PETITION APPENDIX

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holding and return this circuit back to the pre-*Duguid* state in which 'virtually all' cell phones were at risk of violating the TCPA."). To implicate the TCPA, a "random or sequential number generator" must be used to store numbers in a "random or sequential" order *for the purpose of automatically calling them in that order*. While I suppose one might be able to find a smartphone app that can do that—searching the app store using the term "autodialer" might be a good place to start—that's not how an ordinary cell phone works. A cell phone could only violate the TCPA if it deployed an application that automatically stored telephone numbers in a "random or sequential order" for the purpose of sequentially calling them in that order, unaided by the human dialer.

Finally, by not acknowledging the broader purposes of the TCPA, our court in *Borden* overlooked the extent to which the complained-of conduct falls within the TCPA's prohibitions. *Id.* at 1234. While *Borden* emphasized legislative history showing that legislators were concerned about automatic sequential dialing that could dangerously interfere with the use of emergency service telephone lines and overwhelm sequentially numbered business lines, it minimized the fact that legislators were likewise concerned with the nuisance to other commercial and residential consumers who had been "receiving unsolicited calls from automatic dialer systems." H. R. Rep. No. 102–317, p. 24 (1991); *see also Duguid*, 141 S. Ct. at 1167 ("Autodialers could reach cell phones, pagers, and unlisted numbers, inconveniencing consumers and imposing unwanted fees."). If the TCPA targeted only automated calls to emergency services and businesses with multiple phone lines, that is what it would say.

UNITED STATES of America, Plaintiff-Appellee,

v.

David LINEHAN, Defendant-Appellant.

No. 21-50206

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 20, 2022 Pasadena, California

Filed December 22, 2022

Background: Defendant, who was serving a sentence for a previous conviction for transmitting a threat in foreign commerce, was convicted in the United States District Court for the Central District of California, Otis D. Wright, II, J., of two counts of soliciting a crime of violence, one count based on a predicate offense of the transportation or receipt of an explosive in interstate commerce, and the second count based on a predicate offense of using interstate commerce facilities in the commission of murder for hire, based on defendant's having offered to pay a fellow inmate to construct an explosive device and deliver it, after the inmate's release, to the home of a witness who had testified against defendant at his criminal trial. Defendant appealed, arguing that the predicate offenses did not qualify as crimes of violence for purposes of the solicitation statute.

Holdings: The Court of Appeals, Bress, Circuit Judge, held that:

(1) as a matter of apparent first impression, someone who solicits a violation of statute criminalizing the transportation or receipt of an explosive in interstate commerce categorically solicits the attempted use of physical force, and a

completed offense under the explosives statute is thus a predicate offense for purposes of the solicitation statute;

(2) defendant solicited a crime of violence for purposes of the solicitation statute when he solicited a completed offense, not merely an attempted offense, under explosives statute; but

(3) violation of statute criminalizing the use of interstate commerce facilities in the commission of murder for hire does not qualify as a crime of violence for purposes of solicitation statute.

Affirmed in part, reversed in part, and remanded.

1. Criminal Law ⚿1139

An appellate court reviews de novo a district court's denials of pretrial motions to dismiss and motions for acquittal.

2. Criminal Law ⚿45

To determine whether a defendant solicited a qualifying federal offense for purposes of statute criminalizing solicitation to commit a crime of violence, a court applies the categorical approach, under which the court considers not the specific facts of a given conviction but whether the elements of the predicate offense meet the federal definition of a crime of violence. 18 U.S.C.A. § 373(a).

3. Criminal Law ⚿45

If any—even the least culpable—of the acts criminalized by the statute governing a predicate offense do not entail the kind of force meeting the federal definition of a crime of violence, solicitation to commit the predicate offense cannot, under the categorical approach to determining whether a defendant solicited a qualifying federal offense, support a conviction for solicitation to commit a crime of violence. 18 U.S.C.A. § 373(a).

4. Criminal Law ⚿45

The phrase "physical force" in statute criminalizing solicitation to commit a crime of violence and defining a predicate crime as a felony that has as an element the use, attempted use, or threatened use of physical force means violent force—that is, force capable of causing physical pain or injury to another person. 18 U.S.C.A. § 373(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⚿45

The phrase "against property or against the person of another" in statute criminalizing solicitation to commit a crime of violence and defining a predicate crime as a felony involving the use, attempted use, or threatened use of force against property or against the person of another requires that the crime solicited be one that requires purposeful or knowing conduct or conduct evincing extreme recklessness. 18 U.S.C.A. § 373(a).

See publication Words and Phrases for other judicial constructions and definitions.

6. Explosives ⚿4

To convict a defendant of a completed offense of transportation of an explosive, the government must prove that the defendant (1) transported or received in interstate commerce (2) any explosive (3) with knowledge or intent that it would be used to kill, injure, or intimidate any individual or damage any property. 18 U.S.C.A. § 844(d).

7. Criminal Law ⚿45

When a criminal statute is divisible, meaning that it comprises multiple, alternative versions of a crime, the court applies a modified categorical approach to determine whether a conviction under the statute can serve as a predicate offense for

a conviction for solicitation of a crime of violence, and the court consults permitted sources to determine whether the defendant was convicted of that divisible portion of the predicate offense that qualifies as a crime of violence under the categorical approach. 18 U.S.C.A. § 373(a).

8. Criminal Law ⚿45

A criminal statute is divisible, for purposes of determining whether a conviction under the statute qualifies as a predicate offense for a conviction for solicitation of a crime of violence, when the statute lists elements in the alternative and thereby defines multiple crimes. 18 U.S.C.A. § 373(a).

9. Criminal Law ⚿45

If a criminal statute merely lists alternative means of committing the same crime, it is not divisible for purposes of determining whether a conviction under the statute qualifies as a predicate offense for a conviction for solicitation of a crime of violence. 18 U.S.C.A. § 373(a).

10. Criminal Law ⚿45

Statute criminalizing the transportation or receipt, or an attempt to transport or receive, an explosive in interstate commerce is, at the very least, divisible into completed and attempted offenses for purposes of determining whether a conviction under the statute qualifies as a predicate offense for a conviction for solicitation of a crime of violence. 18 U.S.C.A. §§ 373(a), 844(d).

11. Criminal Law ⚿45

Because the elements clause in statute criminalizing solicitation to commit a crime of violence is written in the disjunctive, defining a predicate offense as one that "has as an element the use, attempted use, or threatened use of physical force against property or against the person of another," a predicate offense can qualify as a categorical match under the statute so long as it requires one of the specified uses of force: actual, attempted, or threatened. 18 U.S.C.A. § 373(a).

12. Criminal Law ⚿45

Statute criminalizing the transportation or receipt of an explosive in interstate commerce does not categorically require an outwardly communicated threat of harm and thus does not categorically involve the "threatened use" of physical force, as would make a conviction under the statute necessarily qualify, as involving the threatened use of force, as a predicate offense under statute criminalizing solicitation to commit a crime of violence. 18 U.S.C.A. §§ 373(a), 844(d).

13. Explosives ⚿4

For a defendant to be convicted of the transportation or receipt of an explosive in interstate commerce, the explosive need not be detonated or cause harm; what is criminalized is the conveyance of the explosive in commerce with the knowledge or intent that it will be used for harmful purposes. 18 U.S.C.A. § 844(d).

14. Criminal Law ⚿45

Someone who solicits a violation of statute criminalizing the transportation or receipt of an explosive in interstate commerce categorically solicits the attempted use of physical force, and a completed offense under the explosives statute is thus a predicate offense for purposes of statute criminalizing solicitation to commit a crime of violence: transporting or receiving an explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any person, or damage property, is categorically a substantial step toward the use of violent force and amounts to the attempted use of such force. 18 U.S.C.A. §§ 373(a), 844(d).

15. Criminal Law ⚿44

For conduct to constitute a substantial step toward commission of a crime, and thus to support a charge of attempt to commit the crime, the conduct must go beyond mere preparation and must be strongly corroborative of the firmness of a defendant's criminal intent.

16. Criminal Law ⚿44

For a defendant's conduct to constitute a substantial step toward commission of a crime, and thus to support a charge of attempt to commit the crime, the conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose.

17. Criminal Law ⚿45

Explosives ⚿4

To violate statute criminalizing the transportation or receipt of an explosive in interstate commerce, one must at a minimum intend to intimidate by deploying a readied explosive capable of causing death, injury, or damage to property, and this level of intimidation connotes violent force, such that a violation of the explosives statute is a predicate offense for purposes of statute criminalizing solicitation to commit a crime of violence. 18 U.S.C.A. §§ 373(a), 844(d).

18. Criminal Law ⚿45

Although the elements clause of statute criminalizing solicitation to commit a crime of violence invokes the concept of attempt by defining a predicate offense as a felony that "has as an element the use, attempted use, or threatened use of physical force," the solicitation statute has its own mens rea, intent, and is not itself an attempt offense, nor does it require a predicate offense that is itself an attempt crime, and it does not incorporate a further mens rea requirement specific to attempt beyond the mens rea of intent that the elements clause already requires. 18 U.S.C.A. § 373(a).

19. Criminal Law ⚿45

Defendant, who was serving a sentence for transmitting a threat in foreign commerce, solicited a crime of violence that qualified as a predicate offense under statute criminalizing solicitation to commit a crime of violence when he solicited a completed offense, not merely an attempted offense, under statute criminalizing the transportation or receipt of an explosive in interstate commerce, where defendant, while in prison, offered to pay a fellow inmate to construct an explosive device and deliver it to the home of a witness who had testified against defendant at his criminal trial, and thereby categorically solicited the attempted use of physical force, namely the transportation or receipt of an explosive, with the knowledge or intent that it would be used to kill, injure, or intimidate a person or damage property. 18 U.S.C.A. §§ 373(a), 844(d).

20. Homicide ⚿563

A violation of statute criminalizing the use of interstate commerce facilities in the commission of murder for hire does not qualify as a crime of violence for purposes of statute criminalizing solicitation to commit a crime of violence, where the murder-for-hire statute does not require that a defendant actually enter into a murder-for-hire agreement, that he carry out or attempt to accomplish his criminal intent, or that he contemplate that murder would be attempted or accomplished by another person, but rather requires only that a defendant travel in, or use a facility of, interstate commerce with the requisite criminal intent that a murder be committed. 18 U.S.C.A. §§ 373(a), 1958(a).

Appeal from the United States District Court for the Central District of Califor-

nia, Otis D. Wright II, District Judge, Presiding, D.C. No.s 2:20-cr-00417-ODW-1, 2:20-cr-00417-ODW

Elizabeth Richardson-Royer, San Francisco, California, for Defendant-Appellant.

Mark R. Rehe and Daniel E. Zipp, Assistant United States Attorneys; Merrick B. Garland, United States Attorney General, Office of the United States Attorney, San Diego, California, for Plaintiff-Appellee.

Before: KENNETH K. LEE and DANIEL A. BRESS, Circuit Judges, and SIDNEY A. FITZWATER,* District Judge.

OPINION

BRESS, Circuit Judge:

While in prison on federal charges, David Linehan solicited others to deliver a bomb to the home of a witness who had testified against him at his criminal trial. The federal solicitation statute, 18 U.S.C. § 373, punishes the solicitation of federal crimes that have "as an element the use, attempted use, or threatened use of physical force against property or against the person of another," which is to say violent crimes. In this case, we address whether, under the categorical approach, two predicate crimes—transportation of an explosive, 18 U.S.C. § 844(d), and using a facility of interstate commerce with intent that a murder be committed, 18 U.S.C. § 1958(a)—are crimes of violence under § 373(a).

We hold that a violation of § 844(d) is a categorical match to § 373(a), but that a violation of § 1958(a) is not, a point the government now concedes. We affirm in part, reverse in part, and remand for resentencing.

I

In 1989, David Linehan was involved in a serious car accident in Florida. *United States v. Linehan*, 835 F. App'x 914, 915–16 (9th Cir. 2020). David Sims, a Florida State Trooper, arrived at the scene and cited Linehan for careless driving. Linehan disputed the citation, and a state court held a hearing at which Sims testified. The state court found that Linehan was at fault for the accident and fined him less than $200.

Tragically, the other driver in the accident later committed suicide. *Linehan*, 835 F. App'x at 916. Linehan came to believe that Sims unfairly blamed him for the other driver's death. *Id.* Linehan's automobile insurance policy was also used to compensate the other driver's estate. In connection with those proceedings, Linehan was involved in "contentious litigation" over his own culpability for the accident and the other driver's death. Somewhat improbably, Linehan developed an obsession with Sims over this incident and spent years harassing and threatening him.

In 2001, Linehan moved to China. He also lived for periods in Thailand, Hong Kong, and Cambodia. While in Asia, Linehan continued his "30-year history of threatening harm to government officials who did not respond to his grievances," which culminated in Linehan threatening to firebomb the U.S. Embassy in Phnom Penh. *Linehan*, 835 F. App'x at 916. This led to his expulsion from Cambodia and his arrest upon returning to the United States. *Id.* at 915. Sims testified against Linehan at his criminal trial for the Cambodia threats, after which a jury convicted Linehan of transmitting a threat in foreign

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

commerce. *Id.* Linehan was sentenced to 33 months' imprisonment. *Id.* at 916. We affirmed Linehan's conviction on direct appeal. *Id.* at 916–17.

While in federal prison, Linehan contacted a fellow inmate whom he believed was soon to be released and asked him to locate Sims's residential mailing address for the purpose of mailing a bomb to Sims's home. In a series of handwritten messages that spanned nearly a month, Linehan provided instructions to his fellow inmate on how to find Sims and construct an explosive device. Linehan promised to pay the inmate $200 up front, with a further $25,000 payment upon confirmation that the bomb had been sent to Sims. The inmate turned on Linehan, notified the FBI, and agreed to cooperate.

An undercover agent posing as a willing bomber contacted Linehan, and Linehan arranged for the agent to be paid $200 in cash. Linehan and the undercover agent engaged in several recorded conversations during which Linehan confirmed that he wanted the agent to send a bomb to Sims's house, and that he would pay $25,000 to see it done. Linehan wanted the bomb to "blow Sims' f—ing head up" and "rip his lungs out."

For this, Linehan was charged with a new round of federal offenses: retaliating against a trial witness (Sims), in violation of 18 U.S.C. § 1513(a) (Count 1); soliciting the transportation of an explosive device in commerce with the knowledge or intent that it would be used to kill, injure, or intimidate a person or damage property, in violation of 18 U.S.C. §§ 373(a) and 844(d) (Count 2); and soliciting the use of facilities of commerce with the intent that a murder be committed, in violation of 18 U.S.C. §§ 373(a) and 1958(a) (Count 3).

Before trial, Linehan moved to dismiss Counts 2 and 3 for failure to state an offense. He argued that the underlying offenses—§ 844(d) and § 1958(a)—did not have "as an element the use, attempted use, or threatened use of physical force," as § 373(a) requires. The district court denied Linehan's motion. Linehan unsuccessfully renewed his arguments concerning Counts 2 and 3 at the conclusion of the trial.

[1] The jury acquitted Linehan on Count 1, but convicted him on Counts 2 and 3. Before his sentencing, Linehan renewed his arguments for acquittal for a third time, but the district court again denied his motion. The district court sentenced Linehan to consecutive 60-month sentences on Counts 2 and 3, for a total term of 120 months' imprisonment, to be followed by three years of supervised release. We review de novo the district court's denials of pretrial motions to dismiss and motions for acquittal. *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994).

II

[2] Under the federal solicitation provision, which is entitled "Solicitation to commit a crime of violence,"

> Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned . . . .

18 U.S.C. § 373(a). To determine whether a defendant solicited a qualifying federal offense, we apply the categorical approach. *See United States v. Devorkin*, 159 F.3d

465, 469 (9th Cir. 1998) ("[W]e hold that § 373 requires a categorical approach, rather than a fact-based, case-by-case analysis of the actual result of the solicitation."); *see also, e.g., United States v. Doggart*, 947 F.3d 879, 887–88 (6th Cir. 2020) (applying categorical approach to § 373(a)); *United States v. Gillis*, 938 F.3d 1181, 1201 (11th Cir. 2019) (per curiam) (same).

[3] Under the categorical approach, we consider not the specific facts of a given conviction but whether the elements of the predicate offense meet the federal definition of a "crime of violence." *Moncrieffe v. Holder*, 569 U.S. 184, 190, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013). "If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve as . . . [a] predicate." *Borden v. United States*, —— U.S. ——, 141 S. Ct. 1817, 1822, 210 L.Ed.2d 63 (2021) (plurality opinion).

[4, 5] The language used in § 373(a) is substantially similar to other "crime of violence" or "violent felony" provisions found elsewhere in the federal criminal code. *See* 18 U.S.C. §§ 16(a), 924(c)(3)(A), 924(e)(2)(B)(i). Although we have not before interpreted § 373(a)'s "elements clause" (also known as a "force clause") to any great extent, the parties agree that the same basic framework used for other elements clauses applies to the elements clause in § 373(a). Thus, the parties agree that the phrase "physical force" here, as elsewhere, means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). And the phrase "against property or against the person of another" requires that the crime solicited be one that requires purposeful or knowing conduct, *see Borden*, 141 S. Ct. at 1826–28, or conduct evincing extreme recklessness, *see United States v. Begay*, 33 F.4th 1081, 1093–94 (9th Cir. 2022) (en banc).

Both the solicited offenses here have the necessary mens rea levels (knowledge or higher), for purposes of *Borden*. *See* 18 U.S.C. §§ 844(d), 1958(a). The key question is thus whether, under the categorical approach, they have as an element the use, attempted use, or threatened use of physical force.

III

[6] We begin with the transportation of an explosive, in violation of 18 U.S.C. § 844(d). The relevant portion of § 844(d) provides that:

> Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined under this title, or both . . . .

Id. To convict a defendant of a completed offense under § 844(d), the government must prove that he "(1) transported or received in interstate commerce (2) any explosive (3) with the knowledge or intent that it would be used to kill, injure, or intimidate any individual" or damage any property. *United States v. Michaels*, 796 F.2d 1112, 1118 (9th Cir. 1986).

A

Linehan focuses some of his argument on that portion of § 844(d) that criminalizes the attempted transportation of an explosive. Relying on the Supreme Court's recent decision in *United States v. Taylor*, —— U.S. ——, 142 S. Ct. 2015, 213 L.Ed.2d

349 (2022), which held that attempted Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3)(A), Linehan argues that a person could be convicted of attempting to transport an explosive based on acts preparatory to such transportation that may not themselves involve the use, attempted use, or threatened use of physical force.

[7] We need not explore that issue for the basic reason that Linehan was not convicted of soliciting the *attempted* transportation of an explosive; he was convicted of soliciting the completed offense. Section 844(d) punishes anyone who "transports or receives, *or* attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage" property. *Id.* (emphasis added). When a criminal statute is "divisible," meaning that it "comprises multiple, alternative versions of the crime," we apply what is known as the "modified categorical approach." *Descamps v. United States*, 570 U.S. 254, 261–62, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013); *see also, e.g., United States v. Buck*, 23 F.4th 919, 924 (9th Cir. 2022). In that instance, we then consult permitted sources to determine whether the defendant was convicted of that divisible portion of the predicate offense that qualifies as a categorical match to the elements clause. *See, e.g., Johnson*, 559 U.S. at 144, 130 S.Ct. 1265 (explaining that courts may consider "the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms").

[8–10] "A statute is divisible when it 'list[s] elements in the alternative and thereby define[s] multiple crimes.'" *Buck*, 23 F.4th at 924 (alterations in original) (quoting *Mathis v. United States*, 579 U.S. 500, 505, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016)). But if a statute merely lists "alternative means of committing the same crime," it is not divisible. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 478 (9th Cir. 2016) (en banc); *see also Mathis*, 579 U.S. at 505, 136 S.Ct. 2243. In this case, we have little difficulty concluding that, at the very least, § 844(d) is divisible into completed and attempted offenses.

Taylor guides our analysis on this point. There, the Supreme Court interpreted the Hobbs Act robbery provision, which, like § 844(d), imposes criminal penalties for both the completed and attempted offense. 18 U.S.C. § 1951(a) ("Whoever ... affects commerce ... by robbery or extortion or *attempts or conspires so to do* ... shall be fined under this title or imprisoned not more than twenty years, or both." (emphasis added)). In holding that the offense of *attempted* Hobbs Act robbery was not a crime of violence, the Court did not suggest that *completed* Hobbs Act robbery must be treated identically, even though both the attempted and completed offenses were included in the same provision. *See Taylor*, 142 S. Ct. at 2020 ("Whatever one might say about *completed* Hobbs Act robbery, *attempted* Hobbs Act robbery does not satisfy the elements clause."). And it is well established both pre- and post-*Taylor* that completed Hobbs Act robbery is a crime of violence under the elements clause. *See Jones v. United States*, 36 F.4th 974, 985 (9th Cir. 2022) ("Hobbs Act robbery is a crime of violence under the elements clause."); *United States v. Franklin*, 18 F.4th 1105, 1113 (9th Cir. 2021); *United States v. Baker*, 49 F.4th 1348, 1360 (10th Cir. 2022).

Similarly here, in the context of § 844(d) an attempt to commit the offense is distinct from the completed offense. The indictment and jury instructions thus make

clear that Linehan was charged with and convicted of soliciting the completed transportation of an explosive. Our task now is to compare the elements of a completed offense under § 844(d) to the elements clause in § 373(a), to see whether there is a categorical match.

B

[11] We therefore turn to the language of § 373(a), which punishes the solicitation of a federal offense that "has as an element the use, attempted use, *or* threatened use of physical force against property or against the person of another." 18 U.S.C. § 373(a) (emphasis added). Like other elements clauses, this statute is written in the disjunctive, meaning that a predicate offense can qualify as a categorical match so long as it requires one of the specified uses of force: actual, attempted, or threatened. *See, e.g., United States v. Ladwig*, 432 F.3d 1001, 1005 (9th Cir. 2005) ("By using the disjunctive 'or,' Congress explicitly provided that the [elements clause] applies to the 'threatened use of physical force against the person of another,' even absent actual or attempted physical force against the person of another." (citation omitted)).

[12] The government now effectively concedes that under the Supreme Court's recent decision in *Taylor*, § 844(d) does not categorically involve the "threatened use" of physical force. *Taylor* explained that "in the criminal law the word 'threat' and its cognates usually denote a communicated intent to inflict physical or other harm." 142 S. Ct. at 2022 (quotations omitted). The government now acknowledges that under *Taylor*, transporting or receiving an explosive under § 844(d) does not categorically require an outwardly communicated threat of harm.[1]

Assuming the threatened use of physical force is out, we are left with either the actual or attempted use of physical force. We need not decide whether a violation of the completed offense in § 844(d) requires the actual use of physical force because we conclude that at the very least, it requires the *attempted use* of such force.

1

The "attempted use" component of elements clauses has received little independent consideration in the case law. In part, that may be because pre-*Taylor*, we treated the attempted version of a crime as a crime of violence if the completed offense was so treated. *See United States v. Dominguez*, 954 F.3d 1251, 1262 (9th Cir. 2020). But *Taylor* confirms that analysis is not appropriate. *See Taylor*, 142 S. Ct. at 2021 (rejecting the government's argument that "because completed Hobbs Act robbery qualifies as a crime of violence, it follows that attempted Hobbs Act robbery does too"). *Taylor* thus invites a deeper engagement with both attempt offenses and the statutory phrase "attempted use" in an elements clause. The lack of case law on

1. We note, however, that *Taylor* considered the elements clause in 18 U.S.C. § 924(c)(3)(A). *Taylor* more narrowly interpreted the phrase ''threatened use'' of force to require a communicative act in part to avoid overlap with the now-invalid residual clause in § 924(c)(3)(B). *See* 142 S. Ct. at 2023–24. But § 373(a) has no accompanying residual clause, which raises the question whether the same narrowing of ''threatened use'' should control. If ''threatened use'' of force in § 373(a) is permitted a broader construction than in § 924(c)(3)(A), it would seem clear that a violation of § 844(d) would categorically qualify as the threatened use of physical force, given the imminent threat to persons and property when an explosive is transported with the intent to kill, injure, or intimidate, or damage property. We need not resolve this issue in light of our conclusion that a violation of § 844(d) categorically requires the ''attempted use'' of physical force.

"attempted use" may also be due to the fact that many predicate offenses involve the *actual* use of physical force, and so by definition the attempted use. *See, e.g., Buck*, 23 F.4th at 928 (holding that putting a mail carrier's life in jeopardy by the use of a dangerous weapon under 18 U.S.C. § 2114 "necessarily requires the use, attempted use, or threatened use of violent physical force").

[13] But the "attempted use" of force comes into play here because § 844(d) is a somewhat different breed of crime. It treats as a completed offense the transportation or receipt in commerce of "any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any" property. 18 U.S.C. § 844(d). The explosive need not be detonated or cause harm; what is criminalized is the conveyance of the explosive in commerce with the knowledge or intent that it will be used for harmful purposes. *See Michaels*, 796 F.2d at 1118; *see also United States v. Strickland*, 261 F.3d 1271, 1273 (11th Cir. 2001) (affirming § 844(d) conviction of defendant accused of "manufacturing, transporting, and affixing a pipe bomb to the vehicle of his ex-wife's new husband").

[14] The parties agree that in construing the "attempted use" of physical force under § 373(a), we should employ the traditional meaning of "attempt" as requiring an individual to engage in conduct that reflects a "substantial step" toward the wrongful end. *See, e.g., Taylor*, 142 S. Ct. at 2020. In the context of § 373(a)'s elements clause, this means that the predicate offense must categorically punish conduct that constitutes a substantial step toward the use of physical force, defined as "violent force," meaning "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140, 130 S.Ct. 1265. In this case, we conclude that someone who solicits a violation of § 844(d) categorically solicits the attempted use of physical force: transporting or receiving an explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any person, or damage property, is categorically a substantial step toward the use of violent force.

[15, 16] To constitute a substantial step, conduct "must go beyond mere preparation and must be strongly corroborative of the firmness of a defendant's criminal intent." *United States v. Smith*, 962 F.2d 923, 930 (9th Cir. 1992) (quotations omitted). That is, "the defendant's conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *United States v. Goetzke*, 494 F.3d 1231, 1235–36 (9th Cir. 2007) (per curiam) (quoting *Walters v. Maass*, 45 F.3d 1355, 1358–59 (9th Cir. 1995)).

Transporting or receiving an explosive under § 844(d) is better characterized as a substantial step toward the use of force as opposed to a mere preparation for the use of force. *See United States v. Soto-Barraza*, 947 F.3d 1111, 1120 (9th Cir. 2020) (noting that courts are more likely to find that defendants have attempted an offense when they have "equipped themselves with the items needed to commit the offense"). The statutory definition of "explosive" is critical to our analysis. For purposes of § 844(d), the term "explosive" means any device or chemical "in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion." 18 U.S.C. § 844(j).

As the last sentence of § 844(j) confirms, the device must be readily capable of explosion through a basic act, such as ignition by fire. An explosion is inherently

violent, capable of causing death or serious injury to persons and serious damage to property. By its nature, it deploys violent force. Transporting or receiving an explosive brings it closer to its contemplated or potential detonation. Conveying such a device is a highly dangerous undertaking that requires deliberate and considered action. We do not think it is necessary to imagine every possible type of explosive device and the myriad ways in which they could be triggered to recognize that a prepared explosive is capable of serious physical harm.

Section 844(d) further requires that the person who transports or receives the explosive must do so in service of a violent objective: "with the knowledge or intent that it will be used to kill, injure, or intimidate" any person or damage property. Killing, injuring, and damaging property inherently involves the use of physical force. And given the nature of an explosive device, acting with knowledge or intent to intimidate through transport or receipt of an explosive involves the attempted use of force as well. To "intimidate" is not merely to scare. *See United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017) (per curiam) (explaining that intimidation involves the use of force "in such a way that would put an ordinary, reasonable person in fear of bodily harm" (quoting *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990))). As then-Judge Breyer explained, § 844(d) intimidation requires some degree of coercive conduct because "the statute's basic purpose suggests that it was not designed to punish pure 'frightening' without any element of intent to injure, or to affect future conduct, or to cause some other sort of relatively serious harm." *United States v. Norton*, 808 F.2d 908, 909 (1st Cir. 1987) (Breyer, J.); *see also id.* ("Nothing in the statute's history suggests an intent to make unlawful the transportation of a firecracker across a state line solely for the purpose of scaring a relative, friend, or neighbor.").

[17] To violate § 844(d), one must thus at a minimum intend to intimidate by deploying a readied explosive capable of causing death, injury, or damage to property. This level of intimidation connotes violent force—or, in Justice Breyer's words, force "likely to cause any significant public harm." *Id.* at 910. As the Supreme Court has explained, "force capable of causing physical pain or injury" under the elements clause "does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality." *Stokeling v. United States*, —— U.S. ——, 139 S. Ct. 544, 554, 202 L.Ed.2d 512 (2019). Taking all these points together, the person who violates § 844(d) categorically takes a substantial step toward using "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140, 130 S.Ct. 1265.

This is consistent with *Taylor*, which notes that for a predicate offense to qualify as the " 'use' or 'attempted use' of 'physical force against the person or property of another,' " the government must "prove that the defendant took specific actions against specific persons or their property." 142 S. Ct. at 2023. Here, § 844(d) requires the government categorically to prove that a defendant took the specific action of transporting or receiving a readied explosive device with the intent or knowledge that it would be used to kill, injure, or intimidate a person or damage property. This substantial step toward a completed crime of violence is concrete and defined and does not merely "sweep[ ] in conduct that poses an abstract risk to community peace and order." *Id.*

The example employed in *Taylor* further illustrates how this case is distinguishable

from attempted Hobbs Act robbery. *Taylor* described a hypothetical "Adam" who, with the goal of robbing a store, "buys a ski mask, plots his escape route, and recruits his brother to drive the getaway car." 142 S. Ct. at 2021. Adam also drafts a threatening note that is a bluff, and is arrested when he "crosses the threshold into the store." *Id.* Adam has attempted to commit Hobbs Act robbery but has not attempted to use physical force because his note was a bluff and he never delivered it. *Id.*

A completed violation of § 844(d) does not involve conduct analogous to the "Adam" hypothetical, such as making a shopping list of bomb materials. Instead, it punishes someone who actually transports or receives a readied explosive knowing that it *will* be used to kill, injure, or intimidate, or damage property. Adam could have been bluffing, and the note itself was not capable of violent force. *See id.* Here, by contrast, § 844(d)'s "will be used" requirement creates a more imminent connection to a violent aim. And the explosive, unlike Adam's handwritten note, is readily capable of violent force. Thus, we conclude that a violation of § 844(d) requires the defendant to have undertaken a substantial step toward the use of violent force. This means that a violation of § 844(d) categorically requires the attempted use of physical force within the meaning of § 373(a).

Our holding is consistent with our most analogous precedent, *United States v. Collins*, 109 F.3d 1413 (9th Cir. 1997). There, we considered whether mailing an item with intent to kill or injure another, 18 U.S.C. § 1716, qualified as a crime of violence under 18 U.S.C. § 924(c)(1). *Id.* at 1418–19. That predicate offense is like § 844(d) in that it criminalizes transmitting a dangerous item with an unlawful intent but does not require that the contemplated harm transpire. We had little difficulty in *Collins* concluding that a violation of § 1716 had as an element "the use *or attempted use* of physical force." *Id.* at 1419 (emphasis added).

In holding that § 844(d) constitutes a crime of violence, we also align ourselves with other courts which have treated § 844(d) accordingly, albeit without analysis. *See Worman v. Entzel*, 953 F.3d 1004, 1006 (7th Cir. 2020) (relying on our decision in *Collins* and noting that the "mailing of a pipe bomb [in violation of § 844(d)] constituted the predicate crime of violence for purposes of the § 924(c) charge"); *United States v. Barefoot*, 754 F.3d 226, 247 (4th Cir. 2014) (noting that "receiving an explosive with the intent that it be used to kill, injure, or intimidate, or to damage or destroy buildings, manifestly would have been a crime of violence according to the parties' mutual understanding"); *Strickland*, 261 F.3d at 1274 (treating a violation of § 844(d) as a predicate offense under § 924(c)).

Linehan, meanwhile, has not identified any case holding that § 844(d) is not a crime of violence. And to the extent one could devise obscure hypotheticals suggesting that it might be theoretically possible to carry out the completed offense in § 844(d) without the attempted use of force, that "legal imagination" cannot carry the day. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007) (categorical approach requires "realistic probability" of prosecution); *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1150 (9th Cir. 2020) (noting that "the categorical approach should not be applied in a legal vacuum").

2

Linehan nonetheless argues that a violation of § 844(d) cannot categorically qualify as an offense that requires the attempted

use of force because attempt traditionally requires the mens rea of specific intent, *see, e.g., Braxton v. United States*, 500 U.S. 344, 351 n.*, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991), and a violation of § 844(d) only requires "knowledge." Here we think Linehan reads too much into the "attempted use" of force clause, but his argument fails even on its own terms.

Section 373(a), to return to the key provision, punishes one who, "under circumstances strongly corroborative of that intent," intentionally solicits another to "engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another." 18 U.S.C. § 373(a). This statutory provision not only imposes its own mens rea requirement, but (as we noted above) requires that the underlying predicate offense itself have a certain elevated mens rea. In *Borden*, the Supreme Court held that the phrase "*against* the person of another," "when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." 141 S. Ct. at 1825 (emphasis added). This means that predicate offenses with a mens rea of purpose or knowledge are sufficient, but predicate offenses that merely require reckless conduct are not. *Id.* at 1826. In *Begay*, our en banc court addressed a question left open in *Borden* and held that a mens rea of extreme recklessness also qualifies as a crime of violence under the elements clause. 33 F.4th at 1093–94.

Section 844(d) satisfies *Borden* because it requires the defendant to have transported or received an explosive with "the *knowledge or intent* that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy." 18 U.S.C. § 844(d) (emphasis added). But Linehan maintains that if the "attempted use" of force in the elements clause is the source of § 373(a) liability, we must import a specific intent mens rea that is associated with attempt offenses, so that a predicate offense like § 844(d) that requires merely "knowing" misconduct is insufficient. We do not think Linehan is correct.

[18] Although § 373(a)'s elements clause invokes the concept of "attempt," § 373(a) has its own mens rea ("intent") and is not itself an attempt offense. Nor does it require a predicate offense that is itself an attempt crime. The underlying offense also must already have a heightened mens rea—knowledge or intent, or at the very least extreme recklessness. *See Borden*, 141 S. Ct. at 1825; *Begay*, 33 F.4th at 1093–94. Linehan cites no authority for the proposition that "attempted uses" of force in an elements clause require predicate offenses with an *additional* and even *higher* mens rea, which would confusingly layer multiple mens rea requirements into the same elements clause. We thus do not read § 373(a) as incorporating a further mens rea requirement specific to attempt.

This does not mean that the phrase "attempted use" of force is without content, however. As we explained above, an "attempted use" of force does require a predicate crime that, at minimum, categorically requires the offender to engage in a substantial step toward the use of violent physical force. Reading § 373(a) in context and as part of the broader elements clause, we merely conclude that "attempted use" of force does not also impose a further mens rea requirement beyond the one that the elements clause already requires.

We note, though, that even if Linehan were correct that the "attempted use" of force means that the predicate offense must require a mens rea commensurate with that required for attempt crimes, Linehan's argument still fails. Although attempt classically requires specific intent,

see Braxton, 500 U.S. at 351 n.*, 111 S.Ct. 1854, "[t]raditionally, 'one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.'" *Tison v. Arizona*, 481 U.S. 137, 150, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (quoting W. LaFave & A. Scott, *Criminal Law* § 28, p. 196 (1972)); *see also* W. LaFave, *Substantive Criminal Law* § 5.2(a) (3d. ed. 2017) (explaining the "traditional view" that specific intent lies "(1) when [a person] consciously desires [a] result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result"). Thus, attempt requires "an intent to do an act or to bring about a certain consequence which would in law amount to a crime." LaFave, *Substantive Criminal Law* § 11.3.

Linehan points to authorities noting that a distinction between "purposeful" and "knowing" conduct can be relevant for "inchoate offenses such as attempt and conspiracy." *United States v. Bailey*, 444 U.S. 394, 405, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). But that distinction is important because "a purposeful mental state may help separate criminal conduct from innocent behavior." *Borden*, 141 S. Ct. at 1823 n.3; *see also Bailey*, 444 U.S. at 405, 100 S.Ct. 624 (explaining that the purpose of a "heightened mental state" for inchoate offenses such as attempt is to "separat[e] criminality itself from otherwise innocuous behavior").

Here, however, § 844(d) does not require mere "knowledge" of some bare facts, nor does it criminalize the mere knowing transportation or receipt of an explosive. Instead, it requires someone to transport or receive in commerce a readied explosive "with the knowledge or intent that it *will be used* to kill, injure, or intimidate" a person or damage property. 18 U.S.C. § 844(d) (emphasis added). A person who acts with such knowledge is not engaged in innocent behavior. Thus, we think § 844(d) contains a mens rea requirement that enables it categorically to qualify as an attempted use of force, even on Linehan's mistaken view that "attempted uses" of force require a higher mens rea.

[19] In sum, when Linehan solicited the completed offense in § 844(d), he solicited a crime of violence under § 373(a). We affirm Linehan's conviction under Count 2.[2]

IV

[20] We lastly consider whether a violation of 18 U.S.C. § 1958(a) qualifies as a crime of violence under § 373(a). The government now concedes it does not. That concession is well-taken.

Section 1958(a) provides:

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned not more than twenty years, or both . . . .

2. We note that § 373(a) contains an even further protection for criminal defendants: they must not only intend to solicit a crime of violence but must do so "under circumstances *strongly corroborative* of that intent." 18 U.S.C. § 373(a). Linehan does not raise any challenge to the sufficiency of the evidence under this portion of the statutory provision.

18 U.S.C. § 1958(a). To be convicted of violating § 1958(a), an offender must (1) have traveled or caused another to travel in interstate commerce, or used or caused another to use an instrumentality of interstate or foreign commerce, or conspired to do the same; (2) have done so with the intent that a murder be committed; and (3) have intended that the murder be committed in exchange for something of pecuniary value. *See* Ninth Cir. Model Crim. Jury Instruction No. 16.7 (2022); *see also United States v. Phillips*, 929 F.3d 1120, 1123 (9th Cir. 2019).

Although it is natural to assume that when "murder" is referenced in a criminal statute the offense qualifies as a crime of violence, the United States has conceded on appeal that § 1958(a) is, in fact, not a predicate offense under the elements clause of § 373(a). The government's concession is based on the Solicitor General's same concession several months ago in *Grzegorczyk v. United States*, —— U.S. ——, 142 S. Ct. 2580, 213 L.Ed.2d 1128 (2022). As the Solicitor General explained in that case, § 1958(a)

> require[s] only that a defendant travel in, or use a facility of, interstate commerce with the requisite criminal intent; it does not require that a defendant actually enter into a murder-for-hire agreement, that he carry out or otherwise attempt to accomplish his criminal intent, or that the contemplated murder be attempted or accomplished by another person.

Br. of United States at 9, *Grzegorczyk*, —— U.S. ——, 142 S. Ct. 2580 (No. 21-5967) (quotations and emphasis omitted).

We agree with this analysis.[3] And we further note that our holding here is consistent with those of other courts to have addressed the issue. *See United States v. Cordero*, 973 F.3d 603, 625–26 (6th Cir. 2020) (agreeing with the government's concession that § 1958 is not a crime of violence under U.S.S.G. § 4B1.1(a) because it is "apparent under the categorical approach that a violation of § 1958 can occur without the 'use, attempted use, or threatened use of physical force' against another" (quoting U.S.S.G. § 4B1.2(a)(1))); *United States v. Boman*, 873 F.3d 1035, 1042 (8th Cir. 2017) (explaining that § 1958 is not a crime of violence under § 924(c)'s elements clause); *Fernandez v. United States*, 569 F.Supp.3d 169, 178 (S.D.N.Y. 2021); *Qadar v. United States*, 2020 WL 3451658, at *2 (E.D.N.Y. June 24, 2020); *Dota v. United States*, 368 F. Supp. 3d 1354, 1360–61 (C.D. Cal. 2018); *United States v. Herr*, 2016 WL 6090714, at *4 (D. Mass. Oct. 18, 2016).

For these reasons, we reverse Linehan's conviction on Count 3 for soliciting a violation of § 1958.[4]

* * *

We affirm Linehan's conviction on Count 2, reverse his conviction on Count 3, and remand for resentencing consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

3. Although the Supreme Court declined to remand in *Grzegorczyk* as the Solicitor General requested, it did so not because it rejected the United States's concession but because the defendant had entered an unconditional guilty plea that precluded him from challenging his sentence. 142 S. Ct. at 2580–81 (Kavanaugh, J., respecting the denial of certiorari).

4. We do not address whether the aggravated offenses of § 1958(a)—which impose longer terms of imprisonment if personal injury or death results—should be treated differently. *See United States v. Runyon,* 994 F.3d 192, 201–03 (4th Cir. 2021).

United States District Court
Central District of California

UNITED STATES OF AMERICA vs. **Docket No.** **CR 20-00417-ODW**

Defendant David Linehan **Social Security No.** 4 6 4 8

akas: (Last 4 digits)

[redacted]

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
Sept.	13	2021

COUNSEL **Andrew S. Cowan, panel**
(Name of Counsel)

PLEA ☐ **GUILTY,** and the court being satisfied that there is a factual basis for the plea. ☐ **NOLO CONTENDERE** ☐ **NOT GUILTY**

FINDING There being a finding/verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of:
Count 2s-3s: 18:373-SOLICITATION TO COMMIT A CRIME OF VIOLENCE

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

120 months. This term consists of 60 months on each of Counts 2 and 3 of the First Superseding Indictment to be served consecutively to one another.

It is ordered that the defendant shall pay to the United States a special assessment of $200, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established an inability to pay any fine.

This term shall also run consecutively to the undischarged term of imprisonment imposed in United States District Court Central District of California Court, Docket No. 2:19-cr-00016-PA-1, pursuant to USSG §5G1.3(a).

The Court recommends that the Bureau of Prisons (BOP) conduct a mental health evaluation of the defendant and provide all necessary treatment.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This term consists of three years on each of Counts 2 and 3 of the First Superseding Indictment, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04.

2. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment

3. The defendant shall cooperate in the collection of a DNA sample from himself.

4. The defendant shall submit the defendant's person, property, house, residence, vehicle, papers, computers, cell phones, other electronic communications or data storage devices or media, email accounts, social media accounts, cloud storage accounts, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

5. The defendant shall possess and use only those computers and computer-related devices, screen usernames, passwords, email accounts, and internet service providers (ISPs), social media accounts, messaging applications and cloud storage accounts, that have been disclosed to the Probation Officer upon commencement of supervision. Any changes or additions are to be disclosed to the Probation Officer prior to the first use. Computers and computer-related devices include personal computers, internet appliances, electronic games, cellular telephones, digital storage media, and their peripheral equipment, that can access, or can be modified to access, the internet, electronic bulletin boards, and other computers.

6. All computers, computer-related devices, and their peripheral equipment, used by the defendant shall be subject to search, seizure and computer monitoring. This shall not apply to items used at the employment site that are maintained and monitored by the defendant’s employer.

7. The defendant shall comply with the rules and regulations of the Computer Monitoring Program. The defendant shall pay the cost of the Computer Monitoring Program.

8. The defendant shall participate in mental health treatment, which may include evaluation and counseling, until discharged from the program by the treatment provider, with the approval of the Probation Officer.

9. As directed by the Probation Officer, the defendant shall pay all or part of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.

10. The defendant shall not have any contact, direct or indirect, either telephonically, visually, verbally or through written material, or any third-party communication with the victim or victims' family, without prior approval of the probation officer.

The Court recommends defendant be housed in a Tennessee facility.

The Court authorizes the Probation Officer to disclose the Presentence Report, and any previous mental health evaluations or reports, to the treatment provider. The treatment provider may provide information (excluding the Presentence report), to State or local social service agencies (such as the State of California, Department of Social Services), for the purpose of the client's rehabilitation.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

Pursuant to 18 U.S.C. § 3553(a), the Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed, shall consider -

1. The nature and circumstances of the offense and the history and characteristics of the defendant;
2. The need for the sentence imposed --
   a. To reflect the seriousness of the offense; to promote respect for the law, and to provide just punishment for the offense;
   b. To afford adequate deterrence to future criminal conduct;
   c. To protect the public from further crimes of the defendant; and
   d. To provide the defendant with needed educational correctional or vocational, medical care treatment in the most effective manner.
3. The kinds of sentences available;
4. The guideline sentencing range;
5. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

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In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

September 13, 2021
Date

U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

September 13, 2021
Filed Date

By Sheila English /s/
Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

☐ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
Attn: Fiscal Department
255 East Temple Street, Room 1178
Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. David Linehan Docket No.: CR 20-00417-ODW

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____

Defendant Date

_____ _____

U. S. Probation Officer/Designated Witness Date

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 9 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID LINEHAN, Defendant-Appellant.	No. 21-50206 D.C. Nos. 2:20-cr-00417-ODW-1 2:20-cr-00417-ODW Central District of California, Los Angeles ORDER

Before: LEE and BRESS, Circuit Judges, and FITZWATER,* District Judge.

Judges Lee and Bress voted to deny the petition for rehearing en banc, and Judge Fitzwater so recommended. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc, Dkt. 63, is **DENIED**.

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.