No. 17-2025, 18-1302

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United States of America,

v.

Younes Kabbaj

ON APPEAL FROM ORDERS/JUDGEMENTS ISSUED ON MAY 2ND 2017 (ECF#137) AND JANUARY 26th 2018 (ECF#176)
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Case No. 16-cr-365-MAK (Judge Mark A. Kearney)

INFORMAL BRIEF

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--- The pleadings listed above contain all sworn testimony, legal arguments, definitions and case law supporting the appeal and are incorporated via reference into this appeal brief. The Motions to Dismiss ("MTD") attached as ECF #033, #036, #046, #061, #070, #073, #092, #101, #110, #117, #118, #119, #122 are collectively referred to herein as the "MTD Indictments." The sworn declarations attached as ECF #45, #53, #61, #101, #122, #135 are collectively referred to herein as the "Sworn Declarations." The two Third Circuit filings listed above are collectively referred to herein as the "Third Circuit Motions."

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--- The pleadings listed above as ECF#042, #054, #062, #105, #108, #112, #124, #125, #131, #144 are collectively referred to herein as the "First Amendment Orders," and are incorporated via reference into this appeal brief.

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Additional documents attached to the Informal Appeal Brief

Exhibit 1 - Footnotes

The Footnotes ("FN") attached to this Appeal Brief as Exhibit 1 are hereby incorporated via reference into this appeal brief. They are numbered from 01 to 19, and they will be cited throughout this Appeal Brief by their number (i.e. FN#01).

INFORMAL BRIEF

The First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech … or the right of the people … to petition the government for a redress of grievances."

01. The constitution purports to grant all American citizens equal access to freedom of speech and equal access to a forum for redress of grievances. The judiciary disagrees and alleges that certain individuals and/or minority groups (i.e. religious cults) should be granted automatic First Amendment superiority over others to ensure they always "win" any public debate. If the judiciary is allowed to grant any particular religion the ability to violate the First Amendment rights of others in order to cheat in a public debate about a matter of such public importance as terrorism, then it is the public who is victimized by such a heinous crime. This case documents how our government completely collapsed once the judiciary decided to join an ongoing terrorism conspiracy to rig the 2016 election in favor of Hilary Rodham Clinton, thereby directly resulting in the mass murder of (at least) 49 persons in Florida (permanently disqualifying the judiciary as an impartial arbiter of this unprecedented dispute).

02. Appellant first came into dispute with a government-political-religious cult/mafia called the Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Atheist, + etc. ("LGBTQIA+" or "LGBT") in 1987 after being subjected to an attempted sexual molestation by the headmaster of one of their elite private schools known as the American School of Tangier (herein "AST," a private K-12 school incorporated in Delaware with campuses in Morocco). The Board of Directors for AST is comprised of numerous LGBT high-level government officials running a Hollywood-based pedophile ring in Morocco for 6 decades. After appellant's family reported the attempted molestation to law enforcement in 1987, he was thereby subjected to life-long LGBT retaliation to silence him from speaking out about the criminal conspiracy he witnessed.

03. As the scandal continued to expand following the original incident in 1987, the LGBT initially conspired from approximately 1991-2016 to entrap appellant into involvement with terrorism so they could justify killing or imprisoning him (for life) to remove him as a witness to their crimes. The unprecedented decades-long terrorism sting operations ultimately failed because appellant consistently refused to "take the

bait" by supporting terrorism despite the fact that the LGBT placed appellant into direct contact with the main leaders of several terrorism organizations that were operating out of the Middle East, Pakistan, Afghanistan, Iraq and Iran. Appellant thereby infiltrated the 911 conspiracy long before the 911 attacks, and he ultimately became the only investigative journalist to directly witness the inner workings of how (and why) the attacks occurred. As a result of appellant's successful investigative journalism operation and hard-earned whistleblower status, this vast LGBT conspiracy eventually fizzled out into nothing more than a bungled scheme to rig both the 2012 and 2016 presidential elections as follows:

The 2009-2010 selective/vindictive/malicious prosecution for "true threats"

04. Starting approximately 2005, the LGBT thereby engaged a complex scheme to try and lure appellant back to Morocco for employment at the same school where he was subjected to attempted sexual molestation in 1987. This offer of employment was initially presented as a "waving of the white flag" by AST following assassination of their "molester in chief" Joseph McPhillips in 2007 (20 years after he first targeted appellant in 1987), when in reality it was instead part of a continued LGBT strategy to keep appellant within exploitation-range of their crimes by placing him under direct surveillance through this maliciously-orchestrated offer of employment.

05. After appellant went to work at AST in 2007 (only after McPhillips was assassinated), he continued to witness additional crimes committed by the LGBT and immediately reported them to the AST Board of Directors as legally required by his "mandated reporter" status. When AST failed to convince appellant to participate in the cover-up of this criminal activity to thereby obtain blackmail material against him (which is now confirmed to be the purpose of extending employment to the appellant to begin with), they illegally terminated his employment in 2009 and launched a public smear campaign targeting him with illegal defamation, fighting words, true threats, harassment, stalking, violence and terrorism to "get ahead" of the scandal they created.

06. The LGBT finally launched their First Amendment "master plan" by recruiting three of their members who are United States Ambassadors to thereby file a false criminal complaint against appellant (a natural born American citizen residing in a foreign country) directly with the King of Morocco (a foreign

head of state) seeking to illegally imprison appellant in a foreign country for "criminal defamation" (after appellant threatened to publish truthful information about LGBT crimes in response to the illegal public smear campaign launched by the LGBT against appellant in Morocco). Although defamation is classified as a criminal offense in Morocco (just as it should be everywhere), it is still only a civil offense in America. It is thereby unprecedented for three United States Ambassador to demand that a US Citizen be imprisoned in a foreign country for "criminal defamation" which is not even a crime in America, despite the fact that appellant only threatened to publish truthful information that is clearly protected by the First Amendment.

07. Appellant was never arrested following the false criminal speech complaint filed against him by the LGBT Ambassadors in Morocco in 2009-2010 alleging various "crimes" that never happened, and thus he was free to engage a successful legal defense resulting in dismissal of all charges after the Moroccan federal police (and the King's personal military police force) confirmed that the Ambassadors were simply begging the King to grant them a "personal favor" and imprison appellant to silence him from speaking out about what he witnessed. The Moroccan Courts eventually ordered AST to pay the appellant substantial financial damages after their LGBT were found guilty of defamation and unlawful termination of appellant's employment.

The 2013-2015 selective/vindictive/malicious prosecution for "true threats"

08. Appellant returned from Morocco to the United States in 2010 and filed a lawsuit against the LGBT hierarchy of AST in the original District of Delaware Case No. 10-cv-431 (the "2010 Case") seeking redress for the spectacular LGBT crimes committed against him in Morocco and restraint of future LGBT crimes that were being threatened to specifically sabotage appellant's terrorism mediation operations (which were still ongoing at that time). The 2010 Case initially resulted in the LGBT apologizing for their crimes and offering to pay appellant substantial financial damages to withdraw his claims as memorialized in a settlement contract executed in 2012 (the "2012 Contact") between appellant and the King of Morocco via the King's registered foreign agent and mediator on behalf of the AST pedophile ring, Ambassador Edward M. Gabriel. AST thereby paid appellant approximately $171,111.11 in damages (over three

payments) to compensate his financial losses incurred as a result of their illegal activity, and they also provided him two letters of apology for their crimes.

09. The 2012 Contract directly restrains all AST operatives from using any media (print, television, internet) to attack, harm, damage, hurt, injure, harass appellant in both America and Morocco, and it also specifically prohibits all AST operatives from being allowed to file any civil/criminal complaint against appellant without first seeking prior approval from the Delaware Court. Even though appellant had done a remarkable job at predicting the future crimes that were being plotted by the LGBT (as demonstrated by the contractual language which the judiciary helped author and draft into the agreement to address appellant's concerns), his predictions were useless in the face of a judiciary that already knew it was going to do the exact opposite of whatever the 2012 Contract required to thereby ensure that this "First Amendment" dispute is illegally rigged in favor of the LGBT through outright fraud and deception waged directly against the public through deliberate provocation of terrorism.

10. After the "coast was clear" following appellant's voluntarily dismissal of the 2010 Case pursuant to the terms of the 2012 Contract, the LGBT immediately breached it by launching yet another unprovoked illegal cyber-molestation, threat and defamation campaign falsely accusing appellant of hacking, defaming and threatening various AST operatives (which is tantamount to a claim that appellant illegally breached the 2012 Contract as part of a plot to engage espionage against the King of Morocco with whom he contracted). Appellant was not aware of the judiciary's complicity in the pre-planned breach, and so naturally he immediately approached the court to request restraint of these continued crimes and enforcement of the 2012 Contract (or trial to determine the proper penalty for the breaches which were now being committed by the LGBT based upon their false claim that appellant had "breached first"). The judiciary responded by transferring appellant's complaints endlessly between numerous jurisdictions for 4 years (from 2012 to 2016) to constructively obstruct the proceedings from moving past the initial filing of the complaints.

11. The judiciary thereby abandoned the terms of the 2012 Contract and instead thrust Appellant into a public First Amendment "competition" with the LGBT whereby they were now demanding the right

to issue defamation, fighting words and threats of violence against appellant while trying to portray their illegal activity to the public as being "endorsed by the government." This methodology actually proved to be an effective marketing tool that allowed the LGBT to vastly expand the popularity of their illegal websites because the public internet audience that had gathered to follow this soap-opera saga had actually began to believe that the LGBT version of the story was true, to the point whereby the LGBT supporters also began to threaten violence against appellant.

12. Appellant was thereby forced to respond to LGBT threats of violence with counter-threats of violence for numerous reasons, not the least of which was to ensure that the public was fully informed that appellant was also not being arrested for his counter-threats because he has the same "government endorsement" that the LGBT were claiming to be "exclusive" only to them. Once the rules of engagement were again equalized by appellant in this manner to thereby disprove false LGBT claims of "exclusive government endorsement" for their version of events, the popularity of appellant's one defensive website immediately began to overtake the popularity of the 70+ offensive LGBT websites that were launched by AST to attack him. This limited internet competition thereby demonstrated to the LGBT that once they were publicly disproven to have any special and exclusive government-endorsed right to threaten violence against appellant, the public sentiment quickly shifted to support for appellant's version of events because only the appellant is providing actual evidence to support his claims while the LGBT provide no evidence other than a disclaimer alleging "I am the government LGBT and I approve this message."

13. Thus when the LGBT foray into waging cyberwarfare against appellant quickly taught them that it is better to have the truth on your side than to have the government on your side, this painful reality thereby provoked the LGBT to further retaliate against appellant with additional false police complaints wherein they were now demanding that their LGBT operatives in law enforcement immediately act to "officially endorse" the LGBT version of events *before* they attempt to go back out into the public to ask for a "recount" (as if that would somehow help them to overcome the power of the truth). Appellant was subsequently contacted in 2013 by a New York City Police Department ("NYPD") Detective named Desmond Egan who claimed to be investigating yet another false criminal complaint filed against him by

LGBT operatives Simpson/Albro falsely alleging they feel "threatened" by one of appellant's responses to their death threats (herein the "2013 Email"). Appellant immediately confirmed to the detective that he did threaten Simpson/Albro *in response* to their criminal stalking and death threats directed against him and his elderly mother (who actually quit her job because of the illegal stalking and threats). The NYPD detective was surprised to learn that Simpson/Albro were themselves engaging illegal threats against appellant and his mother, and so he immediately offered to arrest Simpson/Albro if appellant can provide him a copy of these threats. Appellant took the NYPD up on their offer and personally travelled from Florida to NY to provide them copies of the most recent email threats he received from Simpson/Albro (just as the NYPD were themselves requesting), whereby appellant was instead ambushed with illegal kidnapping, imprisonment and assault resulting in substantial physical injuries that required hospitalization and surgery. Appellant was then criminally charged with "threatening" Simpson/Albro for merely defending himself and his family against their crimes (which have been ongoing non-stop since 2009).

14. The LGBT continued to threaten violence against appellant even after he was released on his own recognizance following the assault engaged against him by the NYPD, and they were now doing this to try and deter appellant from issuing subpoenas to trace the illegal LGBT threats for submission at trial (as Simpson/Albro were now denying sending the email threats that provoke appellant's response). Law enforcement (NYPD/FBI) not only refused to prosecute the LGBT for their continued illegal threats despite numerous complaints from appellant, but the Manhattan District Attorney even threatened to increase the false criminal charges/penalties filed against appellant to a "felony hate crime" if he attempted to serve subpoenas to trace them for submission to a jury (because they already knew their complainants were lying when they denied sending them). Continued refusal by police, prosecutors, judiciary to restrain ongoing illegal LGBT threats that continued even after appellant was arrested in New York, eventually caused appellant to respond with counter-threats to assassinate Simpson/Albro *while still under criminal prosecution for his 2013 Email* (as this literally became the only way to highlight the continued injustice that the LGBT judiciary was refusing to correct. No additional charges were attempted against appellant in New York as a result of this continued exchange of threats, nor was appellant ever accused of violating

the restraining order prohibiting him from contacting Simpson/Albro in light of the fact that the police and courts were still amazingly refusing to issue a restraining order prohibiting Simpson/Albro from contacting appellant to provoke his responses (because it is clear that if they did that, the LGBT would then lose the ability to continue to entrap appellant into these illegal imprisonments once they are finally barred, restrained and prohibited from being allowed to contact appellant for any reason whatsoever).

15. As a result of the illegal criminal prosecution attempted in New York in 2013 and the continued illegal threats directed against appellant by the LGBT as part of their attempt to force an involuntary guilty plea, the appellant was now directly cc'ing (via email) the Delaware judges who claimed jurisdiction over the 2012 Contract (Mary Thynge and Richard Andrews, herein "Thynge/Andrews") to ensure that they were fully aware of every facet of the illegal LGBT operation to assault/kidnap/imprison appellant in New York in complete breach of the 2012 Contract. Thynge/Andrews instead increased their crimes by joining AST to file yet another criminal complaint against appellant with the Delaware FBI approximately December of 2013 (about 3 months after the NY prosecution was filed) accusing appellant of unspecified "federal speech crimes." The Delaware FBI subsequently dispatched Agents to interview appellant in January 2014 when he appeared for a criminal court date in NY, whereby appellant again reminded these federal agents that Thynge/Andrews are not credible in filing a false criminal complaint accusing appellant of "speech crimes" when they are themselves complicit in protecting the LGBT to issue illegal speech against appellant in violation of Federal/State stalking and threat statutes (and also the 2012 Contract).

16. The Delaware FBI concluded appellant's January 2014 interview by claiming that they would investigate the illegal speech/threats directed against him by the LGBT, whereby they instead disappeared and refused to contact any of the independent witnesses offered by appellant during that specific interview (despite asking for their contact information, which appellant immediately provided them). The judiciary then acted to exonerate the FBI for their refusal to investigate the illegal threats issued against appellant and his family by declaring that "threats of violence" (including appellant's responses) are being classified as "inappropriate" civil conduct subject to possible monetary sanctions. This ruling thereby allowed the FBI to prematurely terminate their "investigation" of the LGBT speech crimes at exactly the moment when

it came time for the FBI to contact independent witnesses that will implicate the LGBT in issuing illegal threats of violence against appellant and others (in clear violation of 18 USC 875c and other federal *criminal* statutes). These judicial findings and rulings are documented as follows:

> **2014-04-07, District of Delaware Case No. 13-01522, ECF#97 (Pg 15-16)**
> "The Court notes that Plaintiff's filings have included threats of violence … At this juncture, the Court will not sanction Plaintiff ... The Court, however, warns Plaintiff that if he continues inappropriately, his actions may be addressed by sanctions, including monetary sanctions."

> **2014-11-12, District of Delaware Case No. 10-00431, ECF#77 (Pg 7-9)**
> "The affidavit states that the undersigned made a knowingly false claim and accused Plaintiff of threatening the Court … the USMS conducted the interview [of appellant] after some consultation with the FBI and the United States Attorney's Office. In light of the totality of the circumstances … an analysis of all pertinent evidence known at this time … do[es] not mandate recusal by the undersigned."

17. Appellant eventually defied the continued LGBT threats of violence by serving subpoenas to trace their illegal threats for submission to a jury in the NY criminal trial, whereby he also discovered that a substantial portion of this internet traffic was routed through a "proxy" company located in Pennsylvania for the express purpose of attempting to obscure its origin (further demonstrating the LGBT clearly knew that what they were doing was a crime). Appellant successfully traced the illegal threats all around the globe and directly to home residence of Simpson/Albro despite their use of advanced internet proxy technology (as verified by sworn affidavits provided directly by the ISPs as attached in Appendix G), whereby he then declared ready to proceed to trial in NY in Jan-2015. The LGBT prosecutors in New York responded by dismissing the case in Feb-2015 to prevent a public jury in New York from denying them the ability to refile the case in a jurisdiction where the judges are more willing to engage the level of criminal activity necessary to ensure that appellant is forcibly subjected to a falsified conviction (so that the LGBT can finally achieve the "government endorsement" they need to come back out of the closet).

18. The refusal by the judiciary to allow appellant to restrain this illegal LGBT speech via a court process thereby mandated that appellant establish his own First-Amendment protected whistleblower website in 2014 (www.markshermansimpson.com, herein the "Defensive Website" attached as Appendix F) to dispute the ongoing illegal threat/defamation campaign launched against him by the LGBT. The

LGBT immediately responded to the Defensive Website by sending a barrage of attorney letters to appellant's ISPs demanding they remove the website from the internet because it is "threatening" to the LGBT (despite the fact that the Defensive Website does not violate any of the ISP terms of service). When the ISPs refused to remove the website because it contains whistleblower speech that is clearly protected under the First Amendment, the LGBT demanded that the judiciary order appellant to remove his Defensive Website from the internet. The judiciary refused because there was no way to remove the website from the internet without openly admitting their bias, and so they plotted to illegally imprison appellant as the means by which to forcibly take down his Defensive Website without creating additional First Amendment entanglements with the powerful ISPs (who themselves affirmed that appellant's speech is clearly protected by the First Amendment).

19. When appellant also started to analyze the origin of internet traffic to his Defensive Website, he additionally discovered the frantic LGBT efforts to remove it based upon the number of visits to the site which were originating from IP addresses owned by various courts and other government agencies involved in this dispute (to include the Executive Office of the President of the United States, whereby several federal officials also confirmed to appellant that President Obama was directly aware of this dispute). The LGBT thereby hatched a plot to "shut down" the appellant's First Amendment-protected Defensive Website by continuing to issue illegal threats against him in preparation for the "grand finale" kidnapping they were all plotting for election year 2016 (after successfully rigging the 2012 election by convincing the Appellant that the 2012 Contract he executed with the King of Morocco was valid and authentic). In the meantime, the 2013 NYPD assault/kidnapping thereby caused appellant substantial physical injuries requiring hospitalization/surgery and resulting in medical bills in excess of $40,000. Appellant was forced to travel from Florida to NY almost every month from 2013-2015 to keep up court appearances at tremendous expense (approximately $20,000), despite the fact that the LGBT already knew that the proceedings were never heading towards trial once appellant successfully traced the illegal LGBT threats used to provoke him.

The 2016-present selective/vindictive/malicious prosecution for "true threats"

20. Third times a charm: After the LGBT failed to secure a falsified conviction against appellant as part of their two prior illegal speech prosecutions taking place from 2009-2015 in Morocco and New York (and another federal investigation that occurred approximately 2013-2014 which never proceeded to criminal prosecution because Judge Andrews subsequently declared that "threats of violence" will be treated as a civil matter to be punished by monetary sanctions), they regrouped to thereby continue their internet campaign of illegal defamation, threats, stalking and harassment for another year in preparation for their 2016 election year "surprise." Appellant wrote his last email response addressing these continued threats on February 18th, 2016 (the "2016 Email"), which contained language identical to hundreds of his prior responses issued from 2009 to 2016 (which FBI didn't prosecute because they are clearly responsive to illegal unprosecuted LGBT provocations). The 2016 Email was then used as justification to kidnap appellant prior to the 2016 election because the purpose of the kidnapping was not to punish any alleged "speech crime," but rather to physically prevent appellant from travelling to the Middle East to expose crimes committed by Hillary Clinton and her direct friends/associates.

21. After appellant sent the 2016 Email to Maryland-based LGBT operatives of AST named Ambassador Gabriel and Larry Seegull (while Appellant was himself physically located in Maryland), the LGBT thereby immediately jumped to implement their "new and improved" kidnapping scheme by forwarding the 2016 Email out of the neutral jurisdiction of Maryland and the Fourth Circuit (which has no prior involvement in the speech litigation which took place in Delaware from 2010 to 2016) to the alternative jurisdiction of a conflicted and corrupt LGBT Magistrate Thynge in Delaware (and the LGBT Third Circuit), with a clear "wink and nod" instructing her to file false criminal charges against appellant in the LGBT-biased jurisdiction of Delaware/Third Circuit. This prohibited activity is typically called "forum-shopping."

22. Appellant was subsequently kidnapped into the preferred LGBT jurisdiction of the Third Circuit pursuant to a second false FBI "speech" complaint filed against him by Thynge/Andrews since approximately 2013 (where impropriety is automatically infused into every aspect of the proceedings in

both the District and Appellate level based upon prior involvement with the civil speech litigation that they unilaterally converted into a criminal proceeding against appellant while exonerating AST from all civil/criminal prosecution for their crimes). The Delaware FBI then jumped to illegally seize appellant's computer (without a warrant) to destroy all the evidence he accumulated while investigating and documenting this illegal LGBT terrorism conspiracy (to thereby prevent appellant from defending against the false charges). These very serious felony crimes by the FBI and judiciary (occurring in broad daylight) further demonstrate exactly how LGBT threats of violence continue to be proven credible because they are clearly supported by vast government resources, complicity and loyalty to LGBT religion spanning numerous jurisdictions/branches of government.

23. Appellant documented the illegal FBI destruction of his litigation archive (which took him years to assemble, organize and prepare specifically for defending against the campaign of illegal prosecutions attempted since 2009), by establishing that these files were contained on his computer at the time when it was illegally confiscated by the FBI without a warrant, only for the files to later turn up "missing" at some point before the FBI relinquished custody of the computer to a third-part computer forensic expert hired by the court. The LGBT judiciary thereby extended a professional courtesy to the FBI by refusing to sanction them for "losing" exculpatory evidence that implicated all of them in crimes (while it was in their custody), as if only a video-recording of the FBI directly deleting these files (or an affidavit admitting to the crime) will suffice to trigger sanctions. The judiciary also refused to release appellant from his unlawful pretrial kidnapping so he could reconstruct the evidence himself *despite the fact this illegal seizure and destruction of exculpatory evidence by the FBI further mandated immediate dismissal of the indictment with prejudice as the only appropriate sanction*. "You scratch my back, I'll scratch yours."

24. The LGBT judiciary engaged additional misconduct by issuing numerous other provocative rulings that clearly demonstrate their illegal bias and impropriety, to include biased and fraudulent discovery (and other) rulings prohibiting appellant from serving subpoenas to compel witnesses/evidence for trial, and prohibiting access to FBI investigative files concerning the obvious pattern of illegal "criminal speech" prosecutions engaged (or otherwise contemplated) against appellant from 2009-2015 (all of which

are now clearly relevant to yet another "criminal speech" prosecution being attempted since 2016). The judiciary also prohibited appellant from demanding testimony/discovery from Judge Andrews despite the fact that he joined Thynge in a prior false federal "speech crime" complaint filed against appellant in 2013, the eventual outcome of which was a ruling by Judge Andrews directly affirming that "threats of violence" will be treated as possible inappropriate (not illegal) conduct subject to civil (not criminal) sanctions, to include a possible fine (not decades in jail) as documented in Paragraph 16 of this brief.

25. Appellant also attempted to recuperate exculpatory evidence deleted from his computer by requesting the judiciary provide him with copies of his own emails/pleadings that he sent to them over the years (including those which the Delaware judiciary previously used to file a prior false FBI "speech" complaint against appellant in 2013-2014). The judiciary ordered Thynge to provide appellant copies of these emails, and Thynge responded by claiming that she already deleted them despite the fact that they were provocative enough to warrant her joining in the filing of a previous false FBI speech complaint with Judge Andrews *who was also copied on the same exculpatory emails that Thynge deleted* (which is another reason why the judiciary prohibited appellant from seeking the discovery and/or testimony from Judge Andrews).

26. The judiciary refused to sanction Thynge for openly admitting that she destroyed her own copies of this exculpatory evidence, just like they refused to sanction the FBI for destroying appellant's copies of this evidence while prohibiting appellant from also obtaining copies directly from the FBI investigative archive of speech-related "sting operations" conducted against him for 7 years since the time when the first federal "criminal speech" complaint was filed against appellant in 2009. The judiciary further refused to allow appellant to obtain release from the pretrial kidnapping so that he could try to reconstruct copies of this exculpatory evidence illegally seized and destroyed by the FBI.

27. The record of speech prosecutions taking place from 2009-2015 thereby conclusively proves (beyond any reasonable doubt) that appellant is not a flight risk or danger to the community to justify pretrial detention in a criminal speech prosecution that was already ongoing for 7 years while appellant was free on his own recognizance the entire time, and which Thynge/Andrews treated as nothing more than a

civil matter *despite* alleged "threats of violence" (up until they reversed course without notice or warning in 2016 because clearly they were attempting to deliberately entrap appellant into an illegal imprisonment). The failed terrorism sting operations engaged against appellant since the 1990s establish quite the opposite in that appellant was using his influence among the terrorists that the federal government deliberately placed him into contact with as part of their illegal terrorism sting operations, to successfully demand a terrorism ceasefire on behalf of his father's organization (which is known as the "Islamic Mission of America") which thereby protected the American homeland from the various attacks that were being ordered by a group of rogue federal informants called "Al-Qaeda." The Bail Reform Act does not anticipate that Judges will one day become more dangerous to the public than the very defendant which is unfortunate enough to appear before them.

28. Appellant was free on his own recognizance throughout the entirety of the two speech prosecutions taking place from 2009-2015 (7 years), and nothing changed in 2016 to warrant the pretrial kidnapping of appellant in a third speech prosecution which was identical to those which already failed twice before. The judiciary thereby claims it was necessary to kidnap appellant to cure some new unspecified "LGBT danger" that suddenly surfaced as part of the illegal 2016 prosecution (and which was not present in the prior two illegal prosecutions), when the only danger was that they knowingly filed a false criminal complaint and sought to cover it up in time to rig an election in favor of their preferred presidential candidate Hillary Clinton (pictured with Ambassador Gabriel on page 1 of Appendix D4).

The attempt to rig the 2016 presidential election

29. After appellant confirmed the federal judiciary was irreversibly biased in favor of the LGBT (and also against Muslims) in February 2016 following the death of Supreme Court Justice Antonin Scalia (thereby ensuring that this litigation was going nowhere after appellant lost his only voice on the judiciary), he finally agreed to conduct a press conference to testify about the illegal conspiracy engaged by AST against another one of their victims, an imprisoned Egyptian cleric known as Sheikh Omar Abdel Rahman (herein "Sheikh Rahman," the spiritual leader of Al-Qaeda who was also very vocal against the LGBT). Ambassador Frank Wisner of AST orchestrated the illegal LGBT kidnapping of Sheikh Rahman in 1991

during his service to the Bill Clinton administration, which marks inception of the illegal LGBT conspiracy to sabotage the Islamic religion (in the same way they sabotaged the Judaic/Christian religions) resulting in several decades of terrorism violence. Hillary Clinton eventually took over for her husband as the "public relations" face of this original LGBT conspiracy, and this long-term collusion between the Clinton sect of the LGBT and the Moroccan/Shiite governments eventually evolved to include an attempt to rig the 2016 election by kidnapping appellant to prevent him from engaging a press conference to expose this unprecedented terrorism scandal. Hillary Clinton even chose Ambassador Gabriel (Chairman of AST and signatory to the 2012 Contract) as one of her main 2016 election advisors (Appendix D4) to directly reward him for recruiting Thynge to file the false FBI complaint against appellant immediately prior to the election.

30. Appellant's pretrial detention pursuant to a "speech crime" was thereby clearly orchestrated to prevent appellant from participating in a press conference in Cairo, Egypt at the end of March 2016. The press conference was also going to be attended by Muntasser El-Zayat (Sheikh Rahman's attorney), Abdullah Omar Al-Rahman (Sheikh Rahman's son), Mohamed Zawahiri (Ayman Al-Zawahiri's brother) and the Al-Hayat Media Organization. This is not the first time the FBI has engaged an illegal kidnapping for the specific purpose of preventing a citizen from exercising his First Amendment right to participate in a press conference exposing criminal activity engaged by the government. A citizen named James Marvin Thomas ("Thomas") was also kidnapped by the FBI to prevent him from attending a press conference to expose an illegal FBI terrorism entrapment scheme that was much less lethal and provocative than the terrorism entrapment scheme orchestrated against appellant since 1991. A documentary covering this scandal can be found at "http://terrordocumentary.org/"

31. Appellant's Defensive Website remained online for months after he was already illegally kidnaped starting in March 2016, but as the 2016 election date creeped closer the FBI/prosecutors thereby pounced on the real reason why they arrested appellant, which was to prevent the press conference in Egypt and also forcibly take down his Defensive Website so that the scandal does not "accidentally go viral" on the internet prior to the election. The prosecutors thereby jumped to engage their takedown of appellant's Defensive Website by submitting a copy of it into evidence during the hearing held on 8/26/2016 whereby

they falsely claim that appellant "threatened" numerous judges on his Defensive Website and thus he must continue to be denied pretrial release. This false claim was made by the prosecutors *despite the fact that the judiciary repeatedly affirmed from 2014-2016 that appellant's Defensive Website did not contain any unlawful speech warranting removal.*

32. Appellant removed his Defensive Website from the internet immediately after federal prosecutors falsely alleged that it contained additional unspecified criminal threats against judges in Delaware, Florida and New York, as appellant is in no position to argue the legality of any speech while subjected to pretrial kidnapping by the same judiciary that is falsely accusing him of "speech crimes" as part of a brazen plot to rig the 2016 election in favor of Clinton. The LGBT also previously attempted to justify their threats of violence against appellant as "lawful retaliation" for alleged "defamation" of the LGBT which is appearing on his Defensive Website, and thus this multifaceted LGBT "First Amendment" strategy clearly affirms that appellant must not only prove to a jury that his Defensive Website (and 2016 Email) is obviously void of any speech that can even remotely be considered a "true threat," but that his website also does not contain any defamatory claims which are *provoking* the LGBT to issue retaliatory "true threats" against appellant. The judiciary eventually mooted all these legal issues by unilaterally criminalizing all speech that threatens to injure the reputation of an LGBT *regardless if it involves nothing more than the publication of truth* (thereby criminalizing appellant's Defensive Website after the fact, even though it does not contain any threats or defamation).

33. In response to the illegal LGBT takedown of appellant's First Amendment-protected Defensive Website from the internet, appellant's internet supporters thereby retaliated against this illegal takedown by leaking their own "mock" version of the scandal under a different cover-story known as the "Pizza Gate Conspiracy" (which is a play on the name of the organization that is defending appellant from the LGBT, which is "Spaghetti Park"). The "Pizza Gate Conspiracy" intentionally omits reference to the actual AST pedophile scandal because it was merely a "shot across the bow" to remind the LGBT that their use of violence against the whistleblower appellant will not prevent public exposure of their crimes, nor would it help them succeed in rigging the 2016 election. The "Pizza Gate Conspiracy" was thereby leaked as a cover

story for the actual scandal, which is the AST Hollywood pedophile ring run by the LGBT religious cult/mafia since the 1960s ("https://en.wikipedia.org/wiki/Pizzagate_conspiracy_theory").

I. LEGAL ANALYSIS: SELECTIVE PROSECUTION

34. The unprecedented crimes and threats of violence directed against appellant to force his illegal imprisonment/conviction thereby mandates immediate dismissal of all charges with prejudice. This fatal flaw in the prosecution was directly addressed by appellant in his motion filed at ECF#070 requesting dismissal of the indictment for selective, vindictive, malicious prosecution (herein the "MTD Selective") and also recusal motions accusing the judiciary of themselves violating 18 USC 875(c) by inciting others to do so (through alleged "legalization" of LGBT threats). The judiciary denied the MTD Selective and all other motions based upon their unprecedented opinions filed at ECF#108, #131 as follows:

> **ECF#108, Pg1** - "Mr. Kabbaj claims he is being singled out for prosecution when the United States will not prosecute a non-Muslim homosexual for allegedly similar threats against him. He claims the United States is applying a double standard because he threatened a federal official but will not prosecute a person who did not threaten a federal official. This claim lacks merit. The United States charges Mr. Kabbaj with threats against a federal judge. His litigation adversaries did not threaten a federal judge ... the United States did not selectively prosecute him for acts which he did and others did not."
> **ECF#108, Pg 4-5** - "Mr. Kabbaj's ... theory is based on belief the people he has threatened...are similarly situated to him because they also threatened him. His argument is misplaced. Assuming, arguendo, the people Mr. Kabbaj has threatened have likewise threatened him, they would still not be similarly situated. To be similarly situated, they would need to have issued a threat to a federal judge through interstate commerce ... Mr. Kabbaj sent the February 18th, 2016 email with threats to a federal judge. The other persons did not. There is no basis for dismissing the indictment."
> **ECF#131, Pg2** - "We found no selective prosecution given the United States repeated position of prosecuting only for threats upon a Federal Judge. Mr. Kabbaj is apparently upset with the United States prosecuting him for language other persons may have used towards Mr. Kabbaj. Mr. Kabbaj has apparently been verbally battling his enemies for many years and their language includes threats to each other. But only Mr. Kabbaj used language which could fairly be interpreted as a threat to a Federal Judge presiding over his civil case. As we described in our January 24th, 2017 Order, the only charge against him relate to threats against a Federal Judge, and persons who allegedly threaten him did not violate this law. Mr. Kabbaj ignores the undisputed fact the United States charged him with threats against a Federal Judge."
> **ECF#131, Pg6** - "This Case involves threats to a Federal Judge. If, for example, Mr. Kabbaj's enemies had similarly emailed threats about a Federal Judge, he may have a better argument for selective prosecution. We disagree with Mr. Kabbaj's interpretation of the indictment relating to his conduct towards a Federal Judge."

35. The judiciary openly lies and claims (in numerous instances quoted above) that appellant was *only* charged with threatening a Federal Judge *and no one else,* yet the filings made by FBI/prosecutors

instead confirm that appellant was charged under 18 USC §875(c) for threatening *three specific persons* identified as Brian Albro (who is not a Federal Official), Larry Seegull (who is not a Federal Official), and Mary Thynge (who is a Federal Magistrate) as documented in attached in AppendixA-ECF#135 (herein the "Sentencing Memo"). The judiciary thereby unilaterally overrides the charging decisions made by the prosecutors to declare (for purposes of dismissing the MTD Selective), that appellant is henceforth *only* charged with *one* threat against *one* federal magistrate *and no one else*, and the judiciary does this because it is clear to all non-LGBT that the actual charging decisions made by the FBI/prosecutors mandate immediate dismissal of the indictment for blatant selective prosecution.

36. The MTD Selective also clearly documents the fact that appellant submitted at least one example of an illegal death threat sent to him by a Federal Special Agent named James Valdez using his *government-issued* email address at james.valdez@dhs.gov (leaving no doubt as to the purported origin of this communication), and containing a threat to kill the appellant using the unambiguous language "**I will kill you**" (which cannot be interpreted as anything other than what the language intends to convey). A Federal Agent threatens to kill a witness that is trying to file a criminal complaint to specifically deter him from reporting crimes committed by LGBT, and still the judiciary refuses to address it. The judiciary covers up this clear and brazen crime committed against appellant by a Federal Agent in violation of 18 USC 875c (the same threat statute used to prosecute appellant), by falsely alleging that all threats issued to appellant instead originate with a "non-Muslim homosexual litigation adversary" previously identified as Brian Albro (despite the fact that this particular communication clearly originating from a .gov email extension belonging to another person entirely). The judiciary further declares that the illegal threats issued against appellant by his "litigation adversaries" are not actually crimes because appellant *was not employed as a federal judge or member of the LGBT at the time when he received them*. This remarkable ruling is nothing less than direct admission of bias with regards to application of First Amendment rights, as appellant is not less of a human simply because he lacks employment as a judge and/or LGBT. A threat is a threat, no matter who is unfortunate enough to be on the receiving end of one (especially for purposes of the First Amendment).

37. The MTD Selective also documents another threat sent to appellant from an email address impersonating the identity of a Federal Judge named Joan Lenard of the SDFL, who was (at that time) presiding over civil proceedings filed by appellant in Florida against these same LGBT. The judiciary refused to acknowledge this additional "anonymous" threat sent to appellant from "lenardj@hotmail.com" as clearly purporting to originate with Judge Joan Lenard (who was herself prominently featured on appellant's Defensive Website). The judiciary instead falsely claims that all these illegal threats originate with some "non-Muslim homosexual litigation adversary" named Brian Albro *despite the fact that the originating IPs of these threats issued by federal officials do not correspond to those already established by the ISPs to be owned by Albro*. Appellant's Defensive Website accuses at least 6 Judges including Lenard, Thynge and Andrews of involvement with criminal activity related to this dispute, and so the judiciary obviously benefits from immunizing illegal threats to be directed against appellant to force him to remove his lawful Defensive Website from the internet.

38. It is not a coincidence that appellant would eventually start to receive threats from email addresses purporting to originate with the same Federal Judges that are committing crimes on this case. Plaintiff directly witnessed an entire LGBT army of federal judges participate in the mass murder of 49 homosexuals in Florida after provoking a terrorist attack against them through their illegal imprisonment of appellant in violation of the Bail Reform Act. These same judges now have a clear motive to want to murder appellant in order to eliminate him as a witness to their crimes. A normal judiciary and/or FBI would never allow "litigation adversaries" to impersonate the identity of a federal judge for the specific purpose of sending illegal and unsolicited threats of violence to appellant to deter him from pursuing lawful claims, and to also provoke appellant to issue counter-threats against the judiciary (which is exactly why that threat was sent to appellant to begin with). The refusal by the FBI and judiciary to investigate the source of all these illegal threats (while also prohibiting appellant from tracing them so that he could earn the legal right to submit them into evidence before a jury) is thereby based upon a claim made by the judiciary alleging that this evidence is "not relevant" to appellant's prosecution for responsive counter-threats. Refusal by the judiciary to allow appellant to trace these communications for submission to a public

jury thereby makes it clear that this email threat which purport to originate with a judge, most likely did. Even if appellant received a death threat directly from the government email Judge_Mary_Pat_Thynge@ded.uscourts.gov, the judiciary already affirms that such an action would not constitute a crime in the eyes of the court specifically because appellant lacks employment as a federal judge and/or LGBT (which is the very reason why the judiciary consistently claims that threats directed at appellant are not legally relevant to the instant matter when clearly such claims are knowingly false).

39. Appellant is the victim of an illegal criminal conspiracy involving hundreds of members of the LGBT religious cult (including numerous high-level government) acting in concert with each other to illegally target appellant with crimes. There are still over a hundred untraced IP addresses linked directly to the illegal cyber-molestation campaign waged against appellant from 2012 to present, to include those which originated the illegal threats purportedly sent to appellant by federal officials using email addresses james.valdez@dhs.gov and lenardj@hotmail.com (and numerous other federal and non-federal threats whose IP addresses do not correspond to the ones already established by the ISPs to be owned by Simpson/Albro). Appellant was kidnapped specifically because he accumulated much more than the 11 sample threats documented in his MTD Selective (including additional threats from federal officials that were not published into the court record before appellant's surprise kidnapping), and the judiciary could not permit appellant to trace these threats to thereby earn the legal right to present them to a jury for review because it is clear now to appellant (and the public) that these communications must originate with the persons purporting to send them or else the judiciary would not engage all these crimes to prevent appellant from tracing them.

40. Appellant's MTD Selective thereby clearly triggered a legal obligation for the FBI/prosecutors explain why they refuse to prosecute the same LGBT that they were now recruiting as complainants against appellant for the third "criminal speech" prosecution since 2009. The LGBT prosecutors refused to explain the obvious bias despite being confronted with a version of appellant's MTD Selective in every illegal selective speech prosecution attempted against appellant since 2009. They instead responded to these motions by dismissing the criminal charges filed against appellant on the eve of trial in every criminal

prosecution where they were unable to find a Judge (outside of the Third Circuit) that was corrupt enough to actually engage all the crimes necessary to force a false conviction. The FBI/prosecutors absolutely forfeited their opportunity to challenge appellant's MTD Selective by refusing to dispute appellant's *prima facie* showing of bias, and this now requires immediate dismissal of all charges with prejudice.

41. Regardless of whether the illegal threats directed at appellant originate with Federal Agents, Federal Judges, Federal Ambassadors, "non-Muslim homosexual litigation adversaries" or any other deputized unicorns that comprise the LGBT religious structures, there is nothing in 18 USC §875(c) which requires appellant to be employed as a Federal Judge or member of the LGBT in order to be protected from illegal threats of violence and other crimes committed against him by the LGBT for decades thus far (as the judiciary again falsely alleges). These provocative rulings are now relevant to the subsequent Rule 11 violation resulting from illegal threats that obviously coerced appellant to enter an involuntary plea to a non-crime.

42. During the Rule 11 colloquy, the judiciary actually had the audacity to ask appellant if he was being threatened to abandon his defense. Appellant was so surprised by this question in light of the denial of the MTD Selective that he immediately responded in the affirmative. Only after appellant's response did he realize that the judiciary did not simply ask him that question out of remorse for its prior illegal rulings (with possible intent to reverse them), but rather it was *reluctantly asking that question only because Rule 11 required it*. After appellant quickly reminded the court that he was clearly threatened with violence to force an involuntary plea (which is an obvious violation of Rule 11), the judiciary then remarkably stated that it will only consider threats of violence as being illegally coercive under Rule 11 if issued against appellant *on the same day* he was "pleading guilty," and only if such threats contain *specific language describing explicit imminent violence (as directly quoted by the Court)*. After rigging the requirements necessary to qualify threats of violence as illegally coercive under Rule 11, the judiciary then restricted appellant to *only* disclose if he received threats matching *the exact* description set forth by the court to ensure that appellant is prohibited from testifying freely to describe exactly how and why the illegal threats from the LGBT are absolutely impacting and forcing appellant to enter an involuntary plea. Once appellant

confirmed that he didn't receive any new threats on the day of the change of plea hearing (without being permitted to discuss how the prior threats of violence were still clearly affecting him), the judiciary then prohibited any further review of all prior threats which actually did coerce appellant to enter involuntary plea. This is how the LGBT court thereby "complies" with Rule 11 after three decades of illegal LGBT threats.

43. The illegal LGBT threats issued against appellant in the days/weeks/months/years preceding the date of the plea colloquy include unprecedented threats to provoke and/or engage acts of terrorism against the innocent Muslim citizens of the Middle East to punish appellant for disclosing LGBT crimes to the public. They also include threats by the leader of Al-Qaeda (an individual identified in prior pleadings as "Hashem") to order terrorist attacks inside America if appellant does not participate in the press conference to disclose the illegal physical abuse of Sheikh Rahman (which appellant witnessed directly in 1998 during the illegal terrorism sting operations attempted against him by Ambassador Frank Wisner of AST leading up to the 911 attacks). These are not your typical threats of violence, yet the court dismisses them all as irrelevant despite the clear requirements of Rule 11 that a guilty plea must always be voluntary.

44. The LGBT's attempt to rig the 2016 election also ended up backfiring when Hashem responded to appellant's illegal imprisonment by targeting the LGBT directly in a symbolic terrorist attack that killed 49 homosexuals in Florida on June 11th, 2016 (known as the Pulse Nightclub Massacre, which is the first terrorist attack ordered by Hashem inside America since the 911 attacks). This terrorist attack is actually the most immediate and direct consequence of appellant's illegal kidnapping in this matter, and so Frank Wisner's LGBT sect subsequently assassinated Sheikh Rahman on the one-year anniversary of appellant's 2016 Email to thereby retaliate against Hashem for using appellant's detention as an excuse to order the Pulse nightclub massacre. This "symbolic" exchange of violence between various terrorist groups that are illegally holding appellant hostage (to include the LGBT, Al-Qaeda, AST), clearly makes it impossible for appellant to engage any meaningful litigation which is not sabotaged by the ever-present threat of mass-murder and assassinations (especially when the judiciary is now demonstrated to be virtually overrun by the LGBT religious sect directly implicated in this unprecedented terrorism dispute).

45. Appellant tried to force discussion of these terrorism-related issues during various court proceedings, but the LGBT judiciary obstructed this discussion and also destroyed audio recordings of eight specific court hearings wherein discussion of terrorism (and other related topics) was attempted. Anytime courtroom testimony resulted in appellant forcing the LGBT judiciary/government to blurt out something provocative that implicated them in the terrorism crimes, the audio recordings of these hearings were simply "disappeared" to facilitate further illegal alterations of "official court transcripts" to remove nearly all incriminating testimony implicating members of the judiciary with involvement in an LGBT terrorism conspiracy. In one instance the judiciary held a hearing on July 15th, 2016 (which was the first one conducted after appellant successfully predicted the June 11th, 2016 terrorist attack upon the LGBT), whereby court officials then destroyed *both* the audio recordings and transcripts because testimony exchanged at that short hearing proved that appellant's illegal detention caused the attack (Minute Sheet documenting hearing attached at AppendixC-Pg253).

II. LEGAL ANALYSIS: NATURE OF THE OFFENSE

46. Appellant attached Sworn Declarations and other filings in Appendix A (to include ECF#061 and the MTD Indictments) where he conducted a line-by-line analysis of every single word in his 2016 Email thereby affirming that it contained (among other statements) a threat to injure the reputation of the federal magistrate named Thynge to retaliate against her for illegal activity that is clearly not part of her "official duties" (unless murder is now openly acknowledged to be an "official duty" of the LGBT judges to engage against non-LGBT litigants). The 2016 Email does not contain any language that could be interpreted as illegal under the unprecedented context of this long-term dispute. The judiciary thereby responded by rewriting the laws to criminalize appellant's threat to injure the reputation as their last remaining option to prevent the already-rigged criminal trial from proceeding by convicting appellant even before he could plead his case to a jury. Appellant would not have submitted a sworn affidavit to the Court admitting a threat to injure the reputation if he had any forewarning that the Court would pounce on that affidavit as "proof of guilt." It is clear that once the Court criminalized threat to injure reputation only after appellant submitted a sworn affidavit admitting to that specific offense conduct, appellant could no longer

obtain acquittal because the prosecutors only need submit a copy of appellant's affidavit to a jury to ensure he is convicted for that "crime."

47. The judiciary's unprecedented creation of a new crime called "threatening reputation" was directly precipitated by a fatal flaw contained in the language of the indictment under Count 1, 18 USC §875(c) whereby the indictment fails to include the required statutory language describing the type of injury threatened as injury to "the person of another" (i.e. injury to the ***physical body*** of another through the use of illegal ***physical contact***). The omission of critical statutory language from the indictment thereby allows appellant to be convicted under 18 USC §875(c) for threatening to injure reputation, which is only criminalized under 18 USC §875(d) when extortion is involved. Appellant requested dismissal of the indictment because threat to injure reputation cannot be criminalized under the statutes charged (as documented in ECF#061, MTD Indictments and other Appendix A filings), which the judiciary denied in ECF#042, ECF#054, ECF#062, ECF#112 by merely changing the law to criminalize *all* threats, regardless of what is being threatened (as documented below):

> **ECF#042, Pg5 -** "Our Court of Appeals again last week discussed the elements required for conviction under Section 875(c) in the United States V. Elonis ... ***Nothing in §875(c), as reviewed by our Court of Appeals last week, requires the identity of the type of injury threatened by Mr. Kabbaj*** or [the identity of] the "other person[s]" who, in addition to a federal judge or Detective Egan, may be threatened."

48. The judiciary cites a recent Supreme Court ruling on the topic of threat jurisprudence known as *Elonis v. United States 135 S. Ct. 2001*, claiming it establishes a precedent affirming that the type of injury threatened is not a required element of the [threat] offenses charged against appellant (despite statutory language to the contrary). An individual can clearly threaten to injure a physical body (as criminalized by 18 USC §875c), or they can threaten to injure property and/or reputation as part of an extortion plot (as criminalized by 18 USC §875d), or they can threaten to injure emotions, psychological well-being, financial well-being, spiritual well-being or any other form of metaphysical well-being (which is not illegal). Not all threats are created equal.

49. When a statute clearly identifies the type of injury being threatened, so should an indictment. How hard is it for a prosecutor to simply copy the language of a statute verbatim for inclusion in an

indictment (to prevent unfair convictions based upon flawed indictments)? FN#03 includes numerous dictionary definitions of the word "threat" and its use, thereby affirming that if the mere act of issuing a "threat" is now criminalized by the Court *regardless of the type of injury being threatened*, this vastly expands the type of speech that can be charged as a crime to include threats to commit any lawful action (making the threat statutes overbroad and unconstitutional). A landlord who threatens to evict a tenant for failing to pay the rent can now be convicted of a violent felony "threat crime" under 18 USC §875(c), yet if that same landlord actually evicts a tenant for failing to pay the rent without providing advanced warning of the imminent eviction, his actions are thereby lawful. A litigant can be convicted under 18 USC §875(c) for threatening to sue someone, but if he actually files the lawsuit without providing advanced warning in the form of a threat to sue, such conduct is not a crime.

50. The judiciary thereby criminalizes appellant's threat to injure reputation as being a form of "assault" against the LGBT organism, and this is clearly based upon a religious theory promoted by the LGBT religion which alleges that the physical body is not subject to any dimensional boundaries that can contain it (and thus reputation can now be considered a physical extension of the LGBT body). The LGBT judiciary thereby openly engages its religious bias in favor of promoting the LGBT religious beliefs rather than actual written law, and it uses these religious beliefs to thereby justify kidnapping and torture of appellant's *physical* (flesh and blood) body to punish him for threatening to inflict injury upon the "reputational organ" of the "fluid/genderless/bodiless" LGBT organism.

51. Even if the judiciary unilaterally criminalizes threat to injure reputation, such offense cannot also qualify as a "felony crime of violence" because *Apprendi v. New Jersey 530 U.S. 466 (2000)* mandates that any conduct which specifically increases the statutory maximum penalty specifically applicable to any form of assault must thereby be admitted or otherwise found beyond reasonable doubt by a jury. The sentencing of appellant was done in complete violation of *Apprendi* as addressed in numerous pleadings attached to Appendix A to include ECF#135 (herein the "Sentencing Memo") and the Third Circuit Motion filed 8/18/2017. Appellant's admitted offense conduct of threatening reputation doesn't involve a threat to

engage physical contact (i.e. "non-simple assault"), thus it can only be punished as "simple assault" under 18 USC §115(b)(1).

52. 18 USC 115(a)(1)(B) & (b) assault crimes/penalties are defined/codified as follows:

(1) The punishment for an *assault* in violation of this section is (A) a fine under this title; and (B)
(i) … *simple assault [lacking physical contact or use of weapon]*…not more than 1 year
(ii) … *[non-simple] physical contact [assault]* … not more than 10 years
(iii) … *[non-simple] bodily injury [assault]* … not more than 20 years
(iv) … *[non-simple] serious bodily injury [assault]* … not more than 30 years
(2) … kidnapping … any term of years or for life
if the death of any person results … death or life imprisonment
(3) … murder in the first degree … death or by imprisonment for life
… murder in the second degree … any term of years or for life
(4) *a threat [to kidnap or murder]* …not more than 10 years
a threatened [non-simple] assault … shall not exceed 6 years

53. 18 USC §115 provides nine different official maximum penalties and one potential "maximum penalty" to punish a total of ten separate and distinct crimes, five of which specifically criminalize assault and/or the threat thereof. Nine of these crimes have statutory maximum penalties that are described using identical language which declares that the maximum punishment "is" or "shall be" a "term" of "not more than" some number of years. The *only* portion of the entire statute that uses different language to describe a potential maximum penalty is when it declares that "imprisonment for a *threatened assault shall not exceed 6 years*." Why does the statute use the words "is" or "shall be" a "term" when it describes the nine-prior statutory maximum penalties, yet in the very last sentence of the statute it proclaims (in its final dying breath) that imprisonment for "threatened assault *shall not exceed* 6 years"?

54. This difference in language was already investigated in *Great American Insurance Co. v. Norwin School District 544 F.3d 229 (3rd Cir. 2008)* (the text of which is documented in FN#18), wherein the Third Circuit itself established that the term "shall not exceed" is obviously meant to convey a different meaning than the term "is" or "shall be." This difference in language seems to indicate that 18 USC §115 is self-aware that it would be contradictory to impose two different statutory maximum penalties (of 1-year and 6-years) for offense conduct that equally qualifies to be defined as both "simple assault" and "threatened assault," although it does not correct or clarify the issue any further after essentially declaring this anomaly to be present in the statute. This fatal flaw now renders the statute unconstitutional when applied to any

indictment that alleges a "threat to assault" (and nothing more), because a statute cannot set two different statutory maximum penalties for the same offense.

55. "Non-simple assault" is a term coined by the judiciary to define any assault that involves physical contact, use of a weapon, serious bodily injury and/or intent to commit another felony (as there are typically 3-4 different types of non-simple assault). "Simple assault" is a term coined by the judiciary to define the lowest form of "assault," which is a form of assault that specifically excludes physical contact, use of a weapon, serious bodily injury and/or intent to commit another felony. Because the term "assault" comprises conduct ranging from misdemeanor "simple assault" to felony "non-simple assault," any statute that mentions the term "assault" must be clear on whether it is intending to reference the misdemeanor or felony provision of the statute (because that is what sets the statutory maximum). Congress already corrected this clearly fatal ambiguity in 18 USC §111 (the federal assault statute) by amending it to distinguish between simple/non-simple assault (as documented in FN#06), but they failed to correct this identical ambiguity in 18 USC §115.

56. It is thereby clear from the overall construction of the statute (and the prior corrections made by Congress to the original Federal Assault Statute at 18 USC §111), that Congress intended that "imprisonment for a threatened [non-simple] assault shall not exceed 6 years." The confusion arises because the statute declares the term "threatened assault" in its dying breath without clarifying <u>non-simple</u> as the *type* of assault which must be threatened in order to trigger any such 6-year maximum. The statute thereby clearly intends to punish threatened kidnap/murder with a 10-year maximum penalty, threatened [non-simple] assault with a 6-year maximum penalty, and threatened [simple] assault with a 1-year maximum penalty. A threat to injure reputation does not involve a threat to engage physical contact, use of weapon, serious bodily injury, kidnapping and/or murder, and so this conduct is only forcibly criminalized by the judiciary starting from the lowest (not highest) form of "assault" possible, which is "threatened [simple] assault." The LGBT judiciary instead criminalizes threat to injure reputation by classifying it as the highest form of felony assault possible in violation of not only *Apprendi*, but also another important

precedent relevant to this matter which is *Wurtz v. Risley, 719 F.2d 1438 (9th Cir. 1983*) (documented in FN#17, an excerpt is as follows):

> But to punish as a felony the mere communication of a threat to commit such a minor infraction when the purpose is to induce action – any action – by someone, is to chill the king of "uninhibited, robust, and wide-open" debate on public issues that lies at the core of the First Amendment. See New York Times Co. v. Sullivan, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)

57. The above quote from *Wurtz* further affirms it is unconstitutional for the minor infraction of misdemeanor "simple assault" (which is itself equally defined as a "threatened assault") to be punished as a non-violent misdemeanor warranting a one-year maximum sentence, yet a "threatened [simple] assault" is instead punished as a violent felony warranting a six-year maximum sentence. "Simple assault" simultaneously exists as both a threat and an action, and thus there is technically no legal difference between offense conduct described using the generic terms "simple assault," "threatened assault" or "threatened simple assault". The Rule of Lenity (as documented in FN#05) mandates that when a statute is ambiguous by setting out multiple or inconsistent statutory maximum penalties for identical offense conduct, that any such ambiguity be resolved in favor of imposing the more lenient statutory maximum penalty.

58. Since the judiciary has taken the unprecedented step of unilaterally criminalizing appellant's threat to injure reputation as a form of "assault" to specifically ensure he is convicted of a crime, this decision must now also conform to other legal precedents which govern how assaults must be sentenced in order to comply with *Apprendi* (as documented in ECF#135, Third Circuit Motion 10/02/2017 and other pleadings contained in Appendix A). The Third Circuit (and others) have previously affirmed that "simple assault" is not a "crime of violence" in numerous prior <u>non-LGBT</u> cases (thereby requiring this designation to also be removed from appellant's misdemeanor "assault" conviction). The judiciary thereby violates all prior precedents by unilaterally categorizing "threat to injure reputation" as "felony assault" without first analyzing the actual offense conduct admitted by appellant to confirm that he does indeed qualify to be sentenced under a greater maximum penalty than that which is applicable to misdemeanor assault (as affirmed by the following):

FN#09- U.S. v. Hathaway, 318 F.3d 1001 (10th Cir. 2003) ("Simple assault" lacks contact)
FN#10- U.S. v. McCulligan, 256 F.3d 97 (3rd Cir. 2001) ("Simple assault" lacks contact)

FN#11- U.S. v. Vallery, 437 F.3d 626 (7th Cir. 2006) ("Simple assault" lacks contact)
FN#12- U.S. v. Hazlewood, 526 F.3d 862 (5th Cir. 2008) ("Simple assault" lacks contact)
FN#13- Tran v. Gonzales, 414 F.3d 464 (3rd Cir. 2005) (Reckless acts not "crime of violence")
FN#14- PopaI v. Gonzales, 416 F.3d 245 (3rd Cir. 2005)("Simple assault" not "crime of violence")
FN#15- U.S. v. Otero, 502 F.3d 331 (3rd Cir. 2007) ("Simple assault" not "crime of violence")
FN#16- Leocal v. Ashcroft, U.S. 1, 125 S. Ct. 377 (2004) ("Crime of violence" not negligent)

CONCLUSION

59. The damage is done. The entire "war on terror" is a First Amendment scam, just like this instant decade-long "criminal speech" prosecution (which is itself a microcosm of the overarching terrorism dispute). This appeal mandates nothing less than dismissal of all charges with prejudice, and this still would not even scratch the surface of correcting this monumental injustice (if ever it could be corrected anywhere other than in the heavenly court). Appellant already completed the entirety of the unlawful 23-month sentence imposed upon him for what was a non-crime up until the moment the LGBT needed to rig an election, and so there is no relief available to correct that crime except for that which only the creator of the universe is capable of providing. Appellant is still serving an illegal 3-year term of supervised release which is also imposed in violation of the maximum 1-year term applicable to misdemeanor threat to injure reputation, thereby requiring the supervised release to be terminated immediately. Appellant has paid above and beyond the cost required of him to participate in the "legal" systems of a corrupted LGBT government that wages war upon the principles of freedom and equality that are clearly enshrined in the constitution. The LGBT judiciary can "keep the change."

Submitted 10/27/2018,

/s/ Younes Kabbaj

EXHIBIT 1

LIST OF FOOTNOTES ("FN")

FN#01 - Text of 18 USC §875 (c) & (d) (Interstate communications)
FN#02 - Text of 18 USC §115(a)(1)(B) & (b) - Retaliating against a Federal official
FN#03 - Definitions of the word "threat"
FN#04 - Federal definition of the term "crime of violence" pursuant to 18 USC §16
FN#05 - Definition of the "Rule of Lenity"
FN#06 - Modern Federal Jury Instructions 18 USC §111
FN#07 - Modern Federal Jury Instructions 18 USC §115(a)(1)(B)
FN#08 - Elonis v. United States, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (Analysis)
FN#09 - United States v. Hathaway, 318 F.3d 1001 (10th Cir. 2003) ("Simple assault" lacks contact)
FN#10 - United States v. McCulligan, 256 F.3d 97 (3rd Cir. 2001) ("Simple assault" lacks contact)
FN#11 - United States v. Vallery, 437 F.3d 626 (7th Cir. 2006) ("Simple assault" lacks contact)
FN#12 - United States v. Hazlewood, 526 F.3d 862 (5th Cir. 2008) ("Simple assault" lacks contact)
FN#13 - Tran v. Gonzales, 414 F.3d 464 (3rd Cir. 2005) ("Reckless burning/exploding not "crime of violence")
FN#14 - Popal v. Gonzales, 416 F.3d 245 (3rd Cir. 2005) ("Simple assault" not "crime of violence")
FN#15 - United States v. Otero, 502 F.3d 331 (3rd Cir. 2007) ("Simple assault" not "crime of violence")
FN#16 - Leocal v. Ashcroft, 160 L. Ed. 2d 271, 543 U.S. 1, 125 S. Ct. 377 (2004) ("Crime of violence" cannot be accident)
FN#17 - Wurtz v. Risley, 719 F.2d 1438 (9th Cir. 1983) (Threat should not be punished worse than the actions being threatened)
FN#18 - Great American Insurance v. Norwin School District, 544 F.3d 229(3rd Cir.2008) ("shall not exceed" is not "shall be")
FN#19 - United States v. Sutcliffe, 505 F.3d 944 (9th Cir. 2007) (Selective prosecution)

FN#01 – Text of 18 USC §875 (c) & (d) (Interstate communications)

(c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.
(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

FN#02 – Text of 18 USC §115(a)(1)(B) & (b) - Retaliating against a Federal official

(a)(1)Whoever (B) threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section, with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).
(b)(1) The punishment for an assault in violation of this section is (A) a fine under this title; and (B)
(i) if the assault consists of a simple assault, a term of imprisonment for not more than 1 year;
(ii) if the assault involved physical contact with the victim of that assault or the intent to commit another felony, a term of imprisonment for not more than 10 years;
(iii) if the assault resulted in bodily injury, a term of imprisonment for not more than 20 years; or
(iv) if the assault resulted in serious bodily injury … or a dangerous weapon was used during and in relation to the offense, a term of imprisonment for not more than 30 years.
(2) A kidnapping, attempted kidnapping, or conspiracy to kidnap in violation of this section shall be punished as provided in section 1201 of this title for the kidnapping or attempted kidnapping of, or a conspiracy to kidnap, a person described in section 1201(a)(5) of this title.
(3) A murder, attempted murder, or conspiracy to murder in violation of this section shall be punished as provided in sections 1111, 1113, and 1117 of this title.
(4) A threat made in violation of this section shall be punished by a fine under this title or imprisonment for a term of not more than 10 years, or both, except that imprisonment for a threatened assault shall not exceed 6 years.

FN#03 - Definitions of the word "threat"

Dictionary.com - a declaration of an intention or determination to inflict punishment, injury, etc., in retaliation for, or conditionally upon, some action or course; menace (i.e. "He confessed under the threat of imprisonment"); an indication or warning of probable trouble (i.e. "The threat of a storm was in the air").

Merriam-Webster.com - an expression of intention to inflict evil, injury, or damage; an indication of something impending (i.e. "The sky held a threat of rain").
Dictionary.Cambridge.org - a statement that someone will be hurt or harmed, esp. if the person does not do something in particular; the possibility that something unwanted will happen, or a person or thing that is likely to cause something unwanted
En.OxfordDictionaries.com -
A statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done (i.e. "The row occurred because of the claimant's complaint about the barking dog and his threats to take action about it," "I began to receive various threats, which included reporting me to the Law Society," "Her attendance at court had to be secured by a witness summons and a threat of arrest," "We interpreted the letter as a threat to sue, and we believe it was meant to be such a threat");
A person or thing likely to cause damage or danger (i.e. "Knowledge that a stress is likely to occur constitutes a threat to the individual," "These boys are dangerous, you know, and a threat to the moral well-being of all our children," "Criticizing students and putting them under pressure is seen to be a dangerous threat to their sense of self");
The possibility of trouble, danger, or ruin. (i.e. "The Company faces the threat of liquidation proceedings," "Under threat of takeover, once-sleepy executives rushed to reshape their companies," "Government funding through the Arts Council was under threat if they were rejected," "It is not so much the notion of democracy itself that is under threat");
Black's Law Dictionary 1618 (10th ed. 2014) - communicated intent to inflict harm or loss on another or [their] property …
Oxford English Dictionary 352 (2d ed. 1998) - declar[ing] ... one's intention of inflicting injury upon a person ...
American Heritage Dictionary 1801 (4th ed. 2000) - expression of an intention to inflict pain, injury, evil or punishment ...
Random House Unabridged Dictionary 1975 (2d ed. 1987) - declaration of an intention ... to inflict punishment, injury …

FN#04 - Federal definition of the term "crime of violence" pursuant to 18 USC §16
18 USC 16§(a) - an offense that has as an element the use, attempted use or threatened use of physical force against the person or property of another; or (b) any offense that is a felony and that, by its nature, involves substantial risk that physical force against the person or property of another may be used in the course of committing the offense

FN#05 - Definition of the "Rule of Lenity"
Rule of Lenity is a judicial doctrine requiring that those ambiguities in a criminal statute relating to prohibition and penalties be resolved in favor of the defendant if it is not contrary to legislative intent. It embodies a presupposition of law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. The courts while construing an ambiguous criminal statute that sets out multiple or inconsistent punishments should resolve the ambiguity in favor of the more lenient punishment.

FN#06 - 1-14 Modern Federal Jury Instructions - Criminal, 14.01(18 USC §111)(Matthew Bender)
INSTRUCTION 14-1 COMMENT --- Section 111 was amended in 2008 to clarify some ambiguous language that had led to substantial confusion with respect to what was required to be included in an indictment and what must be charged to the jury [Court Security Improvement Act of 2007, Pub. L. No. 110-177, tit. II, 208(b), 121 Stat. 2538 (2008)]. Prior to the 2008 amendment, section 111 provided in full: [(a) In General - Whoever - (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designation in section 1114 of this title while engaged in or on account of the performance of official duties ... shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned for not more than 8 years, or both. (b) Enhanced Penalty - Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.] The problem that arose is that the statute did not define "simple assault" as used in section 111(a), so it was unclear what the difference was between simple assaults and "all other cases." This ambiguity became critical in the wake of the Supreme Court's decision in Apprendi v. New Jersey (530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d. 435 (2000)] because there were different maximum penalties for these two types of assaults and for the enhanced offense in section 111(b), and Apprendi requires that facts that have the potential to increase the maximum penalty submitted to the jury. The courts generally agreed that section 111 should be interpreted to define three separate offenses: (1) "simple assaults" that did not involve any physical contact with the victim; (2) "all other cases" under section 111(a) including all assaults that involved physical contact with the victim but did not involve the use of a weapon or the infliction of bodily injury; and (3) assaults under section 111(b) that did result in bodily injury or involved the use of a weapon . The Eight and Tenth Circuits adopted a slightly different definition of a "simple assault" stating that it should be defined as forcible conduct that "does not involve actual physical contact, a dangerous weapon, serious bodily injury, or the intent to commit murder or another serious felony." Recognizing the ambiguity of the assault statutes, Congress enacted the Court Security Improvement Act of 2007, resolving this problem by deleting the phrase "in all

other cases" and replacing it with "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." Thus, it is clear under the revises statute that section 111 now defines three offenses: (1) simple assaults; (2) assaults that involve physical contact or the intent to commit another felony; and (3) section 111(b) assaults that involve a dangerous weapon or bodily injury. It is critical that the indictment define which of the three offenses is being charged, and the jury instructions should conform to the indictment. An example of the problems that can arise when the indictment is vague is the Tenth Circuit's decision in United States v. Hathaway (318 F.3d 1001 (10th Cir. 2003)], which was specifically commended in the legislative discussion of the (Court Security Improvement] Act [of 2007]. In that case, the defendant physically assaulted a federal agent, but the indictment alleged only that he had "forcibly assaulted" the agent. The court of appeals held that the indictment was sufficient to allege only a simple assault because it did not charge the defendant with engaging in physical contact as required for a non-simple assault. Thus, the court remanded for resentencing as a misdemeanor simple assault. The entire legislative history of this provision (Court Security Improvement Act of 2007, Pub. K. No. 110-117, tit. II, 208(b), 121 Stat. 2538 (2008)] is found in the following comment by Senator Kyl: "This provision also clarifies an assault offense that was created by Congress in 1994. The offense establishes penalties for simple assault, assault with bodily injury, and for assault in 'all other cases.' As one might imagine, the meaning of assault in 'all other cases' has been the subject of confusion and judicial debate. The offense has also been the subject of constant vagueness challenges, and although those legal challenges have been rejected, the offense is rather vague. [The proposed Act] takes the opportunity to correct this legislative sin, codifying what I believe is the most thoughtful explanation of what this language means, the 10th Circuit's decision in United States v. Hathaway ... so that people can easily figure out what this offense actually proscribes." [153 Cong Rec. S 15789-15790 (Dec. 17, 2007) (remarks of Sen. Kyl)]. INSTRUCTION 14-2 ELEMENTS OF THE OFFENSE --- In order to find the defendant guilty of the crime charged, the government must prove beyond a reasonable doubt each of the following elements: First, that on or about the date specified in the indictment, [specify alleged victim named in indictment] was a federal officer, as I will define that term for you; Second, that at that time, the defendant forcibly assaulted (or resisted or opposed or impeded or intimidated or interfered with) [the victim] (if a "non-simple assault is charged, add: and this forcible action involved actual physical contact with [the victim] or the intent to commit the offense of (describe offense]). Third, that, at the time, [the victim] was engaged in the performance of his official duties (or that [the victim] was assaulted on account of his official duties); and Fourth, that the defendant acted willfully. If a violation of section 111(b) is charged, add: Fifth, that the defendant used a deadly or dangerous weapon to commit such acts (or that the defendant's actions resulted in bodily injury) ... COMMENT - As discussed in the Comment to Instruction 14-1, above, section 111 was amended in early 2008 [in the Court Security Improvement Act of 2007] to clarify some ambiguity in its language. Under both the previous and amended versions, section 111 defines three offenses: (1) "simple assaults," which do not involve physical contact, the use of a dangerous weapon or bodily injury to the victim or, as added by the 2008 amendment, an intent to commit another felony; (2) non-simple assaults, which involve physical contact or (now) an intent to commit another felony; and (3) section 111(b) assaults, which involve a dangerous weapon or bodily injury. Thus, the additional language in the second element must be included whenever there was physical contact with the victim (or under the amended statute, an intent to commit another felony). If this language is not included in the indictment and charged to the jury, then the maximum penalty allowable is one year in prison; if it is properly charged, the maximum penalty increases to eight years. INSTRUCTION 14-9 WILLFULNESS --- The fourth element that the government must prove beyond a reasonable doubt is that the defendant committed the act or acts charged in the indictment willfully. In other words, you must be persuaded that the defendant acted voluntarily and intentionally, and not by mistake or accident ... COMMENT - Finally, there are circumstances that will call for the use of instructions beyond that recommended in the text, but that are not easy to anticipate. For example, in United States v. Montoya [739 F.2d 1437 (9th Cir. 1984)], the defendant was convicted of violating section 111 for having used a crutch to strike a park ranger during a campsite scuffle. The defendant's defense at trial was that he did not intend to strike the ranger, but had intended only to "knock a can of beer" from the hand of a companion. The trial court instructed the jury on the issue of "transferred intent," a concept ordinarily confined to first-year law school examinations: "If the defendant intended to assault another person with intent to do bodily harm, but he harms a third person who he did not intend to harm, the law considers the defendant just as guilty as if he had actually harmed the intended victim." The Ninth Circuit reversed, holding that the instruction erroneously permitted the jury to convict even if the defendant did not actually intend to strike the ranger. The court of appeals distinguished [United States v.] Feola [420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975)] on the ground that in that case the defendant intended to assault the individual who, unknown to him, was a federal officer, while in Montoya, the evidence at best indicated that the defendant intended to assault someone who the defendant knew was not a federal officer. Thus, the court rejected the application of the concept of transferred intent in section 111 cases.

FN#07 - 1-14 Modern Federal Jury Instructions - Criminal, 14.02(18 USC §115)(Matthew Bender)

INSTRUCTION 14-14 THREAT TO ASSAULT, KIDNAP OR MURDER --- The first element the government must prove beyond a reasonable doubt is that the defendant threatened to assault, kidnap, or murder [name of victim]. A threat is a serious statement expressing an intention to inflict bodily injury (or murder or kidnap) at once or in the future, as distinguished from

idle or careless talk, exaggeration, or something said in a joking manner. For a statement to be a threat, the statement must have been made under such circumstances that a reasonable person who heard or read the statement would understand it as a serious express ion of an intent to inflict bodily injury. In addition, the defendant must have made the statement intending it to be a threat, or with the knowledge that the statement will be viewed as a threat ... COMMENT - In Elonis v. United States [576 U.S. -, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015)] the Supreme Court rejected the standard under which a conviction could be based solely on how a communication would be understood by a reasonable person. In that case, Elonis' conviction was premised solely on how his Facebook posts would be understood by a reasonable person. Applying 18 USC 875(c), the Court held that a "reasonable person" standard, a civil liability tort principle, "is inconsistent with 'the conventional requirement for criminal conduct,' " that the defendant be aware of some wrongdoing. The recommended instruction reflects the position of the Ninth Circuit in [United States v.] Bagdasarian [652 F.3d 1113 (9th Cir. 2011)]. Its language regarding the objective portion of the test is based on the language in that case. The instruction's statement of the subjective test uses the language that the Court in Elonis stated would satisfy the mental state requirement ... Unlike section 871, which uses the phrase "inflict bodily harm," section 115 uses the term "assault." In one case [United States v. Fulmer, 108 F.3d 1486, 1496 (1st Cir. 1997)], the jury requested the definition of "assault" and the court gave a supplemental instruction defining that term as it is defined in cases under section 111 as a "deliberate and intentional attempt or threat to inflict physical injury upon another." Although reversing on another issue, the court of appeals pointed out that this could only be confusing to the jury as a "threat to assault" was now defined, in effect, as "a threat to attempt or threaten." Instruction 14-14 avoids this problem by substituting "inflict bodily injury" in place of "assault" in the definition of a "threat." INSTRUCTION 14-16 INTENT TO [RETALIATE] IMPEDE INTIMIDATE OR INTERFERE - If applicable: To "retaliate" means to return like for like, to act in reprisal for some past act.

FN#08 - Analysis - Elonis v. United States 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015)

The Supreme Court began its analysis by noting that the dictionary definitions of threat do not set forth an intent requirement. See 135 S. Ct at 2008 ("These definitions ... speak to what the statement conveys, not to the mental state of the author"). The Chief Justice explained, however, that the "mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with such a requirement. 135 S. Ct. at 2009 (quoting Morissete v. United States, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed 288 (1952)). Instead, the Chief Justice noted, courts must read a *mens rea* requirement into such statutes to "separate wrongful conduct from otherwise innocent conduct." 135 S. Ct. at 2010. Chief Justice Roberts said that this rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal" and that a defendant must be "blameworthy in mind" before he can be found guilty. 135 S. Ct. at 2009. Chief Justice Roberts said that the trial judge erred in using a reasonable person standard, because that standard did not require proof that Elonis was aware of his wrongdoing. See 135 S. Ct. at 2009-12. Without specifying the intent that [18 USC] 875(c) requires, the Chief Justice said only that "negligence is not sufficient." 135 S. Ct. at 2013.

FN#09 – U.S. v. Hathaway, 318 F.3d 1001 (10th Cir. 2003) ("Simple assault" lacks contact)

{318 F.3d 1003-1005} On appeal, Mr. Hathaway asserts that the indictment only charged him with a misdemeanor violation of [18 USC] 111 involving SIMPLE ASSAULT. Relying on Jones v. United States, 256 U.S. 227, 143 L.Ed. 2d 311, 119 S. Ct. 1215 (1999), he argues that since both the indictment and the jury instructions failed to distinguish between simple and non-simple assault -- and thus charged only a misdemeanor violation -- he could not in fact be convicted of a felony. As noted at oral argument, Mr. Hathaway does not seek to have his conviction set aside. Instead, he asks this court to order all records to reflect that he was convicted only of a misdemeanor violation of [18 USC] 111...{318 F.3d 1004} Mr. Hathaway was subsequently charged in a one count indictment which reads as follows: ... "RICHARD K. HATHAWAY, did knowingly and intentionally forcibly assault ... Social Security Administration Special Agent, Bruce McKimens, while he was engaged in and on account of the performance of his official duties, in violation of Title 18, United States Code, Section 111" ... On a separate page appended to the indictment at some unknown time, the following language appeared "PENALTIES: Count 1: Imprisonment [not more than] 3 years; $250,000 .00 Fine; [not more than) 1 year [supervised release); Special Assessment $100.00." The indictment included no factual details of Mr. Hathaway's conduct." {318 F.3d 1005} In light of the Supreme Court's reasoning in Jones, Mr. Hathaway argued that [18 USC] 111(a) essentially prohibits two different offenses with different required elements. Thus, conviction for non-simple assault under [18 USC] 111(a) would be valid only if every element of that offense is properly charged in the indictment and then found to exist beyond a reasonable doubt by the jury. Because that did not happen here, Mr. Hathaway argued that he could only be validly sentenced for a misdemeanor violation of [18 USC] 111. {318 F.3d 1008-1010} Specifically addressing [18 USC] 113, we have held that "simple assault" is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." United States v. Joe, 831 F.2d 218, 220 (10th Cir. 1987). However, such a definition of "simple assault" is really nothing more than a non-exclusive recitation of what constitutes assault. It does little to differentiate it from "all other cases" assault in [18 USC] 111 as that statute now exists" ... {318 F.3d 1009} Nonetheless , Mr. Hathaway asserts that *Apprendi* should apply here because

he is prejudiced by the collateral consequences that attach to a felony conviction as opposed to a misdemeanor conviction, including, among others, the loss of the right to vote, the right to hold public office, the right to sit on a jury and the right to possess any type of firearm. We need not decide whether an *Apprendi* analysis is appropriate at this point, because we must first address the issue of what crime was charged. Essentially, Mr. Hathaway argues that although the indictment partially quoted the text of the statute, it failed to include an essential element of a felony charge under [18 USC] 111(a) and thus charged only a misdemeanor offense. Mr. Hathaway does not argue merely that the indictment failed to allege an essential element of the offense for which he was convicted, but rather that the indictment charged an offense different than the one for which he was sentenced. Whether Mr. Hathaway's argument is couched in terms of the sufficiency of the indictment or in terms of constructive amendment based on the jury instructions, our review is de nova. United States v. Avery, 295 F.3d 1158, 1173-74 (10th Cir. 2002); United States v. Van Tieu, 279 F.3d 917, 920 (10th Cir. 2002). "In federal prosecutions, 'no person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury' alleging all the elements of the crime." Harris, 122 S. Ct. at 2410 (quoting U.S. Const. Amend. V and citing Hamling v. United States, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974)) ... The indictment here failed to allege a required and essential element of the felony crime for which Mr. Hathaway was convicted. As noted above, the only difference between a felony offense and a misdemeanor offense under [18 USC] 111(a) is the nature of the assault. Although the indictment {318 F.3d 1010} charged the offense by quoting a portion of the statute, it failed to quote the portion differentiating "simple assault" and "all other cases" assault for which felony penalties attach. Furthermore, the indictment did not allege any factual details of Mr. Hathaway's conduct; it contained no allegation of physical contact between Mr. Hathaway and Agent McKimens. As a result, this indictment did not set forth all the elements of the offense of conviction, and did not put Mr. Hathaway on fair notice that he needed to defend against the felony charge. Although the record reflects that penalty language indicating a felony charge was appended to the indictment on a separate page, the record is also silent as to when the page was appended and whether the grand jury even saw or considered the language. On the basis of no more facts than these, we decline to even consider how this language affects the sufficiency of the indictment. In light of the foregoing, we hold that this indictment was insufficient to sustain Mr. Hathaway's conviction for a felony violation under [18 USC] 111(a) ... Although the indictment here was insufficient to allege a felony violation of [18 USC] 111(a), it was sufficient to allege a misdemeanor violation of [18 USC] 111(a) involving simple assault. Mr. Hathaway does not contend that he was not validly convicted of violating [18 USC] 111(a); instead, he argues that in light of the deficient indictment, the district court could only have viewed his conviction as one for the misdemeanor. We agree. Accordingly, we hereby remand to the district court for compliance with this opinion that all of Mr. Hathaway's records be corrected to reflect his conviction for a misdemeanor violation of (18 USC] 111(a).

FN#10 – U.S. v. McCulligan, 256 F.3d 97 (3rd Cir. 2001) ("Simple assault" lacks contact)

{256 F.3d 99-100} The United States Criminal Code describes the two crimes at issue -- simple {256 F.3d 100} assault and "all other cases" of assault -- in a single statutory subsection, 18 USC 111(a). Under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed 2d 435 (2000), the fact that various offenses are grouped together or share a particular label is irrelevant. Instead, the *Apprendi* Court held, except for the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 120 S. Ct. at 2362-63. The relevant inquiry is whether "the required finding exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict." Id at 2365. Because non-simple assault carries a greater statutory maximum than simple assault, each element of non-simple assault must be charged in the indictment and proven to a jury beyond a reasonable doubt. The District Court instructed the jurors that they were to find McCulligan guilty upon proof of three elements: (1) that he forcibly assaulted the person named in the indictment, (2) that the victim was a federal officer, and (3) that McCulligan did the acts charged voluntarily and intentionally ... The Court further instructed the jury that "forcible assault" means "any deliberate and intentional attempt or threat to inflict physical injury on another person with force or strength, when the attempt or threat is coupled with an apparent present ability to do so ... A forcible assault may be committed by a defendant without actually touching, striking or doing bodily harm to the other person" ... The government concedes that whatever fact separates "all other cases" of assault from mere "simple assault," the jury was not asked to find it ... Any sentence greater than one year on the [18 USC] 111 Count thus represents error under *Apprendi*. Preliminarily, we must respond to the government's contention that because McCulligan failed to object to any *Apprendi* error either at trial or during sentencing, we review only for plain error. We surely would not have expected McCulligan to object to the "simple assault" jury charge at issue in this case; he had no responsibility and certainly no incentive to point out that the government could have attempted to win a conviction on some greater offense. United States v. Candelario, 240 F.3d 1300, 1305 (11th Cir. 2001). No error occurred from McCulligan's perspective until the sentencing stage, when, although not explicitly invoking *Apprendi*, he in fact objected to the Court's determination that his offense of conviction was something greater than simple assault. {256 F.3d 102-104} The government states correctly that, at common law, there were no degrees of assault or battery. Rather, "assault" was defined as the "attempt or offer to beat another, without touching him," Blackstone, Commentaries at 120, or the "placing of another in reasonable apprehension of a battery." United States v. Ramirez, 233 F.3d 318, 321-22 (5th Cir. 2000) (citing LaFave & Scott,

Substantive Criminal Law 7.16 (1986)). "Battery" was defined at common law as the unlawful beating of another, including "the least touching of another's person willfully, or in anger." Blackstone, Commentaries at {256 F.3d 103} 120. Battery could rise to the crime of mayhem where the defendant caused permanent injury. Id. at 121. Over time, many jurisdictions have come to use the term "assault" to describe both assaults and batteries. Rollin M. Perkins and Ronald N. Boyce, Criminal Law 159-60 (3d ed. 1982); Black's Law Dictionary 114 (6th ed. 1990) ... {256 F.3d 104} Congress chose the terms "simple assault" and "all other" assaults, which seem to suggest, if not explicitly refer to, the traditional notion of assault as a crime separated from battery according to the presence or absence of touching ... The record contains no evidence of actual contact by McCulligan. Thus, even assuming Neder (v. United States, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999)] applies to this case, any "conviction" for non-simple assault cannot be salvaged -- the error would not be harmless. {256 F.3d 106-107} The government contends that the court may determine, by a preponderance of the evidence, the "offense statutory maximum" for purposes of sentencing just as it may determine drug quantity. We disagree. Finding drug quantity based on evidence such as undisputed lab results is far different than pretending the jury convicted a defendant of one crime when actually he or she was convicted of another. Moreover, the guidelines do not instruct judges to determine the statutory maxima of offenses. Rather, the Guidelines state that "Offense Statutory Maximum ... refers to the maximum term of imprisonment authorized for the offense of conviction ..." USSG ["United States Sentencing Guidelines] 4B1.1, Application Note 2. The maximum sentence faced by a defendant convicted of a particular crime is set by Congress, not "found" by courts {256 F.3d 107} While, even after *Apprendi*, a sentencing court may make certain factual determinations as it calculates the sentence under the Guidelines, a defendant cannot be convicted of one crime yet sentenced under the guidelines as though he or she were convicted of some other crime … The jury charge and facts of this case both point to a conviction for simple assault under [18 USC 111] (a). The District Court erroneously determined instead that McCulligan was convicted under the "all other" assaults provision, and this error led to a misapplication of the Guidelines. We will affirm the conviction but remand for resentencing.

FN#11 – U.S. v. Vallery, 437 F.3d 626 (7th Cir. 2006) ("Simple assault" lacks contact)

{437 F.3d 628-630} The government appeals from the district court's sentencing of Roosevelt Vallery as a misdemeanant following this conviction under 18 USC 111(a). It is the government's contention that the indictment properly alleged a felony rather than a misdemeanor. Vallery's conviction is not in dispute. A fair reading of the statute requires us to conclude that the misdemeanor provision of [18 USC] 111(a) applies to all conduct prohibited by the subsection. Having determined that Vallery's conviction was for a misdemeanor, we affirm his twelve-month sentence. {437 F.3d 629} The grand jury returned the following one-count indictment: " ... Roosevelt D. Vallery, defendant herein, did knowingly and forcibly assault, resist, impede, and interfere with Ron Garver, a Federal Correctional Officer, while he was engaged in his official duties, to wit: conducting a visual search and restraining a federal inmate attempting to dispose of contraband, in violation of Title 18, United States Code, Sections [sic]111(a)(1)" ... {437 F.3d 630} Adhering to Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), several other circuits have found post-1994 amendment [18 USC] 111 to constitute three separate offenses: first, misdemeanor simple assault under [18 USC] 111(a); second "all other cases" felony assault under [18 USC] 111(a); and third, felony assault involving a deadly or dangerous weapon or resulting in bodily injury under [18 USC] 111(b). See, e.g., United States v. Hathaway, 318 F.3d 1001, 1006-1008 (10th Cir. 2003); United States v. Yates, 304 F.3d 818, 821-22 (8th Cir. 2002); United States v. McCulligan, 256 F.3d 97, 102 (3rd Cir. 2001); United States v. Chestaro, 197 F.3d 600, 608 (2nd Cir. 1999); United States v. Nunez, 180 F.3d 227, 233 (5th Cir. 1999). Even though we have not specifically so held, we assumed as much in United States v. Gray, 332 F.3d 491, 492-93 (7th Cir. 2003) (finding error in sentence exceeding statutory maximum of [18 USC] 111(a) where indictment failed to allege violation of [18 USC] 111(b)). The parties do not dispute the issue, and we think the question is settled. {437 F.3d 633-634} Turning to Vallery's indictment [footnote1], the language closely follows the language {437 F.3d 634} of [18 USC] 111(a) sufficiently to allege the elements of simple assault. However, physical contact was not explicitly or, as previously discussed, implicitly alleged; therefore, we agree with the district court's conclusion that Vallery was not charged with, and could not be convicted of, "all other assaults." Because Vallery was charged only with a misdemeanor and not a felony, he was subject to a statutory maximum term of imprisonment of only one year, not eight. Neither the government nor Vallery otherwise challenges the reasonableness of Vallery's sentence of twelve months' imprisonment. [footnote1] ... the government repeatedly supports its argument by referring to Vallery's actions, which likewise have no place in determining congressional intent. If we were to find Vallery guilty of a felony because he did use physical force (as the background indicates), even though he was charged only with a misdemeanor (as we hold), then we would be unconstitutionally enlarging the scope of Vallery's indictment. See Stirone v. United States, 361 U.S. 212, 215-16, 80 S. Ct. 270, 4 L. Ed 2d 252 (1960). It is the indictment's allegations, not Vallery's conduct, which matters here. See Arrington, 309 F.3d at 45-46 ("The decisive question is not whether the element [defendant] proposes would make any difference in this or other cases, but whether Congress intended it to be an element of the offense").

FN#12 – U.S. v. Hazlewood, 526 F.3d 862 (5th Cir. 2008) ("Simple assault" lacks contact)

{526 F.3d 864-866} The bill of information charged Hazlewood with two counts. The first count stated that she "... did forcibly resist and assault Kelly J. Mann ... in violation of Title 18, United States Code, Section 111." The second count charged her with disorderly conduct in violation of 18 USC 13. With Hazlewood's consent, a jury trial was held on March 20, 2006 before a United States magistrate judge. The magistrate judge treated count one of the information as a charge of simple assault. The jury convicted Hazlewood on both counts ... Hazlewood then appealed to the district court, where that court reversed her disorderly conduct conviction but affirmed her assault conviction, holding that the crime charged in count one was a misdemeanor over which the magistrate judge properly exercised jurisdiction. She timely filed her notice of appeal before this Court ... On appeal, Hazlewood argues that the magistrate judge did not have jurisdiction over count one, the assault charge. In support of her contention, she highlights that count one alleges forcible resistance and assault, and does not include the words "simple assault." Since, according to Hazlewood, the information does not, on its face, allege a misdemeanor charge, the magistrate judge lacked jurisdiction and her conviction must be vacated. We disagree. {526 F.3d 865} Having examined Hazlewood's bill of information, we conclude that count one alleges simple assault. The count states that Hazlewood "forcibly resist[ed] and assault [ed]" Mann; nowhere does it allege or describe any physical contact. Since [18 USC] 111 provides that a person convicted of simple assault faces the maximum penalty of a fine and/or imprisonment not more than one year, count one is a misdemeanor charge over which the magistrate judge properly exercised jurisdiction ... If we accepted Hazlewood's argument we would effectively be adopting a per se rule that would require the inclusion {526 F.3d 866} of the phrase "simple assault" in charging instruments in order for counts to be classified as misdemeanor assaults under [18 USC] 111(a). We decline to do so; instead we join the Seventh and Tenth Circuits, which have both recently held that indictments only charge misdemeanor assaults under [18 USC] 111(a) when they do not describe any physical contact. [United States v.] Vallery, 437 F.3d at 633-34 (explaining that because the indictment did not allege physical contact the defendant could only be charged with simple assault); United States v. Hathaway, 318 F.3d 1001, 1010 (10th Cir. 2003) (observing that because the indictment failed to allege any physical contact, the defendant was not put "on fair notice that he needed to defend against [a] felony charge").

FN#13 - Tran v. Gonzales, 414 F.3d 464 (3rd Cir. 2005) (Reckless not "crime of violence")

{414 F.3d 470-471} We are satisfied that Parson's requirement of specific intent under [Title 18, Section] 16(a) is correct and that "use of physical force is an intentional act." Parson, 955 F.2d at 866. The verb "use" means "to make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end." Black's Law Dictionary 1541 (6th ed. 1990). The Oxford English Dictionary defines the verb to mean, in its most common usages, "to make use of (some immaterial thing) as a means or instrument; to employ for a certain end or purpose," "to employ or make use of (an article , etc.), esp. for a profitable end or purpose; to utilize, turn to account," or "to work, employ, or manage (an implement, instrument , etc.); to manipulate, operate, or handle, esp. to some useful or desired end." Oxford English Dictionary 3574 (compact ed. 1971) (s.v. "use, v.,: definitions 7a, 8a, 9a). These definitions show an obvious commonality: the "use" of force means more than the mere occurrence of force; it requires the intentional employment of that force, generally to obtain some end. The plain language of the statute therefore compels the conclusion that the "use" of force requires specific intent to employ force, and not mere recklessness as to causing harm. In United States v. Trinidad- Aquino, 256 F.3d 1140, 1145 & n.2 (9th Cir. 2001), the Ninth Circuit cited similar definitions of the word "use" to conclude that the word "contain[s] a volitional requirement." It thus excluded the possibility of negligent use of force, but nonetheless held that recklessness -- that is, "conscious disregard of risk of harm that the defendant is aware of," id. at 1146 -- satisfies this volitional requirement. We respectfully disagree. As the Supreme Court said in Leocal, "use requires active employment." 125 S. Ct. at 382 ... The active employment of force, generally to achieve some end, corresponds closely to the concept of {414 F.3d 471} intent, not recklessness. Intent means "[a] state of mind in which a person seeks to accomplish a given result through a course of action." Black's Law Dictionary 810 (6th ed. 1990). The idea of purposeful action, or actively employing a means to achieve an end, is an essential component of both "use" and "intent," and is absent from the concept of "recklessness." We therefore hold that the "use of force" in [Title 18, Section] 16(a) requires specific intent to use force.

FN#14 - PopaI v. Gonzales, 416 F.3d 245 (3rd Cir. 2005)(Simple assault not crime of violence)

{416 F.3d 251} We have recently held that crimes with a *mens rea* of recklessness do not constitute crimes of violence. Tran v. Gonzales, No. 02-3879, 414 F.3d 464, 2005 U.S. App. LEXIS 12978, 2005 WL 1620320 (3d Cir. July 12, 2005). As Popal's crime was a recklessness offense, he is not removable as an aggravated felon. {416 F.3d 254-255} It is now settled law in this Circuit that an offender has committed a "crime of violence" under 18USC 16(a) only if he acted with an intent to use force. We first stated as much in Unites States v. Parson, 955 F.2d 858, 866 (3d Cir. 1992). In Leocal, 125 S. Ct. at 382, the Supreme Court held, in language echoing Parson, that the term "use of force" in 16(a) required, at the least, a *mens rea* greater than negligence. Most recently and explicitly, we reaffirmed Parson in Tran v. Gonzales ... There we clearly held that the 'use of force' in [18 USC]16 requires specific intent to use force ... Because Pennsylvania simple assault requires a *mens rea* of recklessness, rather than intent, it is not a crime of violence under [18 USC] 16(a).

FN#15 – U.S. v. Otero, 502 F.3d 331 (3rd Cir. 2007) (Simple assault not crime of violence)

{502 F.3d 335} We held in Popal that because a Pennsylvania simple assault violation requires a minimum mens rea of recklessness rather than intent, it is not a crime of violence. Popal, 416 F.3d at 254 ... Although the issue in Popal was the removal of an alien for committing a crime of violence under [18 USC] 16(a), its definition of "crime of violence" is identical to the definition contained in [USSG Section] 2L1.2, that is, whether the offense "has as an element the use ... of physical force against the person or property of another." Therefore, we conclude that our holding in Popal applies to the relevant crime of violence definition under USSG 2L1.2.

FN#16 - Leocal v. Ashcroft, 160 L. Ed. 2d 271, 543 U.S. 1, 125 S. Ct. 377 (2004)

{543 US 9} The critical aspect of [18 USC]16(a) is that a crime of violence is one involving the "use ... of physical force against the person or property of another" ... As we said in a similar context in Bailey, "use" requires active employment. 516 U.S., at 145, 133 L. Ed. 2d 471, 116 S. Ct. 501. While one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use ... physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] ... physical force against" another by stumbling and falling into him. When interpreting a statute, we must give words their "ordinary or natural" meaning. Smith, supra, at 228, 124 L. Ed. 2d 138, 113 S. Ct. 2050. The key phrase in [18 USC] 16(a) - the "use ... of physical force against the person or property of another" - most naturally suggests a higher degree of intent than negligent or merely accidental conduct. See United States v. Trinidad-Aquino, 259 F.3d, at 1145; Bazan-Reyes v. INS, 256 F.3d, at 609.

FN#17 - Wurtz v. Risley, 719 F.2d 1438 (9th Cir. 1983)

{719 F.2d 1442} It is true that section 203(1) is confined to threat to "commit any criminal offense." That fact alone, however, is far from enough to prevent the statue from being overbroad. Indeed, it was the breadth of this provision, applying as it does to minor crimes without victims, that caused a federal court to strike down an identical statute in Landry v. Daley, 280 F. Supp. 938, 964 (N.D. Ill 1968) ... When all of the characteristics of section 203(1)(c) are considered together, it becomes apparent that many relatively harmless expressions would come within its purview. The civil rights activist who states to a restaurant owner, "if you don't desegregate this restaurant I am going to organize a boycott" could be punished for the mere statement, even if no action followed. The example is not unduly hypothetical, and the threatened activity itself would raise delicate first amendment issues if carried out, to say nothing of its merely being threatened ... The statute would also apply to the citizen who tells city council members that if they fail to lower parking fees, she will park without putting a coin in the meter. Threats of sit-ins, marches in the street, mass picketing and other such activities are frequently threats to commit acts prohibited by law. Examples may easily be multiplied, but there is no need to belabor the point. The state, of course may punish minor infractions when they actually occur. But to punish as a felony the mere communication of a threat to commit such a minor infraction when the purpose is to induce action – any action – by someone, is to chill the king of “uninhibited, robust, and wide-open" debate on public issues that lies at the core of the First Amendment. See New York Times Co. v. Sullivan, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)

FN#18 - Great American Insurance Co. v. Norwin School District 544 F.3d 229 (3rd Cir. 2008)

Nor are we persuaded by [defendant’s] suggestion that the words ***"shall not exceed"*** should be construed to mean ***"shall be."*** The use of different language to address the same or similar issue … strongly implies that a different meaning was intended. In fact, it would have been quite easy to draft the requirements … using the same ***"shall be"*** language. The same language was not used, however; and we must assume that the choice of different words was deliberate. See, e.g., Penncro Assocs., Inc. v. Sprint Spectrum, L.P., 499 F.3d 1151, 1156-57 (10th Cir.2007) (noting that, "[w]hen a contract uses different language in proximate and similar provisions, we commonly understand the provisions to illuminate one another and assume that the parties' use of different language was intended to convey different meanings"); Taracorp, Inc. v. NL Industries, Inc., 73 F.3d 738, 744 (7th Cir.1996) (noting that "when parties to the same contract use such different language to address parallel issues ..., it is reasonable to infer that they intend this language to mean different things"); see also Commonwealth v. Berryman, 437 Pa.Super. 258, 649 A.2d 961, 969 (1994) (recognizing the rule that, when different language is used in parallel provisions of a statute, the provisions are intended to mean different things). In plain terms, by using the words ***"shall not exceed"*** instead of ***"shall be,"*** Article 9.3.7 of the Supplementary Conditions set a ceiling on the monies to be retained during the second half of the project; it did not "direct" that retainage be five percent (5%) at the time of final payment.

FN#19 - United States v. Sutcliffe, 505 F.3d 944 (9th Cir. 2007) (Selective prosecution)

[Section] C. Selective Prosecution - Defendant argues that he was subjected to selective prosecution. To succeed on this claim, Defendant must demonstrate that (1) other similarly situated individuals have not been prosecuted and (2) his prosecution was based on an impermissible motive. United States v. Culliton, 328 F.3d 1074, 1081 (9th Cir. 2003) (per curiam). The standard for proving such a claim "is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the

presumption that a prosecutor has acted lawfully." *Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 489, 119 S. Ct. 936, 142 L. E.d. 2d 940 (1999)*. In reviewing a selective prosecution claim, this circuit has employed both a de novo and a clear error standard. Culliton, 328 F.3d at 1080. Defendant bases his selective prosecution claim on the government's failure to prosecute an unidentified Global Crossing employee who sent Defendant an email stating "If you post my info again I'm personally going to make sure you get your ass kicked." (E.R. at 35.) However, we are convinced that this employee was not a similarly situated individual. The employee sent a single textual email to Defendant in response to illegal and provocative communication previously posted online by Defendant. In contrast, over the course of several months Defendant used text, music, voiceovers, and pictures to make multiple threats of violence against different individuals. The violence threatened by Defendant was much more serious in nature than the employee's threat, and Defendant's inclusion of personal information--such as the process server's license plate number and the attorney's home address - made his threats significantly more believable. Moreover, Defendant has not introduced any evidence even remotely showing that his prosecution was based on a discriminatory purpose. See Wayte v. United States, 470 U.S. 598, 610, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985) (holding that to prove discriminatory purpose, defendant must show that government undertook particular course of action "at least in part because of ... its adverse effects upon an identifiable group" (internal quotation marks omitted)). Thus, as in *Culliton*, Defendant "has no viable selective prosecution claim under any standard of review," 328 F.3d at 1080, and we accordingly affirm the district court's denial of Defendant's motion for dismissal based on selective prosecution.

CERTIFICATE OF SERVICE

I, Younes Kabbaj, hereby certify that this Appeal Brief and Appendix is hereby served upon all counsel of record via email/ecf.

Submitted 10/27/2018

/s/ Younes Kabbaj

Younes Kabbaj