition.

[7] For the sake of comparison only, a two-level enhancement for obstruction is included for cross-referenced guidelines. *See* U.S.S.G. § 1B1.5(c). Mullet maintains that the express prohibitions set forth in both § 2J1.2 and § 3C1.1 prevent application of a two-level enhancement for obstruction even if a separate guideline section is cross-referenced.

[8] A "dangerous weapon" enhancement is not included, because under the aggravated assault guideline, increasing a base offense level already based on the use of a dangerous weapon constitutes impermissible double counting. *See United States v. Farrow*, 198 F.3d 179, 194 (6th Cir. 1999).

VII. The Need to Avoid Unwarranted Sentence Disparities

The 39 months served to date by Samuel Mullet is a proportionate sentence to other obstruction cases. National statistics, compiled by the Sentencing Commission, reveal that the mean average sentence for an obstruction (administration of justice) offense is **18 months** overall. *See* U.S. Sent'g Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl. 14. A sentencing court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" before imposing a sentence, pursuant to 18 U.S.C. § 3553(a)(6).

The government continues to seek a 15-year sentence, citing no cases imposing such a high sentence for similar obstruction conduct. Even when compared to civil rights offenses, the time served to date by Samuel Mullet is proportionate to the national average for such offenses. The mean average sentence for a federal civil rights offense is **38 months** overall. *See* U.S. Sent'g Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl. 14. The mean average sentence for a federal assault case is **30 months** overall. *Id.*

Recent Sixth Circuit opinions addressing obstruction sentences show that 39 months is proportionate to similarly charged offenses. *See United States v. Adams*, __ F. App'x __, 2015 WL 409815 (6th Cir. Feb. 2, 2015) (affirming **48-month** below-guidelines sentence for death threats to a witness and posting the confidential informant's picture and identification on Facebook); *United States v. Allebban*, 578 F. App'x 492, 499 (6th Cir. 2014) (affirming **41-month** sentence for assisting in cover-up of bribery and extortion payments to county government officials); *United States v. Gray*, 692 F.3d 514, 517 (6th Cir. 2012) (affirming **36-month** below-guidelines sentence for correction officer defendant where victim inmate died after assault, choke hold, and restraint with "double handcuffs, leg shackles, and a belly chain" and the defendant falsified records to

cover-up the offense, resulting in additional investigation expenditures and a delayed trial); *United States v. Alatrash*, 460 F. App'x 487 (6th Cir. 2012) (affirming **21-month** sentence for making false statement to federal agent regarding bribery, fraud, and extortion offenses in Cleveland RTA construction projects); *United States v. Denham*, 436 F. App'x 627 (6th Cir. 2011) (affirming **43-month** sentence for multiple death threats to confidential informant).

The government's requested sentence is an irrational adherence to the now-vacated convictions, and ignores the resulting unwarranted sentencing disparity between similarly charged crimes. The 39-months already served by Samuel Mullet is a proportionate sentence to other obstruction cases.

VIII. Unresolved PSR Objections

The original PSR contained a number of non-guideline objections that were neither resolved nor addressed at sentencing. [*See* Dkt.339, PSR, PageID 3950-58]. The unresolved objections included, but are not limited to: the inclusion of acquitted conduct; an inaccurate factual narrative with misstatements of the evidence and testimony at trial with no citations provided; the inclusion of irrelevant and unproven conduct; and inappropriate hearsay under the guise of "victim impact evidence." [*Id.*]. Mullet now re-raises the following two objections to the revised PSR:

1. Pages 10-20, ¶¶ 37-86: Samuel Mullet objects to the inclusion of this "factual" narrative. The Court was present throughout the proceedings and should rely on the Court's own recollection of the evidence and/or the record documents for sentencing purposes. The narrative also fails to include any citations to the sources of these alleged facts. Furthermore, the narrative is prejudicial in that these allegations will follow Mr. Mullet throughout the remainder of his case.

   In addition, these paragraphs include several misstatements of the evidence at trial, alleged facts Mr. Mullet continues to dispute, and the paragraphs fail to include facts proven at trial that better explain the nature and circumstances of the offense. Rather than list a complete point-by-point objection to each factual error or factual omission in the PSR, Mr. Mullet maintains a general objection to paragraphs 37 to 86 while continuing to assert the evidence in the record is insufficient to support a finding of the alleged facts as written.

2. Victim Impact Statements, ¶ 90: This paragraph contains an unedited letter from Arlene and Myron Miller that in large part does not describe any personal impact Myron suffered because of the October 4, 2011 incident. Rather, the majority of the letter (everything after the first paragraph) improperly contains extraneous false allegations about Samuel Mullet and the Bergholz Amish Community, which are unproven, wholly unrelated to the conduct charged, and irrelevant for victim impact purposes. As such, the letter should be excluded or edited to include only the first paragraph of the letter.

Under Fed. R. Crim. P. 32(i)(3)(B), the Court is required to rule on "any disputed portion of the presentence report" or other controverted sentencing matter, or make the determination that resolving the dispute is unnecessary because it will not affect sentencing or because the Court will not consider the matter at sentencing. *See United States v. Howell,* 412 F.App'x 794 (6th Cir. 2011) (vacating and remanding final judgment for failure to resolve disputes at sentencing). Rule 32 must be strictly "followed to the letter." *Id.* at 795 (citations omitted).

IX. Other § 3553(a) Factors and Request for Downward Departure or Variance

Mullet presents additional mitigating factors under 18 U.S.C. § 3553(a). In the event this Court finds a range higher than time-served to be applicable, Mullet requests a downward departure and/or variance. The Probation Officer recognizes that an unspecified downward variance may be appropriate based on lack of criminal history and because the high range is greater than necessary in this case. [R.590, PSR at ¶ 202, PageID 8348].

A. Downward Departure as Outside the Heartland of Cases

This case, even when considering the now-vacated conduct, is factually distinct from the "typical" violent hate crime or civil rights violation. For example, recently in Geauga County, masked teens attacked several different Amish persons with baseball bats, beating and robbing them, choosing the victims at random because the Amish "were easy targets and would not report the crime." *See* Tracey Read, *Middlefield Township Teen Gets Prison in Amish Attacks*, THE

NEWS-HERALD, Oct. 27, 2014. The leader received an 8½ year prison sentence. *Id.* Another teen received 4½ years in prison, and the remaining teen will be sentenced March 5, 2015. *See* Matt Skrajner, *Middlefield Man Sent to Prison for Crimes Against Amish*, THE NEWS-HERALD, Jan. 29, 2015. The Middlefield attacks illustrate the typical fact pattern for a hate crime – random victims chosen solely because of their protected status. Here, the facts are quite different because the incidents were motivated by long-standing personal disputes and did not involve brutal violence or severe physical harm.

Even cases where a jury **acquitted** defendants of a hate crime involved the typical violent fact pattern not present in Mullet's case. *See e.g., United States v. Henery, et al.*, No. 1:14-CR-00088 (D. Idaho acquitted Feb. 13, 2015) (two defendants acquitted of hate crime where the defendants beat randomly targeted African-American man at nightclub while yelling racial slurs); *United States v. Mason, et al.*, No. 3:13-CR-298 (D. Or. dismissed May 28, 2014) (jury unable to reach verdict as to sexual-orientation hate crime where defendant allegedly beat victim with metal bolt-cutters and/or a wrench after observing the victim with a male partner and a pink poodle); *United States v. Jenkins*, 2013 WL 3158210 (E.D. Ky, June 20, 2013) (defendants acquitted of hate crime where defendants lured victim from his home, drove victim to a secluded park, restrained and brutally beat victim while yelling anti-homosexual slurs).

To avoid an unjust application of a high sentencing range, the Court may depart when a defendant's conduct is outside the typical "heartland" of cases. *See* U.S.S.G. ch. 1, Pt. A(1), n. 4(b); U.S.S.G. § 5K2.0(3). Because the government's guideline range and requested sentence are disproportionate and excessive to the actual conduct, Samuel Mullet asks this Court to vary or depart downward.

B. Samuel Mullet presents a low-risk of recidivism and the Sentencing Commission urges lower sentences for first-time offenders.

Mullet is a 69-year-old Amish farmer and ordained Amish Bishop, with an eighth grade education, and no prior criminal history, arrests, or conduct. Mullet has an extremely low risk for recidivism. The likelihood of Mullet, as a first-time offender, being reconvicted is only 2.5%. U.S.S.C., *Recidivism and the "First Offender,"* p. 14, n.28 (2004) (hereinafter "Recidivism"). As an elderly offender, Mullet's risk of recidivism is even lower, at less than 1%. Dawn Miller, *Sentencing Elderly Criminal Offenders*, 7 NAELA J. 221, 232 (2011). Furthermore, age "may be relevant" when imposing a below-guidelines sentence. *See* U.S.S.G. § 5H1.1.

There is no likelihood the defendants will engage in this conduct again. This case has served to educate both the Amish and the general population about the dangers of such conduct. Mullet's only wish is to return to a peaceful Amish community and put this ordeal behind him. Mullet asks this Court to consider his law-abiding life and find that a below-guidelines sentence is appropriate. *See United States v. Duane*, 533 F.3d 441, 453 (6th Cir. 2008) (noting district court should have addressed defendant's argument that he deserved a lenient sentence because he had zero criminal history points at age 57 "plausibly argu[ing] that even category I . . . overstated his criminal history to some degree"); *United States v Darway*, 255 F. App'x 68, 73 (6th Cir. 2007) (affirming downward variance based in part on fact defendant was first time offender).

The Sentencing Commission encourages lower sentences "for offenders who have little or no prior criminal conduct. . . first offenders are less culpable and less likely to re-offend. As such, they are deserving of reduced punishment." *Recidivism*, p. 1. Like many true first-time offenders, Mullet is over 50 years old, employed, and was married, with no history of illicit drug

use or mental illness. Offenders like Mullet with zero criminal history points have a rate of recidivism half that of offenders with even just one criminal history point. *Recidivism*, at 13-14.

A below-guidelines sentence will also save unnecessary government spending on incarceration, which has already cost the government over $95,000. *See* Dep't of Justice, Bureau of Prisons, *Annual Determination of Average Cost of Incarceration*, 79 Fed. Reg. 26996-01 (May 12, 2014) (federal incarceration costs $29,291 annually per inmate). Costs for elderly inmates are even higher, "[c]urrent estimates are that elderly inmates cost the system two to three times what is required to cover the much larger, younger inmate population, mostly because of the substantial health care burden." *Sentencing Elderly* at 231. Therefore, this Court may consider that a lengthy sentence is not necessary for the purposes of deterrence and a sentence of time-served will serve the purposes of punishment while saving unnecessary spending.

C. Collateral consequences will serve the needs of punishment and deterrence.

Defendants like Samuel Mullet whose cases attract international attention face numerous "invisible" penalties beyond those imposed in the courtroom. A significant collateral consequence for Samuel Mullet is the loss of his privacy and the stained reputation of the Bergholz Amish Community.

The Bergholz Amish Community – which was already ostracized by many Amish persons due to rampant gossip – remains shunned by other Amish communities. Bergholz members regularly attend auctions in Holmes County, but are often taunted. Local Amish persons are told not to talk or associate with the Bergholz community. The Community has been unable to find an Amish Bishop willing to perform even routine ceremonies, such as marriages and funerals. Amish Bishops are concerned about their own reputations if seen associating with the Bergholz Community. A store located on the Bergholz property serving the local Amish community is now

rarely visited by customers. The young people in Bergholz face considerable difficulty finding spouses, as no Amish community will permit their youth to associate with those from Bergholz.

A stigma will forever be attached to this Community. Such collateral consequences may be part of this Court's consideration under § 3553(a) and may support a lower sentence. *Gall v. United States*, 552 U.S. 38, 52 (2007). The Sixth Circuit approves of considering consequences of a conviction into a district court's analysis regarding "just punishment," including "the stigma attached to [a] specific offense." *United States v. Stall*, 581 F.3d 276, 289 (6th Cir. 2009); *see also United States v. Anderson*, 533 F.3d 623, 633 (8th Cir. 2008) (affirming below-guidelines sentence where conviction resulted in "loss of his reputation and his company").

Unique costs have been incurred because of the defendants' Amish culture. With so many of its men incarcerated, this self-sustaining Bergholz Community struggles to meet daily needs. For example, the community construction company is no longer able to take on all of the available jobs. The lifelong restriction on owning firearms will considerably impact this Amish community that depends on hunting for subsistence. The defendants must now hunt by non-firearm methods, which are considerably more difficult even for expert hunters.

Mullet and the Bergholz Amish Community face a lifetime of "invisible punishments" outside of the criminal justice system – more so than most defendants due to the unique nature of Amish society. Therefore, Mullet asks this Court to consider the impact of collateral consequences when determining the appropriate sentence in this case.

D. Concerns for elderly prisoners like Samuel Mullet.

When determining the appropriate sentence, Mullet asks this Court to consider his age of nearly 70 and attendant health needs. For example, Mullet requires medical footwear to prevent his legs and feet from swelling. However, NEOCC has yet to provide Mullet with the proper

footwear and his legs and feet have doubled in size due to swelling, and itch profusely. If the condition progresses, he will be unable to walk. The Supreme Court holds the obligation to provide inmates with adequate medical care as a constitutional right protected by the Eighth Amendment. *Brown v. Plata*, 131 S.Ct. 1910, 1928-29 (2011) (citations omitted). To date, NEOCC continues to violate Mullet's Eight Amendment rights. Incarceration is more detrimental for an aging offender such as Mullet than for a young offender. Thus, Mullet asks this Court to consider his age and health when determining a sentence.

X. Conclusion

The sentence imposed following remand must be based solely on sufficiently proven conduct, and not based on the government's disagreements with Samuel Mullet's beliefs. Imposing the same sentence of 15 years for conduct not proven beyond a preponderance of the evidence under the correct standard of law is unjust. A district court is to impose the **lowest** sentence that will meet the four purposes of sentencing: justice; deterrence; incapacitation; and rehabilitation. 18 U.S.C. § 3553(a)(2); *Kimbrough v. United States*, 552 U.S. 85 (2007).

The applicable guidelines for obstruction result in a range equal to or less than time served, which adequately reflects the conduct of conviction. The obstruction conduct was not violent and did not significantly impede or prohibit the investigation or prosecution of the incidents. For the reasons set forth herein, Samuel Mullet respectfully requests a sentence of time served (39 months), which is sufficient but not greater than necessary to achieve the statutory goals of sentencing, pursuant to 18 U.S.C. §§ 3553(a) and 3661.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2015 a copy of the foregoing **Samuel Mullet's Sentencing Memorandum** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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