Nos. 14-5220, 14-5221, 14-5222

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL WALLI, et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville,
Case No. 3:12-cr-00107-1, The Honorable John G. Heyburn II

OPENING BRIEF OF DEFENDANTS–APPELLANTS MICHAEL WALLI, SISTER MEGAN RICE, AND GREG BOERTJE-OBED

MARC R. SHAPIRO
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

THOMAS S. MCCONVILLE
ORRICK, HERRINGTON
& SUTCLIFFE LLP
2050 MAIN STREET
SUITE 1100
IRVINE, CA 92614-8255
(949) 567-6700

Counsel for Defendants-Appellants
(*Additional Counsel Listed on Inside Cover*)

ANDREW S. ONG
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1000 MARSH ROAD
MENLO PARK, CA 94025-1015
(650) 614-7400

ANNE ELKINS MURRAY
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1152 15TH ST NW
WASHINGTON, DC 20005
(202) 339-8400

ANNA LISE LELLELID-DOUFFET
84607 Camus Lane
Covington, LA 70435
(305) 721-7777

JUDY KWAN
ORRICK, HERRINGTON
& SUTCLIFFE LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017-5855
(213) 629-2020

WILLIAM PATRICK QUIGLEY
7500 Dominican Street
New Orleans, LA 70118
(504) 710-3074

Counsel for Defendants-Appellants

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued**)**

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to this Court's Rule 34(a), Defendants-Appellants respectfully request oral argument in this matter. Oral argument will allow the attorneys for the parties to address any outstanding factual or legal issues that the Court deems relevant and will assist the Court in its decision. Oral argument is particularly important here where the very nature of the claims requires intimate knowledge of the facts at trial and the case presents critical issues concerning the interpretation of a once rarely used but now increasingly deployed statute that criminalizes interference or attempts to interfere with the national defense.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. This appeal is from final judgments of conviction, entered by the district court against Defendants on February 26 and 27, 2014. R. 323, R. 325, R. 327, Judgments. Notices of appeal were filed on the same day as each Defendant's respective judgment was issued. R. 324, R. 326, R. 328, Notices of Appeal.

INTRODUCTION

The Defendants in this case are members of the religiously-based Plowshares Movement. They believe that the United States, and all other countries, would be most secure if nuclear weapons were eliminated entirely. Unable to unilaterally accomplish the Movement's overarching goal of global nuclear disarmament, the Defendants have dedicated themselves to a peaceful, public awareness campaign concerning—what they consider to be—an increasingly high-stakes standoff between nations.

To that end, in the early morning hours of July 28, 2012, the Defendants—an 82-year-old nun, a 63-year-old veteran of the Vietnam War, and a 58-year-old former medical service officer in the United States Army—set out with roses, banners, bolt cutters, baby bottles, little hammers, and bibles to spread their message at Y-12 National Security Complex ("Y-12")—a facility that warehouses enriched uranium and refurbishes nuclear weapons. Notwithstanding that Y-12 is outfitted with numerous security mechanisms, the Defendants were able to cut their way through four fences. When they arrived at the Highly Enriched Uranium Materials Facility building ("HEUMF") (where Y-12's uranium is stored), they did not attempt to enter. Rather, they hung banners containing pro-disarmament statements, spray painted messages on the building, symbolically poured blood on its walls, chipped at its corner edge with their small hammers, and sang hymns.

Security officers arrived seven minutes later and immediately identified the Defendants for who they were: peace protestors. Upon the officers' arrival, the Defendants were wholly compliant. They bowed and offered bread.

Unsurprisingly, there was considerable political fallout from the fact that an 82-year old woman with no sophisticated equipment and her middle-aged cohorts were somehow able to make their way to what the Government characterizes as the "Fort Knox" of uranium. Congressional hearings were held, government contracts were terminated, and personnel were fired. It was against this backdrop and on the heels of their refusal to take a plea that the Government elevated the charges against Michael Walli, Sister Megan Rice, and Greg Boertje-Obed.

Notwithstanding that the Defendants made no effort to enter—nor were they capable of entering—the HEUMF building, the Government brushed aside the trespass count and charged them instead under the Sabotage Act, claiming that, through their actions, the Defendants intended to injure, interfere with, or obstruct the national defense. Though nearly a century old, the provision of the Sabotage Act at issue only rarely has been invoked. 18 U.S.C. § 2155(a).[1] This case presents the first occasion in which a defendant has been tried and convicted under the provision without having either injured government property that is directly

[1] All relevant statutory provisions are set out in the attached addendum.

involved in defending our nation (such as an aircraft) or interfering with a national defense facility that would be called upon immediately to respond to a threat (such as a missile silo that must be prepared to launch within a matter of minutes). The Government was able to secure this result only by advancing a sweeping interpretation of the statute that would subject anyone who knowingly injures, interferes with, or obstructs national defense property or premises—for any reason *or no reason at all*—to a felony conviction, rather than limit the statute to those who intend to prevent the United States from responding to an attack. Even the district court was troubled by the Government's unprecedented interpretation.

But what the court got right on that front, it got wrong on another. It concluded that, notwithstanding the Defendants' inability to access the uranium and undisputed intent not to, their overarching mission of bringing about global nuclear disarmament—in compliance with international law and governing treaties—supplied the requisite intent of injuring "the national defense" under the statute. As a result, Messrs. Boertje-Obed and Walli were sentenced to over five years in prison, while Sister Rice received just under three.

STATEMENT OF THE ISSUES

1. Whether the Government's erroneous interpretation of "the national defense" relieved the prosecution of its burden to prove each element of 18 U.S.C. § 2155(a) beyond a reasonable doubt and allowed the jury to convict based on a determination that the Defendants knowingly intended to injure, interfere with, or obstruct Y-12 operations rather than demonstrating that, through their actions, the Defendants knowingly intended to prevent the United States from defending itself.

2. Whether, for purposes of 18 U.S.C. § 2155(a), a defendant's broad hope for global nuclear disarmament supplies the requisite specific intent of injuring "the national defense" even where, through his or her conduct, he or she has no ability to interfere with weapons that are (or could be) actively utilized in defending the country.

3. Whether the prosecutor engaged in misconduct when he analogized this case—involving alleged threats to our national security—to September 11, 2001, even though the defense introduced no evidence concerning September 11 nor made reference to it during closing argument.

4. Whether the district court erred by allowing the Government to "impeach" the Defendants through the introduction of evidence of their prior convictions, notwithstanding that the Government's theory in no way conflicted with the Defendants' testimony and thus the convictions had no probative value.

STATEMENT OF THE CASE

On the morning of July 28, 2012, an alarm sounded at Y-12. R. 192, Trial Tr., Vol. 2, PD# 1711. Within a matter of minutes, Security Officer Kirk Garland arrived at the HEUMF building where he encountered three individuals: Sister Megan Rice, Michael Walli, and Greg Boertje-Obed. *Id.* at PD# 1697, 1712. Based on his experience, he "knew at that time what [he] had." *Id*. He had three peace protestors. *Id.* at PD# 1716, 1720. As he approached the Defendants, they read a written statement to him as well as verses from the Bible. *Id.* at PD# 1713. They sang hymns and lit candles. *Id.* at PD# 1716–17. When other officers arrived four minutes later, Garland arrested the Defendants and took them into custody. *Id.* at PD# 1669–70, 1713.

Y-12 National Security Complex

Y-12, which is situated on Department of Energy property in Oak Ridge, Tennessee, was constructed as part of the Manhattan Project. *Id.* at PD# 1573. It does not house any equipment that would deploy weapons directly from the facility. *Id.* at PD# 1703–04; R. 51, Gov't Response to Defs' Mot. to Dismiss The Indictment, PD# 303. Rather, it is used to process and store enriched uranium. *Id.* at PD# 1575, 1580. The facility produces the source of explosive power in nuclear weapons (secondaries). *Id.* at PD# 1574, 1577. The government's stated purpose for building nuclear weapon components is to provide a strong nuclear deterrent.

Id. at PD# 1578. That is, our country maintains reliable thermonuclear stockpiles to deter enemies from considering an attack. *Id.* at PD# 1576, 1584. Y-12 serves other purposes as well, including dismantlement of nuclear weapons. *Id.* at PD# 1579.

Though Y-12 is government-owned, it is contractor-operated. *Id.* at PD# 1587. To enter the facility, one must receive clearance and approval. *Id.* at PD# 1589. The most secure part of Y-12 is within the Perimeter Intrusion Detection and Assessment System ("PIDAS"). *Id.* at PD# 1592. PIDAS employs a series of three fences, sensors, and alarms that are designed to detect intruders. *Id.* at PD# 1593. It has a variety of intentionally redundant technological tools put in place to track the movements of an intruder. *Id.* at PD# 1594. On the outside of the PIDAS perimeter are signs that warn lethal force may be used. *Id.* at PD# 1599–1600.

At the core of the PIDAS is the HEUMF building. *Id.* This is a "fortified warehouse, essentially," a "[v]ery, very secure facility, fairly modern . . . built the last few years" and is home to Y-12's enriched uranium supply and secondaries. *Id.* at PD# 1600.

The Defendants

Sister Rice, who was 82 on the date at issue, is a member of a Roman Catholic order that is dedicated to educating others, particularly women. *Id.* at

PD# 1773–74. Born in Manhattan, New York, Sister Rice spent forty years in Africa building schools and educating children. *Id.* at PD# 1777–78, 1780–81. Having heard about nuclear testing in Nevada upon returning to the United States to care for her mother, Sister Rice traveled out west to protest such activity. *Id*. at PD# 1782–86. Thus began her involvement in the Plowshares Movement.

Sister Rice's stated mission is to "transform nuclear weapons by dismantlement and recycling [them into] new industries focused upon by the profit saved by not making more." R. 193, Trial Tr., Vol. 3, PD# 1879. As with her co-defendants, she believes maintenance of nuclear weapons contravenes domestic and international law and feels "with all [her] heart . . . that the use of nuclear weapons is wrong," that "all life, not just human life, is imperiled by each atom bomb," that nuclear weapons are "a disruption in the harmony which God has made possible for us," and that the alleged "nuclear deterrent" "keeps every American in threat by . . . anybody who would try to use a nuclear bomb or manufacture one." *Id.* at PD# 1856–57, 1881–83. It is for this reason that she hopes that we can one day "transform [such] weapons into real, life-giving alternatives to build true peace." R. 192, Trial Tr., Vol. 2, PD# 1789.

Born in 1948, Mr. Walli joined the United States Army at age 18. R. 193, Trial Tr., Vol. 3, PD# 1889–90; Presentence Report, R. 275, Walli Presentence Investigation Report, PD# 3415. He served for over three years, including two

tours in Vietnam during which time he encountered many killings. R. 193, Trial Tr., Vol. 2, PD# 1890, 1897. While working as a law enforcement officer in Vietnam, he learned of the assassination of Martin Luther King, Jr. and began listening to some of Dr. King's messages, particularly those condemning the Vietnam War and nuclear weapons. *Id.* at PD# 1891. He became involved in the Catholic Worker Movement. *Id.* at PD# 1893. Mr. Walli attempted to follow in the Movement's path, including opposing nuclear weapons. *Id.* at PD# 1894. He believes that the United States, as a world leader, should take charge in complying with the rule of law, including international treaties, which require dismantling all nuclear weapons. *Id.* at PD# 1912. That goal is guided by his belief that "Jesus and the Blessed Virgin Mary don't tolerate nuclear weapons . . . and they don't want any here on earth." *Id.* at PD# 1917.

Mr. Boertje-Obed, a 59-year husband and father, was trained as a medical service officer in the United States Army, from which he was honorably discharged. *Id.* at PD# 1955–56. In accordance with the United States' obligations under treaties to which it is a signatory, Mr. Boertje-Obed desires eradication of all nuclear weapons. *Id.* at PD# 1965, 1969. He believes that "[t]he making of nuclear weapons is putting your trust in a false God." *Id.* at PD# 1966.

Events of July 28, 2012

After "pray[ing] together for many months and reflect[ing] and try[ing] to listen to the spirit," Sister Rice and Messrs. Walli and Boertje-Obed decided that, in an effort to advance their agenda, they would attempt to enter the Y-12 facility on July 28, 2012. R. 192, Trial Tr., Vol. 2, PD# 1787. They "were filled with love and compassion for the people who had to work at this very dangerous facility and what was happening to them and to their families." *Id.* Their goal was to "bring healing, things that were signs of life and love." *Id.* And they were moved by a desire "to transform the United States empire and [Y-12] into life-giving alternatives which resolve real problems of poverty and environmental degradation for all." *Id.* at PD# 1789.

To that end, they brought "gifts to symbolize this transformation," including blood, "for healing and pouring out [their] lives in service and love;" small hammers, "to begin the transforming work of deconstructing war machines, creating new jobs which address real problems, . . . and foster the fullness of life;" candles, because "light transforms fear and secrecy into authentic security;" flowers, as they are "the white rose of forgiveness . . . and genuine reconciliation;" crime tape and a self-authored indictment, "which point out truth and end lies which have blinded and dulled the very conscience of nations;" a Bible, "to remind ourselves to become sources of wisdom and to inspire our acts of conscience as we

carry on;" and food, "symbolized by this bread, strengthening us as we build this new world, where people do not feel compelled to build nuclear weapons in order to feed their families." *Id.* at PD# 1789–90; *see also* 1957; R. 153, Exhibit and Witness List, Def's Ex. 1, A Statement for the Y-12 Facility, A14. They also had with them banners, binoculars, spray paint, and backpacks. *Id.* at PD# 1714–15, 1754. What they did not have was any weapons. R. 192, Trial Tr., Vol. 2, PD# 1692–93; R. 193, Trial Tr., Vol. 3, PD# 1960. No bombs. No grenades. No firearms. *Id.*

Though Mr. Boertje-Obed physically led the way, the threesome did not know where they were going and thus were led by the "[s]pirit of God." R. 192, Trial Tr., Vol. 2, PD# 1796–98. They used bolt cutters to make their way through several fences, *id.* at PD# 1683, and they "kept getting more and more surprised that [they were] able to keep going right up to the top and over." *Id.* at PD# 1798. They "guess[ed] it was an answer to prayer and a miracle." R. 193, Trial Tr., Vol. 3, PD# 1906, 1961. They did not have a clear plan for when they encountered security personnel; they just knew what they "wanted to say to all of the employees that were there." R. 192, Trial Tr., Vol. 2, PD# 1798.

They were able to make their way to the exterior of the HEUMF building. However, they never entered. *Id.* at PD#1655–56. Nor did the Government claim they tried to enter. *Id.* at PD# 1699–70 (testimony from Y-12 officer that there was

no evidence of forced entry). Rather, upon arriving, they staged a peaceful protest during which they spray painted the building; symbolically poured blood; hung crime scene tape; and, with their "little hammers," chipped at the side of the building. *Id.* at PD# 1679–80, 1714; R. 153, Exhibit and Witness List, Gov't Exs. 5–14, 20, Photographs, A2–12. After seven minutes, *see* R. 192, Trial Tr., Vol. 2, PD# 1697; R. 153, Exhibit and Witness List; Gov't Ex. 3, DVD of surveillance video, A1, Officer Garland arrived. R. 192, Trial Tr., Vol. 2, PD# 1712. Aware that they were peace protestors, *id.* at PD# 1716, he knew he did not need to use lethal force, even though he was authorized to do so. *Id.* at PD# 1717–18. In fact, he did not even feel the need to draw his firearm. *Id.* at PD# 1695–96; R. 153, Exhibit and Witness List; Gov't Ex. 3, DVD of surveillance video, A1. Nor a taser or mace. *Id.* at PD# 1697–98; R. 153, Gov't Ex. 3, A1. Upon confronting the Defendants, they bowed and sang to him, read from a statement and the Bible, lit candles, and offered him bread. *Id.* at PD# 1694–98, 1716, 1719, 1798; R. 153, Gov't Ex. 3, A1. They followed his commands and were passive. *Id.* at PD# 1717–18; R. 153, Gov't Ex. 3, A1.

Sergeant Chad Riggs arrived soon thereafter. *Id.* at PD# 1673; R. 153, Gov't Ex. 3, A1. Riggs similarly did not feel deadly force was necessary. *Id.* at PD# 1692. He too found them cooperative. *Id.* at PD# 1694. Eventually, Riggs,

Garland, and other officers used flex cuffs to restrain the Defendants and took them into custody. *Id.* at PD# 1677.

Aftermath of the Security Breach

Following the events, "[t]he Department of Energy [] concluded that the incident at Y-12 and the poor response to it demonstrated a deeply flawed execution of security procedures at Y-12." *Id.* at PD# 1619. Y-12 went fully secure, which meant that "all materials [were] locked away, [and] no normal operations [could occur] until it could be proven that the layered security system . . . was, in fact, in place." *Id.* at PD# 1605. Officials swept the facility to ensure no other trespassers were on the premises. *Id.* In addition, while those procedures took place, Y-12 delayed a scheduled inbound shipment of materials—a shipment the Defendants indisputably could not have known about. *Id.* at PD# 1606–07, 1628. And, in the days that followed, personnel repaired the affected fences, sensors, and buildings. *Id.* at PD# 1661, 1729.

On account of the flawed response to the security breach, Y-12 had a 15-day stand-down of operations, during which nuclear operations were suspended, security personnel were retrained, and plans were set to address the deficiencies in the facility's security procedures. *Id.* at PD# 1604, 1619.

A report by the Inspector General following an inquiry into Y-12's security deficiencies concluded that there were "multiple systems failures on several

levels." *Id.* at PD# 1623. It was discovered that one of the cameras that would have identified the Defendants had not been working for six months before the incident. *Id.* at PD# 1620. It was also discovered that there were gaps in communication between security personnel. *Id.* at PD# 1621. The Inspector General concluded that an "unjustified" level of confidence in the "quality of the Y-12 security apparatus" existed. *Id.* at PD# 1625. Even one of the Government's witnesses at trial acknowledged that he was very surprised that the Defendants were able to get through all the security systems. *Id.* at PD# 1627–28. Notably, even after the shutdown and retraining, the Defendants' point of entry through a perimeter fence was not discovered for several months. *Id.* at PD# 1637.

Fallout from the security mishap included termination of one of the security companies' contract. *Id.* at PD# 1648, 1701. Likewise, Officer Garland was fired. *Id.* at PD# 1723.

It is undisputed that today—after the investigations that followed Defendants' entrance to Y-12—the site is a more secure facility. *Id.* at PD# 1628. Relieved that it was Defendants and not a real threat from hostile enemies that exposed the facility's failings, members of Congress thanked Defendants for exposing Y-12's security flaws. *Id.* at PD# 1964.

The Charges and Trial

On August 7, 2012, the Government secured a three-count indictment, charging the Defendants with trespassing on, and destroying, government property. R. 2, Indictment, PD# 10–11. In an effort to persuade the Defendants to plead guilty, the prosecution threatened them with the more serious crime of sabotage under 18 U.S.C. § 2155(a). R. 72, Motion to Dismiss New Sabotage Charge in Superseding Indictment, PD# 541. After Defendants elected to exercise their constitutional right to a jury trial, the Government made good on its promise. On December 4, 2012, it secured a superseding indictment, charging the Defendants with intending to injure, interfere with, or obstruct the national defense. *Id.* at PD# 541–42; R. 55, Superseding Indictment, PD# 322–23.

At trial, which began on May 6, 2013, the Government presented no evidence that the Defendants inhibited or could have inhibited our nation's ability to respond to an attack. Indeed, the evidence demonstrated it was impossible for them to do so due to both the nature of the facility and the capabilities of the Defendants. And none of the Defendants, each of whom testified, claimed that, through their specific actions that day, they anticipated injuring or interfering with government property that would be utilized in protecting our country. In fact, they testified that they intended *not* to disrupt operations at Y-12, but "to bring healing and forgiveness and love and the experience of genuine friendship, empowerment"

and "introduce the notion that the teachings of Jesus are practical and doable." R. 193, Trial Tr., Vol. 3, PD# 1878, 1900.

Because the Government failed to introduce any evidence that would allow a reasonable juror to conclude that the Defendants intended to injure the national defense, the defense moved for a judgment of acquittal at the close of the Government's case. R. 192, Trial Tr., Vol. 2, PD# 1805. In response, the Government continued to espouse its theory, upon which its case rested, that "intent to injure, interfere with, or obstruct the national defense" under 18 U.S.C. § 2155(a) could be proven simply by showing that the Defendants knowingly intended to injure *any* Y-12 property. R. 192, Trial Tr., Vol. 2, PD# 1553, 1815-16; R. 193, Trial Tr., Vol. 3, PD# 1994, 2029. The district court expressed serious concern with that theory, rhetorically asking, "just getting in doesn't necessarily mean they had the intent to . . . injure, interfere with, or obstruct the national defense." R. 192, Trial Tr., Vol. 2, PD# 1815. Likewise, in commenting on the sufficiency of the evidence, the court stated, "I do think it's a close call, to be candid, and I have some reservation about the evidence supporting intent." R. 193, Trial Tr., Vol. 3, PD# 1848. However, the court tabled a ruling until after the jury returned its verdict. *Id.* at PD# 1849.

As the trial proceeded, the district court allowed the Government to introduce evidence, for impeachment purposes, of Messrs. Walli and Boertje-

Obed's prior convictions for similar offenses. *Id*. at PD# 1871. It did so notwithstanding that the Government neither asserted nor rested part of its case on the premise that the Defendants were lying or were otherwise lacking credibility. To the contrary, the evidence at trial was largely undisputed, as the jury's determination really boiled down to a legal dispute over the definition of "intent to injure the national defense." Similarly problematic, during closing argument, the prosecution invoked September 11, planting that emotional memory in the jury's mind while it was charged with evaluating issues concerning the national defense. *Id.* at PD# 2031.

On May 8, 2013, the jury returned a verdict, finding all three Defendants guilty of violating the Sabotage Act and of injuring government property. *Id.* at PD# 2042. During post-trial proceedings, the district court revisited the Defendants' Rule 29 motion. R. 239, Memorandum and Order. Though the court continued to question the propriety of the Government's theory, it nonetheless denied the Defendants' motion, claiming that statements made by the Defendants from jail—stating that they wanted to "oppose nuclear weapons directly," take "direct action," "begin the work of disarmament," and hoped a uranium processing facility would not be built—supplied adequate evidence from which a jury could find intent under the Sabotage Act. *Id*. at PD# 2378 (citing R. 235-1, Transcript of Defs' Phone Calls, PD# 2345, 2352).

Following a hearing on February 18, 2014, the district court sentenced Mr. Walli and Mr. Boertje-Obed to 62 months followed by three years of supervised release and Sister Rice to 35 months. R. 334, Sentencing Hrg., Vol. 1, PD# 4483, 4489, 4506. And, notwithstanding that the cost of base labor and materials from the cleanup totaled just over $8,500, the court ordered $52,953 in restitution. R. 277, Megan Rice Presentence Investigation Report, at 7; Gov't Tr. Ex. 68, Cost of Repairs at Y-12 Property, A13; R. 335, Sentencing Hrg Tr., Vol. 1, PD# 4602. Defendants filed timely notices of appeal. R. 324, 326, 328, Notices of Appeal. This appeal follows.

SUMMARY OF ARGUMENT

The impetus for Congress' passage of the provision of the Sabotage Act at issue here was a desire to punish individuals who intentionally undermine our nation's war efforts. Prior to the statute's enactment, the only tool for combating such conduct was a state-law based criminal charge. Members of Congress felt that was an insufficient deterrent; they wanted a bigger stick in their arsenal. But that stick was never intended to be wielded against peace protestors who simply trespass onto and deface government property.

It is only through a distorted and unmoored interpretation of the Sabotage Act that the Government was able to secure the convictions in this case. Aware that it could not demonstrate that, through their actions that day, the Defendants intended to prevent the United States from being able to defend itself against a threat, the Government substituted the words "Y-12" for "the national defense." In other words, jurors were led to believe that as long as the Defendants intended to injure, interfere with, or obstruct Y-12 (i.e., national defense premises or property) rather than "the national defense," they could be convicted. For all intents and purposes, that showing could have been made once the Government demonstrated the Defendants damaged property at Y-12. But as the plain language of the Sabotage Act, legislative history, and case law demonstrate, that interpretation of the statute is wholly unsupported. And it is just as mischievous as it is erroneous.

Under the Government's interpretation, large swaths of individuals could be convicted simply for knowingly defacing government property. While that may amount to a federal offense, it does not constitute intent to injure or interfere with the national defense and certainly does not constitute sabotage. The district court recognized as much, but the prosecution was still permitted to advance these arguments before the jury.

For its part, the district court adopted an alternative but equally erroneous theory of conviction. It concluded that sufficient evidence existed for the issue to go to the jury because the Defendants expressed an intent to bring an end to nuclear weapons. But that conclusion impermissibly conflates motive with intent or, in this case, symbolic disarmament with real disarmament. Though the Defendants certainly harbored a desire to stop the use of nuclear weapons, there is no basis for concluding that through their actions on the day in question they intended or were even capable of stopping the country from defending itself against foreign threats. To the contrary, it is undisputed they did not even attempt to enter the building where Y-12's uranium is stored. And whatever diversion they caused, it in no way prevented our country from mounting a defense given that Y-12 is not a facility that would be directly involved in defending against an attack.

Even employing its misguided theory, the district court acknowledged that this case was a close one. That made the prosecutor's invocation of September 11, 2001 during closing argument particularly problematic. In a case involving national security, any discussion of the most tragic terrorist event on American soil was likely to sway the jury, causing them to render a verdict based not on the elements of the offense but on the fears and passions flowing from the collective trauma suffered on September 11.

Lastly, the prosecution unlawfully introduced evidence of the Defendants' prior convictions. While such evidence is permissible when it is used to impeach, it is irrelevant and thus impermissible under Rule 403 when the prosecution's theory is not predicated on the Defendants' lack of truthfulness. That is precisely the case here. The Defendants at every turn acknowledged—indeed, embraced—all of their conduct on the day in question. As such, the prosecution's asserted basis for introducing this evidence—impeachment—was illusory and its introduction was therefore gratuitous, prejudicial, and reversible error.

ARGUMENT

I. THE GOVERNMENT'S ERRONEOUS INTERPRETATION OF "THE NATIONAL DEFENSE" ALLOWED IT TO SECURE A CONVICTION WITHOUT PROVING EACH ELEMENT OF 18 U.S.C. § 2155(A) BEYOND A REASONABLE DOUBT

Perhaps no principle is more firmly rooted in our criminal justice system than that requiring the Government prove each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970) ("[t]he Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

The statute at issue here contains two elements. 18 U.S.C. § 2155(a). First, the Government must prove that the defendant "willfully injure[d], destroy[ed], contaminate[d], or infect[ed], or attempt[ed] to so injure, destroy, contaminate or infect any national-defense material, national-defense premises or national-defense utilities." *Id.* Second, it must prove beyond a reasonable doubt that the defendant "intend[ed] to injure, interfere with, or obstruct *the* national defense of the United States." *Id* (emphasis added). As discussed in more detail below, the second element—intent to injure the national defense—was the only meaningful issue before the jury at trial. *See infra* at Section II.

The Government improperly eased its burden of proof when, at every turn, it effectively conflated the two elements of 18 U.S.C. § 2155(a) to the jury and

thereby led jurors to believe that once the prosecution demonstrated the Defendants willfully injured what they knew to be national defense property, it *a fortiori* had proven intent to injure the national defense. That is not the law and, applying de novo review,[2] this Court should reverse. *See, e.g.*, *United States v. Carroll*, 26 F.3d 1380, 1384 (6th Cir. 1994) (reversible error may be found where prosecutor's remarks have a tendency to mislead the jury); *United States v. Smith*, 500 F.2d 293, 294, 296 (6th Cir. 1974) (reversible error where prosecutor's comments impermissibly shifted burden of proof to defendants).

At the outset, the Government made clear its theory of intent: intent to interfere with the national defense may be established simply by demonstrating intent to interfere with anything at or involving Y-12 (on the basis that an interference with Y-12 would necessarily require a diversion of resources from the national defense). Employing this reasoning, the Government treated "the national defense" and "national defense material" or "national defense premises" interchangeably throughout the trial.

Indeed, as early as opening argument, the Government began asking the jury to conflate the two, stating:

---

[2] As this Court explained in *Carroll*, de novo review applies where defense counsel objects to the prosecution's impermissible statements. 26 F.3d at 1383 n.4. Defense counsel clearly objected to the prosecution's erroneous theory. *See, e.g.*, R. 192, Trial Tr., Vol. 2, PD# 1819–10.

> [T]hrough their actions, you'll also be able to determine the intent these defendants had. The evidence will show, clearly, that these defendants intended to injure, destroy or contaminate national defense premises or Y-12 property in an effort to interfere with and obstruct the national defense *or Y-12 operations*.

R. 192, Trial Tr., Vol. 2, PD# 1553 (emphasis added). As the trial proceeded, the prosecution apprised the court, albeit outside the jury's presence, of its interference-with-Y-12-constitutes-interference-with-the-national-defense theory, stating, "I think [by continuing past the warning signs, that] was reasonably expected to disrupt or interfere with or obstruct Y-12, the operations of Y-12, because they would be responding in a very serious fashion." *Id*. And during closing argument, the Government could not have more clearly articulated its position, explaining, "Ladies and gentlemen, I would submit to you that by interfering with the Y-12 National Security Complex, by doing that, you are interfering with the national defense of the United States." R. 193, Trial Tr., Vol. 3, PD# 1994. The prosecutor continued this line of reasoning during rebuttal, asserting:

> And as I stated before, ask yourself this. If you are intending to interfere with Y-12, are you interfering with the national defense? Of course. Did they intend to interfere with Y-12? Did they intend to interfere with Y-12 when they went there? Why else did they go there?

Id. at PD# 2029. In other words, at every step along the way, the Government claimed that if the Defendants intended to injure, interfere with, or obstruct Y-12

operations, then they necessarily interfered with the national defense because their actions would inevitably result in a diversion of Y-12 resources. That contention is contrary to the statute's plain language, 18 U.S.C. § 2155(a) jurisprudence, as well as the policy underlying the Sabotage Act.

A. The Government's Conflation of "The National Defense" and "National Defense Premises" Is Contrary to the Plain Language of the Statute and Applicable Case Law

Fundamental principles of statutory construction dictate that this Court's first (and final) stop should be the statute's plain language. *United States v. Turner*, 465 F.3d 667, 671 (6th Cir. 2006) ("In interpreting a statute, [we] look [] first to its plain language."); *Chrysler Corp. v. Comm'r of Internal Revenue*, 436 F.3d 644, 654 (6th Cir. 2006) ("legislative intent should be divined first and foremost from the plain language of the statute"). 18 U.S.C. § 2155(a) employs both the terms "the national defense" and "national defense premises." *See also, e.g.*, 18 U.S.C. § 793 (separately referencing "the national defense" and "place[s] connected with the national defense"). As the United States Supreme Court has explained, that difference has meaning: courts must "assume that Congress used [the] two terms [in the same statute] because it intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995). Accordingly, the phrase "the national defense" could not also have been meant to refer to "all buildings, grounds, mines, or other places wherein such

national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported." 18 U.S.C. § 2151 (defining "national defense premises"). Thus, a plain reading of the statute reveals the Government's erroneous interpretation of the statute.

Reviewing courts have agreed with this understanding, rejecting the Government's the-national-defense-equates-to-national-defense-premises theory. In *United States v. Stewart*, 19 U.S.M.C.A 417 (May 15, 1970), for example, the United States Court of Military Appeals reversed a conviction notwithstanding that the defendant-airman intentionally injured what he knew to be national defense property—when he threw a pipe and chain into the air intake duct of an F8C jet aircraft—because, on its own, this did not constitute evidence of intent to interfere with the national defense. *Id.* at 420. Likewise, in *United States v. Johnson*, 15 M.J. 676, 677 (Jan. 21 1983), the U.S. Air Force Court of Military Review concluded that the accused-airman did not have the requisite intent to injure the national defense where he "deliberately placed a bolt in the air intake of the number two engine of aircraft 66-397 just prior to engine start," resulting in over $26,000 worth of damages.[3] If injury to national defense property were sufficient

[3] Although *Johnson* was reversed on appeal, the U.S. Court of Military Appeals did not find that mere knowledge of injury to national defense property was sufficient to convict but that intent to injure the national defense can be shown

to establish intent to injure the national defense, the convictions in both of these cases would have been affirmed.

B. *United States v. Platte* Does Not Supply a Basis for Adopting the Government's Otherwise Unprecedented Theory

Not only did defense counsel take issue with the Government's theory, *see* R. 192, Trial Tr., Vol. 2, PD# 1820, the district court itself expressed skepticism with the Government's theory, stating, "So just getting in doesn't necessarily mean they had the intent to . . . injure, interfere with, or obstruct the national defense." *Id*. at PD# 1815. The court continued to question the interpretation, rhetorically asking, "[So] [a]ny time anyone is aggressive, they can -- any time, no matter for what reason, if they go in to the premises and cut a fence, so they've met the other element, just by their arrest, there's enough evidence from which a jury could conclude they've committed a violation?" *Id*. at PD# 1817. In response, the Government claimed its novel interpretation of 18 U.S.C. § 2155(a) finds support in *United States v. Platte*, 401 F.3d 1176 (10th Cir. 2005). *Id*. at PD# 1823 ("this [case] is indistinguishable from *Platte*, really, when you look at it").

In *Platte*, the Tenth Circuit indeed seemed to suggest that mere diversion of resources at a national defense facility constitutes a sufficient basis under

---

if the defendant "knew that injury to the national defense would be the almost inevitable result." *United States v. Johnson*, 24 M.J. 101, 105 (C.M.A. 1987).

18 U.S.C. § 2155(a) for inferring intent to interfere with the national defense. R. 239, Opinion and Order, PD# 2377. However, as the district court here explained, that cannot be a proper reading of the statute because "[t]aken to its logical conclusion," it would have "some bizarre implications." *Id.* The lower court offered one striking hypothetical: consider a boy, who having read the facility's signs, throws a football over the fence at Y-12, intending for a guard to throw it back. *Id*. at PD# 2378. Under the Tenth Circuit's apparent reasoning, and the reasoning advanced by the Government here, such an act would constitute intentional interference with the national defense.[4]

Just as disconcerting is the prospect that under the Government's theory—that "the national defense" is synonymous with "national defense premises"—anyone who damages any property at a national defense facility knowing it is such can be convicted under the Sabotage Act. Consider, for instance, a Y-12 employee who, upon being told he is fired, retaliates by jamming his printer or, even worse, smashing his computer. He has willfully injured national-defense material and done so knowing it was Y-12 property. So too has a union worker protesting his

[4] So too would a delivery man who makes a scene at the admission gate because a security officer is being less than cordial. Or even a visitor who knowingly stays at the facility beyond his permitted time. Under any of these scenarios, there would be a diversion of resources: returning the ball, responding to the irate delivery man, and escorting the visitor off the premises.

wages; he could be indicted if he forms a picket line that prevents other employees from crossing and tending to their daily duties. Likewise, an employee who takes office supplies home from work (e.g., a few reams of Xerox paper). He has interfered with Y-12 by stealing from it and has knowingly and intentionally engaged in such conduct.[5] In none of these scenarios has the individual intended to make the U.S. less safe or otherwise impede the national defense, but he or she has intentionally interfered with Y-12 and thus, under the Government's interpretation, they can each be convicted under 18 U.S.C. § 2155(a). Yet, there is no indication Congress intended for the statute to capture such relatively innocuous conduct.

To the contrary, during hearings on the initial incarnation of the peace-time provision of the Sabotage Act,[6] members of Congress described the types of scenarios they were concerned about. The fear was that, when the country is not at

[5] The discussion of a strike came up during Congressional hearings in connection with the war-time provision of the Sabotage Act. 56 Cong. Rec., Pt. 3, 2109, 3117 (1918). However, there is a fundamental difference between a strike during war time and one during peace time insofar as it is much easier to conclude that a work stoppage during the war would injure the national defense. Moreover, even in that context, members of Congress recognized that it would have to be shown the defendant had "reasonable cause to believe that the consequences of his act are an injury to the United States." *Id.*

[6] The first incarnation of the Sabotage Act was applicable only during World War I. *United States v. Achtenberg*, 459 F.2d 91, 94 (8th Cir. 1972). Over time the statute was broadened to apply to any war. 18 U.S.C. § 2153. And, in 1940, a corresponding provision—now codified at 18 U.S.C. § 2155(a)—was enacted that applied during peace time.

war but readying the national defense, a factory worker who sympathized with a rival nation might "deliberately ma[k]e a bad shell" or "make a war-head for a torpedo . . . [that] will not go off." 86 Cong. Rec. 12560, 12565, 12567 (1940). They were not concerned with mere diversion of resources.

Properly construed then, *Platte* is best understood as being confined to its facts rather than advancing a sweeping interpretation that would lead to unintended and, indeed, preposterous consequences. So relegated, *Platte* falls within the class of scenarios/situations contemplated by Congress. That's because the facility at issue "was in a state of high readiness—the nuclear missiles were to be launched within 15 minutes of a Presidential order" *and the Defendants there were aware of this fact*. 401 F.3d at 1178; *see also United States v. Sicken*, 223 F.3d 1169, 1170 (10th Cir. 2000) (same where defendants trespassed at U.S. Air Force nuclear missile facility and damaged "concrete blast door to the underground missile silo[] and the rails on which the blast door moved"); *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986) (defendants broke into a "U.S. military installation in Missouri housing launch and support facilities for a Minuteman II intercontinental ballistic missile"). Knowing that the premises operated as one of the U.S.'s first lines of defense against a domestic strike, a jury could have sufficient reason to find that the *Platte* defendants knew the diversion of resources would curtail the facility's ability to respond in a timely fashion. In other words, the diversion created by

their presence alone could have been the proximate cause of the facility's inability to defend the country as required.

That is simply not the case at Y-12. There was no evidence that it must be prepared to respond at a moment's notice. Indeed, it need not. Y-12 functions largely as a storage and manufacturing facility, warehousing enriched uranium and engaging in the lengthy process of restoring parts for nuclear weapons. R. 192, Trial Tr., Vol. 2, PD# 1575, 1628–29, 1633–36. Indeed, as the Government explained, the Y-12 complex is not "involved in the 'use' or 'threatened use' of nuclear weapons." R. 51, Gov'ts Response to Defs' Mot.to Dismiss The Indictment, PD# 303. Thus, while a trespass at Y-12 could slow things down, there is no indication that a delay would be the proximate cause of the U.S.'s inability to defend itself.[7] Accordingly, *Platte* should be limited to its facts and, to the extent it could be construed as announcing a broader rule, this Court, like the district court before it, should decline to embrace *Platte*'s ill-considered reasoning.

[7] That is especially the case given that the Government's stated position at trial was that the United States does not intend to actually use nuclear weapons but that our ownership of them is, in and of itself, the backbone of our national security program. R. 192, Trial Tr., Vol. 2, PD# 1575–76.

C. Application of the Government's Theory Would Render the Statute Unconstitutionally Vague As-Applied

To confer upon "the national defense" the sweeping definition advanced by the Government would render 18 U.S.C. § 2155(a) unconstitutionally vague. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Where, as here, criminal sanctions are at stake, "[v]ague laws are subject to particular scrutiny." *United States v. Caseer*, 399 F.3d 828, 835 (6th Cir. 2005); *Belle Maer Harbor v. Charter Township of Harrison*, 170 F.3d 553, 559 (6th Cir. 1999) ("[A]lthough we do not require impossible clarity in standards governing conduct, the court must apply a relative strict standard of scrutiny here where criminal sanctions apply.") (internal citation omitted).

A finding of unconstitutional vagueness is not limited to the statutory language. *Bouie v. Columbia*, 378 U.S. 347, 352 (1964). It can also result "from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* This is because "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids." *Id.* at 353.

It cannot seriously be disputed that this case is factually unique. Both *Platte* and *Kabat* involved facilities tasked with responding immediately to domestic threats. And the cases from military tribunals involved damage to government property—typically, aircrafts—that would be actively involved in combat or defense missions. Here, in contrast, the Defendants simply cut fences, hung banners, and stained walls at a facility that is not tasked with responding to threats. This is, therefore, the first occasion in which a court has been asked to interpret the phrase "the national defense" as applying to acts that would in no way directly impede the United States' ability to defend itself.

In terms of resolving this issue, there is nothing in the statute itself or the history of the legislation that would lead an ordinary person to believe the Government's interpretation—that 18 U.S.C. § 2155(a) applies to *any* action taken with respect to national defense property or premises which results in a diversion of resources—would be adopted by any court. Yet, in *Platte*, the Tenth Circuit claimed that *Gorin v. United States*, 312 U.S. 19 (1941), supports this understanding of "the national defense" and concluded it was not unconstitutionally vague. *Gorin* did not.

At issue in *Gorin* was a vagueness challenge to the Espionage Act, which was passed in 1917 just after the United States' entry into World War I and was motivated by a concern with spies. 312 U.S. at 23–29. The statute criminalized

entering certain places "connected with the national defense" or otherwise intentionally obtaining or transferring information "respecting" or "connected with the national defense" with the intent of injuring the United States or assisting a foreign nation. *Id.* at 20 n.1; 18 U.S.C. § 793. Though the Tenth Circuit characterized the *Gorin* Court's construction of the term "national defense" in a manner that rescued the statute from unconstitutional uncertainty, *see Platte*, 401 F.3d at 1188, in fact, the *Gorin* Court concluded that it was the scienter requirement of "intent . . . to injur[e] [] the United States or to the advantage of a foreign nation" that provided the constitutionally required "delimiting words" in the statute. *Gorin*, 312 U.S. at 27–28. What saved the Espionage Act in *Gorin* is, under the Government's interpretation, absent from the provision of the Sabotage Act at issue here.[8] That is not to say however that 18 U.S.C. § 2155(a) cannot be construed in a similar manner. Indeed, it should be.

In *Gorin*, the Supreme Court concluded that the term "national defense" means "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Id.* at 28. But

[8] In other words under the Government's interpretation, one could be convicted under the peace-time provision of the Sabotage Act simply for knowingly injuring government property. 18 U.S.C. § 2155(a). Likewise, in *Gorin*, without the requirement of injury to the United States, one could be convicted of intentionally obtaining information respecting or connected to the national defense. 18 U.S.C. § 793.

that definition must be placed in the context of the statute at issue, which used the term only when modified by "connected with" or "respecting the." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). As such, both phrases were intended to be applied broadly, capturing a range of property, places, or activities that were merely *associated* with the national defense. *See Jordan v. De George*, 341 U.S. 223, 232 n.15 (1951) (characterizing the *Gorin* Court as having engaged in a vagueness analysis of the phrase "connected with or related to the national defense," not "*the* national defense") (emphasis added).

The provision of the Sabotage Act at issue here contains no such modifiers; rather, it simply discusses injury to or interference with "the national defense." 18 U.S.C. § 2155(a). Yet, the Government's position makes no distinction between the phrases. That is, under the Government's interpretation, "the national defense" has the same meaning as the phrase "connected with the national defense" or "respecting the national defense." But that is contrary to basic canons of construction, which presume Congress was aware of the difference and intended different meanings. *See Prewett v. Weems*, 749 F.3d 454, 461 (6th Cir. 2014) ("Omitting a phrase from one statute that Congress has used in another statute with a similar purpose 'virtually commands the . . . inference' that the two have

different meanings.") (citation omitted); *see also Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local 737 v. Auto Glass Employees Fed. Credit Union*, 72 F.3d 1243, 1248 (6th Cir. 1996) ("It is a settled principle of statutory construction that when Congress drafts a statute, courts presume that it does so with full knowledge of the existing law."). Accordingly, "the national defense" must be more narrow in meaning than either "connected with the national defense" or "respecting the national defense."

As the legislative history and military tribunal cases demonstrate, injury to "the national defense"—as opposed to injury to property "connected to the national defense"—requires a proximate nexus with the country's instrumentalities for engaging in the national defense. Any other conclusion would render the statute unconstitutionally vague as applied by pulling within its grasp a whole range of conduct—as exemplified by the hypotheticals set out above—and thus deprive "ordinary people [of an] understand[ing] [as to] what conduct is prohibited" by the statute.[9] *Kolender*, 461 U.S. at 357.

This conclusion is reinforced by the rule of lenity, which recognizes that "[w]hen there are two rational readings of a criminal statute, one harsher than the

[9] Though the district court in *United States v. Melville*, 309 F. Supp. 774, 780 (S.D.N.Y. 1970) concluded that 18 U.S.C. § 2155(a) is not unconstitutionally vague, the challenge there was a facial one and did not involve the sort of expansive application pursued by the Government here.

other, ... we are to choose the harsher only when Congress has spoken in clear and definite language." *United States v. Miller*, 734 F.3d 530, 542 (6th Cir. 2013) (quoting *United States v. Brock*, 501 F.3d 762, 768 (6th Cir. 2007)). The reason being, "that no citizen should be held accountable for a violation of a statute whose commands are uncertain." *United States v. Santos*, 553 U.S. 507, 514 (2008) (stating that the rule of lenity also "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

That's precisely the case here. While the Defendants could have foreseen that they could be charged under some federal statute (e.g., 18 U.S.C. § 1361, injuring government property, or 18 U.S.C. § 2278a(c), trespass), they had no reason to anticipate that merely entering onto government property knowingly would constitute injury to the country's national defense.

D. The Government's Conflation of "The National Defense" With "National Defense Premises" Was Highly Prejudicial

Though the district court expressed skepticism with the Government's interpretation of 18 U.S.C. § 2155(a), it nonetheless allowed the Government to conflate "interference with Y-12" with "interference with the national defense" to the jury. The impact of this approach cannot be overstated. While the statute requires two wholly distinct inquiries—(1) willful injury to national defense property and (2) intent to injure, interfere with, or obstruct the national defense—

the prosecution's theory effectively collapsed the analysis by replacing the second element with a showing simply that the Defendants knew the property was national defense property. That is, upon finding that the Defendants willfully injured Y-12 property, the jury was told that to convict, it need only find the Defendants knew it was Y-12 property. Consequently, the jury did not have to resolve the only meaningfully disputed issue in the case: whether a broad agenda to bring about disarmament can supply the requisite intent under the statute notwithstanding that the Defendants did not intend to engage in any conduct that would foreseeably prevent the U.S. from defending itself.

Although the district court did instruct the jury that it should follow the court's instructions on the law rather than counsel's statements, *see* R. 332, Excerpted Tr. Final Jury Instructions, Trial Day 3, PD# 4312, 4314; R. 170, Final Jury Instructions, PD# 1227, 1230, that general instruction did not cure the taint of the prosecutor's repeated and erroneous characterizations of the law. *United States v. Carter*, 236 F.3d 777, 787 (6th Cir. 2001) (holding that a general instruction, given "along with all other routine instructions for evaluating the evidence presented at trial," is inadequate to cure the prejudice of the prosecutor's misstatements of law because "there [i]s nothing directly linking th[e] jury instruction to the prosecutor's misconduct."); *id.* ("measures more substantial than a general instruction . . . [a]re needed to cure the prejudicial effect of the

prosecutor's comments during closing arguments"); *see also Lent v. Wells*, 861 F.2d 972, 977 (6th Cir. 1988) (jury instruction insufficient to cure harm where it "did not mention the prosecutor's improper comments"); *Smith*, 500 F.2d at 298.

Accordingly, the prosecution's repeated insistence upon this erroneous interpretation of the statute over the course of a three-day trial and particularly during closing arguments was highly prejudicial and thus constituted reversible error. *United States v. Warshak*, 631 F.3d 266, 307 (6th Cir. 2010); *United States v. Krebs*, 788 F.2d 1166, 1177 (6th Cir. 1986) (explaining that reversal is warranted when a prosecutor's statements are "so pronounced and persistent that [they] permeate[] the entire atmosphere of the trial"); *see also Boyde v. California*, 494 U.S. 370, 380 (1990) (holding that reversible error occurs where there is a "reasonable likelihood" that the jury misapplied the law).

II. THE GOVERNMENT FAILED TO PUT FORTH SUFFICIENT EVIDENCE THAT DEFENDANTS POSSESSED THE REQUISITE INTENT TO INJURE, INTERFERE WITH, OR OBSTRUCT THE NATIONAL DEFENSE

Reversals based on insufficient evidence are reserved for the most remarkable cases. This case is one of them. All three defendants here have devoted their lives to accomplishing what many consider to be the impossible: bringing about world peace. R. 192, Trial Tr., Vol. 2, PD# 1788–89; R. 193, Trial Tr., Vol. 3, PD# 1890, 1911, 1958–59. Their commitment to advancing the mission is just as earnest as their religious devotion. Through non-violent,

symbolic acts, Defendants seek to educate others regarding the pitfalls of what, at present, is a passive standoff between the United States and other countries. Their fear is that, having access to a stockpile of nuclear weapons, if tensions ever escalate between nations, global decimation could be one push of a button away. When Defendants entered Y-12, their intent was to secure a direct line of communication with Y-12 employees and share with these individuals their belief that continued production of nuclear weapons is illegal and only makes this country more vulnerable. R. 192, Trial Tr., Vol. 2, PD# 1798; R. 193, Trial Tr., Vol. 3, PD# 1878, 1890. Through their conduct at Y-12, the Government claimed that Defendants demonstrated an intent to injure, interfere with, or obstruct the national defense. R. 193, Trial Tr., Vol. 3, PD# 1983–99, 2029–36. The Defendants did not possess this intent, the Government failed to carry its burden, and this Court should reverse their convictions.

"When reviewing a guilty verdict, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Faulkenberry*, 614 F.3d 573, 580 (6th Cir. 2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis omitted). "Although the sufficiency-of-the-evidence standard is highly deferential to the jury," this Court has recognized that such "deference [cannot] blind [it] on review

to the government's burden to prove guilt beyond a reasonable doubt." *United States v. Bailey*, 553 F.3d 940, 947 (6th Cir. 2009); *see also United States v. Leon,* 534 F.2d 667, 677 (6th Cir. 1976) ("a verdict of guilty cannot stand on appeal where the evidence 'at most establishes no more than a choice of reasonable probabilities' or inferences, one criminal and the other innocent") (citation omitted). Because the Defendants made their Rule 29 motion at the close of the Government's case, like the district court's evaluation of the claim, this Court is relegated to the Government's evidence.

The Government's burden here required that it prove, beyond a reasonable doubt, that "with intent to injure, interfere with, or obstruct the national defense of the United States," each Defendant "willfully injure[d], destroy[ed], contaminate[d] or infect[ed], or attempt[ed] to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities." 18 U.S.C. § 2155(a). This Court's analysis of the issue is, in many respects, far easier than the typical sufficiency-of-the-evidence inquiry. That's because the facts at trial were largely undisputed.

Though prior to staging their peaceful protest, the Defendants cut through several fences, there was no dispute that they did not have with them any instruments that would allow them to gain admission to the HEUMF and thus access to the uranium. R. 192, Trial Tr., Vol. 2, PD# 1693, 1717; R. 193, Trial Tr.,

Vol. 3, PD# 1900. Nor was there any dispute that they did not try to enter the HEUMF building through force or trickery. Rather, upon arrival by Y-12 security, the Defendants were wholly compliant, bowing to Officer Garland, and offering him bread. R. 192, Trial Tr., Vol. 2, 1694, 1799; R. 153, Exhibit and Witness List; Gov't Ex. 3, DVD of surveillance video, A1. Accordingly, there was no real dispute below over whether Defendants injured national defense material; rather, this trial was centered on whether the Defendants intended to "injure, interfere with, or obstruct the national defense."

The Government originally elected not to pursue a charge that would require it to prove the element of intent,[10] opting instead to simply demonstrate that the Defendants trespassed and injured government property. R. 2, Indictment, PD# 11. It was only when the Defendants decided to go to trial that the Government trumped up the charges by securing a superseding indictment that included the sabotage charge. R. 55, Superseding Indictment, PD# 322. Notwithstanding that the Defendants had no ability to destroy or otherwise degrade the uranium at the facility, the Government claimed they intended, through their actions, to injure or interfere with the national defense. The district court expressed real concern with

[10] The Government originally charged the Defendants with (1) injuring or attempt to injure property within Y-12, 18 U.S.C. § 1363; (2) depredation against U.S. property, 18 U.S.C. § 1361; and (3) trespass, 42 U.S.C. § 2278a(c). R. 2, Indictment, PD# 10–11.

the Government's theory as well as its evidence in evaluating the Rule 29 motion, explaining, "I do think it's a close call, to be candid, and I have some reservation about the evidence supporting intent." R. 193, Trial Tr., Vol. 3, PD# 1848. Ultimately though, the court sided with the Government.

Though the district court declined to adopt the reasoning of *Platte*, *see supra* at p. 27, it concluded that a reasonable jury could infer intent based largely on the telephone calls the Defendants placed from jail. R. 239, Opinion and Order, PD# 2378. Specifically, because the Defendants stated that they went to Y-12 to "oppos[e] nuclear weapons directly," they wanted to take "direct action," "begin the work of disarmament," and hoped a uranium processing facility would not be built. *Id.*

But in seizing upon these statements, the district court failed to distinguish between specific intent and aspirations, or what the *Kabat* Court characterized as "motive." The Eighth Circuit explained that a defendant's long-term objective—in that case, as here, disarmament—is irrelevant to the analysis. *Kabat*, 797 F.2d at 587. It can neither "replace or negate the intent which the statute requires." *Id* at 588.

Kabat involved the opposite of what we have here. The defendants there argued that their benign motives constituted intent and thus relieved them of liability. *Id.* The court concluded that motive was irrelevant; what mattered

instead was the defendants' specific intent on the date in question. In analyzing that issue, the court noted the distinction between real disarmament and symbolic disarmament and found intent based on the former. *Id.* at 585. Specifically, Paul Kabat, who entered the facility with a jackhammer, testified that he intended to engage in real disarmament "in every way possible" and specifically desired to "render th[e] [missile at the site] unusable." *Id*.

The Defendants here made no comparable statements indicating that they intended to render the uranium or any nuclear weapons at the facility inoperable. Nor did they bring with them any instruments, such as a jackhammer, that would have even theoretically allowed them to do so. Stated in the parlance of *Kabat*, the Defendants never engaged in or attempted to engage in any acts beyond symbolic disarmament.

The distinction between motive and intent and real and symbolic disarmament finds support beyond just *Kabat*. In *United States v. Johnson*, the Court of Military Appeals explained that the intent required under 18 U.S.C. § 2155(a) means the accused must have known "that the result is *practically certain* to follow." 24 M.J. 101 (C.M.A. 1987) (emphasis added). In other words, to be convicted under the peace-time provision of the Sabotage Act, the accused must not only have desired but have been *capable* of engaging in acts that he or she could foresee would disarm the Government. In *United States v.*

Stewart, 19 U.S.M.C.A 417 (May 15, 1970), it was the defendant's throwing of a pipe and chain into a F8C jet aircraft's air intake duct.[11] In *United States v. Banks*, 7 M.J. 501 (July 26, 1978), it was the defendant applying glue to a drag parachute bag and pilot parachute. And, as discussed, in *Platte* where there were missiles and the equipment to launch them, it could have been the intrusion itself. This understanding is fully consonant with Congressional intent, which contemplated scenarios involving actors that could render weapons inoperable or defective. *See supra* at pp. 29–30.

No reasonable jury could find it was "practically certain" the acts of symbolic disarmament engaged in by the Defendants here would lead to actual disarmament. *Johnson*, 24 M.J. 101. Indeed, the Defendants could no more have believed their conduct on the day in question would bring about the elimination of nuclear weapons than the men and women who crossed the Edmund Pettus Bridge in March 1965 believed their specific actions that day would bring an end to racial discrimination. On a practical level, both lofty goals were simply impossible to accomplish through any particular act.

[11] *See also United States v. Reyes*, 30 C.M.R. 776 (Sept. 19, 1960) (cutting certain wires in a B-52 aircraft); *United States v. Johnson*, 24 M.J. 101 (May 26, 1987) (placing bolts in the air intake of an aircraft engine); *United States v. Ortiz*, 25 M.J. 570 (Oct. 27, 1987) (disconnecting an electrical relay in the anti-skid system of an aircraft).

Affirming the district court's determination that the Defendants' *motives* constituted a sufficient basis for finding specific *intent* would lead to absurd results. Consider, for example, a protestor who, after a day of demonstrating outside of Y-12, encounters a Y-12 van at a gas station down the road from the facility and, in his final expression of disapproval for the day, begins banging on the van as it leaves the station.[12] The driver, disoriented by the banging, veers off the road, and the supplies inside are damaged. Employing the district court's reasoning, the protestor's broad aspirations to bring about disarmament could be transferred to his specific actions on the day of question. This Court should not countenance a position that would pull such unintended conduct within the statute's grasp and should thus conclude there was no basis for a reasonable jury to find that the Defendants intended to injure, interfere with, or obstruct the national defense.

III. THE PROSECUTOR ENGAGED IN MISCONDUCT BY INVOKING SEPTEMBER 11 DURING THE COURSE OF A TRIAL CONCERNING ALLEGED THREATS TO OUR NATIONAL SECURITY

During closing argument, the prosecutor engaged in misconduct by invoking the memory of the terrorist attacks on September 11, 2001. Because this case

[12] By beating on the Y-12 van, the individual would have willfully attempted to damage/injure national-defense material.

concerned allegations of injuring and interfering with the national defense and the evidence against the Defendants was, by the district court's own account, questionable, the prosecutor's statements were highly prejudicial and thus constitute reversible error.

Though the defense made no reference to September 11 during their closing arguments, the prosecutor made the following statements during his rebuttal:

> Everybody knows Y-12 [the nuclear facility] was remiss here. And to the extent that it's argued that this was, oh, this is a great benefit to Y-12, that's been suggested by Colonel Wright [defense witness] in arguments, think of this. *Right after 9/11, did you notice how much better security got at airports and public buildings, how much better security got?*
>
> *If you ever had a flight after 9/11, you know how much tighter security got. And that may be a good thing. It certainly is a good thing. Does that mean 9/11 was a good thing? Of course not.*
>
> I'm certainly not trying to say that the defendants are terrorists or anything like that. I'm just making comparisons. Just because their security was increased, that doesn't mean what they did was good, and that doesn't mean they should get a pass on it. They're not above the law.

R. 193, Trial Tr., Vol. 3, PD# 1716–17. Defense counsel objected, stating "I hesitatingly, move for dismissal or, alternatively, for mistrial. We got through an entire trial without any use of the word terror or terrorism, and then counsel in his concluding argument used 9/11, implying a comparison between these defendants

and those."[13] R. 193, Trial Tr., Vol. 3, PD# 2039. The district court denied the motion, noting that the Government affirmatively disclaimed it was comparing the Defendants to terrorists and the Defendants raised the issue of terrorism themselves during the trial. *Id*. at PD# 2040; R. 239, Opinion and Order, PD# 2384. This Court's review of the district court's determination is de novo. *See, e.g.*, *United States v. Owens*, 426 F.3d 800, 806 (6th Cir. 2005).

As the United States Supreme Court has explained, a prosecutor's interest is not simply to "win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935). "[W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

This Court applies a two-step test in evaluating whether a prosecutor engaged in misconduct during closing argument. *United States v. Carroll*, 26 F.3d

[13] Though the Government did not so assert at the time Defendants lodged their objection, it claimed during post-trial briefing that Defendants' objection was untimely because it was raised at the close of arguments. R. 217, Gov't Response to Defs' Rule 33 Motion for New Trial, PD# 2236. Notwithstanding the Government's contention, the district court appropriately adjudicated Defendant's argument on the merits, as it did during the trial. R. 193, Trial Tr., Vol. 3, PD# 2040; R. 239, Opinion and Order, PD# 2384; *see United States v. Smith*, 500 F.2d 293, 295 (6th Cir. 1974) (finding reversible error by applying traditional prosecutorial misconduct standard of review rather than plain error where defense counsel waited to object until the conclusion of the Government's argument).

1380, 1385 (6th Cir. 1994). First, it determines whether the prosecutor's statements were "improper." *Id*. If they were, the Court inquires whether the impropriety was flagrant. *Id*. A finding of flagrancy automatically warrants reversal. *See, e.g.*, *United States v. Hargrove*, 416 F.3d 486, 493 (6th Cir. 2005). Even if an improper statement is found to be non-flagrant, a new trial may be warranted under certain circumstances. *Id.*

A. The Prosecutor's Invocation of September 11 Was Improper

It is well settled that a prosecutor is prohibited from making statements that are likely to arouse the passions or prejudice of the jury. *Viereck v. United States*, 318 U.S. 236, 247 (1943) (finding prosecutorial remarks regarding jurors' patriotism offered at trial during World War II were improper); *see also, e.g.*, *Bates v. Bell*, 402 F.3d 635, 644 (6th Cir. 2005) (suggesting that if jurors did not convict, they would be responsible for next death by defendant); *United States v. Solivan*, 937 F.2d 1146, 1149–55 (6th Cir. 1991) (finding reversible error where prosecutor situated drug case in the context of larger "War on Drugs").

By their very nature, references to September 11 are likely to elicit powerful emotions. The shock and anger that accompanied the terrorist attacks back in 2001, combined with the deep sorrow that reverberated throughout the country in the weeks and months that followed, left many in particularly unstable emotional states. One appellate court, expressing concern with the likely impact that such

references have on juries, stated:

> Even accounting for the fact that prosecutors are afforded wide latitude during closing argument we agree with [petitioner] that the prosecutor's comments regarding 9/11 crossed the line and constituted misconduct. . . . We also consider it naïve at best—and disingenuous at worst—to suggest, as the prosecutor did, that the mere mention of 9/11 does not continue to invoke fear, dread and anger in the listener. As defense counsel aptly noted, "I don't think it would be possible to come up with a more emotional topic or example or circumstance for the jury pool and also something that's more universal to the American people and the jury pool that was present here than the 9-11-01 incident." Given the ongoing sensitivity of the subject matter, prosecutors who undertake to inject those facts into a case must use caution. . . . By analogizing to the 9/11 victims' plight, the prosecutor improperly sought to place the jury in their shoes. This is the sort of 'foul blow' that exceeds the legitimate bounds of advocacy.

People v. Zurinaga, 148 Cal. App. 4th 1248, 1258–60 (2007). These statements were no less valid at the time of Defendants' trial in May 2013, which occurred just one month after the Boston Marathon bombings, two poison-laced letters were sent to the White House, and a number of bomb threats. *See, e.g.*, Chris Cillizza, *What September 2001 Can Teach Us About April 2013*, The Fix, Wash. Post Blogs (Apr. 20, 2013). Simply put, the trauma suffered by our country on September 11, 2001, has not sufficiently subsided such that the Government's statements here could be viewed as an innocuous analogy.

The district court erroneously concluded otherwise reasoning that the Defendants discussed terrorism during the trial.[14] To be sure, during closing arguments, prosecutors are permitted to rely upon any evidence submitted at trial or inferences therefrom. *United States v. White*, 563 F.3d 184, 195 (6th Cir. 2009); *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000). But no Defendant referenced September 11 or discussed our country's security after September 11.[15] Rather, Mr. Walli and Mr. Boertje-Obed invoked the term "terrorism" only in relation to their service for our country during Vietnam and our nation's development of nuclear weapons. *See, e.g.*, R. 193, Trial Tr., Vol. 3, PD# 1890, 1901, 1908, 1968. Neither terrorism nor September 11 were invoked by the defense in the context of security procedures or protocol. The prosecutor drummed it up entirely unprompted. Thus, contrary to the district court's contention, the Defendants' use of the term "terrorism" did not give the prosecutor carte blanche to use the word as he pleased or otherwise freely invoke September 11.

---

[14] The district court did not suggest that defense counsel opened the door to the Government's line of reasoning during closing argument. *Cf. United States v. Jacobs*, 244 F.3d 503, 508 (6th Cir. 2001) (finding no prosecutorial misconduct where defense counsel "opened the door" to prosecutorial response by arguing facts not in the record).

[15] Although Mr. Walli did say that he thought there was a possibility they could run into Al-Qaeda while at Y-12, that has nothing to do with whether the Defendants thought their conduct would increase security. R. 193, Trial Tr., Vol. 3, PD# 1900–01.

B. The Prosecutor's Invocation of September 11 Was Flagrant and Therefore Constitutes Reversible Error

To determine whether an improper comment was flagrant and warrants reversal, this Court engages in a four-factor inquiry:

> (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong.

United States v. Carter, 236 F.3d 777, 783 (6th Cir. 2001); *see also Girts v. Yanai*, 501 F.3d 743, 759 (6th Cir. 2007). The court balances these factors, and no single factor is dispositive. *See United States v. Galloway*, 316 F.3d 624, 632 (6th Cir. 2003); *Carroll*, 26 F.3d at 1390. On balance, they dictate a finding of flagrancy.

First, the prosecutor's comments prejudiced the Defendants. As discussed above, the raw emotions following September 11 have not subsided. With the Government justifying drones as preemptive strikes against Al-Qaeda operatives, new bombings on U.S. soil (Boston Marathon), and concern about nuclear weapons in Syria, the public remains very much on guard against the threat of terrorism. Courts have recognized as much. *Zurinaga*, 148 Cal. App. 4th at 1259–60; *see also United States v. Burden*, 600 F.3d 204, 222 (2d Cir. 2010) (expressing concern regarding prosecutor's analogies to terrorism); *Wright v. Stovall*, 06-cv-12419, 2008 U.S. Dist. LEXIS 41626, at *18 (E.D. Mich. May 28, 2008) (prosecutor's reference to 9/11 terrorist attacks was "potentially inflammatory");

People v. Johnson, No. 261096, 2006 Mich. App. LEXIS 1713 (Mich. Ct. App. May 23, 2006) (characterizing 9/11 analogy as being "in poor taste"). In fact, even statements that are one step removed have been found to be improper. *See, e.*g., *James v. McCall*, 09-cv-09-2674, 2010 U.S. Dist. LEXIS 88477, at *21 (D.S.C. Aug. 3, 2010) (sustaining objection to prosecutor's statement, "This is probably our second biggest fear these days after a terrorist attack.").

The prosecutor's comments here were in many respects more prejudicial than those in the cited cases because none of those cases dealt with allegations concerning national security. Accordingly, the juries in those instances may have deemed the prosecutors' analogies irrelevant, unpersuasive, inapt, or "poor." *See Burden*, 600 F.3d at 222; *Zurinaga*, 148 Cal. App. 4th at 1259. Here, on the other hand, the very nature of the charges concern threats to our national defense. Accordingly, not only would the jury here have found the analogy engaging, it would have been aroused by the comments, causing them to elevate their fears and emotions over reason. *Viereck*, 318 U.S. at 247; *United States v. Payne*, 2 F.3d 706, 712 (6th Cir. 1993) (per curiam) (holding that prosecutor's references to the plight of poor children, Christmas time, and to announcement by General Motors of a 75,000-person layoff in a case involving convictions for obstructing and deserting mail constituted reversible error because the prosecutor's statements had

the "ability to mislead the jury as well as ignite strong sympathetic passions for the victims and against [the defendant]."")

Second, although the comments were not extensive, the nature of the case, including the timing of when the comments were made (during closing argument) and resulting impact (likely to elicit emotion), compensated for any weakness in this prong. As this Court has explained, the fact that a "prosecutor's remark was isolated [may] not change matters." *Solivan*, 937 F.2d at 1150. Even "'a single' misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated." *Id.* "And where the other relevant factors weigh so heavily in favor of mistrial, this Court will not authorize 'one free bite,' particularly when the prosecutor timed the comment to exact the maximum prejudicial toll." *United States v. Parkes*, 668 F.3d 295, 306–07 (6th Cir. 2012). Here, the prosecutor's comment, coming in rebuttal and at the very end of closings when the jury was close to retiring to deliberate, were timed to effect considerable prejudice. R. 193, Trial Tr., Vol. 3, PD# 2031–32. Thus, any weakness in this element is more than satisfied by the strength of the other elements.

Third, the prosecutor's comments were not accidental. Given the nature of the case, there can be little doubt that the prosecutor's references to September 11 were anything other than deliberate. *See, e.g.*, *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000) (finding comments deliberate where prosecutor authored handbook

that derided such tactics). Indeed, defense counsel stated as much in objecting, noting that those tragic events were certainly close to the surface throughout the trial: "We got through an entire trial without any use of the word terror or terrorism, and then counsel in his concluding argument used 9/11 . . . ." R. 193, Trial Tr., Vol. 3, PD# 2039. It would be wholly disingenuous for the Government to assert it was not obvious such a statement would taint the jury. In fact, the prosecutor's follow-up statement that he was not comparing the Defendants to terrorists indicates he recognized as much. *Id*. at PD# 2032. But that backpedaling did nothing to relieve the sting flowing from the prosecutor's injection of the issue into the trial.

Fourth, as discussed *supra*, the evidence against the Defendants was weak. So much so that the district court struggled with whether to grant the Defendants' Rule 29 motion. R. 193, Trial Tr., Vol. 3, PD# 1848 ("I do think it's a close call, to be candid, and I have some reservation about the evidence supporting intent."). Rather than rehash all of Defendants' sufficiency of the evidence argument, suffice it to say that the district court could only justify its ruling by conflating intent with motive while disregarding that the Defendants could not possibly have interfered with the national defense given the nature of the site and their limited capabilities. *Parkes*, 668 F.3d at 306–07 (6th Cir. 2012) ("When such remarks accompany a case as frail as this one, they are flagrant, requiring mistrial."). Because the

evidence against the Defendants was tenuous at best, *see supra* at Sections I–II, any comments likely to distract the jury from determining whether all of the elements of the offenses were met would inevitably prejudice the Defendants.

C. Even If The Prosecutor's Invocation of September 11 Was Non-Flagrant, It Still Constitutes Reversible Error

Where a comment does not rise to the level of being flagrant, this Court may still reverse if it determines that: 1) the proof of the defendant's guilt is not overwhelming; 2) defense counsel objected; and 3) the trial court failed to cure the impropriety by properly admonishing the jury. *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999); *Carroll*, 26 F.3d at 1390.

These elements weigh in favor of the Defendants, and therefore reversal is in order. As previously discussed, proof of the Defendants' guilt was far from overwhelming; to the contrary, by the district court's own admission, resolution of the Defendants' Rule 29 motion was a close call. R. 193, Trial Tr., Vol. 3, PD# 1848. Defense counsel objected, and the trial court did not instruct the jury to disregard the prosecutor's appeal to 9/11. *Id*. at PD# 2039. Although defense counsel's objection came at the close of arguments, the Defendants' position was that the statements were so inflammatory that dismissal or a mistrial was the proper relief. *Id.* However, to the extent the district court believed a less severe remedy was warranted, nothing precluded the court from reconvening the jury and instructing members to ignore the prosecutor's discussion of 9/11. For these

reasons, this Court should reverse even if the Government's statements are not considered flagrant.

IV. THE DISTRICT COURT ERRONEOUSLY ADMITTED IRRELEVANT EVIDENCE OF PRIOR CONVICTIONS

Under Rule of Evidence 609(a)(1), a felony conviction may be introduced to impeach a defendant who testifies. However, Rule 609(a)(1)(B) is expressly limited to situations in which "the probative value of the evidence outweighs its prejudicial effect to that defendant." *See also United States v. Sims,* 588 F.2d 1145, 1149 (6th Cir. 1978). Because the prior conviction at issue here had *no* probative value, it necessarily was outweighed by the unfair prejudice that accompanied its admission. Accordingly, the district court abused its discretion and this Court should reverse. *Id.*; *see also United States v. McDaniel*, 398 F.3d 540, 544 (6th Cir. 2005) ("it is an abuse of discretion to make errors of law or clear errors of factual determination").

At issue is the introduction of Michael Walli and Greg Boertje-Obed's 2006 convictions under 18 U.S.C. § 1361. R. 193, Trial Tr., Vol. 3, PD# 1868, 1964. Under Rule 609(a)(1)(B), this evidence could only be admitted if its probative value were outweighed by the prejudice accompanying it. As the district court appropriately noted though, given that the Defendants were "effectively admitting [they] went on and damaged the property. Why would it be relevant? Why would there be any probative value to it?" R. 193, Trial Tr., Vol. 3, PD# 1870; *see also*

id. at PD# 1871. The prosecutor could offer up no better explanation than "he's probably going to deny certain things. And it goes to overall credibility." *Id.* But overall credibility was never an issue. There was no portion of the Defendants' testimony that the Government could identify as lacking in credibility. Indeed, everyone recognized that the facts of the case were largely undisputed with three Defendants acknowledging—indeed, embracing—their involvement in the offense. Thus, the prior convictions only served to prejudice the Defendants by informing the jury that this was not the first time the Defendants had engaged in such conduct and thereby allowing jurors to convict on the basis of deterrence—a consideration that should have been irrelevant to its analysis. Because there was no basis for impeachment and the evidence of the Defendants' prior convictions was prejudicial, the trial court clearly erred in its assessment of the evidence and thus abused its discretion. *United States v. Dotson*, 715 F.3d 576, 582 (6th Cir. 2013)

Though the Defendants preemptively introduced evidence of Mr. Walli's prior conviction, R. 193, Trial Tr., Vol. 3, PD# 1902, that should not preclude this Court's review of the issue. Numerous courts have questioned the soundness of the Supreme Court's 5-4 decision in *Ohler v. United States*, 529 U.S. 753, 757-60 (2000), in which it "conclude[d] that a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error." *See, e.g.*, *State v. Allen*, 323 P.3d 925,

929 (N.M. Ct. App. 2013); *Cure v. State*, 26 A.3d 899, 911–12 (Md. 2011); *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006); *State v. Gary M.B.*, 676 N.W.2d 475, 482 (Wisc. 2004); *Zola v. Kelley*, 826 A.2d 589, 593 (N.H. 2003); *Pineda v. State*, 88 P.3d 827, 831 (Nev. 2004); *State v. Keiser*, 807 A.2d 378, 388 (Vt. 2002); *State v. Thang*, 41 P.3d 1159, 1167 (Wash. 2002); *State v. Daly*, 623 N.W.2d 799, 801 (Iowa 2001). As Justice Souter explained in his *Ohler* dissent, the majority opinion rested on weak precedential and intellectual footing. 529 U.S. at 761–62 (Souter, J., dissenting). For these reasons, *Ohler* should pose no barrier to this Court's review of the issue.

CONCLUSION

For the foregoing reasons, this Court should reverse the Defendants' convictions.

Respectfully submitted,

/s/ Thomas S. McConville

MARC R. SHAPIRO
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

ANDREW S. ONG
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1000 MARSH ROAD
MENLO PARK, CA 94025-1015
(650) 614-7400

ANNE ELKINS MURRAY
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1152 15TH ST NW
WASHINGTON, DC 20005
(202) 339-8400

ANNA LISE LELLELID-DOUFFET
84607 Camus Lane
Covington, LA 70435
(305) 721-7777

THOMAS S. MCCONVILLE
ORRICK, HERRINGTON
& SUTCLIFFE LLP
2050 MAIN STREET
SUITE 1100
IRVINE, CA 92614-8255
(949) 567-6700

JUDY KWAN
ORRICK, HERRINGTON
& SUTCLIFFE LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017-5855
(213) 629-2020

WILLIAM PATRICK QUIGLEY
7500 Dominican Street
New Orleans, LA 70118
(504) 710-3074

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Sixth Circuit Rule 32, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,995 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: August 4, 2014 ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Thomas S. McConville
Thomas S. McConville

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on August 4, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thomas S. McConville

Attorney for Defendants-Appellants

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(b), the Defendants-Appellants hereby submit the following designation of relevant district court documents:

Record No.	Description	Page Designations	Appendix
2	Indictment	10-14	
55	Superseding Indictment	322-329	
72	Motion to Dismiss New Charges in Superseding Indictment	539-551	
153	Exhibit and Witness List	1150-1152	
	Gov't Ex. 3, DVD of surveillance video		A1
	Gov't Ex. 5, Photograph of "Woe to the Empire of Blood"		A2
	Gov't Ex. 6, Photograph of "The Fruit of Justice is Peace"		A3
	Gov't Ex. 7, Photograph of "Plowshares Please Isaiah"		A4
	Gov't Ex. 8, Photograph of "Plowshares Please Isaiah" (tower view)		A5
	Gov't Ex. 9, Photograph of blood on wall		A6
	Gov't Ex. 10, Photograph of blood on wall (with backpacks)		A7
	Gov't Ex. 11, Photograph of baby bottle/blood		A8
	Gov't Ex. 12, Photograph of "Disarm Transform"		A9
	Gov't Ex. 13, Photograph of "Disarm Transform" (close view)		A10
	Gov't Ex. 14, Photograph of "Peace Not War"		A11
	Gov't Ex. 20, Photograph of "Swords Into Plowshares; Spears Into Pruning Hooks"		A12
	Gov't Ex. 68, Cost of Repairs at Y-12 Property		A13
	Defs Ex. 1, A Statement for the Y-12 Facility by Megan Rice		A14

170	Final Jury Instructions	1226-1263	
192	Trial Transcript, Day 2, May 7, 2013	1531-1845	
193	Trial Transcript, Day 3, May 8, 2013	1846-2052	
217	Government's Response to Defendants' Rule 33 Motion for New Trial	2231-2245	
235-1	Ex.1, Transcript, Defendants' Phone Calls	2343-2356	
239	Memorandum Opinion and Order	2373-2386	
275	Michael Walli Presentence Investigation Report **(Sealed document)**	3413-3435	
277	Megan Rice Presentence Investigation Report **(Sealed document)**	3438-3453	
323	Judgment as to Michael R. Walli	4282-4287	
324	Notice of Appeal by Michael Walli	4288	
325	Judgment as to Greg Boertje-Obed	4289-4294	
326	Notice of Appeal by Greg Boertje-Obed	4295	
327	Judgment as to Megan Rice	4296-4301	
328	Notice of Appeal by Megan Rice	4302	
332	Trial Day 3 of 3, Excerpted Transcript Final Jury Instructions, May 8, 2013	4309-4335	
334	Sentencing Hearing Transcript, Vol. 2, Feb. 18, 2014	4445-4513	
335	Sentencing Hearing Transcript, Vol. 1, January 28, 2014	4514-4603	
336	Sentencing Hearing Transcript, Vol. 2, January 28, 2014	4624-4752	

STATUTORY ADDENDUM

18 U.S.C.A. § 793

§ 793. Gathering, transmitting or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or

constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense

which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer--

Shall be fined under this title or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

(h)(1) Any person convicted of a violation of this section shall forfeit to the United States, irrespective of any provision of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, from any

foreign government, or any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, as the result of such violation. For the purposes of this subsection, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1) of this subsection.

(3) The provisions of subsections (b), (c), and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853(b), (c), and (e)-(p)) shall apply to--

(A) property subject to forfeiture under this subsection;

(B) any seizure or disposition of such property; and

(C) any administrative or judicial proceeding in relation to such property,

if not inconsistent with this subsection.

(4) Notwithstanding section 524(c) of title 28, there shall be deposited in the Crime Victims Fund in the Treasury all amounts from the forfeiture of property under this subsection remaining after the payment of expenses for forfeiture and sale

authorized by law.

18 U.S.C.A. § 1361

§ 1361. Government property or contracts

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, or attempts to commit any of the foregoing offenses, shall be punished as follows:

If the damage or attempted damage to such property exceeds the sum of $1,000, by a fine under this title or imprisonment for not more than ten years, or both; if the damage or attempted damage to such property does not exceed the sum of $1,000, by a fine under this title or by imprisonment for not more than one year, or both.

18 U.S.C.A. § 2151

§ 2151. Definitions

As used in this chapter:

The words "war material" include arms, armament, ammunition, livestock, forage, forest products and standing timber, stores of clothing, air, water, food, foodstuffs, fuel, supplies, munitions, and all articles, parts or ingredients, intended for, adapted to, or suitable for the use of the United States or any associate nation, in connection with the conduct of war or defense activities.

The words "war premises" include all buildings, grounds, mines, or other places wherein such war material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other installations of the Armed Forces of the United States, or any associate nation.

The words "war utilities" include all railroads, railways, electric lines, roads of whatever description, any railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, aircraft, airfields, air lanes, and fixtures or appurtenances thereof, or any other means of transportation whatsoever, whereon or whereby such war

material or any troops of the United States, or of any associate nation, are being or may be transported either within the limits of the United States or upon the high seas or elsewhere; and all air-conditioning systems, dams, reservoirs, aqueducts, water and gas mains and pipes, structures and buildings, whereby or in connection with which air, water or gas is being furnished, or may be furnished, to any war premises or to the Armed Forces of the United States, or any associate nation, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures, and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply air, water, light, heat, power, or facilities of communication to any war premises or to the Armed Forces of the United States, or any associate nation.

The words "associate nation" mean any nation at war with any nation with which the United States is at war.

The words "national-defense material" include arms, armament, ammunition, livestock, forage, forest products and standing timber, stores of clothing, air, water, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States in connection with the national defense or for use

in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.

The words "national-defense premises" include all buildings, grounds, mines, or other places wherein such national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other installations of the Armed Forces of the United States.

The words "national-defense utilities" include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, aircraft, airfields, air lanes, and fixtures or appurtenances thereof, or any other means of transportation whatsoever, whereon or whereby such national-defense material, or any troops of the United States, are being or may be transported either within the limits of the United States or upon the high seas or elsewhere; and all air-conditioning systems, dams, reservoirs, aqueducts, water and gas mains and pipes, structures, and buildings, whereby or in connection with which air, water, or gas may be furnished to any national-defense premises or to

the Armed Forces of the United States, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply air, water, light, heat, power, or facilities of communication to any national-defense premises or to the Armed Forces of the United States.

18 U.S.C.A. § 2153

§ 2153. Destruction of war material, war premises, or war utilities

(a) Whoever, when the United States is at war, or in times of national emergency as declared by the President or by the Congress, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities, shall be fined under this title or imprisoned not more than thirty years, or both.

(b) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in subsection (a) of this section.

18 U.S.C.A. § 2155

§ 2155. Destruction of national-defense materials, national-defense premises, or national-defense utilities

(a) Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities, shall be fined under this title or imprisoned not more than 20 years, or both, and, if death results to any person, shall be imprisoned for any term of years or for life.

(b) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in subsection (a) of this section.

18 U.S.C.A. § 2278

§ 2278. Explosives on vessels carrying steerage passengers

Whoever, being the master of a steamship or other vessel referred to in section 151 of Title 46, except as otherwise expressly provided by law, takes, carries, or has on board of any such vessel any nitroglycerin, dynamite, or any other explosive article or compound, or any vitriol or like acids, or gunpowder, except for the ship's use, or any article or number of articles, whether as a cargo or ballast, which, by reason of the nature or quantity or mode of storage thereof, shall, either singly or collectively, be likely to endanger the health or lives of the passengers or the safety of the vessel, shall be fined under this title or imprisoned not more than one year, or both.

42 U.S.C.A. § 2278a

§ 2278a. Trespass on Commission installations

(a) Issuance and posting of regulations

(1) The Commission is authorized to issue regulations relating to the entry upon or carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon any facility, installation, or real property subject to the jurisdiction, administration, in the custody of the Commission, or subject to the licensing authority of the Commission or certification by the Commission under this chapter or any other Act.

(2) Every such regulation of the Commission shall be posted conspicuously at the location involved.

(b) Penalty for violation of regulations

Whoever shall willfully violate any regulation of the Commission issued pursuant to subsection (a) of this section shall, upon conviction thereof, be punishable by a fine of not more than $1,000.

(c) Penalty for violation of regulations regarding enclosed property

Whoever shall willfully violate any regulation of the Commission issued pursuant

to subsection (a) of this section with respect to any installation or other property which is enclosed by a fence, wall, floor, roof, or other structural barrier shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both.